

10-9-2019

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THE IMPACT OF EUROPEAN PRIVATE LAW UPON THE MIXED LEGAL SYSTEM OF CYPRUS

Nicholas Mouttotos*

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ABSTRACT

This article attempts to examine the impact of European private law upon the legal system of Cyprus taking into account its mixed elements and whether these elements have contributed towards a smooth reception of EU law. While Nikitas Hatzimihail argued in 2013 that it may still be too early to assess the impact of European Union (EU) law upon the legal system of Cyprus, the financial crisis and its effects render such an assessment possible. Building upon Hatzimihail's work in his effort at understanding a "unique" legal system by using comparative law theory to understand the doctrinal development and elaboration of Cyprus law, this article attempts to

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offer its own contribution towards that end, by examining the impact of EU law upon the enforcement of contracts.

The legal system of Cyprus reaffirms Sir Thomas Smith's perception of a mixed jurisdiction as a system where civil law and common law doctrines have been received and indeed contend for supremacy. These systems, that Vernon Valentine Palmer described as forming part of the "third legal family" are considered to be more receptive of outside influences, while their experience is considered valuable for the elaboration of a European private law. In this context, the experience of European law reception in Cyprus, particularly the Unfair Contract Terms in Consumer Contracts Directive, proves otherwise. Cyprus courts have given European standards a common law gloss despite the willingness to partake in European law.

Keywords: mixed legal systems, comparative private law, unfair contract terms, harmonized European private law, Cyprus

I. INTRODUCTION

Given the multiplicity of legal sources and the classificatory vacuum that the previous taxonomies left with certain legal systems, an attempt was made less than two decades ago to renew the old research by creating a "living classification."¹ In this environment, Vernon Valentine Palmer proposed that mixed jurisdictions form a third legal family alongside the common law and continental law. This "novel epistemic move" that is growing with time, managed to put on the map of comparative law the peripheral systems of South Africa, Quebec, Scotland, Puerto Rico, and the Philippines, thus creating a new field of comparative law. According to Glenn "[t]he concept of tradition [is] . . . an epistemological concept which is rooted in what can be called an epistemology of conciliation, as

1. Esin Öricü, *Family Trees for Legal Systems: Towards a Contemporary Approach*, in EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 363 (Mark van Hoecke ed., Hart Publ'g 2004) [hereinafter EPISTEMOLOGY AND METHODOLOGY].

opposed to an epistemology of conflict.”² Mixed legal systems illustrate how this conciliation takes place.³

Cyprus has only recently entered the map of comparative law literature regarding mixed jurisdictions.⁴ This was primarily a result of the legal system being falsely categorized as part of the common law family, overlooking the ever-growing influence of continental law especially in the public law sphere. While it is true that in order to understand Cyprus law, one needs to think in common law terms, the influence of Greek law and legal thinking—as a result also of the role of the national language, which is primarily attached to the continental legal tradition (Greek language)—is changing the landscape. The legal elite in recent years, however, is pushing more towards an understanding of the Cyprus legal system as a unique and intricate legal system and away from the common law ideal types, arguably as an attempt to maintain their power.

This article is divided in two parts. The first part introduces the mixed jurisdiction theory and places Cyprus within the discussion; a remark is also made of the idea of mixed legal systems as a model for Europe; it then proceeds with a historical analysis leading to independence and the current state of the law. The second part examines the impact of EU law, in particular the Unfair Contract Terms Directive (also known as Directive 93/13) and the general framework of consumer protection in Cyprus. The article draws certain conclusions as a result of the jurisprudence of the courts regarding the Unfair Contract Terms Directive.

2. Patrick Glenn, *Legal Cultures and Legal Traditions*, in *EPISTEMOLOGY AND METHODOLOGY*, *id.* at 19-20.

3. Seán P. Donlan, *Comparative Law and Hybrid Legal Traditions: An Introduction*, in *COMPARATIVE LAW AND HYBRID LEGAL TRADITIONS* 4 (Eleanor Cashin-Ritaine, Seán Patrick Donlan & Martin Sychold eds., Swiss Institute of Comparative Law 2010).

4. Nikitas E. Hatzimihail, *Cyprus as a Mixed Legal System*, 6 *J. CIV. L. STUD.* 95 (2013).

II. MIXED JURISDICTIONS

Destined in a “classificatory limbo” mixed legal systems were dismissed in all efforts of classification, leading to their marginalization without taking the time to analyze closely the common traits and shared experiences between them until relatively recently. Vernon Palmer suggests that as is the case with modern biological nomenclature, where Carolus Linnaeus in his two Kingdoms approach certain types of organisms (zoophytes) such as the sponge or coral did not fit into one of those Kingdoms, in comparative legal scholarship, we experience an analogous situation with the explanation of legal phenomena that are only describable as mixed systems.⁵ This dichotomy in comparative legal thinking was the reason for the emergence of the idea of classical “mixed jurisdiction.” Palmer, in his work devoted to the comparative treatment of systems such as South Africa and Scotland, argued that “the unity of the mixed jurisdiction ‘experience’ is palpable from the perspective of the jurists who live within them.”⁶ Jurists within such systems have a close understanding that stems from their knowledge of civil law, common law, and the English language: “[t]hey speak similar bijural dialects”⁷

Two camps exist in comparative literature consisting of the classical “mixed jurisdiction” studies, which tends to focus on a single kind of hybrid, namely, the systems that straddle common law and civil law and, on the other hand, scholars of legal pluralism who use a more expansive and factually-oriented approach. Palmer and his predecessors such as Sir Thomas Smith⁸ and Frederick Parker Walton,⁹ represent the classical conception of mixed systems, which

5. Vernon V. Palmer, *Two Rival Theories of Mixed Legal Systems*, 12 ELEC. J. COMP. L. (2008). See also Staffan Müller-Wille, *Carolus Linnaeus*, ENCYCLOPEDIA BRITANNICA, <https://perma.cc/FT32-PH2R>.

6. See Palmer, *supra* note 5, at 2.

7. *Id.*

8. THOMAS B. SMITH, A SHORT COMMENTARY ON THE LAWS OF SCOTLAND (W. Green & Son Ltd. 1962).

9. Frederick P. Walton, *The Civil Law and the Common Law in Canada*, 11 JURID. REV. 282 (1899).

limits the mixture of laws in Western hybrids; that is a system equally influenced by the common law and the civil law. Conversely, in more recent times the tendency is to include all elements of mixity of a system, be it indigenous with exogenous, religious with customary, western with non-western, in a more pluralist conception that conceives a mixed system as one where two or more kinds of laws or legal traditions are present. As Esin Öricü points out, “all legal systems are mixed;”¹⁰ a view shared by Reinhard Zimmermann who argues that “all our national private laws in Europe today can be described as mixed legal systems.”¹¹ This liberal conception includes a broader pursuit of legal phenomena recognized by a state, but also includes unrecognized and unofficial laws not under state control, which constitute the living law.

The justification for the “classical mixed jurisdiction theory” in limiting the mixture in a western hybrid lies in the deeper measure of comparability that the comparatist encounters when studying such systems. Although the liberal conception of mixed systems is valuable in understanding non-occidental personal laws, its task of comparing divergent laws is more difficult and less fruitful than within the classical circle.¹² It transcends the conventional taxonomies of comparative law. Additionally, it is easy to discover five or six stromata of exogenous elements in a single legal system. Nonetheless, the classical mixed jurisdiction theory conceptualized hybridity in a new classificatory scheme, the third legal family. The word “family” is used in order to emphasize the “impressive” unity of these systems, despite their geographical remoteness, diversity of peoples, cultures, languages, etc. The study of the members of the third legal family brings to light the common traits and problems as

10. Esin Öricü, *What is a Mixed Legal System: Exclusion or Expansion?*, 12 *ELEC. J. COMP. L.* 2 (2008). See also Stephen Thomson, *Mixed Jurisdiction and the Scottish Legal Tradition: Reconsidering the Concept of Mixture*, 7 *J. CIV. L. STUD.* 51 (2014).

11. REINHARD ZIMMERMANN, *ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW* 159 (Clarendon Law Lectures, Oxford U. Press 2001).

12. See Palmer, *supra* note 5.

well as a similarity in patterns of behavior within their legal systems. The effort was originally conceived for purposes of convenience, utility, and explanatory power has indeed flourished and transformed from a one-man band into an “entire orchestra.” It has also seen the establishment of The World Society of Mixed Jurisdiction Jurists, an international organization that purports to support further research in the area.

The specificity of the mixture is the first element that characterizes the legal systems of the “third legal family.”¹³ These systems are built upon the dual foundations of common law and civil law. This dual character of the law should be acknowledged by the actors and observers within the system. This constitutes the second characteristic, namely, the psychological element that the dual foundations upon which the system is based are obvious to an ordinary observer. The final characteristic deals with the structure of the duality. Civil law dominates in the realm of private law, while common law in the field of public law. However, cases of reverse allocation are possible. Cyprus is the prime example, where private law, with the exception of family law, certain principles of property law and succession (which are influenced by Greek continental law) follows the English common law, while public law, with the exception of criminal law which is directed towards common law stereotypes, is based on continental law.

A. Mixed Jurisdictions as a Model for Europe?

Apart from the internal aspect of understanding the legal system, mixed legal systems are considered as vital in the context of European private law as the study of legal systems already mixed can provide valuable lessons for all legal systems within the EU; since through cross-fertilization and horizontal transfers, they will eventually mix to some degree.¹⁴ Jan Smits, therefore, submits that the open-endedness of the

13. VERNON V. PALMER, *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* 28 *et seq.* (Vernon V. Palmer ed., Cambridge U. Press 2012).

14. *See* Öricü, *supra* note 10, at 12.

idea of mixed systems as a model for Europe makes it an attractive perspective in the debate about European harmonization of private law.¹⁵ Drawing lessons from the development of mixed systems poses a number of questions such as “what is the type of experience that can be drawn?” Is the legal method of mixed jurisdictions superior to that of “pure” legal systems? Or is it substantive law that may offer fruitful insights? Smits reaches the conclusion that it is more likely the negative experience of mixed systems that can provide lessons for the process of European harmonization.¹⁶

Mixed jurisdictions have developed organically, something which runs counter to the idea of using the experience of such systems for the drafting of coherent sets of European principles. Smits thesis is based on the theory of regulatory competition, based on which competition for regulation leads to a discovery process for new and potentially more efficient legal products.¹⁷ Jurisdictional competition on the other hand involves interactions with other jurisdictions that create external competition for the supply of law. This empirical approach to cultural diversity allows for an analysis of certain solutions taken by other legal systems and the evaluation of their

15. Jan M. Smits, *Mixed Jurisdictions: Lessons for European Harmonisation?*, 12 ELEC. J. COMP. L. (2008). See also Hein Kötz, *The Value of Mixed Legal Systems*, 78 TUL. L. REV. 435 (2003-2004) (arguing that the experience of mixed legal systems may make a significant contribution to the great project of developing a European common law, and perhaps even of a European civil code) [hereinafter *Lessons for European Harmonisation?*]. See also JAN M. SMITS, THE CONTRIBUTION OF MIXED LEGAL SYSTEMS TO EUROPEAN PRIVATE LAW (Intersentia 2001) [hereinafter THE CONTRIBUTION OF MIXED LEGAL SYSTEMS]. Hector MacQueen traced this idea about the value of mixed jurisdictions back to the French comparatist Lévy Ullman who observed that “Scots law gives us a picture of what will be some day the law of the civilized nations, namely a combination between Anglo-Saxon and the Continental system.” See Hector L. MacQueen, *Scots Law and the Road to the New Ius Commune, Ius Commune Lectures on European Private Law*, 4 ELEC. J. COMP. L. (2000) (citing Lévy Ullman).

16. See Smits, *Lessons for European Harmonisation?*, *supra* note 15.

17. See Horst Eidenmueller, *Collateral Damage: Brexit’s Negative Effects on Regulatory Competition and Legal Innovation in Private Law* (ECGI Law, Working Paper no. 403, 2018).

functionality.¹⁸ The belief that was expressed in particular with Scots law is that it can contribute as a model for the development of private law in Europe; this was based on the premise that the mixture is one of quality, and not just that the mixture is of civil law and common law.¹⁹ Therefore, it is the critical picking and choosing of these systems from both legal traditions that should be a subject of further study.

Various explanations were given for the process of legal borrowing namely that selective borrowing is a result of “prestige”²⁰ or it may result from a movement of legal systems towards more efficiency;²¹ the latter also being influenced by the legal origins thesis, which explores whether economic performance of a country is the result of its legal system. Whether legal borrowing is influenced by one or the other parameters, it is not a conclusive fact.²² Nevertheless, mixed jurisdictions may provide insights as to the potential of successfully transplanting a foreign legal instrument. As Agustín Parise indicates from the case of Louisiana, legal borrowing can lead to successful results that exert influence in other legislative endeavors.²³ Mixed legal systems can contribute in this debate since they are arguably more receptive of transplants.

18. On how judges change the law in mixed jurisdictions, see Biagio Andò, *The Role of Judges in the Development of Mixed Legal Systems: The Case of Malta*, 4 J. CIV. L. STUD. 238 (2011) (presenting the example of Malta).

19. Jan M. Smits, *Scotland as a Mixed Jurisdiction and the Development of European Private Law: Is There Something to Learn from Evolutionary Theory?* 7 ELEC. J. COMP. L. (2003).

20. As explained by Sacco who argued that “there are two fundamental causes of imitation: imposition and prestige.” See Rodolfo Sacco, *Legal For- mants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 398 (1991).

21. Raffaele Caterina, *Comparative Law and Economics*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 192 (2d ed., Jan M. Smits ed., Edward Elgar Publ’g 2012).

22. On legal transplantation, see the seminal work of ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed., U. of Georgia Press 1993).

23. Agustín Parise, *A Constant Give and Take: Tracing Legal Borrowings in the Louisiana Civil Law Experience*, 35 SETON HALL LEGIS. J. 17 (2010). The text has influenced active and passive legal borrowing in the Americas, Asia and in Europe.

