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Evidence in Civil Law - Cyprus

Authors:
Nikitas Hatzimihail
Antria Pantelidou


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Author: Nikitas Hatzimihail, Antria Pantelidou

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Evidence in Civil Law - Cyprus

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Evidence in Civil Law – Cyprus

NIKITAS HATZIMIHAIL, ANTRIA PANTELIDOU

ABSTRACT This short monograph attempts an exploration of the legal treatment of evidence questions in Cyprus law. The first section of the study offers a comparative-law introduction to the legal system of Cyprus – a mixed legal system that in matters of civil litigation, including evidence, tends to strongly follow the English common law tradition (including the existence of an autonomous legal field of evidence law, that tends to be dominated by criminal evidence law. The second section presents the general principles underlying Cypriot civil procedure, including evidence. The sections that follow examine in more detail legal aspects involving civil evidence, especially how the basic types of evidence are treated in Cyprus law and how the processes for the taking of evidence are organized. The study also examines special questions including the legal treatment of illegally obtained evidence, legal costs and problems of language. The final section examines the cross-border dimensions of civil evidence-taking.

KEYWORDS: • civil procedure law • Cyprus • principles • evidence • cross-border cases • judicial cooperation

CORRESPONDENCE ADDRESS: Nikitas Hatzimihail, University of Cyprus, Department of Law, P.O. Box 20537, 1678 Nicosia, Cyprus, email: nikitas.hatzimihail@ucy.ac.cy. Antria Pantelidou, M.Sc. Student, University of Oxford, Brasenose College, Radcliffe Sq, Oxford OX1 4AJ, UK, email: pantelidou.antria@ucy.ac.cy.

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Nikitas Hatzimihail

Author Biography Nikitas Hatzimihail obtained his law degree with first-class honours from the University of Athens (1995). He completed his graduate and doctoral studies at Harvard Law School (LL.M. 1997; S.J.D. 2002), receiving fellowships from Fulbright Program in Greece, the Onassis and Leventis Foundations and the Harvard Law School Byse and Lewis funds. At Harvard he was twice the recipient of the Addison-Brown commencement prize for written work on private international law or maritime law. He was admitted to the Bar at Athens in 1998. He is a CEDR accredited mediator (2014). He has practical experience principally in international commercial disputes and business transactions.

Prior to his appointment at the University of Cyprus (2006; tenure in 2012), Professor Hatzimihail served as a research fellow and then senior research fellow at the Université Libre de Bruxelles (2002-2006) and participated in the instruction of graduate courses at the University of Athens Law Faculty (2005-2008). He has organized and taught courses and seminars at Harvard Law School (2000), the University of Oklahoma College of Law (2001) and the Law Faculty of Vietnam National University at Hanoi (2005) and was a guest lecturer at the University of Osaka and as visiting scholar at the University of Bremen and Cambridge University.

Antria Pantelidou

Author Biography Antria Pantelidou completed her undergraduate studies in law at the University of Cyprus, graduating in 2014 first in her class with first-class honours (Award of the Speaker of the House of Representatives). She has completed her traineeship as an advocate in Cyprus and is currently a student at Brasenose College, Oxford (M.Sc. in Law and Finance).

Foreword

This small monograph constitutes a work in progress – an early example of the work being undertaken by the newly established research group on commercial law, private international law and dispute resolution at the University of Cyprus Department of Law. It is based on the national report for Cyprus for the EU project.

Our work has been particularly challenging. Cyprus evidence law tends to follow English evidence law, which treats together civil and criminal processes – and this results on the law of evidence being dominated by criminal procedure. English and common-law material can thus help illuminate Cyprus law, both to the outsider and the insider. But only to a certain degree: legal practice has its own dynamic and things are more complicated. Very little has been written on Cyprus civil procedure, in either English or Greek. There has been some notable work on evidence, in Greek, but it is oriented towards criminal proceedings. Accordingly, we hope to be able to soon revisit and expand the work, which has an important contribution to make to the study of Cyprus law and, eventually, civil litigation reform in Cyprus.

Ms Antria Pantelidou, who undertook the bulk of the research and the early drafting of the report, and whom I thank for her dedicated work, deserves most of the credit. The undersigned must bear any blame for omissions, errors, and controversial statements.

Contents

Part I

1 Introduction

The purpose of this study is to provide an exploration of the legal treatment of evidence questions in Cyprus law. This is a challenging task: Cyprus evidence law tends to follow English evidence law, which treats together civil and criminal processes – and this results on the law of evidence being dominated by criminal procedure. English and common-law material can thus help illuminate Cyprus law, both to the outsider and the insider. But things are more complicated in practice.

From a scholarly or legal-literature point of view, very little has been written on Cyprus civil procedure, in either English or Greek. There has been some notable work on evidence, in Greek, but it is oriented towards criminal proceedings.

The structure of this study is reflecting, to a great but not full extent, the structure of the questionnaire in the Maribor project and the other national studies published in this series. As our work neared completion and acquired its own dynamic, the structure begun to change.

The first section of the study offers a comparative-law introduction to the legal system of Cyprus – a mixed legal system that in matters of civil litigation, including evidence, tends to strongly follow the English common law tradition, including the existence of an autonomous legal field of evidence law, that tends to be dominated by criminal evidence law. The second section presents the general principles underlying Cypriot civil procedure, including evidence. The sections that follow examine in more detail legal aspects involving civil evidence, especially how the basic types of evidence are treated in Cyprus law and how the processes for the taking of evidence are organized. The study also examines special questions including the legal treatment of illegally obtained evidence, legal costs and problems of language. The final section examines the cross-border dimensions of civil evidence-taking.

1.1 Basic Facts About the Legal System of Cyprus

Cyprus law is regarded, in comparative-law terms, as a unique variety of a mixed legal system.[2] English common law lays at the roots of most of Cyprus private law, and effectively criminal and procedural law across the board. Public law – as well as family law and certain elements of succession and land law – are strongly influenced by, or even transplanted from, Continental legal systems (especially Greek law). Both the legal profession and the court structure would be essentially classified as common-law – however, the thirteen justices of the ubiquitous Supreme Court of Cyprus spend most of their time employing mostly Continental notions to adjudicate administrative law cases on first instance, as well as on appeal. The lack of an intermediate jurisdiction (appeal being a guaranteed right) means the Justices have no discretion over which cases to review. The hierarchical structure (and relative political independence) of the judiciary grants the Supreme Court – which also acts as a fully-fledged constitutional court – additional power.

Sources of law add to the hybridity of Cyprus law.[3] On the one hand, a clear hierarchy exists: constitution takes precedence over international (but not EU) law, which takes precedence over statutory law, which takes precedence over case law. The Constitution is the cornerstone of both legal and political discourse – and extremely hard to amend. Statutory law is everywhere: even the "traditional" areas, where English common law forms explicitly law of the land, are governed primarily by comprehensive legislation often dating from the Colonial-era.[4] In "common law" fields, therefore, English and Cypriot case law is used, along with legal literature, to interpret statutory provisions and fill legal gaps. Accession to the European Union has further increased the significance of written law to the Cyprus legal system. On the other hand, it is at best unclear whether it is common-law or Continental methods, or both, which are used in statutory interpretation. The use of stare decisis is also not without its own problems, and indeed there are instances of "conflicting" lines of precedent. It is also unclear whether recourse to the English common law must also include United Kingdom statutes that modified the common law after Cyprus independence, or whether a Cyprus appellate case mistating the common law in e.g. contracts is higher authority than the "original" common law rule. Last but not least, it is unclear whether case law has binding or persuasive authority in legal fields, which do not derive from English common law. Both family law (where Greek family law was transplanted en masse in 1990s statutes) and administrative law (largely influenced by Greek case law) offer interesting cases to consider.

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[2] See Nikitas E. Hatzimihail, "Cyprus as a Mixed Legal System" Journal of Civil Law Studies 6 (2013): 37-96; Symeon S. Symeonides, "The Mixed Legal System of the Republic of Cyprus" *Tulane Law Review* 78 (2003): 441.

[3] See in more detail Nikitas Hatzimihail, "Reconstructing Mixity: Sources of Law and Legal Method in Cyprus" in Vernon Palmer Mohamed Mattar & Anna Koppel (eds), *Mixed Legal Systems, East and West* (Ashgate 2015): 75-99.