B. The Mixed Legal System of Cyprus

Symeonides argued that “the legal system of Cyprus is a paradise of comparative law,”²⁴ while Frank Hoffmeister said that Cyprus is an international and European lawyer’s goldmine.²⁵ When compared to the more populous mixed jurisdictions, the young legal system of Cyprus can claim less juristic innovation. Nevertheless, it can also offer interesting case studies of hybridity and mutation of common law and continental legal institutions.²⁶ It is said that such comparative work could help the “beleaguered mixed jurisdictions . . . overcome their intellectual isolation and assist in efforts to preserve and maintain the civilian tradition.”²⁷

As is the case with Cyprus, a number of mixed systems freely chose to become hybrid (e.g., Israel and Scotland), whereas the majority acted under varying degrees of compulsion. Cyprus resembles the development of the Israeli legal system as far as post-independence developments are concerned. For example, the structure of the Constitution transformed the legal system from a purely common law jurisdiction into a mixed system.²⁸ The bilingualism of the system and the power politics of the legal elites have strengthened and challenged its bijurality. The two neighboring legal systems both have taken the decision to leave all existing common law in place subject to future amendments and to preserve the rule that *lacunae* should be filled from importing rules from the English common law and equity. The decision to preserve the structure and substance of the common law, a system that was then associated with oppression and injustice, has been attributed to the inexperience of the legislature, and the main factor that lead to the so-called anglicization of

24. Symeon C. Symeonides, *The Mixed Legal System of the Republic of Cyprus*, 78 TUL. L. REV. 442 (2003).

25. FRANK HOFFMEISTER, LEGAL ASPECTS OF THE CYPRUS PROBLEM 239 (Martinus Nijhoff Pubs. 2006).

26. See Hatzimihail, *supra* note 4, at 55.

27. Palmer, *supra* note 5, at 13.

28. See Talia Einhorn, *The Common Law Foundations of the Israeli Draft Civil Code*, 80 RABELS ZEITSCHRIFT 93 (2016).

the law.²⁹ However, it has been described as a result of pragmatism rather than principle, an effort by the founding generations to find their place in the post-colonial era. As Hatzimihail points out, the personal biases of the dominant group of colonial advocates played a major role in the maintenance of the common law.³⁰

C. Historical Evolution

The Republic of Cyprus, a former colony of the United Kingdom and a member of the Commonwealth, joined the European Union in 2004. During the year of independence in 1960, the last and only island-wide official census took place, which estimated the island's population at 550,000 people, composed of 81,14% Greek and 18,86% Turkish Cypriots. The latest census regarding the population that resides in the government-controlled area resulted in a population of 864,200, while previous versions estimated that 74,5% of the population is Greek and 9,8% is Turkish Cypriots.³¹ Geographically, Cyprus is closer to Turkey and the Middle East rather than Greek mainland. As the late Christopher Hitchens put it, "[its] favorable position, within such easy reach of Syria, Turkey and Egypt, has often been more of a curse than a boon"³²

Symeon Symeonides correctly points out that the "diverse elements that compose the law of Cyprus owe their origin and survival to its troubled political history; they are accidents of history."³³ A mixed system is by definition suggestive of a turbulent past, but also of an uncertain future. Cyprus long periods of foreign occupation,

29. Symeonides, *supra* note 24, 450. See, e.g., the decision of the Polish to draw upon the Napoleonic Code and the civil codes of Germany and Austria, which is regarded as an effort not to endorse the legal institutions of a recent occupier. See Beata Gessel & Kalinowska vel Kalisz, *Mixing Legal Systems in Europe; the Role of Common Law Transplants (Polish Law Example)*, 4 EUR. REV. PRIV. L. 793 (2017).

30. Hatzimihail, *supra* note 4, at 88.

31. For more, see Statistical Service of the Republic of Cyprus, *Demographic Report 2017* (Nov. 30, 2018), <https://perma.cc/7EVH-5N6K>.

32. CHRISTOPHER HITCHENS, *HOSTAGE TO HISTORY: CYPRUS FROM THE OTTOMANS TO KISSINGER* 29 (Verso 1997).

33. See Symeonides, *supra* note 24, at 454.

that is still present on the island, formed and is forming its legal system. First, by the inheritance of the common law system and, secondly, by the prevailing sense of interim stage that the legal system is perceived to be, until Turkish Cypriots return on their posts. Therefore, the “Cyprus problem”³⁴ malfunctions have spilled over in the legal system, while it is uncertain what the impact of a future political settlement will be. These malfunctions and particularities might be considered qualities, as they make the legal system of Cyprus intellectually intriguing for comparative lawyers.

The Mycenaeans, Phoenicians, Assyrians, Egyptians, Persians, Romans, Byzantines, Crusaders, Lusignans, Venetians, Turks, British, and Alexander the Great have all in turn exercised control and influence over the island, something that still has an effect in present day Cyprus, since it is a melting pot of languages, cultures as well as diverse laws. The most important conquerors of the island that shaped the present day’s pluralist nature of its legal system are the Byzantines, Turks, and British, and to a lesser extent the Venetians and the Lusignans.³⁵ After the Ottoman rule, which lasted four centuries, leaving its mark on the island, the United Kingdom ceded Cyprus in 1878 as a “*place d’armes*,”³⁶ a product of bargain with

34. The “Cyprus problem” is a term often used to describe the occupation and *de facto* division of the island.

35. The *Livre des Assises des Bourgeois*, which was a collection of customary laws, is one of the most important monuments of European legal history. See THE ASSIZES OF THE LUSIGNAN KINGDOM OF CYPRUS (Nicholas Coureas trans., Cyprus Research Centre 2002). See also Seán P. Donlan, *The Mediterranean Hybridity Project: Crossing the Boundaries of Law and Culture*, 4 J. CIV. L. STUD. 355 (2011), on the various traditions that represent the extraordinary legal and normative hybridity of the Mediterranean region as a result of conquest, colonization and social and legal diffusion across shifting and porous political boundaries.

36. WILLIAM MALLINSON, CYPRUS: A MODERN HISTORY 10 (I. B. Tauris 2005). The island had a role of a reserve *place d’armes* lying on the periphery of an area of vital concern to Britain. Historical evidence suggest that Cyprus would only acquire importance if Britain evacuated Egypt. Therefore, the island was not considered definitely useless, but it was also not disposable. See GEORGE S. GEORGHALLIDES, A POLITICAL AND ADMINISTRATIVE HISTORY OF CYPRUS, 1918-1926 14 (Cyprus Research Centre 1979).

the weakened Ottoman Empire in return for protection against the expansionist aims of Russia.³⁷

As regards the legal system, despite the gradual introduction of the common law in Cyprus, certain laws that were introduced by the *Tanzimat* movement and initiated by the Ottomans still remained in force, such as the communal administration of justice system, an element that comes closer to the classic definition of a mixed jurisdiction even during the colonial era.³⁸ During Ottoman rule, the Commercial Code of 1850, the Criminal Code of 1858, and the Maritime Code of 1863, which were introduced in Cyprus, were based on the respective French codes. With the 1878 Supplementary Agreement to the Cyprus Convention that stripped the Sultan of all his substantive powers over the island, the Queen of England was invested with “full powers for making Laws and Conventions for the Government of the Island of Cyprus in her Majesty’s name, and for the regulation of its Commercial and Consular relations and affairs free from the Porte’s control.”³⁹ Britain introduced a series of reforms such as the independent currency system, the abolition of capitulations and consular courts, the establishment of a new judicial organization, and the enactment of a representative Legislative Council.⁴⁰ Until 1935, when common law almost entirely replaced Ottoman law, the residual law of the country was implemented making recourse to English law to avoid manifest injustice and to fill gaps in the law.⁴¹

37. See GEORGHALLIDES, *supra* note 36, at 4 *et seq.* In June 4, 1878, Sir Austen Layard and Safvet Pasha, the Ottoman Foreign Minister, signed an Anglo-Turkish Convention of Defensive Alliance which stipulated that Britain would go to Turkey’s assistance in the vent of the renewal of Russian attacks in Asiatic Turkey and the occupation and administration of Cyprus to be given to Britain in order to be able to carry out its military obligations to Turkey. See also Andreas Neocleous & David Bevir, *Legal History, in* INTRODUCTION TO CYPRUS LAW 6 (Dennis Campbell ed., A. Neocleous & Co., Yorkhill Law Publ’g 2000) [hereinafter INTRODUCTION TO CYPRUS LAW].

38. See Hatzimihail, *supra* note 4, at 40.

39. *Correspondence respecting the Island of Cyprus*, C. 2229, London (1879). See also GEORGHALLIDES, *supra* note 36, at 11.

40. *Id.* According to Georghallides, the enactment of the Council came in spite of the protests by the Turkish Cypriot leaders and the Porte.

41. See section 1202 of the Mejlle (Civil Code of the Ottoman Empire): “It is considered as a great nuisance that a place used by women such as the kitchen, the mouth of the well and the yard of a house should be seen.” See also Hassan

During that period, English judges applied English rules of interpretation of the law, giving a new dimension to its application—what Hatzimihail calls *mutation*.⁴²

Ottoman law was partly preserved by the British by recognizing the jurisdiction of the Moslem Religious Courts to adjudicate matters of personal status of the Muslim inhabitants of the island,⁴³ while Byzantine law was preserved through the recognition of the jurisdiction of the Episcopal Courts and the law-making authority of the Orthodox church for matters of personal status of the Greek Orthodox inhabitants.⁴⁴ The

Erikzade v. Georghi Arghiro (1890) 1 C.L.R. 84, the court noted that (emphasis added):

Now it is to be observed that, *prima facie*, a man is entitled to use his property in any way he pleases; and he is further entitled to the free access of light and air to his property unless his rights are restricted by any law, or unless the owner of adjoining property has acquired some easement recognized by the law, which interferes with the free exercise of these rights. Such a restriction on the natural right of a man to make use of his property in any way he pleases, is contained in the section of the Mejele last above referred to, and we consider that *in construing a law, which is restrictive of the natural rights of individuals, a strict construction must be placed upon it, that is to say, we must construe it in such a way that the enjoyment of his property by the defendant shall be interfered with as little as possible.*

Therefore, Section 1202 of the Mejele was interpreted in line with English law to avoid manifest injustice. *See also* GEORGE M. PIKIS, AN ANALYSIS OF THE ENGLISH COMMON LAW, PRINCIPLES OF EQUITY AND THEIR APPLICATION IN A FORMER BRITISH COLONY, CYPRUS 73 (Brill Nijhoff 2017).

42. *See* Hatzimihail, *supra* note 4, at 38.

43. Article I of the Annex to the 1878 Convention obliged Britain to ensure that Moslem Sheri Law would be administered by special courts in religious and family matters affecting the members of the Turkish community, establishing “[t]hat a Mussulman religious Tribunal (Mehkeme-I Sheri) shall continue to exist in the island, which will take exclusive cognizance of religious matters, and of no others, concerning the Mussulman population of the island.” *See* The Cyprus Convention, Convention of Defensive Alliance Between Great Britain and Turkey with Respect of the Asiatic Provinces of Turkey, U.K.-Turk., June 4, 1878. Georghallides points out that, unlike the religious courts of the Greek Orthodox Church, the Moslem courts continued to have all their expenses defrayed by the Cyprus budget. *See* GEORGHALLIDES, *supra* note 36, at 358.

44. A similar approach was followed in India. *See* GILLES CUNIBERTI, GRANDS SYSTÈMES DE DROIT CONTEMPORAINS 398 (2d ed., Lextenso 2011). The composition of the Supreme Court was a subject of contention in 1925 since it consisted of two British Judges, the Greek elected members of the Legislative Council argued that such a composition was deprived of detailed knowledge of

essential characteristics of the *millet* system were thus maintained and the British administrator modernized the faith-groups as ethnic communities, transforming at the same time the “quasi-medieval community elites into ‘ethno-communal elites’”⁴⁵ The *millet* was a form of indirect rule according to religious difference adopted by the Ottomans.⁴⁶

In 1925, Cyprus formally became a British colony and English substantive law began its conquest of the land. The gradual imposition of common law over the legal system, a policy of “structured *mixité*”⁴⁷ was based on the rule of international law that provides that the laws of a conquered country continue in force, until they are altered by the conqueror.⁴⁸ Palmer suggests that neither British nor American decision makers based their policies on this rule; rather they exercised discretion taking into account demographic, political, and social factors such as introducing foreign language to an uncomprehending population.⁴⁹ This may be shown in the judgment of Chief Justice Hallinan in *Universal Advertising and Publishing Agency v. Panayiota A. Vouros*,⁵⁰ where it was stressed that the

local habits, customs and laws such as of Moslem religious and Greek canon law. See GEORGHALLIDES, *supra* note 36, at 358.

45. Nicos Trimikliniotis, *Nationality and Citizenship in Cyprus Since 1945: Communal Citizenship, Gendered Nationality and the Adventures of a Post-Colonial Subject in a Divided Country*, in CITIZENSHIP POLICIES IN THE NEW EUROPE 391 (Rainer Bauböck, Bernhard Perchinig & Wiebke Sievers eds., Amsterdam U. Press 2009).

46. Karen Barkey & George Gavriliis, *The Ottoman Millet System: Non-Territorial Autonomy and Its Contemporary Legacy*, 15 ETHNOPOLITICS 26 (2016).

47. Patrick H. Glenn, *Quebec: Mixité and Monism*, in STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING 3-8 (Esin Örücü, Elspeth Attwool & Sean Coyle eds., Kluwer Law Int'l 1996).

48. *Campbell v. Hall* (1774) 1 Cowp. All ER Rep 252 1045, at 1047, as per Lord Mansfield: “The laws of a conquered country continue in force, until they are altered by the conqueror.” Under the common law doctrine of reception, the laws of a conquered or ceded territory remained in force unless and until they are altered by the conquering nation. See Ulla Secher, *The Mabo Decision—Preserving the Distinction Between ‘Settled’ and ‘Conquered or Ceded’ Territories*, 24 UQ LAW J 35 (2005). See *Mabo v. Queensland (No 2)* [hereinafter *Mabo case*] HCA 23; 175 CLR 1, 35 (1992).

49. PALMER, *supra* note 13, at 28.

50. *Universal Advertising and Publishing Agency v. Panayiota A. Vouros*, 19 C.L.R. 87, 94 (1957) [hereinafter *Universal Advertising and Publishing Agency*].

principles of the common law of England do not fit Cyprus in their totality.⁵¹

According to Christian Burset, the political reasons behind such policies is the belief, on the one hand, that by withholding English law, the Empire kept the colonies culturally isolated, economically dependent, and politically docile; on the other hand, that Britain should govern all colonies based on a global common law that would both reflect and promote the equality of all British subjects.⁵² Applying the legal origins perspective to such distinct approaches to legal transplantation, in particular, the view that the common law is more favorable to free markets and supports a less statist approach to governing, Burset argues that the proponents of withholding English law did so as such imposition would bar the door to government intervention.⁵³ English law provided important protections against authoritarianism and expropriation. On the other hand, the supporters of a global common law wanted a legal system that supported a particular political-economic agenda.

The gradual imposition of English law in Cyprus can be explained from a policy standpoint since Cyprus was initially regarded as an “inconsequential possession,” while at a later stage it acquired a heightened role as a result of the importance of its geographical position in defending the Suez Canal.⁵⁴ English common law totally replaced the pre-existing legal system until independence when the island was regarded as a definite member of the common law tradition.⁵⁵ This illustrates that conquest itself,

51. See PIKIS, *supra* note 41, at 75.

52. Christian R. Burset, *Why Didn't the Common Law Follow the Flag?* 105 VA. L. REV. 483, 535 (2019).

53. *Id.* at 50.

54. ANDREKOS VARNAVA, *BRITISH IMPERIALISM IN CYPRUS, 1878-1915: THE INCONSEQUENTIAL POSSESSION* (Manchester U. Press 2009). See also GEORGHALLIDES, *supra* note 36, at 10.

55. Nikitas E. Hatzimihail, *Reconstructing Mixity: Sources of Law and Legal Method in Cyprus*, in *MIXED LEGAL SYSTEMS, EAST AND WEST* 75 (Vernon V. Palmer, Mohamed Y. Mattar & Anna Koppel eds., Routledge 2016). From the Tanzimat reformation, the Penal Code remained in force until 1928, the Commercial Code until 1930, and the Ottoman Land Code until 1946.

while indeed a “triggering event” of legal change, does not create a mixed jurisdiction.⁵⁶

The principle of binding precedent was applicable in the same spirit as in England. Therefore, decisions of the High Court were binding on first instance courts, whereas the High Court of Cyprus was bound by decisions of the Privy Council. Decisions of the High Court of Cyprus were appealable before the Privy Council. First instance decisions of the English High Court were of persuasive authority. According to George Pikis, decisions of the High Court of Cyprus were assimilated in terms of binding precedent to first instance decisions of the High Court of England.⁵⁷ The Courts of Justice Order of 1935 set forth that the common law and principles of equity as they stood in England in 1914 were applicable. This provision, according to Pikis, was ignored as the assimilation of the decisions to those of the High Court of England indicates. This has resulted in a failure of adjusting the common law and principles of equity to the needs of Cyprus and the idiosyncrasy of its people notwithstanding the fact that common law is a living body meant to respond to the living needs of society.⁵⁸

Chief Justice Hallinan underlined in the *Universal Advertising and Publishing Agency*⁵⁹ case that the common law must be transplanted in Cyprus as a living organism, with the necessary legal and judicial adjustments to meet the needs of the people of Cyprus. Pikis, in emphasizing Lord Denning’s dicta in *Nyali Ltd. v. Attorney General*,⁶⁰ where he stressed that the common law cannot be applied in a foreign land without considerable qualification, argues that little effort was made in that direction. Lord Denning stressed that, just as with an English oak, although the English common law will flourish in a foreign land, it will need careful tending. The common law, according to Lord Denning, “has many principles of manifest justice

56. PALMER, *supra* note 13, at 30.

57. See PIKIS, *supra* note 41, at 74.

58. *Id.*

59. *Universal Advertising and Publishing Agency*, *supra* note 50.

60. *Nyali Ltd. v. Attorney General* (1956) 1 Q.B. 16.

and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away.”

In post-independence Cyprus, such adjustments have been made, in limited cases though, as is seen from cases such as *KEM (Taxi) Ltd. v. Anastasis Tryphonos*,⁶¹ where it was emphasized that the reaction of employer and employee in the context of a labor dispute in Cyprus may take different form from a corresponding reaction in England.

Consequently, since 1945 Cypriots are the only Europeans to have undergone colonial rule, guerilla war, civil war, and modern technological war on their soil.⁶² Also, as of 1945 and onwards, the struggle for *enosis* (unification with Greece) and the demand for freedom and self-determination was renewed.⁶³ To counter any anti-colonial movements, the British offered constitutional proposals that were rejected by the Greek Cypriots. The subversive organization of *EOKA* (National Organization of Cypriot Fighters) was formed and an armed rebellion began in 1955 and lasted until 1959, a few days before Cyprus gained the status of an independent state. The British colonial rule suppressed civil liberties and imposed harsh reprisals, while reinforcing Turkish radicalization and claims to partition the island as a counterweight to the struggle for unification with Greece.⁶⁴ The Zurich-London Accords of 1960, despite different aspirations, imposed independence on the people of Cyprus.⁶⁵ According to late President Makarios, this marked the

61. *KEM (Taxi) Ltd. v. Anastasis Tryphonos* (1969) 1 C.L.R. 52.

62. HITCHENS, *supra* note 32, at 12.

63. Neocleous & Bevir, *supra* note 37, at 7.

64. *See* Hatzimihail, *supra* note 4, at 48; MALLINSON, *supra* note 36, at 31 *et seq.*

65. *See* Hatzimihail, *supra* note 4, at 48. According to Polyviou, the thesis about “an imposed settlement” was advanced in numerous legal opinions, letters and notes prepared and issued by the then Attorney General of the Republic of Cyprus, Mr Criton Tornaritis, from 1961 onwards. *See* POLYVIOS G. POLYVIU, *CYPRUS: A STUDY IN THE THEORY, STRUCTURE AND METHOD OF THE LEGAL SYSTEM OF THE REPUBLIC OF CYPRUS* 8 (Cryssafinis & Polyviou 2015).

creation of a state but not of a nation. The notion of a nation-state, a term that presupposes the congruence of a particular ethnic group and a territory,⁶⁶ is therefore absent from the outset. The Constitution of the Republic of Cyprus was attached to these agreements; a constitution that is argued to be drafted by a joint committee of Greek and Turkish Cypriot jurists. However, its *travaux préparatoires* are yet to be published.⁶⁷ Since Cypriots had a minimal role in drafting it, few felt it to be sacred.⁶⁸ The Constitution divided the citizens of the republic into a Greek and Turkish community and provided for a binary/bi-communal government with presidential characteristics in a consociational system.⁶⁹ This model of government is akin to federalism, as it distributes political authority on a functional or personal basis.⁷⁰

The Constitution has been characterized as one of the most peculiar in the constitutional world.⁷¹ It is a rather lengthy instrument with several provisions having the character of fundamental, basic articles, not capable of any revision or amendment.⁷² Accordingly, the Constitution has been described as: “probably the most rigid in

66. Alison D. Renteln, *Ethnicity*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Oxford U. Press 2011).

67. See Hatzimihail, *supra* note 4, at 48.

68. HITCHENS, *supra* note 32, at 55.

69. The consociational model was derived from the political experience of Austria, Belgium, the Netherlands and Switzerland. As to the democratic system, it represents the complement of the Anglo-American model. AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 6 (Yale U. Press 1977). See also Carleton W. Sterling, *Consociational Democracy*, 40 REV. POL. 303 (1978).

70. George E. Devenish, *Federalism Revisited: The South African Paradigm*, 17 STELLENBOSCH L. REV. 129 (2006).

71. Pavlos Neofytou Kourtellos, *Constitutional Law*, in INTRODUCTION TO CYPRUS LAW, *supra* note 37, at 16. Jan Smits measures complexity in law by looking at the different factors of density, technicality, institutional differentiation and indeterminacy and finds that the Constitution of Cyprus is highly difficult to understand, while in general, the legal system scores high on complexity. Jan M. Smits, *Do Small Jurisdictions Have a More Complex Law? A Numerical Experiment in Constitutional and Private Law* (Maastricht European Private Law Institute, Working Paper no. 2015/05, 2015).

72. According to Tornaritis (Attorney General from 1960 to 1984) “such provisions are contrary to the accepted principles of public law and the current constitutional practice.” See CRITON TORNARITIS, *CYPRUS AND ITS CONSTITUTIONAL AND OTHER LEGAL PROBLEMS* 55 (Proodos Ltd. 1977).

the world. It is certainly the most detailed and . . . most complicated. It is weighed down by checks and balances, procedural and substantive safeguards, guarantees and prohibitions. Constitutionalism has run riot in harness with Communalism.”⁷³

The bi-communal administration was unfortunately short-lived, as three years after independence, the republic was faced with a major political and constitutional crisis after the departure of the Turkish Cypriots from their posts in the executive and legislative functions.⁷⁴ Their withdrawal was the result of the proposal for constitutional amendments by President Makarios to remove obstacles to the smooth functioning of the State. After the presentation of these proposals, inter-communal violence broke out. The majority of the members of the Turkish Cypriot community were secluded into enclaves with strong lines of defense.⁷⁵ The proper functioning of the state was made possible thanks to the doctrine of necessity. This doctrine provides that when the compliance with constitutional provisions is rendered impossible due to the exceptional and unforeseen circumstances, which the framers of the Constitution never contemplated (e.g., the non-participation of Turkish Cypriots in the institutions of the republic), the relevant constitutional provisions are deemed to be amended so that the state can avoid complete paralysis.⁷⁶

73. STANLEY A. DE SMITH, *THE NEW COMMONWEALTH AND ITS CONSTITUTIONS* 285 (Stevens 1964).

74. The Turkish Cypriot judges remained in their posts for a few more years, while the Turkish Cypriot High Court Judge Mehmet Zekia became the united Supreme Court’s (merged Supreme Constitutional Court and High Court) first President and first Cypriot judge at the European Court of Human Rights. See Hatzimihail, *supra* note 4, at 67.

75. NIKOS SKOUTARIS, *THE CYPRUS ISSUE: THE FOUR FREEDOMS IN A MEMBER STATE UNDER SIEGE* 24 (Hart Publ’g 2011).

76. Particularly, it was held that the Constitution can be amended by a law passed by a majority of two-thirds of the Greek Cypriot members of the House of Representatives alone. See *Nicolaou v. Nicolaou* (1992) 1 C.L.R. 1338. See also Constantinos Lykourgos, *Cyprus Public Law as Affected by Accession to the European Union*, in *STUDIES IN EUROPEAN PUBLIC LAW: THEMATIC, NATIONAL AND POST-NATIONAL PERSPECTIVES* 103 (Constantinos Kombos ed., Sakkoulas Publications 2010).

From 1963 until 1974, the two communities were engaged in negotiations to find a comprehensive and viable solution for the island. However, a *coup d'état*, orchestrated by the military junta of Greece that upset legality, was used as a pretext by Turkey to invade the island, causing a humanitarian catastrophe and establishing a geographical and ethnical division. Turkey seized approximately 36% of the territory of Cyprus and expelled approximately 170,000 Greek Cypriots from their lawful residences.⁷⁷ Turkey based its operation on article IV of the Treaty of Guarantee, which provides that the guarantor states (Greece, Turkey, and the United Kingdom) have the “right to take action with the sole aim of re-establishing the state of affairs.” The “right of action” was thus interpreted as the right to use force unilaterally, which is expressly prohibited under article 2(4) of the UN Charter.⁷⁸ The Security Council expressed “its formal disapproval of the unilateral military actions undertaken against the Republic of Cyprus.”⁷⁹ On November 15, 1983, the self-proclaimed “Turkish Republic of Northern Cyprus” (TRNC) emerged as the “exercise of self-determination” of the Turkish Cypriots.⁸⁰ The UN Security Council deplored the “secession of part of the Republic of Cyprus”⁸¹ and called upon all states not to recognize the purported state “set up by secessionist acts.”⁸² The unlawfulness of the TRNC has been consistently dealt with by legal means from the first moment. It was also upheld by the European Court of Human Rights and the International Court of Justice.⁸³

77. In what regards the island's territory, 59,5% is under the control of the Republic of Cyprus, 35,2% under Turkish occupation and 2,6% is the buffer zone, while 2,7% constitute British sovereign bases.

78. Under the Vienna Convention on the Law of Treaties, May 23, 1969, art. 53: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”

79. S.C. Res. 360 (Aug. 16, 1974).

80. According to de Wet, no general right of a minority to secede has been recognized in international law. ERIKA DE WET, *THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL* 328 (Studies in International Law, Hart Publ'g 2004).

81. S.C. Res. 541 (Nov. 18, 1983).

82. S.C. Res. 550 (May 11, 1984).

83. See European Court of Human Rights, *Cyprus v. Turkey*, application no. 25781/94, May 12, 2014. See also International Court of Justice, *Accordance with*

Nevertheless, talks continued with an aim to find a comprehensive and viable solution in the context of a bi-zonal, bi-communal federation and end this unprecedented political anomaly. To this day, and despite ongoing talks, Turkey's military holds 36% of the territory. While the bi-communal structure of the Republic of Cyprus functions according to the doctrine of necessity, the Turkish Cypriot community is expected to return and reclaim their seats, once it is set free from Turkey.⁸⁴

D. The Legal System

Two ideas usually exist for Cyprus: first that of an insular paradise, the birthplace of Aphrodite, the perfect beaches and mountains, the olive groves, the gentle people, and the wine-dark sea; and secondly that of an unprecedented political anomaly, often seen as an insoluble Gordian Knot. In this vivid imagery that author Christopher Hitchens used to describe Cyprus,⁸⁵ two ideas can be added: its legal system and the recent financial crisis that led to the first time when creditors (and even depositors) of a bank were called upon to finance the banks' deficit (the so-called bail-in).⁸⁶

The elements that make up Cyprus law are reversely allocated compared to other mixed jurisdictions⁸⁷ presenting into the theory

International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, July 22, 2010, no. 141, § 81.

84. See Hatzimihail, *supra* note 4, at 51. Turkish Cypriot property in the area controlled by the republic is held in trust by the government, pending resolution of the Cyprus problem. See Turkish Cypriot Properties (Management and Other Topics) Law L. 139/91.

85. HITCHENS, *supra* note 32, at 19.

86. For the legal implications, see Myron M. Nicolatos (President of the Supreme Court of Cyprus, Substitute Member of the Venice Commission), European Commission for Democracy Through Law, *Austerity Measures and Economic Crisis. The Case of Cyprus—A Judge's approach* (2014).

87. See also Agustín Parise, *Codification of the Law in Louisiana: Early Nineteenth-Century Oscillation Between Continental European and Common Law Systems*, 27 TULANE EUR. CIV. L. FORUM (2012) (looking at the codification endeavors that took place in Louisiana during the early American period until before the developments of the Civil War, where the drafters were representatives of both continental European and common law traditions that resulted in an "eclectic work").

of mixed jurisdiction with a “juridical unicorn,” *i.e.*, common law has a stronghold in private law with the exception of non-commercial matters and criminal law, whereas public law is based on civilian stereotypes. Procedural law follows common law as all other mixed jurisdictions. However, in the case of Cyprus, it is vital to think in common law terms in order to understand Cyprus law.⁸⁸ Procedural law has acted as a vehicle for the introduction of common law notions into areas of substantive law that are oriented towards the continental legal tradition, and for ensuring the persistence of a common law mentality.⁸⁹ Thus, the legal system of Cyprus reaffirms Sir Thomas Smith’s perception that a mixed jurisdiction is a system where civil law and common law doctrines have been received and indeed contend for supremacy.⁹⁰

Cyprus more closely resembles a common law jurisdiction than other mixed jurisdictions; however, the civilian influence is constantly expanding in new areas of the law. Additionally, most of the legislation has been imported or transplanted from abroad. According to Hatzimihail, this importation has often resulted in veritable transplants, while in other instances resulted in the formation of altered legal regimes, evoking Gunther Teubner’s idea of *legal irritants*.⁹¹ For example, the courts have given the principle of good faith, provided under the Unfair Contract Terms Directive, a common law gloss by focusing on an absence of dishonesty in agreeing upon the terms. All this adds to the amazingly complex picture of a unique legal system that Hatzimihail envisaged.

The journey of mixedness of Cyprus law has taken a “contrariwise movement,”⁹² since the common law has emigrated rather than

88. Nikitas E. Hatzimihail, *On Law, Legal Elites and the Legal Profession in a (Biggish) Small State: Cyprus*, in *SMALL STATES IN A LEGAL WORLD* 217 (Petra Butler & Caroline Morris eds., Springer 2017).

89. *Id.* at 228.

90. Thomas B. Smith, *Property and Trust*, in *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* (René David et al. eds., Tübingen 1972).

91. Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 *MOD. L. REV.* 11 (1998).

92. PALMER, *supra* note 13, at 9.

migrated as in almost all mixed jurisdictions. Apart from the fact that Cyprus law tends to agree on terms of constitutional form, the principles of separation of powers, the independence of the judge, judicial review of governmental acts, due process of law, free speech, and freedom from arbitrary search and arrest, public law is strongly influenced by Greek administrative law.⁹³ Moreover, the constitution provided under article 146 for a separate Constitutional Court with original jurisdiction over administrative law cases. The principle of *ne bis in idem* or “double jeopardy,” which is of continental origin, is also applicable via article 12.2 of the Constitution of Cyprus.⁹⁴

This allocation arose from constitutional provisions such as article 146, which establishes jurisdiction over petitions to annul or confirm administrative acts in the spirit of the French *recours en annulation*. Another example is article 188 of the Constitution; this provision states that the laws applicable until independence will continue to be in force and be interpreted in line with the Constitution as well as organic laws such as the Courts of Justice Law, which provided for the common law doctrines of equity⁹⁵ to be sources of law unless otherwise provided for by law or the Constitution, thereby confirming the colonial *status quo*.⁹⁶ As Hatzimihail points out, independence should have led Cyprus away from the common law tradition as it empowered a people attached to motherlands and languages falling firmly within the continental legal tradition. Nevertheless, it confirmed the place of the colonial legal, business, and administrative elite as well as its capacity to absorb new entrants, a form of rent-seeking as explained by Anthony Ogus.⁹⁷

93. Greek administrative law is based on French doctrine, see EPAMINONDAS SPILIOTOPOULOS, GREEK ADMINISTRATIVE LAW (Ant. N. Sakkoulas 2004).