[4] For example, the Cyprus Contract Law (Cap. 149) is a copy of the Indian Contract Act of 1872. The Sale of Goods Law 1994 transplants the English Sale of Goods Act 1979.

The Supreme Court of Cyprus has adopted the English rules of *stare decisis*, as contrasted to the more liberal U.S. approach.[5] It has moreover reserved its right to reverse its own judgments – a judicial policy grounded on English judgments and *dicta*, but asserted more vigorously in Cyprus.[6] The District Courts, Family Courts and specialized tribunals are bound by Supreme Court judgments, although District judges are known to have held contrary to Supreme Court rulings, by invoking English authorities when applicable. A single Supreme Court justice sitting at first instance (in administrative annulment cases) is on the contrary not considered as an "inferior court", but he is nonetheless bound by the decisions of an appeals bench.[7] The full bench, however, may reverse its own case law. An appellate panel should accordingly be able to explicitly reject (or reverse) the rule created by another appellate panel. Consistency is usually sought after, but there are several examples where a line of precedent has been disregarded in some cases, leading to a contrary line of precedent co-existing with the established one.[8]

English common law may be regarded as binding, in accordance with Article 29(1) of the Court of Justice Law, subject to a contrary statutory provision. At the same time, there are practical limits to this statement. Cyprus has long ago abolished any overseas appellate control, namely by the Privy Council, and the last foreign judge trained in the common law left Cyprus fifty years ago. The Supreme Court of Cyprus is the court of last resort in all legal questions (except, of course, EU law and European human rights law), which means that it is conceivable for Cyprus courts to deviate from the English common law with no means for correction; especially given that the persistence of British influence on Cyprus and respect for English law seldom translates into an emotional or metropolitan bond. The fact that another language, Greek, is now the language of courts, government, parliament and the population at large has driven a further wedge between law in books and law in action. It is not infrequent to hear or even read allegations that the English common law constitutes "persuasive" authority even in fields where this is clearly not so. At the same time, the Supreme Court has to act as an intermediate court of appeals, in panels, with no right to restrict appeals; the sheer mass of cases determined by appellate panels, and the lack of a superior appellate court of "last resort" judging only cases of importance, has undermined any effort to develop a consistent Cypriot case law distinct from the English one.[9]

British legislation enacted after 1960 is regarded as not having any authority in Cyprus. Coupled with the reluctance of lawyers and legislators to reform basic laws, this actually means that English common law rules superseded by statute in the United Kingdom are still valid in Cyprus; an example that comes to mind concerns the

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[5] *See e.g. Republic v. Demetriades*, (1977) 3 C.L.R. 213 at 259-264 (Loizou, J.), *and especially* 296-320 (Triantafyllides, P.).
[6] *See* an early case, *Papageorgiou v. Komodromou*, (1963) 2 C.L.R. 221; *Mavrogenis v. House of Representatives*, (1996) 1 C.L.R. 315.
[7] *Republic v. Demetriades*, (1977) 3 C.L.R. 213, at 320. *See also KEO Ltd. v. The Republic*, (1998) 4 C.L.R. 1023.
[8] See e.g. Hatzimihail, "Reconstructing Mixity": 96-97.
[9] Hatzimihail, "Reconstructing Mixity": 86.

common law doctrine of privity of contract and third-party rights. It might be possible, however, to "cheat" the court, using reference works and subsequent case law, into accepting that English law as modified by statute constitutes in effect English common law.[10]

The common law case law of other Commonwealth jurisdictions (notably Australia, New Zealand and Canada), and at times the United States of America, has persuasive authority.[11] Especially in the early life of the Republic, U.S. case law was invoked in constitutional law matters.[12] Given that Privy Council jurisdiction was abolished upon independence, Cyprus law should arguably follow the English approach, which regards decisions issued by the Judicial Committee ("Board") of the Privy Council as of persuasive, and not of binding, authority.[13] "Authoritative" textbooks and other works on English law also have persuasive authority.[14]

1.2 Civil Procedure and Evidence Law

The basic legal source of Cyprus civil procedure – effectively, the principal equivalent to a Continental-type code of civil procedure – are the *Civil Procedure Rules (Θεσμοί Πολιτικής Δικονομίας)*, promulgated by the Supreme Court of Cyprus. The bulk of the Rules has remained unchanged since the late British colonial era. The civil procedure regime they have created is modelled after the English civil procedure circa 1954. The Rules operate within the framework of the Courts of Justice Law 1960, promulgated just after independence but largely following its colonial-era predecessor. They are supplemented by the Civil Procedure Law (Cap. 6), which dates back to the late nineteenth century,[15] includes certain general provisions but is mostly concerned enforcement of judgments. English law exercises a strong influence on modern-day civil litigation in Cyprus. Given that England and Cyprus have followed slightly divergent

[10] *See, e.g.*, Evangelos Vasilakakis and Savvas Papasavvas, *Elements of Cyprus Law* (Athens – Thessaloniki, 2002): 50, in Greek.

[11] *See e.g. Republic v. Alan Ford et al.*, (1995) 2 C.L.R. 232 (referring to "Canadian and American cases" regarding criminal procedure); *Jirkotis & Achilleos Co. Ltd. v. Paneuropean Ins. Co. Ltd.* (2000) 1 C.L.R. 537, citing *The Esmeralda I* (1988) 1 Ll.R. 206 (Aus.), as well as English treatises (among ordinary civil appeals (three-justice panel)); *Standard Fruit Co. (Berm.) Ltd. v. Gold Seal Shipping Co. Ltd.* (1997) 1 C.L.R. 464) (citing U.S. and Canadian cases).

[12] *See, e.g., Khadar v. The Republic* (1978) 2 C.L.R. 130, at 230-33 (discussing *Furman v. Georgia*, 33 L.Ed.2d 349).

[13] *See, e.g. R v. Blastland* (1986) AC 41, 58 (Privy Council decision in *Ratten's*case, All ER 801 (1971)) ("Not technically binding" but "of the highest persuasive authority" in view of the Board's "constitution"). See also Simon Whittaker, "Precedent in English Law: A View from the Citadel,"*European Review of Private Law* 14 (2006): 705, 721.

[14] *See Standard Fruit Co. (Berm.) Ltd. v. Gold Seal Shipping Co. Ltd*., (1997) 1 C.L.R. 464. The Court, in this admiralty case, uses English treatises on international trade and carriage of goods as primary authority, excerpting at length from Thomas Gilbert Carver & Raoul P. Colinvaux, *Carriage by Sea* (12th ed., 1971) and Clive m. Schmitthoff& John Adams, *Schmitthoff's Export Trade: The Law and Practice of International Trade* (9th ed., Stevens 1990) (publication dates are not mentioned in the decision); cases are only cited in an incidental fashion.

[15] Enacted as L. 10/1885.

paths with regard to litigation reform, English case law is regarded by some as persuasive rather than binding in matters where statutory law has diverged. However, the Supreme Court of Cyprus in full bench has not hesitated to depart from its own previous decisions, in accordance to developments in English case law, when called to interpret civil procedure norms inspired by English civil procedure.[16]

In accordance with the common law tradition, evidence law exists as a standalone subject that addresses both civil and criminal cases. The basis of Cyprus evidence law is the Evidence Law (Cap. 9). Article 3 of the Evidence Law states that Cyprus courts are to apply "in any civil or criminal proceeding … so far as circumstances permit, the law the statutes in question and rules of evidence as in force in England on the 5th day of November, 1914."[17] This is explained historically as follows.[18] Only in 1935 were "the common law and the doctrines of equity" finally made the residual system of norms in Cyprus. The 1935 colonial Courts of Justice Law declared as applicable in Cyprus "the common law and the doctrines of equity"as in force on November 8, 1914 (the day Cyprus was annexed to the Crown following the declaration of war between British and Ottomans). Article 3 – which goes back to 1946, when the colony's evidence rules were reformed into a consolidated statute – reflects that reality. Even though in 1953 the common law as it presently stood became directly applicable in Cyprus, the Evidence Law was not amended in the remaining years of colonial rule (nor were other statutes with similar, albeit less problematic, interpretation clauses). After independence, political realities and the traditionalist mentality of the country's legal elites did not encourage a modification – not even during the recent amendments of the Evidence Law. In any case, the present-day English case law and doctrine on evidence exercises strong influence on Cyprus courts and legal practice at large. It must be noted that Cyprus case law is relatively limited and recourse is frequently had to English (and other common law) authorities. For the purposes of this Report, alongside Cyprus legislation and case law, we have made use of English legal material, regarded as having authority in Cyprus.