94. See Attorney General (Article 7) (1993) 1 C.L.R. 793.

95. Translated as principles of equity.

96. See Courts of Justice Law no. 14/60 (1960), art. 29 [hereinafter Courts of Justice Law].

97. See Hatzimihail, *supra* note 88, at 216. See Anthony Ogus, *The Contribution of Economic Analysis of Law to Legal Transplants*, in THE CONTRIBUTION OF MIXED LEGAL SYSTEMS, *supra* note 15.

According to Symeonides, this statute passed by an inexperienced House of Representatives went much further than the letter and spirit of the Constitution, tying the legal system of Cyprus in a permanent and surreptitious manner to the English common law.⁹⁸ This provision had no temporal limitation; hence, it authorized the application of post-independence common law along with pre-independence laws. It also made common law binding rather than persuasive upon courts leading to the so-called anglicization of the law.⁹⁹ However, the republic was born in “an uneasy truce between realities and aspirations,” with the various social groups and legal and political elites trying to find their place in the post-colonial era.¹⁰⁰ In any case, the institutional arrangements would have disallowed significant law reform as the sharing of power proved already problematic in 1963 when the Turkish members of the House of Representatives rejected the budget.¹⁰¹ The decision for maintenance of the *status quo* was, therefore, the easy way out, as it left the option for a future law reform, on which there was no consensus at the time and did not have the intellectual structure to begin with.¹⁰² However, as former Judge Pikiš points out:

The inheritance of English law in Cyprus had positive effects in relation to human rights, including property rights. It is no coincidence that despite the blows inflicted upon Cyprus in 1974, the rule of law retained its force, the State survived, helping in the sustenance of the Republic of Cyprus becoming in due course a member of the European Union.¹⁰³

It is obvious that personal biases of the dominant group of colonial advocates played a major role in the maintenance of the common law.¹⁰⁴ Following independence, Cyprus Bar membership

98. The task was undertaken by a well-known former servant of Her Majesty's government according to Symeonides, *supra* note 24, at 450.

99. *Id.*

100. See Hatzimihail, *supra* note 55.

101. See Hatzimihail, *supra* note 88, at 216.

102. See Hatzimihail, *supra* note 55.

103. See Pikiš, *supra* note 41, at 98 (emphasis added).

104. For the last thirty years of Colonial rule, membership to the Cyprus Bar had been preserved for barristers trained in England. See Advocates Law (Cap. 2)

begun expanding significantly, with a new wave of lawyers coming from non-legal families and holders of university degrees from Greek law schools. This resulted in a cultural conflict, with traces that are still visible today. Maintenance of the English common law became a vehicle for the dominance of the established group of colonial advocates, and their children, in the emerging legal profession of Cyprus.¹⁰⁵ But this internal conflict is best illustrated in the use of the English language: it took three decades after independence for the legal system to complete the transition from English to the republic's official languages. Hatzimihail stresses that perhaps it is not mere coincidence that it took a little more than three decades after independence for the first Cypriot graduates of a Greek law school to reach the appellate bench. Be that as it may, this did not act as an obstacle for a unique Cypriot legal identity to be formed, shifting away from common law ideal types.¹⁰⁶

E. Contract and Commercial Law

Cyprus commercial and contract law is patterned after English statutory models. The majority of mixed jurisdictions at their founding had a civilian-based commercial law, which was later taken over by common law rules mainly based on the idea that the requirements of commerce are best served via common law rules and that old commercial law was inadequate to cope with them.¹⁰⁷

(1955), art. 3: admission to practice as an advocate was reserved to those “entitled to practice” as a barrister-at-law or “admitted to practice” as a solicitor in England or Northern Ireland, or as an advocate in Scotland. *See also* Hatzimihail, *supra* note 55.

105. Hatzimihail stresses that the most influential groups within the legal profession—appellate judges and the *notables* that used to belong to families that trace their origins in the profession to the colonial-era advocates—are the ones who most closely identify with the common law. Therefore, these groups had a vested right to act as gatekeepers and refrain from opening the system to new entrants who were educated in Greece. *See* Hatzimihail, *supra* note 88, at 234.

106. *See* Hatzimihail, *supra* note 88, at 242.

107. *Id.* at 92. *See also* Jacques du Plessis, *Common Law Influences on the Law of Contract and Unjustified Enrichment in Some Mixed Legal Systems*, 78 *TUL. L. REV.* 219 (2016). Du Plessis examines the common law influence with regards to *causa* and consideration, promissory estoppel and reasonable reliance,

New legislation in Cyprus relating to contract law simply replaced previous English statutory transplants as is the case with the Sale of Goods Act.¹⁰⁸ The dominance of English contract and commercial law is evident from the fact that legislative deviations from the English paradigm such as the Vienna Convention on the Sale of Goods, also known as the United Nations Convention on Contracts for the International Sale of Goods (CISG),¹⁰⁹ as well as statutes implementing EU derivative law, are only absorbed very gradually in legal practice and caselaw.¹¹⁰ Despite the fact that the Vienna Convention on the Sale of Goods entered into force over a decade ago in Cyprus—which could have led to an autonomous source of law with its own interpretation and application, separate from the common law—the CISG has yet to generate any caselaw.¹¹¹ It may be argued that this reflects a preference towards the English law of sale, which is preferred as the governing law in international sales.¹¹²

The impact of EU derivative law is just beginning to be felt in contractual practice and caselaw, mainly through the Unfair

offer, acceptance and the mailbox theory, undue influence and good faith, anticipatory breach and repudiation and the *condictio indebiti*.

108. See Hatzimihail, *supra* note 88, at 227-28. New legislation on Sale of Goods enacted in 1994 (L. 10(I)/1994) replaced the English Sale of Goods Act of 1893 (applicable under Sale of Goods Law (Cap. 267), L.25/1953) with the English Sale of Goods Act of 1979.

109. United Nations Convention on Contracts for the International Sale of Goods (CISG), 1980. According to Rogowska, the English legal system has achieved wide international acceptance and familiarity since, despite the advantages of the CISG, business parties worldwide have frequently incorporated English law into their international sales contracts. See Anna Rogowska, *Some Considerations on the Desirability of Accession to the CISG by the UK*, 2 ELEC. J. COMP. L. (2013).

110. *Id.* at 228.

111. *Id.* According to Hatzimihail, even legal literature makes no reference of the CISG being applicable in Cyprus. See Hatzimihail, *supra* note 88, at 228. The absence of caselaw on the CISG can be seen by the data available on the “Case Law on UNCITRAL Texts” (CLOUT) of UNCITRAL, <https://perma.cc/6V6K-XDY3>.

112. Min Yan, *Remedies Under the Convention on Contracts for the International Sale of Goods and the United Kingdom’s Sale of Goods Act: A Comparative Examination*, 3 CITY U. H.K. L. REV. 111 (2011).

Contract Terms Directive.¹¹³ Directive 93/13 was implemented already prior to accession. However, the prohibition against unfair terms has only recently started to excerpt influence in contracts, while discussions are being held for a possible extension of the fairness clause to SMEs.¹¹⁴ Effective consumer protection, though, is still in its early stages. This contrasts with the inroads that the principle of good faith has made into English caselaw.¹¹⁵ The reasoning in most contract cases in Cyprus, however, is not comparable to appellate English opinions.¹¹⁶

Article 29(1)(c) of the Courts of Justice Law provides that the applicable law in Cyprus is the common law and the principles of equity.¹¹⁷ However, the hybrid nature of the law is emphasized by the fact that the starting point for the development of judicially constructed rules is the codified legislation. The law of contract in Cyprus is contained in Chapter 149 of the Laws of Cyprus (also known as Cap. 149) originally enacted in 1957, which is effectively a transplant of the Indian Contract Act of 1872.¹¹⁸ According to Hatzimihail, the primary differences between the two texts are technical: certain explanations were moved into the main text, illustrations have been removed, and specific performance is provided for

113. See Council Directive 93/13, 1993 O.J. (L95) (EC), on Unfair Terms in Consumer Contracts [hereinafter Unfair Terms in Consumer Contracts Directive].

114. French law prohibits contractual clauses that create a significant imbalance between the parties' rights and obligations arising under a contract. This concept is defined by reference to *lesion* originating from consumer law—and was later extended to commercial law and to general contract law with the French revision of obligations by Ordinance no. 2016-131, Feb. 10, 2016. See also David R. Amariles, Eva M. Bassilana & Matteo Winkler, *The Impact of the French Doctrine of Significant Imbalance on International Business Transactions*, 2 J. BUS. L. 149 (2018).

115. See *Yam Seng Pte Ltd. v. International Trade Corp. Ltd.* (2013) EWHC 111 (QB). See to that effect, Ewan McKendrick, *Doctrine and Discretion in the Law of Contract Revisited*, 7 CHIN. J. COMP. L. 1 (2019).

116. See Hatzimihail, *supra* note 88, at 228.

117. See *Constantinou v. Panayides* (1984) 1 C.L.R. 466; it was clarified that the common law finds application in Cyprus in light of the provisions of the Courts of Justice Law. The court explained that the common law without the amendments by English statute was applicable.

118. L. 24/30 Laws of Cyprus at Chapter 149, Contract [hereinafter Cap. 149].

in Cyprus contract law.¹¹⁹ The most important difference has to do with the interpretation of the statute. In Cyprus, the statute is to be interpreted in accordance with the principles of legal interpretation obtained in England. Also, expressions used in a statute shall be presumed, so far as it is consistent with their context, to be used with the meaning attached to them in English law.¹²⁰ It should be pointed out, nonetheless, that certain provisions were read by Cyprus courts (unlike Indian courts) as deviating from the common law.¹²¹

In *Pastella Marine v. Iranian Tanker*,¹²² the court noted that in interpreting a statute it may resort to English authorities interpreting English analogous statutes. However, for the purposes of the case, and since a comparison of the text of section 30 of The Merchant Shipping (Registration of Ships Sales and Mortgages) Law¹²³ revealed notable differences between the wording of the Cyprus and the English enactments, little or no assistance could be derived from English case law affecting the interpretation of said section. In *Sekavin S.A. v. Ship "PlatonCh"*,¹²⁴ it was stipulated that article 70 of the Contract Law reproduces common law in respect of quasi contractual liability of recipient of goods or services supplied or rendered not gratuitously. According to the court, in *Saab and Another v. Holy Monastery of Ayios Neophytos*,¹²⁵ Cap. 149, article 73 aims to reproduce the common law rules on damages for breach of contract as they crystallized and were fashioned in the case of *Hadley*

119. Hatzimihail, *supra* note 55, at 75-99. See also Shivprasad Swaminathan, *The Will Theorist's Mailbox: Misunderstanding the Moment of Contract Formation in the Indian Contract Act, 1872*, 39 STAT. L. REV. (2018).

120. Cap. 149, *supra* note 118, at art. 2(1).

121. *Myriantousis v. Petrou* (1956) 21 C.L.R. 32 (on past consideration); *Maison Jenny Ltd. v. Krashias Footwear Industry Ltd.* (2002) 1 C.L.R. 1156 (on frustration).

122. *Pastella Marine v. Iranian Tanker* (1987) 1 C.L.R. 583.

123. The Merchant Shipping (Registration of Ships, Sales and Mortgages) Law no. 45/1963.

124. *Sekavin S.A. v. Ship "PlatonCh"* (1987) 1 C.L.R. 297 [hereinafter *Sekavin*].

125. *Saab and Another v. Holy Monastery of Ayios Neophytos* (1982) 1 C.L.R. 499.

v. *Baxendale*.¹²⁶ Damages, therefore, aim to restore the party to the position he would be but for the breach.¹²⁷

The law provides that all agreements are contracts if they are made by the free consent of the parties competent to contract for a lawful consideration and for a lawful object, but two or more persons are said to consent when they agree upon the same thing in the same sense (meeting of the minds). Non-performance of a contract is governed by the doctrine of breach of contract, by providing damages, specific performance and injunctions, and the doctrine of impossibility of performance due to an unintentional weakness, where frustration is the only cause for justifying non-performance. Cap. 149, article 29 states the following: “Agreements, the meaning of which is not certain, or capable of being made certain, are void.” According to the court,¹²⁸ this incorporates the common law rule that only agreements with terms that are certain are enforceable in law. Thus, the ingredients of a valid contract as listed in *Horrocks v. Forray*¹²⁹ apply, namely:

- a meeting of the minds of the contracting parties;
- reasonable certainty as to the terms of the contract, the essential terms of the contract must be clearly made out;
- the agreement must be accompanied by an intention to affect legal relations of the contracting parties; and
- there must be consideration moving from the promisee.

The hold on the common law in contract and commercial law in Cyprus may be explained by the search for the most efficient rules

126. See *Hadley v. Baxendale* (1843-60) All E.R. Rep. 461. The judgment sets the rule that if two parties make a contract, and one of them breaches it, the damages that the other party ought to receive regarding this breach of contract should be such as may fairly and reasonably be considered. Such damages arise either naturally, *i.e.*, according to the usual course of things, from the breach of contract itself, or are the probable result of the breach as contemplated by both parties.

127. See *C. Czarnikow Ltd. v. Koufos (The Heron II)* (1967) 3 All E.R. 686 (H.L.); *Soleada S.A. v. Hamoor Tanker Corporation Inc.* (1981) 1 All E.R. 856 (C.A.).

128. *Sekavin*, *supra* note 124.

129. *Horrocks v. Forray* (1976) 1 All E.R. 737.

that favor today's market economy. Cyprus' contract and commercial law—as opposed to non-commercial civil matters that have been under civilian influence—is a reaffirmation that in mixed jurisdictions commercial law [mainly] and in certain cases contract law follows the dominant economy rather than the dominant culture.¹³⁰ “Pockets of resistance” to the common law influence in private law have been expanded or created, as the transplantation of Greek family law indicates.¹³¹ Another such example is the transplantation of Greek law with regards to the Associations and Foundations Act, which governs non-profit institutions.¹³²

III. THE IMPACT OF EU LAW

EU membership created a lot of hopes both in terms of reunification of the territorially divided island and mainly in terms of facilitating the reform of the basic institutions thereby considered as an impetus for change. After accession in 2004, the Constitution was amended introducing a Europe provision on the model of article 29(4)(6) of the Irish Constitution, with the aim of overriding with this general article all the specific incompatibilities existing between other articles of the Constitution and the obligations of Cyprus as a member of the EU. Under article 1A of the Constitution and 179,¹³³ supremacy is given to EU law. Also, under article 169.3 of the Constitution, International Treaties, Conventions, and Agreements have a superior force of law based on reciprocity. In essence, the Constitution precedes even the case law of the Court of Justice of the European Union (CJEU), which never expressly held that the acts adopted under the Union's third pillar—as it was at the time of the fifth constitutional amendment—had precedence over national constitutional provisions.¹³⁴ It basically embodies a total surrender to

130. PALMER, *supra* note 13, at 56.

131. *See* Hatzimihail, *supra* note 88, at 217.

132. Law 57/72.

133. As amended by Law 127(I)/2006, amend. 6.

134. Lykourgos, *supra* note 76, at 104-5.

the supremacy of European law.¹³⁵ This favorable, “pro-European approach” was a result of the difficulty to amend the Constitution and the will to render unnecessary any future amendment. Since international legality and European integration are the basis for a future reintegration of the divided island, the decision to adopt a “Europe provision” that gives prevalence to EU law over domestic therefore “come[s] as no surprise.”¹³⁶

Symeonides found a silver lining: prior comprehensive streamlining and modernization of Cyprus legislation was not undertaken as it avoided duplication with the harmonization project.¹³⁷ Nonetheless, the most common practice of EU derivative law implementation has been the transposition of the text of directives *verbatim*, with little effort at consolidation or integration with national legal structures.¹³⁸ These texts are usually based on prototypes from Greece and the United Kingdom. This has led to arguments that the process of harmonization in Cyprus has led to an indirect rapprochement with Greek law, endangering its common law elements. Hatzimihail notes that one can indeed find implementation legislation where a distinctive local touch was asserted.¹³⁹

In general, it is argued that the harmonization process reduces the differences between common law and continental law. For example, Zimmermann argues that the idea of English common law as an autochthonous achievement is a myth¹⁴⁰ and that it would have had the same direction and evolution regardless of the

135. Christiana Markou, *The Cyprus and Other EU Court Rulings on Data Retention: The Directive as a Privacy Bomb*, 28 COMP. L. & SEC. REV. 474 (2012).

136. See Hatzimihail, *supra* note 4, at 53.

137. Symeonides, *supra* note 24, at 454.

138. See Hatzimihail, *supra* note 4, at 82.

139. *Id.* (referring to CONSTANTINOS ILIOPOULOS, THE ACCESSION OF THE REPUBLIC OF CYPRUS IN THE EUROPEAN UNION AND THE HARMONIZATION OF THE LAW OF COMPANIES AND INTELLECTUAL PROPOERTY (A. Sakkoulas, 2006) (in Greek)).

140. Reinhard Zimmermann, *Roman Law and the Harmonisation of Private Law in Europe*, in TOWARDS A EUROPEAN CIVIL CODE 34 (3d ed., Arthur S. Hartkamp, Ewoud H. Hondius, Carla Joustra, Edgar du Perron, Muriel Veldman & Martijn Hesselink eds., Kluwer Law Int'l 2004).

Europeanization of law. However, in Cyprus, the legal system would have been attached to a greater degree to the old common law, due to the tendency to withhold legal, institutional, and political reform indefinitely. Moreover, the relatively few publications written on the legal system and the absence of a legal academia who can contribute to the doctrinal development of the system until very recently implies that changes will be significantly bigger than in more developed systems.

European law has affected the juristic outlooks of the English legal system. European law directives led to the adoption of continental reasoning, such as the principle of proportionality, legitimate expectation, the use of teleological and purposive reasoning, and the principle of good faith.¹⁴¹ According to Margit Cohn, the Europeanization of British public law has been oblique and implied, with the unreasonableness doctrine retaining its unique nature in areas that have not been directly influenced by the external system. Proportionality has not reached a status of an overarching principle and it is only applied in European Court of Human Rights (ECHR) contexts. When it is applied, courts rely on Commonwealth sources rather than referencing its European origin.¹⁴² Therefore, the British administrative law shows resistance to the adoption of civil law constructs. On the contrary, most of these principles formed part of the legal system of Cyprus due to the predominance of civil law in public law matters. Greek legal thinking tends to look for the purpose and meaning of the statute, hence applying a teleological interpretation. Similarly, Cyprus judges employ the teleological interpretation more than their English colleagues, a clear example of the ability to adapt to the synthetic blending of the two legal traditions of the West by

141. PALMER, *supra* note 13, at 9.

142. Margit Cohn, *Pure or Mixed? The Evolution of Three Grounds of Judicial Review of the Administration in British and Israeli Administrative Law*, 6 J. COMP. L. 86 (2012).

generating what is called as metamorphosis or creation of autonomous law.¹⁴³

At the same time, it is argued that little of the substance of English contract law has changed directly as a result of membership in the EU.¹⁴⁴ The most impactful EU legislative measure upon English contract law is the Directive on Unfair Terms in Consumer Contracts.¹⁴⁵ According to Catherine MacMillan, the good faith concept has posed a considerable challenge in its orientation in a body of law largely premised upon *caveat emptor* and a strong orientation towards freedom of contract.¹⁴⁶ Since English contract law has developed around the concept of *caveat emptor*, tension arises between this principle and good faith.¹⁴⁷ MacMillan argues that this tension is evident in the case of *Office of Fair Trading v. Abbey National plc*,¹⁴⁸ which arguably shows that U.K. courts have not embraced the European approach to fairness.¹⁴⁹ The court examined the fairness of bank charges for unauthorized overdrafts. It held that the charges were excluded from review because they were not the prices paid in exchange for the transactions in question, but they were monetary considerations related to the package of banking services supplied to current account customers. This means that the charges were part of the price or remuneration paid by the customer in exchange for the package of services, falling within the notion of the “main subject matter of the

143. PALMER, *supra* note 13, at 71. The so-called *sui generis* norms of mixed jurisdictions come as a result of a process of mingling common law and civil law elements. The teleological approach was followed even in cases of interpretation of a contract.

144. Catherine MacMillan, *The Impact of Brexit upon English Contract Law*, 27 KING'S L. J. 426 (2016).

145. Unfair Terms in Consumer Contracts Directive, *supra* note 113.

146. *Id.*

147. *Id.* at 427.

148. *Office of Fair Trading v. Abbey National PLC* (2010) 1 A.C. 696, Supreme Court [hereinafter *Office of Fair Trading*].

149. Geraint G. Howells, *The European Union's Influence on English Consumer Contract Law*, 85 GEO. WASH. L. REV. 1904 (2017).

contract” and thus not subject to review for unfairness. Lord Mance in his deliberation highlighted that:

there is no basis for requiring [the court to read and interpret the contract] by attempting to identify a ‘typical consumer’ or by confining the focus to matters on which it might conjecture that he or she would be likely to focus. *The consumer’s protection under the Directive and Regulations is the requirement of transparency . . .*¹⁵⁰

This conclusion is criticized as being at odds with the European notion of the average consumer and it follows the general assumption that the common law emphasizes laissez-faire values, which goes against the EU’s general fairness test (assumed to have a protective ethic).¹⁵¹ Whereas there have been cases where a duty of good faith was recognized as an implied term within the contract,¹⁵² it is still not possible to consider this as a shift towards the continental use of the concept, which is now less likely to take place given the withdrawal of the U.K. from the EU.¹⁵³ This tension is also apparent in the case of Cyprus, while the approach of the courts is stricter than the one evident in the U.K.¹⁵⁴

However, as Geraint Howells points out, the assumption that the common law emphasizes laissez-faire values that may sit uneasily with the EU’s general fairness test, assumed to have a protective ethic, should be a cautious one since English as well as German law are also seen as more open to intervention compared to France and Italy who were reluctant to challenge unfair terms as their states were heavily involved as suppliers.¹⁵⁵ Therefore, he rightly argues

150. See *Office of Fair Trading*, *supra* note 148, § 113 (emphasis added).

151. See Howells, *supra* note 149, at 1908, 1934.

152. See recent judgment in *Bates and others v. Post Office Ltd.*, Judgment no. 3 (2009) EWHC 606 (QB).

153. Mariana Pargendler, *The Role of the State in Contract Law: The Common-Civil Law Divide*, 43 *YALE J. INT’L L.* 143, 152 (2018).

154. See *Unfair Terms in Consumer Contracts Directive*, *supra* note 113; in Cyprus, the fairness test provided under this directive was limited to the search for bad faith or undue influence in agreeing upon the terms of the contract.

155. See Howells, *supra* note 149, at 1908 (referring to Leone Niglia’s conclusion in *THE TRANSFORMATION OF CONTRACT IN EUROPE* (Kluwer Law Int’l 2002)).

that the debate might be better viewed as one between business and consumer interests rather than one between legal cultures.¹⁵⁶ Truth lies in the middle and, as Howells indicates, there has been a variety of approaches as to the assessment of fairness by English judges, some embracing a more protective ethic and others a self-interest/self-reliant perspective.¹⁵⁷ Howells argues that: “It may be too easy to typecast the common law as more laissez-faire than civilian regimes and jump on particular judgments as evidence of a return to form.”¹⁵⁸

Nevertheless, and despite the willingness of Cypriots to partake in European law, at least in the realm of contract law, Cyprus courts have been resistant to outside influences; challenging the idea that mixed legal systems are more receptive to outside influences.¹⁵⁹ The harmonization process in Cyprus has shown that the combined project of harmonization and modernization was not realized. The scope of change effected through European integration in general and the Europeanization of private law in particular are only gradually realized. Furthermore, the response of the courts towards European principles was one of irritation as Teubner suggests regarding the reception of good faith by British courts.¹⁶⁰ The following analysis will examine the reception of the Unfair Contract Terms

156. *Id.* at 1950.

157. *Id.* at 1948 (referring to Willett’s distinction), see Chris Willett, *General Clauses and the Competing Ethics of European Consumer Law in the UK*, 71 CAMBRIDGE L. J. 412 (2012). The open-textured nature of general clauses of fairness that EU law provides can be subject to interpretation by reference to some background ethic, what Chris Willett calls: “some vision of the ideal market and civil order.” This gives rise to two competing ethics, namely one based on values of trader self-interest and consumer self-reliance, and another that aims to substantively protect the consumers against the weaknesses that they suffer relatively to traders. The ethic of self-interest/reliance is closest to freedom of contract thinking and the approach of the common law courts; while the protective ethic prioritizes consumer protection from the financial and social impact of ‘harsh’ terms and practices and is closer to the continental approach.

158. See Howells, *supra* note 149, at 1948.

159. Lord Rodger of Earlsferry, “*Say Not the Struggle Naught Availeth*”: *The Costs and Benefits of Mixed Legal Systems*, 78 TUL. L. REV. 433 (2003) (opposing the change towards more European unity, which he sees as a threat to the value of mixed legal systems).

160. Teubner, *supra* note 91.

Directive within the legal system of Cyprus by first presenting the framework for consumer protection.

IV. CONSUMER PROTECTION UNDER CYPRUS LAW

As with other EU member states, Cyprus did not provide for consumer protection through statutory law or caselaw until the adoption of EU directives in the field. Consumers, therefore, had to resort to the general principles of private law in order to protect their interests.¹⁶¹ Cap 149 did not provide the necessary tools in dealing with unfair contract terms. Therefore, the implementation of the Unfair Contract Terms Directive covered a legal vacuum by providing for the judicial control of unfair terms in consumer contracts. Additionally, Cyprus did not follow the enactment of the Unfair Contract Terms Act of 1977 (Chapter 50) in England, Wales, and Northern Ireland. The 1977 Act imposed limits on the extent to which the law allowed the avoidance of civil liability for breach of contract, or for negligence or other breach of duty by means of contract terms and otherwise. Thus, it conferred a substantial degree of discretion upon a court in finding a particular exclusion or limitation clause to be unreasonable. Consequently, the absence of similar statutory developments in Cyprus meant that judicial discretion in contractual matters was limited, with the courts having little interest in interfering with the terms of the contract.

The beginnings of consumer protection in Cyprus may be found in the case of *Cyprus Wine Association Ltd. v. Theodossis Georghiou*,¹⁶² a consumer suffered a wine-cork injury to his left eye. The trial court in delivering its judgment in favor of the consumer relied on the English common law principle expounded in the case of *Donoghue v. Stevenson*¹⁶³ where Lord Atkin stated that:

161. EVRIPIDES HATZINESTOROS & GIORGOS CHARALAMBOUS, THE LAW ON THE SALE OF GOODS AND CONSUMER PROTECTION IN CYPRUS 316 (Nomiki Bibliothiki 2016) (in Greek).

162. *Cyprus Wine Association Ltd. v. Theodossis Georghiou* (1970) 1 C.L.R. 246.

163. *Donoghue v. Stevenson* (1932) A.C. 562.

a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

Further, the court stated that if liability is based on the principle stipulated in *Donoghue*, there must be evidence of negligence, though slight evidence may suffice.¹⁶⁴ The Supreme Court on appeal held that the appellants were not guilty of want of reasonable care since the trial court erred in not weighing properly witness evidence. It also held that the trial court misinterpreted the legal effect of the *Grant* case regarding the level of evidence that must be provided in order to show negligence. The court's use of general principles of negligence and its reference to a duty of reasonable care that manufacturers owe towards both consumers and purchasers of products in general was the first line of protection offered by the system for injuries caused by such products. However, the standard of proof in this case was the balance of probabilities, specifically the consumer/purchaser had to show that the method of manufacture of the good in question was faulty and that his personal injuries were caused by the negligence of the manufacturer.

This element is also seen in the cases following the financial crisis (2013) where debtors accused creditors of breaching their duty of care.¹⁶⁵ However, EU law provides for the relaxation of the burden of proof in favor of the consumer.¹⁶⁶ This relaxation, according

164. See *Grant v. Australian Knitting Mills Ltd.* (1936) A.C. 85.

165. *Syrimi v. Pancyprian Funding Agency Ltd.* (2010) 1 C.L.R. 1131 [hereinafter *Syrimi*]; *Gregoriou v. Euroinvestment & Finance Ltd.* (2011) 1 C.L.R. 2229.

166. See art. 5(3) of Directive 1999/44 that provides for a derogation from the principle set forth in art. 3(1) that stipulates that the seller is to be liable for any lack of conformity which exists at the time the goods were delivered. The derogation refers to the lack of conformity becoming apparent within six months of delivery of the goods, that is presumed to have existed at the time of delivery.

to the CJEU in *Froukje Faber v. Autobedrijf Hazet Ochten BV*, is based on:

the determination that where the lack of conformity becomes apparent only subsequent to the time of delivery of the goods, it is ‘well-nigh impossible for consumers’ to prove that the lack of conformity existed at the time of delivery, whereas it is generally far easier for the professional to demonstrate that the lack of conformity was not present at the time of delivery and that it resulted, for example, from improper handling by the consumer.¹⁶⁷

For the consumer to benefit from the relaxation of the burden of proof, he must furnish evidence of certain facts. The consumer must show that the goods sold are not in conformity with the contract, insofar as they do not have the qualities agreed or are not fit for the purpose. However, the consumer is not required to establish that the origin of the malfunction is attributable to the seller. Also, the consumer must prove that the lack of conformity became apparent physically within six months of delivery of the goods. The occurrence of the lack of conformity within six months makes it possible to assume that it existed “in embryonic form in those goods at the time of delivery.”¹⁶⁸

The case before the Supreme Court of Cyprus indicates that the standard of proof is higher for the consumer, since even if the respondents managed to show that the appellants (as a matter of inference) were negligent, the manufacturers adduced reliable evidence to rebut the inference of negligence. Therefore, even though the

167. Case C-497/13, *Froukje Faber v. Autobedrijf Hazet Ochten BV*, 2015 ECLI:EU:C:2015:357 § 54. Directive 1999/44 offers the possibility to the consumer, in order to benefit from his rights, to inform the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity. This option reflects the aim of reinforcing legal certainty, according to the *travaux préparatoires*, by encouraging diligence on the part of the purchaser taking the seller’s interests into account but does not establish a strict obligation to carry out a detailed inspection of the good. The court explains that the obligation does not establish a requirement for the consumer to furnish evidence that the lack of conformity actually adversely affects the goods or to state the precise cause of that lack of conformity.

168. Case C-497/13, *Froukje Faber v. Autobedrijf Hazet Ochten BV*, 2015 ECLI:EU:C:2015:357 § 72.

appellants/manufacturers were aware that the wine being fermented could cause the wine-cork to pop out the container, this possibility in view of the evidence was estimated at 1%. Judge Hadjiana-stassiou noted that he was not persuaded that the cork had to be fastened by a wire or that there should be a warning on the demijohn to address the risks of fermentation. The judge also noted that, in this case, the manufacturer could not foresee that there was a reasonable probability of fermentation to necessitate an express warning.