2 Fundamental Principles of Civil Procedure in Cyprus

Cyprus lacks, as explained above, a veritable "Code" of civil procedure, in the Continental sense of the word: therefore, even though written law is the primary point of reference for civil procedure, including the law of evidence, the fundamental principles of civil procedure are not enunciated in statute. Moreover, there has seldom been any serious attempt at providing academic treatment of civil procedure in Cyprus. On the other hand, English literature and doctrine on civil litgation is undoubtedly, and justly, influential in this regard. Accordingly, references are being made to English-law secondary as well as primary sources. To a lesser extent, Greek civil procedure has had

[16] *Seamark Consultancy Services Ltd v. Lasala* (2007) 1 C.L.R. 162 (regarding the admissibility under Cyprus law of worldwide freezing orders). For a presentation of the evolution in Cyprus case law in that regard see Hatzimihail, "Reconstructing Mixity": 94-96.

[17] Art. 3. The full title of L. 14/46 was: "A law to amend and consolidate certain provisions relating to the law of Evidence."

[18] See Hatzimihail, "Cyprus as a Mixed Legal System": 73-74.

some indirect influence, through books circulating and the thousands of Cypriot lawyers (including scores of judges) educated in law schools in Greece: such influence is not easily, if at all, identifiable in terms of blackletter law, but a careful observer may notice a certain degree of influence on perceptions about civil justice and the lending/incubating of concepts.

For the purposes of this work, principles are elaborated on the basis of the Project Guidelines, which reflect themselves a broader consensus in comparative civil procedure today. Readers seriously interested in common-law litigation may also consider the "five constellations of procedural principle" as elaborated by Professor Neil Andrews.[19] The Principles of Transnational Civil Procedure elaborated by the American Law Institute and Unidroit are also relevant.

2.1 Principle of Free Disposition of the Parties

Civil procedure in Cyprus is governed by the *principle of free disposition* by the parties, as opposed to the *officiality principle*. Litigation is initiated and conducted by the parties to a legal dispute. It is up to the parties to define the issues they petition the court or tribunal to adjudicate. The parties are expected to carry out pre-trial investigation into the facts of the dispute and to present the evidence in support of their claims. The parties are also free to settle their dispute, or parts thereof, at any point prior to the court passing judgment on it.

The civil courts in Cyprus act as an arbiter in this regard: their role is limited to hearing the evidence and argument presented by the parties and to ruling on the issues of fact and law that arise from the parties' claims. The court may not decide *extra et ultra petitum*, that is it may not decide more than it has been asked to. The Court has more significant powers with regard to awarding remedies. Even though there was never a separate equity jurisdiction in Cyprus, the historical impact of the onetime parallel existence of common law and equity has left its indirect marks on Cyprus law, especially with regard to remedies and the distinction between regular damages and specific relief. The court grants remedies at the request of the parties.

2.2 Principle of the Adversarial System of Trial

Cyprus follows the adversarial system of trial, in the common law tradition. Civil litigation takes the character of a contest (or "fight") between two or more opponents. Each party aims to present its own case in the best possible light and to cause maximum damage to the case – and narrative – of the "opponent." The party who raises an allegation has the burden to prove it on the balance of probabilities.[20] The court sits in the middle acting as an umpire.[21] Active court input to the development of the case is

[19] Neil Andrews, *Andrews on Civil Processes I: Court Proceedings* (Intersentia, 2015): 685 ff.
[20] Sotiris Pittas & Evelina Koudounari, "Judicial System and Procedure" in Andreas Neocleous & Co LLC, *Neocleous's Introduction to Cyprus Law* (Neocleous 2010): 160.
[21] *Προκοπίου ν. Ryan και άλλου*, ΠΕ 341/08, ημ. 5.9.12; *Βενιζέλου ν. Δημοκρατίας* (2009) 2 Α.Α.Δ. 59.

constrained.[22] It follows that adversary litigation does not purport to be, and is unlikely in practice to amount to, a free-ranging official enquiry into the truth of disputed or uncertain facts. It is more of a process in which, if the matter ever gets to trial, two or more parties present competing versions of a past or present reality and invite the adjudicator to choose between them.[23]

However, the plaintiff in every action shall take out a summons for directions returnable in not less than four days. On the hearing of the summons for directions the Court or Judge may in its or his discretion (a) where a plaintiff or defendant has failed to give sufficient particulars of his claim, defence or counter-claim, make such order for further and better particulars, and as to costs occasioned by such default, as the Court or Judge may think fit, or may order issues to be framed or a special case to be stated, or the counter-claim to be excluded; (b) make such order for discovery and inspection of documents, or with regard to admissions of fact and of documents, as may seem necessary or desirable having regard to the issues raised in the pleadings; (c) division that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the trial on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient ground to be dispensed with be examined before a Commissioner or Examiner: provided that where it appears to the Court or Judge that the other party reasonably desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit, but the expenses of such witnesses at the trial may be specially reserved; (d) record any consent of the parties either wholly excluding their right of appeal or limiting it to questions of law only; (e) make such order for inspection of property as may seem desirable; (f) direct either party to apply to the Registrar within a specified time to fix the case for trial and/or direct the Registrar to fix it at short notice; (g) make such other order with respect to the proceeding., to be taken in the action, and as to the costs thereof, as may seem necessary or desirable with a view to saving time and expense.[24] Also, it should be noted that in any civil procedure, the Court has the power to call any person to testify or to produce evidence at any stage of the procedure.[25]

2.3 Hearing of Both Parties Principle (audiatur et alter pars) – Contradictory Principle

The contradictory principle forms the backbone of the adversarial principle.

The right to a free and fair hearing of both parties is constitutionally prescribed. Article 30 guarantees, among other things, to every person the right "to present his case before the court and to have sufficient time necessary for its preparation" and to "to adduce or

[22] See accordingly, Gregory Durston, *Evidence, Text and Materials*: 13-14.
[23] Ian Dennis, *The Law of Evidence*: 14. See also Takis Eiades and Nikolaos Santis, *The Law of Evidence: Procedural and Substantive Aspects*, (Hippasus Publishing 2014): 21.
[24] Order 30 Rule 2.
[25] Section 48 of the Law 14/60.

cause to be adduced his evidence and to examine witnesses according to law."[26] The bills of rights as inscribed in the Constitution of Cypurs is he right of litigants to be aware of any document or argument produced before the Court and to present their case.

In the case law of the European Court of Human Rights, the core of the adversarial principle is.[27]

The rule of hearing both parties does not apply in the case of ex parte applications. A party may make ex parte applications in specific cases e.g. for leave to issue a writ of summons for service out of Cyprus, or of which notice is to be given out of Cyprus; for leave to issue execution under third-party procedure before satisfaction by defendant of the judgment against him; for an order making a party the personal representative, trustee or other successor in interest of a party; for judgment in default of appearance; for leave to take away exhibits; for a general search or inspection or for office copies, if by a person not a party;[28] However, the Court or Judge dealing with an application made ex parte may direct that it be made by summons with notice to such persons as the Court or Judge may think fit.[29] Any person affected by an order made ex parte may apply by summons to have it set aside or varied and the Court or Judge may set aside or vary such order on such terms as may seem just.[30]

Regarding the right to equal treatment, the Section 30 (2) of the Cyprus Constitution provides that *"[...] In the determination of his civil rights and obligations or of any criminal charge against him, every person is entitled to a fair and public hearing [...]"* In the context of the right to a fair trial, the Court should issue the same decisions where the circumstances are the same. The applicable principle of binding precedent promotes the equal treatment as the Court may not depart from its own previous decisions unless these decisions were based on obviously incorrect principle of law.[31]

In the case that no appearance has been entered to a writ of summons for a defendant within 10 days after the delivery of the writ[32] and the it appears on the hearing of such application that the writ of summons was duly served the plaintiff may apply for a judgment under certain conditions.[33]

[26] Article 30(3)(b) and (c).
[27] See Costas Paraskeva, *Cyprus Constitutional Law: Fundamental Rights and Liberties* (Nomiki Bibliothiki, 2015), in greek: 507-517; Christos Rozakis, *European Convention on Human Rights: Interpretation of each section* (NomikiBibliothiki, 2013): 231, in Greek.
[28] Order 48 Rule 8 (1).
[29] Order 48 Rule 8 (3).
[30] Order 48 Rule 8 (4).
[31] *Κουλουντής Γιαννάκης και Άλλος ν. Βουλής των Αντιπροσώπων και Άλλων*, (1997) 1 Α.Α.Δ. 1026.
[32] Order 16 Rules 1 and 2.
[33] Order 17.