A more recent decision indicates the tendency of the courts to place the burden of proving whether a product is secure upon the shoulders of the plaintiff/consumer. This makes it difficult to prove since, depending on the nature of the product, expert testimony may be required.¹⁶⁹ In the case of *Tsiattes v. Kokis Solomonides (Cartridges Industries) Ltd.*,¹⁷⁰ the appellant requested damages for hearing injuries that were caused by the detonation of the right barrel of his shotgun during a hunting excursion. The appellant argued that the underlying cause of the accident was the defective cartridge purchased from the respondents/defendants who maintained a cartridge manufacturing plant and a retail outlet. The Supreme Court held that the appellant failed to provide evidence that the detonation of the barrel was the result of the deficient cartridge. According to the court, the trial court was correct in holding that the appellant failed to prove causation between the incident and the cartridge.

After the accident, the appellant referred to the seller of the shotgun who in turn sent the shotgun to the manufacturer in Spain. According to the manufacturer, there are two possible causes for the accident: the presence of a foreign object in the barrel or the high pressure from the cartridge. The manufacturer suggested that the gun ought to be sent to a weapons proofing establishment in Spain, in which case the company would have considered its conclusions acceptable. Instead, the appellant preferred to send the gun to the

169. HATZINESTOROS & CHARALAMBOUS, *supra* note 161, at 403.

170. *Tsiattes v. Kokis Solomonides (Cartridges Industries) Ltd.* (2009) 1 C.L.R. 974.

Birmingham Gun Barrel Proof House located in the U.K. After a metallurgical test that indicated that the gun did not suffer from a structural defect and that its barrel was cracked as a result of its prolonged use, the weapons proofing establishment reached the conclusion that the detonation was caused by the high pressure in the barrel. However, it did not indicate whether it was the cartridge to blame or another cause.

For the defendants, the owners of the company provided testimony relating to the manufacturing cartridges. The owners explained that they utilized state-of-the-art equipment, that their cartridges were amongst the best in Europe, and that the company met ISO 9002 standards. The trial court accepted their testimony as they were regarded as experts in the field. But the report by the Birmingham Gun Barrel Proof House was not considered because the author of the report was not present as a witness and it, therefore, amounted to hearsay evidence (based on the applicable law at the moment of judgment). Thus, the judge of first instance held that the principle of *res ipsa loquitur* was not applicable to the facts of the case and that there was no causation between the incident and the damage inflicted. It also did not find that the injury was the result of a defective cartridge and therefore did not find that the defendant was negligent.

The Supreme Court stated that the crucial issue to be dealt with was the question of the burden of proof. The appellant had the burden of proving the defectiveness of the cartridge. His failure to save the last cartridge that he used was seen as a hinderance for a proper examination. At the same time the court noted that no evidence was provided either by expert testimony or otherwise as to the cartridge, but only presumptions as to the possible cause of the accident.

Consumer protection in Cyprus is only at early stages even after the adoption of the EU Directives. The courts still resort to the general principles of contract law when dealing with issues of consumer protection. This leads to fragmentation since sectorial regulators such as the Financial Ombudsman have ruled differently from the courts in similar cases, when arguably applying the same principles.

The consumer *acquis* of the EU applies to particular types of contract such as timeshare contracts, package travel, and contracts of consumer credit and is, therefore, piecemeal, furthering such fragmentation in the law. Consequently, the EU *consumer acquis* lacks an overarching principle or set of principles since it is governed by special sets of rules.¹⁷¹ The good faith requirement, therefore, does not have the same weight as in civilian legal systems. However, such legal systems have been more willing and prepared to realize the set of rules provided under EU law.

Simon Whittaker emphasizes that this lack of general principles safeguards against the risk of clash with existing general principles of municipal laws. However, the absence of principles makes the implemented legislation appear exceptionally uncoordinated and difficult to place.¹⁷² Legal systems that do not recognize a general norm of good faith or fairness governing contracts, as is the case with English and Cyprus contract law, create tension between traditional contract law and policing/regulatory law since the requirement appears to apply only to the latter. Thus, one may conclude that the availability of the requirement only for policing measures may result in its extension for purposes of traditional contract law.¹⁷³ As is seen from the experience of Cyprus, this has not been the situation in contrast to certain cases before English courts where good faith was recognized as an implied term. The Director of the Consumer Protection Service, however, took the view that the content of the requirement of good faith is identical to the one adopted in civilian systems such as Greece and Germany and has consequently applied the requirement by citing rulings of Greek and German courts.¹⁷⁴

171. Simon Whittaker, *Form and Substance in the Reception of EC Directives into English Contract Law*, 4 EUR. R. CONT. L. 389 (2007).

172. *Id.*

173. *Id.*

174. Decision of the Republic of Cyprus Consumer Protection Service 2018/1, Dossier No. 8.13.10.26.4.4.1 and 8.13.10.26.4.4.9. The Director referred to a German Highest Court decision where it was decided that burdening the consumer with the supplier's management costs was contrary to good faith and

A. The Unfair Contract Terms Directive

The Unfair Contract Terms Directive directly affects the substance of all contracts concluded between a consumer and a supplier. Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, regarding both his bargaining power and his level of knowledge.¹⁷⁵ “In view of that weak position, Directive 93/13 prohibits, . . . in Article 3(1), standard terms which, contrary to the requirement of good faith, cause a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”¹⁷⁶ Article 3(1) of the Directive specifically refers to “[a] contractual term which has not been individually negotiated shall be regarded as unfair”¹⁷⁷

As per article 3(2), the burden of proving that the term was individually negotiated lies on the seller/supplier. Also, article 4(2) provides that:

Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.¹⁷⁸

Non-negotiated terms that fail the standard of fairness of Directive 93/13 are rendered ineffective. It is for the national court to check the fairness of the terms by taking account of all the circumstances of the case including the nature of the goods or services for which the contract was concluded.¹⁷⁹ The CJEU

fundamental principles of contract law. *See* BUNDESGERICHTHOF [BGH] [Federal Court of Justice], July 06, 2011, XZR 388/10. *See also* Decision of the Republic of Cyprus Consumer Protection Service 2017/9, Dossier No. 8.13.10.26.4.5.1.

175. C-119/15, *Biuro podrzozy Partner* (2016) EU:C:2016:987, § 28.

176. C-92/11, *RWE Vertrieb* (2013) EU:C:2013:180, § 42.

177. *See Unfair Terms in Consumer Contracts Directive*, *supra* note 113, at art. 3(1).

178. *Id.* at art. 4(2).

179. C-415/11, *Mohamed Aziz v. Caixa d’Estalvis de Catalunya, Taragona I Manresa* ECLI:EU:C:2013:164, § 71 [hereinafter *Aziz*].

noted that supreme courts of member states in their role of ensuring consistency in the interpretation of the law and in the interests of legal certainty may elaborate certain criteria in the light of which the lower courts must examine the unfairness of contractual terms.¹⁸⁰

The Directive combines rules governing contract law in the more traditional sense; hence, the rules governing the mutual rights and obligations of parties to a contract, with a requirement for the creation of policing measures of a regulatory nature, aiming at the cessation of certain types of undesirable market behaviour by contracting parties.¹⁸¹ The good faith requirement of the Directive provides for the assessment of the majority of terms found in consumer contracts to be subject to the fairness test. The fairness test, however, has a certain degree of ambiguity as far as its content is concerned.¹⁸²

The Directive, thus, sets two core requirements for a finding of a term as unfair in addition to the detriment suffered by the consumer: the existence of a significant imbalance between the parties and it being contrary to good faith.¹⁸³ Nevertheless, it is not entirely clear whether these two elements of significant imbalance and good faith need to be shown separately and cumulatively in all circumstances. According to Anne-Lise Sibony, the drafting suggests that a grossly imbalanced contract is due to such imbalance, contrary to good faith.¹⁸⁴ The requirement of significant imbalance may be interpreted as an indication of substantive unfairness.¹⁸⁵ The CJEU held in *Aziz*, that:

[I]n order to ascertain whether a term causes a ‘significant imbalance’ in the parties’ rights and obligations arising

180. Joined Cases C-96/16 and C-94/17, *Banco Santander SA v. Mahamadou Demba*, 2018 ECLI:EU:C:2018:643 § 78.

181. Whittaker, *supra* note 171, at 385.

182. See Howells, *supra* note 149, at 1913.

183. *Id.* at 1916.

184. Anne-Lise Sibony, *European Unfairness and American Unconscionability: A Letter From a European Lawyer to American Friends*, 15 EUR. REV. C. L. 195, 204 (2019).

185. See Howells, *supra* note 149, 1916.

under the contract, to the detriment of the consumer, it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. To that end, an assessment should also be carried out of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms.¹⁸⁶

Accordingly, this interpretation was regarded as fitting the German approach under which the assessment is made against default rules.¹⁸⁷ The concept of “significant imbalance” in rights and obligations is broadly accepted as referring to substantive features of the terms.¹⁸⁸ This reflects various national traditions and understandings of the test, according to Chris Willett, and implies that terms are contrary to the test when they allocate the substantive rights and obligations in ways that are unduly detrimental to the consumer by, for example, adding to the responsibilities of the consumer when compared with the responsibilities under the legal default position.¹⁸⁹

The second core requirement of good faith is linked to the establishment of a significant imbalance.¹⁹⁰ According to one interpretation of the Directive, the good faith requirement does not have a supplementary role that is added to the criterion of “significant imbalance” but it rather only adds to the decade long national caselaw and doctrine developed in the majority of the member states.¹⁹¹ Thus, it is only a means of explaining the concept of significant imbalance in the countries where the principle of good faith applies. A

186. See Aziz, *supra* note 179, § 68.

187. See Howells, *supra* note 149, at 1917.

188. Chris Willett, *The Functions of Transparency in Regulating Contract Terms: UK and Australian Approaches*, 60 INT. COMP. L. Q. 355, 363 (2011); Hugh Collins, *Good Faith in European Contract Law*, 14 OXFORD J.LEGAL. STUD. 229, 249 (1994).

189. *Id.* at 363.

190. See Howells, *supra* note 149, at 1918.

191. Mário Tenreiro, *The Community Directive on Unfair Terms and National Legal Systems*, 3 EUR. REV. PRIVATE L. 273, 279 (1995).

term is always regarded as contrary to the requirement of good faith when it causes such an imbalance, based on this view. According to Willett, however, the fact that Recital 16 provides that the assessment is to be supplemented by various criteria that are germane to good faith is an indication that violation of good faith is an independent requirement.¹⁹² While good faith is a creature of civilian tradition, the concept must be given an autonomous European interpretation.¹⁹³ Recital 16 of the preamble to the Directive provides that:

[I]n making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer¹⁹⁴

Also, in *Aziz*, the CJEU stated that:

With regard to the question of the circumstances in which an imbalance arises ‘contrary to the requirement of good faith’ . . . the national court must assess . . . whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations.¹⁹⁵

This, according to Howells, places substantive limits on contractual freedom, beyond the procedural controls, clearly forcing common lawyers to think beyond their traditional understanding of fairness.¹⁹⁶

The terms that are not assessable for their fairness are terms that describe the main subject matter of the contract or the quality/price ratio of the goods or services supplied.¹⁹⁷ German academic criticism was the result of this exception since it was seen as a drastic restriction of the

192. Willett, *supra* note 188, at 364.

193. See Howells, *supra* note 149, at 1921.

194. See Unfair Terms in Consumer Contracts Directive, *supra* note 113, at recital no. 16.

195. *Aziz*, *supra* note 179, § 69.

196. See Howells, *supra* note 149, at 1919.

197. See Unfair Terms in Consumer Contracts Directive, *supra* note 113, at recital no. 19.

autonomy of the individual.¹⁹⁸ This distinction between core and ancillary terms is more familiar to civil lawyers.¹⁹⁹ According to Anne de Moor, the distinction between main (or principal) and subsidiary contractual obligations that can be drawn in civil law, is not as readily available to common law courts.²⁰⁰ This has particular repercussions since common law courts may find that article 6(1) of the Directive—which provides that “unfair terms . . . shall . . . not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms” (“severance”)—is an “illegitimate exercise in ‘rewriting of the contract.’”²⁰¹

The CJEU has also used the concept of “plain and intelligible language” in order to ensure a high level of consumer protection.²⁰² Article 5 provides that the terms must always “be drafted in plain, intelligible language” and “[w]here there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.” Recital 19 specifies that consumers should be given an opportunity to examine all the terms. In case that terms that relate to the main subject matter of the contract are not in plain intelligible language, they are also subject to unfairness review as stated in article 4(2). In *Kásler*, the CJEU held that the concept requires that intelligibility is not restricted to mere formal or grammatical intelligibility. Instead, the standard used to assess it is the “average consumer, who is reasonably . . . observant and circumspect”²⁰³

198. See Howells, *supra* note 149, at 1928. See also Hans Erich Brandner & Peter Ulmer, *The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission*, 28 COMMON MKT. L. REV. 647, 662 (1991).

199. Howells, *supra* note 149, at 1928. See also Anne de Moor, *Common and Civil Law Conceptions of Contract and a European Law of Contract: the Case of the Directive on Unfair Terms in Consumer Contracts*, 3 EUR. REV. PRIV. L. 257, 268 (1995).

200. See de Moor, *supra* note 199, at 268.

201. *Id.* at 269.

202. See Howells, *supra* note 149, at 1936.

203. C-26/13, *Kásler and Rabai v. OTP Jelzálogbank Zrt*, 2014 ECLI:EU:C:2014:282 §§ 71-72, 74.

This accordingly was seen as rather protective of the average consumer, since it required the consumer to be aware of the existence of the difference between the selling rate of exchange and the buying rate of exchange of a foreign currency. It also required the consumer to also be able to assess the potentially significant economic consequences for him resulting from the application of the selling rate of exchange for the calculation of the repayments for which he would ultimately be liable (and the total cost of the sum borrowed).²⁰⁴ This concept of transparency, as de Moor highlights, was met with reservation in English legal circles because of the common law conception of the contract as an exchange; whereby acceptance does not imply assenting to the offer but doing what the offeror requested or specified in return for the offer. By contrast, the continental law conception of the contract is the meeting of minds or accord of wills.²⁰⁵ The interpretation of intelligibility, as far as credit contracts are concerned, poses challenges on the established rules on variation of interest rate in credit contracts that can be found in the U.K. as well as other jurisdictions such as Cyprus.²⁰⁶

European regulatory law, especially in the aftermath of the financial crisis (after 2008),²⁰⁷ introduced standards for increased disclosure, promoted transparency, and to a certain extent enabled the retroactive modification of private contracts.²⁰⁸ In this environment, transparency enforcing mechanisms have been extended as a result of the Unfair Contract

204. *Id.* § 74. See also Howells, *supra* note 149, at 1938.

205. See de Moor, *supra* note 199, at 262.

206. See Howells, *supra* note 149, at 1939.

207. See C-308/17, *Hellenische Republik v. Leo Kuhn* (2018) ECLI:EU:C:2018:911 [hereinafter *Hellenische Republik*].

208. The information paradigm is predominant in EU law, see, e.g., C-788/79, *Herbert Gilli v. Paul Andres* ECLI:EU:C:1980:171, where the court took the view that consumers could be protected by labelling of a product. See also John A. Usher, *Disclosure Rules (Information) as a Primary Tool in the Doctrine on Measures Having an Equivalent Effect*, in *PARTY AUTONOMY AND THE ROLE OF INFORMATION IN THE INTERNAL MARKET* (Stefan Grundmann, Wolfgang Kerber & Stephen Weatherill eds., de Gruyter 2012). For the retroactive modification of private contracts, see *Aziz*, *supra* note 179, §§ 74-75. See also Amitai Aviram, *Bail-Ins: Cyclical Effects of a Common Response to Financial Crises*, 2011 U. ILL. L. REV. 1633 (2011); and Shmuel Becher, *Unintended Consequences and the Design of Consumer Protection Legislation*, 93 TUL. L. REV. 105 (2018).

Terms Directive to dispute resolution agreements. In *Verein für Konsumenteninformation v. Amazon EU Sàrl*,²⁰⁹ the CJEU held that:

[A] pre-formulated term on the choice of the applicable law designating the law of the Member State in which the seller or supplier is established is unfair only in so far as it displays certain specific characteristics inherent in its wording or context which cause a significant imbalance in the rights and obligations of the parties.²¹⁰

The court highlighted that “the unfairness of such a term may result from a formulation that does not comply with the requirement of being drafted in plain and intelligible language set out in Article 5 of Directive 93/13.”²¹¹ Finally, the court decided upon the term in question that was not individually negotiated and included in the general terms and conditions that it:

[I]s unfair in so far as it leads the consumer into error by giving him the impression that only the law of that Member State applies to the contract, without informing him that . . . he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term²¹²

The court elevated the principle of transparency as a formal requirement determining the existence and material validity of the choice of law agreement in accordance with article 11 of Rome I. Advocate General Hogan realized the overreach of the transparency requirement in his recent opinion in C-34/18 where he stated that the *Amazon* judgment “somewhat overstated the scope of the ‘transparency requirement’”²¹³ The Advocate General argued that the court should revert to its previous approach, according to which

209. C-191/15, *Verein für Konsumenteninformation* ECLI:EU:C:2016:612.

210. *Id.* § 67.

211. *Id.* § 68.

212. *Id.* § 71.

213. C-34/18, *Ottília Lovasné Tóth v. Erste Bank Hungary Zrt* (2019) ECLI:EU:C:2019:245, § 89.

article 5 of the Directive does not establish an autonomous test of unfairness which is distinct from that contained in article 3(1).²¹⁴

Finally, Article 7 of the Directive provides that member states shall ensure that “adequate and effective means exist to prevent the *continued use* of unfair terms in contracts”²¹⁵ According to Whittaker, this provision has been implemented differently. In some cases, it allowed consumers’ association to bring proceedings for cessation. In other cases, it empowered public bodies to police unfair terms. It highlights the regulatory characteristics of the Directive since it aims at preventing future undesirable market behaviour. Whittaker argues that the *Oceano Grupo Editorial SA v. Murciano Quintero*²¹⁶ decision is evidence that the CJEU considers the two types of intervention—that is, the rules governing contract law and rules aiming at regulating market behaviour—to be related. Specifically, in deciding upon the power of a national court to rule on the unfairness of a contract term through its own motion, the court relied on the existence of article 7 as a preventative mechanism.²¹⁷ Qualified entities are empowered under EU law to ensure compliance with the consumer protection directives.²¹⁸

B. The Directive Before Cyprus Courts

The Directive was implemented into law by the Unfair Contract Terms in Consumer Contracts Law in 1996 (also known as Law

214. Interestingly, the Advocate General stated in § 99 that: “One might ask: is it to be seriously suggested as a result of the decision in *Verein für Konsumenteninformation* that consumers be given a summary of judicial decisions by potential vendors prior to the conclusion of a consumer contract?” This comment is suggestive of the complexity of consumer law that is difficult to express in plain intelligible language.

215. Unfair Terms in Consumer Contracts Directive, *supra* note 113, at art. 7 (emphasis added).

216. Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores* (2000) E.C.R. I-4941.

217. Whittaker, *supra* note 171, at 387.

218. See Directive 98/27/EC of the European Parliament and of the Council, May 19, 1998 on injunctions for the protection of consumers’ interests.

93(I)/96),²¹⁹ verbatim, except for recent amendments not derived from the Directive. The objective of the law is to safeguard the economic interests of consumers from unfair contract terms included in contracts with suppliers or service providers and consumers. The director of the Consumer Protection Service has a duty to investigate upon submission of a complaint or *ex officio* whether a contractual term intended for general use is unfair. However, despite its adoption in 1996, prior to Cyprus joining the EU, case law in courts only appeared in 2007.

As noted by the Fitness Check Study rapporteur for Cyprus, case law, which is rather limited, reveals the gaps in understanding the philosophy and aim of the law both on the part of courts and lawyers representing consumers.²²⁰ Case law of the CJEU found no representation in Cypriot case law until very recently. In fact, no court ruling existed until very recently where a thorough application of the principle-based approach of article 4(1) of the Directive takes place. The test was limited to the search for bad faith or undue influence (*i.e.*, in the common law sense of absence of dishonesty) in agreeing upon the terms, as also noted above.²²¹

The CJEU held that it is for the national court to decide whether a contractual term satisfies the requirements of it to be regarded as unfair.²²² Thus, the concept is not subject to legal definition or interpretation at neither the European nor national level and it is a factual issue to be decided based on an assessment of the circumstances in each case. Lower courts in Cyprus limit the test to a reference stating that in the absence of an allegation that the consumer entered into the contract

219. Law 93(I)/96.

220. See Civic Consulting, European Commission, *Study for the Fitness Check of EU Consumer and Marketing Law, Final report Part 3—Country reporting 207* (May 2017) [hereinafter *Fitness Check Study*].

221. Syrimi, *supra* note 165, is the precedent followed when applying the test provided under art. 4(1) of the Unfair Terms in Consumer Contracts Directive, *supra* note 113.

222. C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter* (2004) ECLI:EU:C:2004:209.

involuntarily, the law can afford the consumer no defence to claims by financial institutions, except for the terms on the black list.²²³ Other rulings of lower courts indicated that if the signature on the agreement is not disputed, the debtors are estopped from raising an issue of unfair contract terms.²²⁴ In *Maria Nicolaou v. Ellinas Finance Ltd.*,²²⁵ the court rejected the argument of the appellants about the unfairness of the terms of the loan agreement as a result of significant imbalance between the parties and the lack of individual negotiations of certain terms, as it was not convinced that such an imbalance and non-negotiation existed. Regarding a term that provided for twenty-four hours of notice before increasing the “margin of safety,” which could potentially be exploitative according to the court, it was argued that the defendants did not apply said term to the detriment of the appellants.

Courts tend to examine the unfairness of the contractual term notwithstanding the status of the contractual party as a consumer or a business. For example, in *Euroinvestment & Finance v. Schiza*,²²⁶ the court examined the unfairness of a term notwithstanding the fact that the contract involved an investment agreement. The court ruled that the defendants claim over the unfairness of the terms were unfounded since throughout the duration of the agreement they had the power to terminate the agreement based on the law of contracts and could have sold the shares in their portfolio. The court also examined the background of the defendants to note that it involved an experienced investor who was aware of the risks involved in the agreement. However, in *I.S.G. Developers Ltd., S. Yurmanov v. Bank of Cyprus Public Company Ltd.*,²²⁷ the court held that the Unfair Contract Terms Law did not apply in the facts of the case since

223. National Bank of Greece [Cyprus] Ltd. v. Theokli & Levadioti Real Estate Companies Ltd. (2012) Case no. 1973/2012.

224. See *Fitness Check Study*, *supra* note 220, at 208.

225. *Maria Nicolaou v. Ellinas Finance Ltd.* (2013) 1 C.L.R. 2392.

226. *Euroinvestment & Finance v. Schiza* (2014) app. no. 5212/2005.

227. *I.S.G. Developers Ltd., S. Yurmanov v. Bank of Cyprus Public Company Ltd.* (2016) app. no. 1664/16.

the claimants were not consumers, within the meaning of the law, as they were a legal rather than a natural person. The latter judgment signifies the shift in the understanding of the law.

A few cases have come before courts with financial institutions requesting registration of an arbitration award and the consumers alleging unfairness of the arbitration clause. In *Angeliki Taki Charalambous v. Cooperative Savings Bank Limassol*,²²⁸ the applicants requested for the court to refer to the CJEU two preliminary questions dealing with the interpretation of the Unfair Contract Terms Directive. In particular, the applicants requested for the court to refer to the CJEU to decide whether the Directive is to be interpreted as meaning that a national court dealing with an appeal against an arbitral award and assessing the invalidity or unfairness of an exclusive arbitration clause contained in a contract can and/or has to take into account and/or assess the fact that the consumer has not been heard and had no involvement in the selection of the arbitrator and, hence, rule the arbitration clause as unfair. Furthermore, the applicants requested for the court to refer the following question: Should the Directive be interpreted as meaning that a court that deals with an appeal against an arbitration award and assesses the invalidity and/or unfairness of an exclusive arbitration clause contained in a contract may and/or has to assess and take into account that article 52(a) of the Cooperative Societies Law—which is the legal basis for the arbitration clause—was amended; leaving unaffected the right of the consumer to resort to a competent civil court instead of opting for arbitration, which was absent from the arbitration clause in question, and hence hold said clause as unfair?

As provided under article 34A(1) of Law 14/60, the Supreme Court ruled that the request did not meet the condition governing such referrals to the CJEU. Article 34A(1) provides the following: a court when dealing with a question of EU law interpretation, which

228. *Angeliki Taki Charalambous v. Cooperative Savings Bank Limassol* (2016) joined apps. 115/13, 114/13, 363/13.

emerges in the case before it may request for a preliminary ruling as to the issue by the CJEU, if the court deems such a referral necessary. The court, thus, found that the reference for preliminary ruling was not necessary, citing its own case law in *Cypra Ltd. v. Republic of Cyprus*, where it was held that, under article 267 of the Treaty on the Functioning of the European Union (TFEU), only the CJEU has power to interpret EU law and did not apply the law in the circumstances of the case. The function of the preliminary ruling mechanism, according to the judgment, is “essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community.”²²⁹ According to the decision in *Charalambous v. Cooperative Savings Bank Limassol*, the CJEU decides over issues of interpretation and validity of EU law and not over the compatibility of national law with the former. The CJEU does have jurisdiction to provide the national court with all the elements of interpretation of EU law to enable it to assess the compatibility for the purpose of deciding the case before it.²³⁰ In the facts of the case, the court found no ambiguity as to the interpretation of EU law that would render a preliminary request necessary.

The decision in *Alpha Bank Cyprus Ltd. v. Martin Miller et al.* provides for the way by which the courts should approach questions about the unfairness of terms in credit contracts.²³¹ In this case, the court made a declaratory judgment that modified the contract by eliminating the unfair terms that existed. In doing so, the court rejected both claimants’ and defendants’ claims for remedies. It is a unique judgment, in that no other judgment deals to the same extent with similar questions of unfairness of terms. However, one may notice similarities with the approach taken in previous caselaw.

229. C-166/73, *Rheinmühlen-Düsseldorf v. EVGF* (1974) E.C.R. 33.

230. See C-369/89, *Piageme v. BVBA Peelers* (1991) E.C.R. 1-2971, § 7.

231. *Alpha Bank Cyprus Ltd v. Martin Miller et al.* (2017) app. no. 2014/2008 [hereinafter *Alpha Bank*].

Nevertheless, it is a judgment from a court of first instance and has no force of precedent.

The case involved a mortgage contract between the claimants/creditors and the defendants/debtors. The defendants challenged the right of the claimant to unilaterally set the interest rate as well as the rate itself. They argued that the claimants should have provided them legal consultation through an independent lawyer for the terms of the loan as well as the rates to be sufficiently explained. The right of the claimants to unilaterally terminate the defendants' account was also challenged. The defendants also challenged the constitutionality of the Liberalization of Interest Law²³² and the disharmony of certain provisions with EU derivative law. Section 3(5) of Law 93(I)/96 provides that it is incumbent on the seller to prove that a standard term has been individually negotiated. Also, section 3(1)(b) of the Liberalization of Interest Law provides that the imposition of increased interest on late payment creates a plausible presumption for the credit institution that has the burden of proving that the default interest charged on late payments represents its actual loss.

An extensive part of the decision is dedicated to the witness testimonies and their evaluation. A part of the cross-examination dealt with the fact that the document of the loan commitment indicated an interest rate of 2%, while the agreement itself a 3% interest rate. This raised important questions as to the binding nature of documents given at the precontractual stage and whether these documents constituted an offer. Based on the testimony of the bank employee, the interest rate was set at 3% and the loan commitment rate represented solely a typing error. Given that the defendants were transferring the instalments of the loan in British pounds, the bank employee was questioned as to the appropriateness of the loan agreement to be paid in British pounds instead of Euros. The court emphasized that there was no basis on the files of the defendants for

232. Law 160(I)/1999.

such a question to arise, but it could fall under the general claim of existence of unfair terms. The court questioned all the witnesses and made an evaluation on each one, indicating at the same time that this evaluation had no bearing on the legal aspect of the case. Nevertheless, the court examined the credibility of the witnesses and how reliable they were for the court to reach appropriate conclusions as to the facts. This bears a similarity to previous case law and indicates the importance of credibility of witnesses in order to ascertain their knowledge background and establish whether a significant imbalance exists between the parties.

The defendant stated that he agreed that the loan was to be received in Euros, as the bank advised him that the interest rate would be 2% over LIBOR. The court held that there was no evidence indicating that this was the case. The defendant also argued that the loan agreement was a technical document that was difficult to understand by a layman, unless one is a lawyer, and hence he should have been subject to legal consultation. It was also claimed by the defendant that after the bank informed him that the loan agreement was a standard document, he placed his confidence in the bank as a trustworthy and professional institution. The court highlighted that it is not enough for a person to claim that he did not read the document that he subsequently signed. The consequences of a signature are not dependent on this.

In other words, the consumer in similar cases bears the responsibility of seeking a legal opinion, in the event that he believes it to be necessary. At the same time, the court places the responsibility upon the shoulders of consumers to be informed about the contents of the documents they are signing. The court linked this argument of insufficient information about the contents of the agreement with the defences available in the common law of contract. In particular, the court linked the argument to the *non est factum* defence in cases of fraud and misrepresentation, although the defendants did not raise

such defences.²³³ This approach signifies the courts' belief that contract law defences remedy such information imbalances. References were made by the court to Supreme Court of Cyprus and English case law in which it was held that the failure of the defendant to exercise reasonable care that would be expected from a contracting party before signing a contract constitutes an omission that cannot be remedied through the defence of *non est factum*.²³⁴ The court clarified that the claimant did not exercise pressure upon the defendants to sign the mortgage contract. The contract was signed voluntarily by the defendants.

Regarding the constitutionality of the Interest Rate Liberalization Law,²³⁵ the defendants claimed that, based on the legislation that preceded the law, the act of usury by banks was impermissible; whereas under the Interest Rate Liberalization Law this became permissible, allowing the claimant to profit at the expense of the defendants. Therefore, the law is a violation of the freedom to contract as well as the right to decent existence and social security. Article 26.1 of the Constitution, which provides for the right to enter into contracts freely, stipulates that a law shall provide for the prevention of exploitation by persons who are commanding economic power. The court held that the Interest Rate Liberalization Law does not violate article 26 of the Constitution since a borrower is not obliged to conclude a contract with a bank if he disagrees with the bank's ability to raise the interest rate, capitalize such rate, or impose compound interest rates. The court found no grounds to examine whether the law was not in compliance with EU derivative law.

Concerning the terms of the contract, the court highlighted that since the agreement had a standard form, all of the clauses were not

233. The defendants argued that they "did not expect to be deceived by the bank" since the actions of financial institutions are controlled by the Central Bank of Cyprus and the Republic of Cyprus. See *Alpha Bank*, *supra* note 231, §§ 198, 208.

234. *Anastasiou v. Michaeloude* (1998) 1 C.L.R. 264; *Avon Finance Co Ltd. v. Bridger and another* (1985) 2 All E.R. 281.