2.4 Principle of Orality – Right to Oral Stage of Procedure, Principle of Written Form

Being part of the common-law tradition, Cyprus procedural law gives emphasis on According to the principle of orality as established in the Cyprus legal order, evidence on disputed questions of fact should be given by witnesses called before the court to give oral testimony of matters within their own knowledge.[34] Historically the principle is connected with the importance attached by the common law to the oath, to the demeanour of the witness, and to cross-examination as guarantees of reliability. Oral testimony from witnesses also helps to legitimise the adjudication in other ways and it allows for maximum participation in decision-making in the sense that parties can confront their accusers and challenge the evidence against them in the most direct way possible by cross-examination.[35] Cross-examination is important in Cyprus civil – as well as criminal – practice, in terms of both practical significance and symbolic capital.[36]

In criminal and civil cases, witnesses should be called before the court and give oral testimony.[37] However, there are some exclusions to the general principle. In civil cases, the Court has the discretionary power to accept testimony which is included into a statement under oath.[38] Also, where it is impossible for a witness to come before the Court due to a serious reason, the Court has the power to give directions in order the testimony to be given to a Commissary or to an examiner.[39] Lastly, witnesses may testify via videoconference[40] or their testimony may be video recorded[41].

2.5 Principle of Directness

The principle of directness can be found in the so called "Best Evidence Rule" and in rules against hearsay. In the early 1700s Chief Baron Gilbert who wrote one of the earliest treatise on evidence felt that generally the "Best Evidence" Rule "… demands

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[34] TakisIliades, *The Law of Evidence: A practical approach* (Nicosia, 1994): 12, in Greek.
[35] Ian Dennis, *The Law of Evidence* (4th ed., Sweet and Maxwell 2010): 15.
[36] See e.g. two books by George Serghides, the long-serving President of the Family Court: G.A. Serghides, *On the Art of Cross-Examination: Four Great Old Authorities, Two Englishmen and two Americans with emphasis on their principles* (Nicosia, 2009) and George A. Serghides, *The Technique of Cross-Examination: Golden Rules of Cross-Examination and Four Greats of Antiquity: Two Greek (Aristotle, Socrates) and Two Latins (Cicero and Cointilian)* (Nicosia, 2007) in Greek. Erudition notwithstanding, the books are notable for providing cross-examination a strong genealogical pedigree as well as attempting to distill ethnical and practical advice for the modern-day practitioner.
[37] Criminal Code (Chapter 154), section 55; Civil Procedure Rules, Order 36 Rule 1.
[38] TakisIliades and Nikolaos Santis, The Law of Evidence: Procedural and Substantive Aspects, 105-106.
[39] Chapter 36 Rule 1. See also *Cyprus Import Corporation Ltd v. Kaisis* (1974) 1 CLR 16.
[40] Article 36 A of Chapter 9.
[41] TakisIliades and Nikolaos Santis, The Law of Evidence: Procedural and Substantive Aspects, 108.

the best Evidence that the nature of the thing admits".[42] However, nowadays, courts in England and Cyprus have established a more flexible approach to the above rule and they hold that they do not confine themselves to the best evidence, they admit all relevant evidence and the goodness or badness of it goes only to weight, and not to admissibility.[43]

In civil cases, it is possible to produce the copy of a bill of lading where the original document is held by a bank abroad which refuses to give it[44] and oral evidence will be permitted for the property ownership if the title of the ownership has been abandoned in an occupied city.[45] In Cyprus the exclusions to the rule that you should produce the original document, have been presented in *Mahattos v Viceroy Shipping Co. Ltd*.[46] Where 1) the original document is public, judicial or private and which according to the law it should be put on record, 2) the original document is held by the litigant, 3) the original document is held by a stranger, 4) the original document has been lost or destroyed, 5) the original document couldn't been founded after a careful and exhaustive investigation, 6) the original document is impossible or practically difficult to be produced and 7) in the case of interim procedures.[47]

Regarding to the rule against hearsay at common law, a statement other than one made by a person while giving oral evidence in the proceedings is generally inadmissible as evidence of any fact stated.[48] The hearsay evidence may refer to a repetition of something said, to the content of a document, to an attitude or to signs or movements. In *Lefkaritis Bros Marine Ltd v. Tania Shipping Office* (1987) 1 CLR 43, it was held that where the hearsay evidence aims to prove the truth of its content, it is not permitted. However, where the hearsay evidence is produced as circumstantial evidence it is permitted because it has nothing to do with the proof of its content's truth. This is the rule in Cyprus now.[49] Under Section 25 of Chapter 9,any witness may adopt the contents of a written statement or declaration he has made. In such a case the said statement or declaration is filed with the Court and is deemed as the "examination in chief" of the witness or part thereof. Moreover, the Section 26 provides for the power of the Court to give leave to summon a witness to cross examine him in connection with a statement that he supposingly made and which a witness produces in Court orgave evidence in relation to it. This is a safe guard against the unconditional acceptance of hearsay evidence.Under Section 27 of the Law, the Court in weighing the evidence takes into consideration when dealing with hearsay evidence: whether it was reasonable and feasible to have put in the initial evidence or statement; the time gap between the initial statement and the facts stated therein; the degree of the hearsay evidence; the

[42] Gregory Durston, *Evidence, Text and Materials*, (OUP 2008): 60-61.
[43] Ibid.
[44] *Food Preserving and Canning Industries Ltd v. Apollo Shipping and Transport Co. Ltd and Others* (1984) 1 CLR 330.
[45] *Παναγήν. Ζουβάνη* [1987] 1 CLR 58.
[46] (1981) 1 CLR 335.
[47] TakisIliades, *TheLaw of Evidence: A practical approach*: 22.
[48] Colin Tapper, *Cross and Tapper on Evidence* (12th ed., OUP 2010): 552-553.
[49] TakisIliades, *TheLaw of Evidence: A practical approach*: 254-255.

motives of the involved persons; whether the initial statement was accurately carried through; the general context the initial statement was given into; whether the hearsay evidence is materially different from the initial statement; whether the circumstances under which the hearsay evidence was given, appear not to facilitate the correct weight to be given do it; whether in the circumstances an attempt is being made to hinder the proper weight to be put on this evidence and; whether the litigants could have produced the best evidence that they could and failed to do.

Also, the principle of directness may refer to one more aspect: the change of the judge who conducts the entire proceedings and issues the judgement. The general rule is that the judge in a civil or criminal case may not change except where the Supreme Court decides so. According to the Section 61 of the Courts of Justice Law 14/60, the Supreme Court may in its own initiative or after an application of a party to refer a case from one court to another provided that the latter has jurisdiction to conduct the proceedings.[50] The Supreme Court may decide for a reference by issuing an order in any stage of the proceedings. In addition, the President of a District Court in Cyprus may ask the reference of a case to another court for any reason he or she thinks it should happen.[51]

2.6 Principle of Public Hearing

According to article 30 (2) of the Cyprus Constitution, "In the determination of his civil rights and obligations or of any criminal charge against him, every person is entitled to a fair and public hearing within a reasonable time by an independent, impartial and competent court established by law. Judgement shall be reasoned and pronounced in public session, but the press and the public may be excluded from all or any part of the trial upon a decision of the court where it is in the interest of the security of the Republic or the constitutional order or the public order or the public safety or the public morals or where the interests of juveniles or the protection of the private life of the parties so require or, in special circumstances where, in the opinion of the court, publicity would prejudice the interests of justice."

The significance of public hearing has been pointed out by many legal and historical writers.[52] Bentham believes that "Where there is no publicity there is no justice. The publicity is the soul of justice as it judges the judge who hears a case. The publicity is the security of the securities". The right of the public to watch the judicial procedures has been recognized a long time ago[53] and it was examined in an extensive way in the *case Scott v. Scott* (1911) 13 All ER Rep. 1. It was held that the Court couldn't exclude the public from a trial just because an immoral testimony would be given. In *R. v. Denbigh Justices*, Ex Parte *Williams* (1974) 2 All E.R. 1052, it was held that when the Court examines an application for the exclusion of the public, it should take into account among others, the kind of the case, the age of the witnesses and questions

[50] Article 61 of the Courts of Justice Law 1960.
[51] Article 64 of the Courts of Justice Law 1960.
[52] Takis Iliades, *TheLaw of Evidence: A practical approach*: 10.
[53] *Darkbney v. Cooper* (1829) 10 B+C 237.

regarding the security of the Court. In exceptional circumstances where the judicial procedure is required to be conducted in the Judge's office, the office is considered as a Court hall and the procedure is public.[54] The judge should refer to this fact and to the reasons of his decision in the records of the case.[55]

2.7 Pre-Trial Discovery

Cyprus law does not possess a distinct process for pre-trial discovery similar to the wide powers of the U.S. institution, or the English "Anton-Pillar Order." However, certain procedural rules allow for a certain degree of pre-trial discovery under existing Cyprus law.

According to the Civil Procedure Rules: "Any party may, without filing any affidavit, apply to the Court or a Judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question therein. On the hearing of such application the Court or Judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may, in the Court's or Judge's discretion, be thought fit: provided that discovery shall not be ordered when and so far as the Court or Judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs. If an order is made for discovery, such order shall specify the time within which the party directed to make discovery shall file his affidavit."[56]

Parties may also apply for an order to inspect documents "except such as disclosed in the pleadings, particulars or affidavits of the party against whom the application is made," provided they file an affidavit "showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party."[57] For the order to be made, the court must determine that the inspection of such documents is "necessary either for disposing fairly of the cause or matter or for saving costs."[58]

The Rules provide an incentive for compliance with a discovery order: a party who was ordered to make discovery of documents and failed to do so cannot subsequently put in evidence on his behalf in the action any document he failed to discover or to allow to be inspected, unless the Court is satisfied that he had sufficient excuse for so failing.[59] Moreover, parties who refuse to allow inspection or fail to comply with any order for

[54] *Παπακόκκινου ν. Λαϊκής Κυπριακής Τράπεζας Λτδ* (2007) 1 (B) Α.Α.Δ. 1357.
[55] *Hji Savva and Another v. Hjisavva*(1965) 1 CLR 151.
[56] O. 28 R. 1 CPR.
[57] O. 28 R. 5 CPR.
[58] Ibid.
[59] O. 28 R. 3 CPR.

discovery or inspection of documents are liable to attachment and to having their action dismissed (or, respectively, their defence struck out).[60]

2.8 Free Assessment of Evidence

The principle of *free proof* is paramount in Cyprus civil litigation. Under the principle, all probative evidence may be freely admitted and evaluated. Courts are free to rule on the admissibility of any evidence and to decide accordingly which evidence to take into account.[61] The distinction is being made between *direct evidence* (such as eyewitness testimony) and *indirect* (or *circumstantial*) *evidence*, with the latter lending itself to prove an argument indirectly, i.e. by association with other relevant incidents. Indirect evidence may refer to the motive of the defendant, preparatory acts, opportunity for the defendant to commit the tort, ability, recognition of the defendant etc.[62]

As a general rule, all evidence sufficiently relevant to an issue before the court is admissible; evidence irrelevant – or insufficiently relevant – should be excluded.[63] The limitations imposed by statutory and especially case law on the admissibility of evidence are grounded on the need, on the one hand, to manage the limited time and resources available to courts and stakeholders to the civil process and, on the other hand, to balance competing values such as procedural fairness and accuracy in fact finding.[64]

Regarding the **assessment of evidence**, the general rule is that the content of a private document must be proven by "primary evidence", that is by the presentation of the original document.[65] In contrast, with regard to public documents, the mere production of the appropriate copy will suffice to put it in evidence.[66] The same presumption is valid for documents being part of the records of an ecclesiastical authority: such documents may be received in evidence in civil proceedings without further proof.[67]

Evidence is admissible only if **relevant** to an issue between the parties. The word "relevant" means that any two facts to which it is applied are so related to each other that, according to the common course of events, one fact – either taken by itself or in connection with other facts – proves or renders probable the past, present, or future existence or non-existence of the other. or insufficiently relevant[68]. This allows a balancing process to be performed. In the words of the New Zealand High Court: "[L]ack of relevance can be used to exclude evidence not because it has absolutely no bearing upon the likelihood or unlikelihood of a fact in issue but because the connection

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[60] O. 28 R. 12 CPR.
[61] Ian Dennis, *The Law of Evidence*: 29-30.
[62] See *Παφίτης v. Δημοκρατίας* (1990) 2 Α.Α.Δ. 102.
[63] *Hollington v. F Hewthorn & Co Ltd* [1943] KB 587, 594.
[64] Ian Dennis, *The Law of Evidence*: 29-30.
[65] Takis Eliades, *The Law of Evidence: A practical approach*: 74-79.
[66] Colin Tapper, *Cross and Tapper on Evidence*: 77.
[67] Article 35 (1) of the Evidence Law (Cap. 9).
[68] *R v. Byrne* (1995) LEXIS, 21th November.

is considered to be too remote. Once it is regarded as a matter of degree, competing policy considerations can be taken into account. These include the desirability of shortening trials, avoiding emotive distractions of marginal significance, protecting the reputations of those not represented before the Courts and respecting the feelings of a deceased's family. None of these matters would be determinative if the evidence in question were of significant probative value."[69]

The general rule that all relevant evidence is admissible is subject to numerous **exceptions**:

(a) *Hearsay* used to be the leading example in the common law, but legislative intervention has made hearsay evidence largely admissible in civil proceedings.[70]
(b) *Opinion* is excluded as being irrelevant.[71] Witnesses are generally not allowed to inform the court of the inferences they draw from facts perceived by them; they must confine their statements to an account of such facts. However, expert witnesses may testify to their opinion on matters involving their expertise.
(c) Evidence of the bad or good *character* of a litigant is not admissible.[72]
(d) Evidence regarding the *past behaviour* of a litigant on other similar occasions is also not admissible as being irrelevant – at least in principle.[73]

2.9 Relevance of Material Truth

Presumably, establishment of (material) truth is the fundamental purpose of fact-finding and evidence processes. On the other hand, the rule of law requires procedural safeguards to ensure that any quest for truth does not end up in the opposite direction, through coercion or misinterpretation of evidence. There are also other fundamental values to balance against the desire for truth, such as human dignity, privacy, rights to property and so forth. Practical considerations of time and cost, and more generally the limited resources possessed by the administration of justice system, as well as the need to achieve finality also influence the choices made, the rules and limitations imposed on the fact-finding process.

In the English adversarial system of litigation, even though the court may aspire to the ascertainment of truth, it cannot undertake a search for relevant evidence but must reach its decision solely on the basis of the evidence produced by the parties, in fact even if the evidence introduced is inadequate or inconclusive. It is correctly noted that litigation is a human endeavour with ample scope for differences of opinion, error, deceit and lies. Thus judges who are called upon to decide what evidence is relevant and to be taken into account may take different views as to which facts are relevant or not, true or untrue.[74]

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[69] R v Wilson [1991] 2 NZLR 707, 711 (Fisher J.).
[70] Article 24A of the Evidence Law (Cap. 9).
[71] Eliades & Santis: 572-575.
[72] Ibid: 445.
[73] Ibid: 469-472.
[74] Adrian Keane, James Griffiths & Paul McKeown, *The Modern Law of Evidence*, (OUP 2010): 2.

In criminal cases, there is an especially strong presumption of innocence. One is considered innocent until proven guilty, and to be proven guilty the accused must be found guilty beyond any reasonable doubt. If reasonable doubt remains, the accused is to be acquitted. The application of this presumption in practice does not always allow for reaching material truth but it safeguards fundamental values of our legal civilization and allows us to carry-on everyday life without fear of wrongful prosecution.