235. *Law 2/77*.

individually negotiated, and the defendants were not in a position to influence the content of the clauses. The court stated that the Unfair Terms in Consumer Contracts Law of 1996²³⁶ is the law applicable to the case beforehand, since the conclusion of the contract preceded the amendments that followed.²³⁷ The court reiterated that, based on the law, in order to decide on whether a term is in compliance with the requirement of good faith, the bargaining position of the parties is taken into account, whether the consumer was subject to inducement to agree on the particular term and whether the supplier treated the consumer fairly.²³⁸ Regarding the consequences of such unfair terms, section 6 of the law provides that contrary to the provisions in Cap. 149 relating to contract law, an unfair term in a contract between a supplier and a consumer does not bind the consumer. However, the contract continues to bind the parties, unless it is not possible without the said term.

According to section 2(a) and 2(b) of the Annex to the Unfair Terms in Consumer Contracts Law of 1996, the supplier of financial services can reserve the right to unilaterally terminate the contract of indeterminate duration without notice, where there is a valid reason, provided that the supplier informs the other contracting party immediately. Also, a supplier can reserve the right to alter the rate of interest payable by the consumer (or due to the consumer), or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier informs the other contracting party at the earliest opportunity and that the latter are free to dissolve the contract immediately.²³⁹ The court held that except for the terms regulating the principal amount and the repayments—thus, implying that they were negotiated (since they constitute essential terms)—the Unfair Terms in Consumer Contracts Law of 1996 applies to all other terms of the mortgage contract. The

236. Law 93(I)/96.

237. Law 69(I)/99; Law 136(I)/14; Law 49/16.

238. Law 93(I)/96 at art. 5(3).

239. Sections 2 (a) and (b) were abrogated by Law 136(I)/2014.

burden to prove that a term of the contract was individually negotiated lies on the supplier. According to the court, during the course of the hearing, the claimants attempted to prove the acceptance of the contents of the contract rather than the fact that the contents were negotiated between the parties.

The contract was signed 15 years before trial and was not subject to renegotiation until the date of termination by the claimants. This led the court to highlight that it could not uphold the fairness of the terms in a theoretical and absolute manner given the fact that the contract resulted in a *fait accompli*. Consequently, the court held that the mortgage contract indeed contained unfair terms. These terms concerned the repayment of the loan and were found to be in breach of the requirements of good faith. This is because, according to the contract, the bank could unilaterally, at any given point—and without providing any valid reason or notice—alter or terminate the provisions regarding the loan repayment modalities. Also, the bank had the ability to accept part payments and vary any terms of the agreement, or forbear time, performance or any other element regarding payment. The court held that these terms resulted in allowing the supplier to unilaterally alter the terms of the contract without a valid reason. Whereas section 2(b)(i) of the Unfair Terms in Consumer Contracts Law of 1996 provides that a supplier can unilaterally alter the terms of the contract, the court emphasized that this exception applies to contracts of indeterminate duration, which is not the case for a mortgage contract with specific instalments of repayment. The term providing for renunciation of the contract was found by the court to be unfair in the absence of a similar right to renunciate the contract for the consumer.

The court then stipulated that the contract continues to be in force despite the existence of these terms. Based on the ruling, the court should strive to restore the balance between the contracting parties by maintaining the validity of the agreement as a whole rather than discharge it (as the defendants

argued for).²⁴⁰ This would have caused uncertainty and confusion, especially after the advancement of a period of time. The court correctly held that the contract should continue to be in force since it resulted in certain consequences, excluding the application unfair terms (and their consequences). With a declaratory judgment, the contract was accordingly modified and restructured to exclude the unfair terms; it also set the monthly instalments to be paid.

C. The Impact on Procedural Law

The fact that European private law in general and the good faith requirement in particular did not have a major impact in the development of contract law in Cyprus is also the result of the adversarial system. In Cyprus, the judge acts as an arbiter of the contest between lawyers presenting arguments of fact and of law and is called to decide based on the materials brought forward by the litigating parties. This is in contrast to the civil law conception of the judge who is called to separate relevant from irrelevant facts and supply legal knowledge as a public good according to the principle *iura novit curia* (the court understands the law).²⁴¹ Cyprus civil procedure did not follow the Woolf reforms and the introduction of case management practices, *inter alia*, which is only now being discussed.²⁴²

240. The court referred to C-453/10, *Jana Perenicova, Vladislav Perenic v. SOS finance spol. S r. o.* (2012).

241. See also Masahiro Kawai & Henrik Schmiegelow, *Financial Crisis as a Catalyst for Legal Reforms: The Case of Asia*, in *INSTITUTIONAL COMPETITION BETWEEN COMMON LAW AND CIVIL LAW—THEORY AND POLICY* (Michelle & Henrik Schmiegelow eds., Springer 2014).

242. See Sir Harry Woolf, 1 *ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM OF ENGLAND AND WALES* ch 3, §§ 30-39 (HMSO 1995) (criticizing the adversarial system). In consultation with the Structural Reform Support Service of the European Commission, the Supreme Court of Cyprus made a request for technical assistance to support an in-depth review of the Civil Procedure Rules (CPR). The Institute of Public Administration (IPA) of Ireland was appointed to undertake this work having already completed a number of reviews of Cypriot public authorities. The IPA provided a functional review of the courts system of Cyprus that lists the deficiencies and comes up with proposals for updating the system in order to meet the needs of the people of Cyprus, especially after the financial crisis. The Report was adopted in

A recent Supreme Court judgment indicates that the courts depend on the arguments brought forward by the litigating parties. In particular, the Supreme Court and the first instance court were presented with an argument for the unfairness of a term in a loan contract by the borrower. The Supreme Court indicated that:

[I]t does not suffice for the party claiming an unfairness of a term to attach an account statement to the affidavit claiming that half of the amount in the current balance consists of unfair and abusive charges, without identifying the alleged charges, and expecting the judge to become an accountant that will identify the abusive charges.²⁴³

An active role of the judge as provider of legal knowledge, identifier of legally relevant facts, and manager of the pace of procedure is argued to be a crucial factor of efficiency of justice. At the same time, as highlighted above, the role of the judge has repercussions as to the proper application of European law. In particular, the power of the national court to examine its own motion regarding the unfairness of a contractual term of an agreement in the course of a simplified procedure is determined by the view that the judge takes towards his role. For example, Cyprus courts have not exercised these powers, potentially as a result of its unwillingness to interfere beyond the limits that a common law judge is required to adhere to. However, this may also be attributed to its insufficient knowledge

its entirety by the Supreme Court and was presented to the President of the Republic, in May 2018, who expressed his full support for the implementation of the experts' recommendations. The IPA Report, as well as the reform of the CPR, is part of the efforts of the government in line with the Economic Adjustment Program, which ended in March 2016, to reorganize and improve the Cypriot judicial system. The program of reforms to improve the courts system focuses on four areas: court operations, judicial training, e-justice and the reform of the CPR. See IPA, Ireland, Structural Reform Support Service (SRSS) of the European Commission, *Functional Review of the Courts System of Cyprus* (March 2018); see also IPA, Ireland, *Progress Report: Review of the Rules of Civil Procedure of Cyprus* (June 2018).

243. *Efstathiou et al. v. Hellenic Bank Public Company Ltd.* (2017) Civil Appeal no. 130/2012 (as translated by Mouttotos). See also *Brainvibes et al. v. Bank of Cyprus Public Company Ltd.* (2018) Civil Appeal no. 504/2012, where similarly to the *Efstathiou* judgment, the court highlighted the failure of the appellants to substantiate their allegations as to the unfairness of terms in their contract.

of European law and the fact that the Law 93(I)/1996 provides that such *ex officio* investigation is held by the Consumer Protection Service. Recently, Cyprus courts have been more willing to divert cases to alternative dispute resolution mechanisms, especially arbitration, when faced with issues high in complexity, inviting parties to mediate or recommending the appointment of an arbitrator.²⁴⁴

Howells argues that the *ex officio* doctrine represents a departure from English civil procedure and makes more sense in continental systems, where judges may supply legal knowledge and monitor the court process and, hence, can raise an issue of unfairness on their own motion.²⁴⁵ Law 93(I)/1996 provides that the Director of the Consumer Protection Service shall investigate upon the submission of a complaint or of its own motion whether a contractual term intended for general use is unfair contrary to the situation in England where the Consumer Rights Act places a duty on the court to consider whether the term is fair even if none of the parties raised the issue.²⁴⁶

The decisions of sectorial regulators are, therefore, important since not only they can have a major impact in changing the market culture, they are also specialized entities.²⁴⁷ Regulatory action by these authorities “is the front line of day-in-day-out enforcement action against unfair terms.”²⁴⁸ The adherence of these authorities to the European concepts and the jurisprudence of the CJEU might be stronger than the courts, also due to the strong networks at the EU level between regulators.²⁴⁹ This might be a reaffirmation of the proposition that the enforcement of regulatory law is better left to

244. The introduction of a school for training judges was the first of the eight projects for reforming justice in Cyprus. The recommendations provided within the report of Jeremy Cooper were approved by the Supreme Court and the legal framework for the establishment of such school is expected.

245. See Howells, *supra* note 149, at 1942.

246. Art. 9(1) of Law 93(I)/1996. Consumer Rights Act 2015, Chapter 15, Section 71(2).

247. See Howells, *supra* note 149, at 1947.

248. *Id.*

249. *Id.*

public authorities.²⁵⁰ Additionally, in systems such as the one in Cyprus where judges lack specialization, time, and economies of scale, entrusting sectorial regulators to ensure the proper application of EU consumer law seems more appropriate to a certain extent.

Nonetheless, the subsequent introduction of private rights of action under the New Deal for Consumers,²⁵¹ which can be argued that is a contribution of the legal origins thesis, since the regulatory gap in the enforcement of EU law in this context, is purported to be filled by private litigation, is about to put more pressure on the courts and the traditional model in particular.²⁵² Private litigation, in this context, is seen as an efficient tool, useful to achieve certain regulatory or social goals.²⁵³ This contradicts the idea of a lawsuit as a vehicle for settling disputes between private parties regarding private rights. It also challenges the traditional perception of civil justice, which aims at protecting the rights of private litigants. As Saul Zipkin also highlights, private enforcement schemes “reveal an effort to govern by making use of the courts to promote the achievement of the goals of substantive law, an orientation dramatically different from one in which courts are open to hear disputes properly brought before them but disclaim any role in a larger project of governing.”²⁵⁴

250. Private enforcement may be seen as a threat to democratic governance since it places immense power of suing to enforce public laws in private hands. See late Justice Scalia’s dissenting opinion in *Friends of the Earth, Inc. et al. v. Laidlaw Environmental Services (TOC) Inc.* (2000) 528 U.S. 167, 215.

251. Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC, Directive 98/6/EC, Directive 2005/29/EC and Directive 2011/83/EU as regards better enforcement and modernization of EU consumer protection rules, COM (2018) 185.

252. Axel Halfmeier, *The Role of Private Litigation in Market Regulation: Beyond Legal Origins*, in *EUROPEAN CONSUMER PROTECTION: THEORY AND PRACTICE* 300 (James Devenney, Mel Kenny, Cambridge U. Press 2012).

253. See also Christopher Hodges & Naomi Creutzfeldt, *Transformations in Public and Private Enforcement*, in *THE TRANSFORMATION OF ENFORCEMENT—EUROPEAN ECONOMIC LAW IN A GLOBAL PERSPECTIVE* (Hans W. Micklitz & Andrea Wechsler eds., Hart Publ’g 2016).

254. Saul Zipkin, *A Common Law Court in a Regulatory World*, 74 *OHIO ST. L. J.* 322 (2013).

Collective redress mechanisms, however, raise questions as to the substance and the procedure as well as the divide between the content of a right and the institutional means of its enforcement.²⁵⁵ The question is whether the aggregation mechanism travels with the right or whether it is a characteristic of the institutional setting.²⁵⁶ Whether class wide adjudication is a matter of procedure, despite its effects on substance having the sole purpose of aggregating claims, or whether it is a matter of substance has been a subject of controversy in the Supreme Court of the U.S.²⁵⁷ In the EU, since the purpose is to ensure the effective enforcement of EU derivative law rights, the focus is on the aggregation mechanism travelling with the right.

V. CONCLUSIONS

EU legislation as well as the Draft Common Frame of Reference²⁵⁸ relies on good faith in several instances finding its way into domestic law in those particular areas. The argument that was posited was that as familiarity with the concept increases, the debate over the acceptance of a good faith principle in English contract law will grow. With the eventual exit of the U.K. from the EU, it is still to be seen if this influence will continue

255. *Id.* at 310.

256. *Id.*

257. *Id.* at 306 *et seq.* See, e.g., *Brown Governor of California et al. v. Plata et al.* (2011) U.S. Supreme Court 131 S. Ct. 1910, 552 Justice Scalia:

But what procedural principle justifies certifying a class of plaintiffs so they may assert a claim of systemic unconstitutionality? I can think of two possibilities, both of which are untenable. The first is that although some or most plaintiffs in the class do not individually have viable Eighth Amendment claims, the class as a whole has collectively suffered an Eighth Amendment violation. That theory is contrary to the bedrock rule that the sole purpose of classwide adjudication is to aggregate claims that are individually viable.

See also *Hanna v. Plumer* (1965) U.S. Supreme Court, 85 S. Ct. 1136, 464: “The test is not whether the rule affects a litigant’s substantive rights; most procedural rules do.”

258. I PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) (Christian von Bar & Eric Clive eds., Oxford U. Press 2010).

to take place. Although, English courts have recognized in certain cases the existence of a duty of good faith in performing the contract, Cyprus courts have been reluctant in recognizing this duty when interpreting contracts, probably as a result of limited contractual practice to incorporate a duty to act in good faith. The principles of contractual interpretation are important to that end, since textual and contextual interpretation differ as to the evidentiary basis that will be used in determining the meaning of the contract: in the former a narrower evidentiary basis is admitted, while the latter uses a broader evidentiary basis. The introduction of express pre-contractual information duties in different areas of EU law may erode the reluctance of Cyprus law to impose these duties.

In Cyprus, this formalistic stance may be seen in the majority of the cases. However, examples of the shift happening in the jurisprudence of lower instance courts exist. These courts have been more receptive to consumer protection and welcoming of the European concepts to a certain extent, although initially they have given the principle of good faith a common law gloss, by limiting it to an absence of dishonesty. What can be clearly deduced from the jurisprudence is that Cyprus courts take a unifying view of contract law, without necessarily making the distinction between consumer law and commercial law. The approach of the Supreme Court, contrariwise, is one reflecting a self-interest/self-reliance ethic. This can be contrasted to the CJEU case law, which arguably has used the Unfair Contract Terms Directive proactively in order to protect consumers affected by social crises.²⁵⁹

The Supreme Court's approach can be attributed to the status of Cyprus as a service-based economy and the importance of the financial services sector. Therefore, as was the case with the judgment of the Supreme Court of the U.K. in *Office of Fair*

259. See Howells, *supra* note 149, at 1922.

Trading v. Abbey National plc, where it refused to review the unfairness of the bank charges as this might dramatically impact banks,²⁶⁰ a similar pro-bank stance might be reflected in the caselaw of the Supreme Court of Cyprus. If these claims would have been successful, or are successful in the future, banks “would be facing an Armageddon claim Given the economic climate and the state support for the banking sector, the taxpayer would be left to pick up the bill.”²⁶¹ Financial stability is, thus, the overarching principle.²⁶² This is reinforced by the recent judgment of the CJEU in *Hellenische Republik v. Leo Kuhn*.²⁶³

260. *Id.* at 1934.

261. Phillip Morgan, *Bank Charges and the Unfair Terms in Consumer Contracts Regulations 1999: The End of the Road for Consumers?* LLOYD'S MAR. & COM. L. Q. 214 (2011).

262. Hans W. Micklitz, *The Transformation of Private Law Through Competition* 22 EUR. L. J. 627 (2016).

263. *See Hellenische Republik*, *supra* note 207, § 42.