In civil cases, the balance of probabilities test applies. In the words of Lord Denning "If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not."[75] The success of the lawsuit accordingly depends on the plaintiff's ability to produce evidence with larger evidential weight than the defendant's evidence and to prove than the plaintiff's version about the facts is more plausible than his oppenent's version. However, in,[76] it was held that "If the claimant bears the burden of proof, and fails to persuade the court that his case has been proved on the balance of probabilities, judgment should be given for the defendant. Moreover, the test is not whether the claimant's case is more probable than the defendant's but whether the claimant's case is more probably true than not true, i.e., the claimant's case is measured by reference to an objective standard of probability… An important point is that the burden of proof is the burden to prove that the facts relied on are more probable than not, and not merely than they are probable than an explanation advanced by the other side". Also, in *Wynne v. David Costakis Mavronicola,*[77] it was held that where there is only one version about the facts, the Court examines if these are well enough to prove the case on the necessary level. But where the only witness is considered unreliable, the Court should reject the lawsuit.

Additionally, other worth noting limitations of establishing of material truth in the legal system of Cyprus relate to the protection of privacy/secrecy and to some particular privileges. According to articles 3 and 16 of the Protection of Private Communication Secrecy Act 92(I)/96, the interception of private communication is prohibited in any case and its content cannot be used in any criminal or civil procedure. Moreover, the existence of privileges such as the privilege against self-incrimination;[78] the legal professional privilege regarding the communication between a lawyer and his/her client;[79] the legal advice privilege relating to confidential communications passing between a legal adviser and his/her client with a view to giving or securing legal advice;[80] the litigation privilege regarding communications between a client and his/her lawyer or between one of them and a third party when litigation is in prospect or pending;[81] and the privilege relating to the use of the phrase "without prejudice" in a

[75] *Miller v. Minister of Pensions* [1947] 2 All E.R. 372.
[76] *Baloise Insurance v. Κατωμονιάτη* (2008) 1 Α.Α.Δ 1275.
[77] (2009) 1 Α.Α.Δ. 1138.
[78] Takis Iliades, *The Law of Evidence: A practical approach*: 115.
[79] Ibid 115-118.
[80] See Colin Tapper, *Cross and Tapper on Evidence*: 436.
[81] See *Wheeler v. Le Merchant* (1881) L.R. 17 Ch. D. 675; *L (A Minor)* [1997] A.C. 16; *Waugh v. British Railways Board* [1980] A.C. 521.

document which is made as part of a genuine attempt to negotiate a settlement, restrict the ability of the court to reach the material truth considerably.

2.9.1 Limitations to the Right to Propose New Facts and Evidence (ius novorum)

Regarding matters arising pending the action the Order 28 of Cyprus Civil Procedure Rules provides that *"1. (A)ny ground of defence which has arisen after action brought, but before the defendant has delivered his defence, and before the time limited for his doing so has expired, may be raised by the defendant in his defence, either alone or together with other grounds of defence. And if, after a defence has been delivered, any ground of defence arises to any counter-claim put in by the defendant, it may be raised by the plaintiff in his defence to the counter-claim, either alone or together with any other ground of defence. 2. Where any ground of defence arises after the defendant has delivered his defence, or after the time limited for his doing so has expired, the defendant may, and where any ground of defence to any counter-claim arises after defence to the counter-claim, or after the time limited for delivering such defence has expired, the plaintiff may, within fifteen days after such ground of defence has arisen or at any subsequent time by leave of the Court or a Judge, deliver a further defence as the case may be, setting forth the same. 3. Whenever any defendant in his defence, or in any further defence as in the immediately preceding Rule mentioned, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence in Form 17, and may thereupon have judgment for his costs up to the time of the making or pleading of such defence, unless the Court or a Judge shall otherwise order."*

Parties has also the opportunity to amend their pleadings and possibly propose new facts which require the production of new evidence. The Order 25 provide that the Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.[82] Also, the Court may at any time amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.[83] The Court has the discretionary power to accept or reject the application for amendment. Generally, the application will be accepted in order for the Court to examine the facts and the arguments of litigants.[84] However, the Court takes into account all the circumstances. It should be proved that there will be an irrecoverable damage if the Court rejects the application.[85] Delay is an extremely

[82] Order 25 Rule 1.
[83] Order 25 Rule 5.
[84] *Χριστοδούλου ν. Χριστοδούλου (1991)1 Α.Α.Δ. 934 και Εθνική Τράπεζα της Ελλάδος ν. Βιομηχανία Χαρίλαος Αλωνεύτης* (2002) 1 Α.Α.Δ. 237.
[85] *Ταξί Κυριάκος ν. Παύλου* (1995) 1 Α.Α.Δ. 560.

significant factor and where there is, the litigant should justify it sufficiently.[86] It is worth noting that amendments may take place at any stage in the proceedings.[87]

3 Evidence in General

There are four categories of evidence: Oral evidence, hearsay evidence, documents and things or real evidence.

Oral evidence is produced by witnesses who give testimony to the Court (normally by appearing physically before the Court but also by near-equivalent means of communication, such as videoconference). Parties to the case may themselves testify as witnesses, and their witness statements shall count as oral evidence. The law defines as *statement* "any production or description or performance of a fact or production or expression of an opinion which is produced orally or written or otherwise."[88]

The common-law spirit permeating Cyprus evidence law is captured in the statement, included in *Cross on Evidence*, that "there is a sense in which testimony is the only item of judicial evidence."[89] Another statement therein is also true: "the general rule is that a witness can give evidence only of facts of which he has personal knowledge, something that he has perceived with one of his five senses."[90] The two exceptions to this rule are expert witnesses and hearsay evidence.

In those cases where the determination of the issue at hand requires special knowledge and the judge is unable to form his "own conclusions without help" on the proven facts",[91] the opinion of one or more **expert** becomes necessary. Item prices, for example, must be proven by experts.[92] Foreign law, which is treated as factum in Cyprus, may only be proven by experts. The same holds true with regard to scientific questions.

There is a general rule that a witness should always testify under oath.[93] If a witness refuses to testify under oath or to give an affirmation for irrelevant reasons to his/her capacity or to his/her religion then he or she commits an offense.[94] In addition, where a witness commits the offense of perjury, he or she is liable to imprisonment not exceeding seven years.[95] Some limits to the facts witnesses may testify about are also worth noting.

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[86] *Federal Bank of Lebanon v. Σιακόλας* (2002) 1 Α.Α.Δ. 223.
[87] *Γενικός Εισαγγελέας v. Στυλιανού* (2002) 1 Α.Α.Δ. 1718, *Καθητζιώτης v. Επιχειρήσεις Μέλιος και Παφίτης* (1997) 1 Α.Α.Δ. 252, *Fysco Constructingv. Γεωργίου* (1991) 1 Α.Α.Δ. 1014.
[88] Article 2(1) of the Evidence Law (Cap. 9).
[89] Tapper: 53-54.
[90] Ibid.
[91] *R v. Turner* [1975] Q.B. 843, 841.
[92] *R. v. Beckett* (1913) 8 Cr. App. Rep. 204.
[93] Section 50 (1) of Courts of Justice Law 14/60.
[94] Section 51 of Courts of Justice Law 14/60.
[95] Section 111 of Criminal Code (Chapter 154).

The court evaluates the overall testimony of a witness (whether he/she is a party or not) before using it for making findings.[96] The reliability of a testimony is evaluated taking into account the witness' behavior when he/she sits in the dock e.g. his/her appearance, reactions, memory, nervousness, caution, temperament;[97] the possible effect of any intermediary interpretation;[98] witness' possible health problems which may affect he/she behaviour when testifying;[99] any contradictions in his/her testimony.[100] The evaluation of a witness' testimony is conducted solely by the court of first instance: the Supreme Court may not consider the reliability of a witness.[101]

Hearsay evidence is defined as "a statement which was made by a person other than the one giving evidence in any civil or criminal procedure and which is introduced as evidence in proof of everything mentioned therein."[102] It involves all kinds of statements, oral, written, recorded, videotaped.

The definition of **documents** includes "anything in which information of any description is recorded."[103] A *copy*, in relation to a document, is "anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly."[104] Cross argues that thecontents of a document need not be treated as a separate item of judicial evidence…"[105]

According to Article 34 of the Evidence Law, the content of a statement which is included in a document and it is an admissible evidence, could be proven only by the presentation of the original document or by a copy of it, given that there is a sufficient justification for not producing the original. Article 35 moreover provides that "a document which is shown to form part of the records of business may be received in evidence in civil proceedings, and its weight is evaluated by the Court."

A distinct category of documents is constituted by **public documents**, defined as "a document made by a public officer for the purpose of the public making use of it and being able to refer to it."[106] Judicial decisions are considered as public documents in this regard. It is meant to be where there is a judicial or quasi-judicial duty to inquire as might be said to be the case with the bishops acting under the writs issued by the

[96] See *Ιωάννου ν. Παλάζη* (2004) 1 (Α) Α.Α.Δ. 576.
[97] See *Μαυροσκούφη ν. Τράπεζας Πειραιώς (Κύπρου) Λτδ*, ΠΕ 352/08, ημ. 16.4.14; *Χριστοφή ν. Ζαχαριάδη* (2002) 1 (Α) Α.Α.Δ. 401; *C & A Pelekanos Associates Limited v. Πελεκάνου* (1999) 1 (Β) Α.Α.Δ. 1273.
[98] See Takis Iliades and Nikolaos Santis, The Law of Evidence: Procedural and Substantive Aspects: 132.
[99] See *In The Marriage of Zantiotis* (1993) 113 ALR 441.
[100] See *Swepco Construction Limited v. Επίσημου Παραλήπτη, ως Προσωρινού Εκκαθαριστή της Εταιρείας Hob Entertainment Ltd και Άλλου*, ΠΕ 195/09, ημ. 30.5.14.
[101] See *Χριστοδούλου ν. Αστυνομίας,* Ποιν. Έφ. 9/11, ημ. 22.1.13.
[102] Article 23 of the Evidence Law (Cap. 9).
[103] Article 2(1) of the Evidence Law (Cap. 9).
[104] Ibid.
[105] Colin Tapper, *Cross and Tapper on Evidence*: 55.
[106] *Sturla v Freccia* (1880) 5 App Cas 623.

Crown. Statements in public documents are generally admissible evidence of the truth of their contents.[107] At common law, the contents of numerous public documents could be proved by copies of various kinds, on account of the inconvenience that would have been occasioned by production of the originals.[108] Section 35 (1) of Chapter 9 provides that document which is shown to form part of the records of a business or public authority may be received in evidence in civil proceedings without further proof.

Things or **real evidence** are "independent species of evidence as their production calls upon the court to reach conclusions on the basis of its own perception, and not that of witnesses directly or indirectly reported to it".[109] For example, items, people or animals, the behavior of witnesses, the inspection of a place, tapes, films and photos. The the Court of Appeal held that the litigant who presented a video tape as evidence should refer to its content explicitly. He should reproduce it.[110]

3.1 Instances Where One Type of Evidence is Required

Secondly, witness for a copy of registration in bankers' book should be given only by the bank manager or by a bank employee either orally either with a statement under oath.[111] Thirdly, the content of a statement which is included in a document and it is an admissible evidence, could be proven only by the presentation of the original document or by a copy of it, given that there is a sufficient justification for not producing the original.[112]

3.2 Duty to Present or Deliver Evidence

In civil cases, the party bearing the legal burden of proof (the litigant who promotes an argument and he depends on it in order for his lawsuit or his defence to be succeed), has to present evidence in the proceedings to prove his arguments. Otherwise, his arguments will not be persuasive and he may lost his case. In any case, parties are obliged to produce evidence they have utilized or to which they have referred during a proceeding. In *Κύπρος Αντωνίου & Υιός Ατδ v. Sigma Radio T.V. Limited*,[113] the Court of Appeal held that the litigant who presented a video tape as evidence should refer to its content explicitly. He should reproduce it. Also, in *TK (Burundi) v. Secretary of State for Home Affairs* [2009] EWCA Civ 40 the failure to call witnesses to support a party's case coupled with the absence of any plausible explanation for that failure, has been held to detract from the party's credibility and to justify the rejection of his account.

Regarding the duty of third persons to deliver evidence, Order 37 Rule 12 of the Civil Procedure Rules provides that"Any party in any cause or matter may summon any

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[107] Colin Tapper, *Cross and Tapper on Evidence*: 592.
[108] Colin Tapper, *Cross and Tapper on Evidence*: 672.
[109] Tapper: 56.
[110] *Κύπρος Αντωνίου & Υιός Ατδ v. Sigma Radio T.V. Limited* (2004) 1 Α.Α.Δ. 1592.
[111] Article 22 (2) of Chapter 9.
[112] Article 34 (1) of Chapter 9.
[113] (2004) 1 Α.Α.Δ 1592.

person in Cyprus to attend and give evidence or produce any document in his possession before any person appointed to take the examination in Cyprus, for the purpose of using his evidence upon any proceeding in the cause or matter in like manner as such witness would be bound to attend and be examined at the hearing or trial; and any party or witness having made an affidavit to be used or which shall be used on any proceeding in the cause or matter shall be bound on being served with such summons to attend before such person for cross-examination." If any person duly summoned by subpoena to attend for examination refuses to attend, or if, having attended, he refuses to be sworn or to answer any lawful question, a certificate of such refusal, signed by the examiner, shall be filed in Court, and thereupon the party requiring the attendance of the witness may apply to the Court for an order directing the witness to attend, or to be sworn, or to answer any question, as the case may be.[114]

4 Burden of Proof

The distinction is being made, in Anglo-Cypriot civil procedure,[115] between the *evidential* (or *production*) *burden*, described as the burden "to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue, due regard being had to the standard of proof demanded of the party under such obligation,"[116] and the *legal burden* or *burden of proof*, which is borne by the litigant who has to prove the truth (or untruth) of a claim made – in most cases, the burden of proof is borne by the litigant who is making the claim/allegation in question. A successful litigant may pass the burden to the opposing side, who then have to provide adequate evidence to refute the prima facie conclusion.[117]

Lord Pearson has eloquently described the process (and the potential for confusion involved): "In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift." "But if in the course of the trial there is proved a set of fact which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiffs favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential burden of proof resting on the defendants. I have some doubts whether it is strictly correct to use the expression 'burden of proof' with this meaning, as there is a risk of it being confused with the formal burden of proof, but it is a familiar and convenient usage."[118]

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[114] Order 37 Rule 8.
[115] Takis Iliades, *The Law of Evidence: A practical approach*: 63.
[116] Tapper, Cross Taper: 134.
[117] *Ιορδάνου v. Ζήνωνος* (1998) 1 Α.Α.Δ 652, 657-658.
[118] *Henderson v. Henry E. Jenkings& Sons* [1969] 3 All E.R. 756, 766.

In criminal cases, the standard of proof is especially high for the prosecution: allegations must be proved "beyond reasonable doubt." On the contrary, in civil cases the standard concerns the "balance of probabilities".[119] The civil Court will assess the oral, documentary and real evidence advanced by each party and decide whose case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely than not.[120] If the plaintiff does not succeed to prove his allegations on the balance of probabilities then the court will reject his lawsuit.[121]

In criminal cases, there is an especially strong presumption of innocence. One is considered innocent until proven guilty, and to be proven guilty the accused must be found guilty beyond any reasonable doubt. If reasonable doubt remains, the accused is to be acquitted. The application of this presumption in practice does not always allow for reaching material truth but it safeguards fundamental values of our legal civilization and allows us to carry-on everyday life without fear of wrongful prosecution.

In civil cases, the balance of probabilities test applies. In the words of Lord Denning "If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not."[122] The success of the lawsuit accordingly depends on the plaintiff's ability to produce evidence with larger evidential weight than the defendant's evidence and to prove than the plaintiff's version about the facts is more plausible than his oppenent's version. However, in,[123] it was held that "If the claimant bears the burden of proof, and fails to persuade the court that his case has been proved on the balance of probabilities, judgment should be given for the defendant. Moreover, the test is not whether the claimant's case is more probable than the defendant's but whether the claimant's case is more probably true than not true, i.e., the claimant's case is measured by reference to an objective standard of probability… An important point is that the burden of proof is the burden to prove that the facts relied on are more probable than not, and not merely than they are probable than an explanation advanced by the other side". Also, in *Wynne v. David Costakis Mavronicola,*[124] it was held that where there is only one version about the facts, the Court examines if these are well enough to prove the case on the necessary level. But where the only witness is considered unreliable, the Court should reject the lawsuit.

4.1 Some Facts do not Require Proof by Litigants

In certain cases, a presumption of fact is established in law, shifting the burden to the other litigant. For example, a presumption of navigability exists, even with regard to a ship that sank immediately after its departure.[125] In cases where a litigant destroys

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[119] See Takis Iliades and Nikolaos Santis, The Law of Evidence: Procedural and Substantive Aspects: 21.
[120] *Σοφοκλέους v. Κυριάκου* (2010) 1 (A) A.A.Δ. 665.
[121] See *Λουκαΐδη v. Πρώτο Θέμα ΑΕ και Άλλων*, ΠΕ 172/09, ημ. 13.2.13.
[122] *Miller v. Minister of Pensions* [1947] 2 All E.R. 372.
[123] *Baloise Insurance v. Κατωμονιάτη* (2008) 1 A.A.Δ 1275.
[124] (2009) 1 A.A.Δ. 1138.
[125] See *Pickup v. Thames Marine Insurance Co Ltd* (1878) 3 QBD 594.

evidence, it is presumed that these evidence constituted adverse evidence for him.[126] Many rebuttable presumptions exist, relating to sanity,[127] marriage,[128] innocence,[129] death,[130] continuity[131] and regularity.[132] There are also irrebuttable presumptions – effectively, rules whose application cannot be waived: for example, children under the age of fourteen are not liable for any act or omission in criminal law.[133]

A different category of cases involves instances of **judicial knowledge**. Certain facts are accepted by courts as being undisputed and trite, and as such they do not require any proof. For example, the fact that the currency has depreciated;[134] or that cats are pets.[135] "Judicial knowledge" also covers knowledge of daily human experiences;[136] public, constitutional and administrative issues regarding the country;[137] all political issues,[138] geographical divisions of different countries or administrative division of a country into cities and villages;[139] and formal stamps and signatures of governmental departments and courts in Cyprus.[140] The same applies – in the spirit of the maxim *iura novit curia* – for Cyprus law,[141] as well as European Union law.[142]

If the facts claimed by a party and the proposed evidence are incomplete, the Court is not obliged to advise the party but it may do it. According to Order 33 Rule 7 where the issues between the parties involve legal points only and the parties state that no evidence is being adduced, the first party (the party on whom the burden of proof lies) may address the Court, then the second party may do likewise, and finally the first party may reply. In other cases, when the first party has replied, or, if he has no right to reply, when the second party has addressed the Court, the case shall be closed, unless the Court directs either party to adduce further evidence or itself calls any witness.

The courts have no means to induce parties to elaborate on claims and express an opinion on any factual or legal matter.

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[126] See *Anastassiades v. The Republic* (1977) 2 CLR 97.
[127] Article 11 of the Criminal Code (Cap. 154).
[128] See Takis Iliades and Nikolaos Santis, The Law of Evidence: Procedural and Substantive Aspects: 237.
[129] *Woolmington v. DPP* (1935) All ER Rep 1.
[130] See Takis Iliades and Nikolaos Santis, The Law of Evidence: Procedural and Substantive Aspects: 238-239.
[131] *Beeresford v. St Albans Justices* (1905) 22 TLR 1.
[132] *Παπουτσή και Άλλων v. Μιχαήλ* (1999) 1 (A) Α.Α.Δ. 163.
[133] Article 14 of the Criminal Code (Cap. 154).
[134] *Bryant v. Foot* (1868) LR 3 QB 497.
[135] *Γενικός Εισαγγελέας της Δημοκρατίας v. Κλεάνθους και Άλλων* (1999) 2 Α.Α.Δ. 342.
[136] *Σωκράτους v. Λοΐζου και Άλλων*, ΠΕ 197/09, ημ. 11.4.13.
[137] *Προέδρου της Δημοκρατίας v. Βουλής των Αντιπροσώπων* (1985) 3(B) CLR 1429.
[138] *Δημοκρατία της Σλοβενίας v. Beogradska Banka DD* (1999) 1 (A) Α.Α.Δ. 225.
[139] *Deybel's Case* (1814-23) All ER Rep 752.
[140] Order 39 Rule 17.
[141] *Κυπριακή Δημοκρατία v. Ιωσήφ και Άλλης* (2004) 3 Α.Α.Δ. 420.
[142] Section 3 of the Law 177(I)/06.

In the context of the Cyprus civil procedural law, a court may never collect evidence on its own initiative. Judges are heavily constrained in their input to the development of a case, and have little active involvement in the process.[143] In *Jones v. National Coal Board*[144] Lord Denning famously argued that "In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties not to conduct an investigation or examination on behalf of society at large." Also, in *Laker Airways Ltd v. Department of Trade*[145] Lawton LJ said that "I regard myself as referee. I can blow my judicial whistle when the ball goes out of play; but when the game restarts I must neither take part in it nor tell the players how to play."

4.2 Additional Submission of Evidence

The Court of first instance has the discretionary power to accept the additional submission of evidence under certain conditions. The plaintiff has the opportunity to call and examine additional witnesses before the defendant begins presenting his/her own case.[146] The plaintiff has to explain why he/she did not call these witnesses at the beginning of the procedure. If he/she could find and call these witnesses on time and he/she failed to do so, his/her application for the presentation of additional witness will be rejected.[147] Similarly, the Court has the opportunity to allow additional evidence to be submitted by the defendant after the latter finishes with the presentation of his/her case.[148] According to Order 33, Rule 9 (b), a party shall not adduce evidence in reply except by leave of the Court; and where such leave is given, the evidence shall be adduced at such stage as the Court may direct, regard being had to the principle that the other party must be given an opportunity of commenting thereon.

It should be noted that where the additional evidence relates to facts which are not referred in the pleadings, the party who wants the submission of it should apply for the amendment of his/her pleadings. Parties have the opportunity to amend their pleadings and propose new facts which require the production of new evidence. The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.[149]

Regarding the submission of additional evidence at the stage of the appeal, the Supreme Court accepts such a submission rarely.[150] In some criminal cases the Court allowed the

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[143] Gregory Durston, *Evidence, Text and Materials*: 13-14.
[144] [1957] 2 QB 55 (Lord Denning).
[145] [1977] 2 All ER 182 (Lawton LJ).
[146] *Επί Τοις Αφορώσι την Αίτηση του Γιαννάκη Μ Βασιλιτσιά* (1995) 1 Α.Α.Δ. 1119.
[147] *Abu Dhabi National Company for Building Materials v. Damiata Shipping Company Limited και Άλλων* (Αρ. 1) (2003) 1 (Β) Α.Α.Δ. 1163.
[148] *Χαραλάμπους ν. Δημοκρατίας*, Ποιν. Έφ. 180/07, ημ. 29.6.12.
[149] Order 25 Rule 1.
[150] *Σάββα ν. Αντωνίου*, ΠΕ 134/09, ημ. 16.4.14; *Egiazaryan και Άλλων v. Denoro Investments Limited και Άλλων*, ΠΕ 75/11, ημ. 19.2.13.

presentation of additional evidences for matters relating to the substance of the case or to the sentencing.[151]

5 Written Evidence

5.1 "Documents" in Cyprus Law

The Evidence Law defines as *document* "anything in which information of any description is recorded, and "copy", in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly."[152] The provision is identical to English law.[153] Hoffmann J in *Huddleston v. Control Risks Information Services Ltd*[154] said that a written instrument or any other object carrying information such as photograph, tape recording or computer disk can be a □document□ for the purposes of the law. Adrian Keane, James Griffiths and Paul McKeown explain that in civil proceedings □document□ for the purposes of the rules of disclosure and inspection of documents, means *"anything in which information of any description is recorded"*, a definition wide enough to cover not only documents in writing, but also maps, plans, graphs, drawings, discs, audio-tapes, sound-tracks, photographs, negatives, videotapes, and films.[155]

On joining the EU, Cyprus implemented Directive 1999/93/EC on a Community framework for electronic signatures. Cyprus incorporated the Directive into its domestic law by Law 188 (I)/2004 on the Legal Framework of E-signature and relevant issues of 2004. The Law recognizes three different types of E-signature, namely, the electronic signature, the advanced electronic signature and the qualified electronic signature. As regards the first one, it is the simplified form with the widest application, defined as "the data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication".[156] As to the advanced electronic signature, it is based on the public key infrastructure ("PKI") (technologically speaking this involves the use of encryption technology to sign data, and requires a public and a private key) and is defined as "an electronic signature which meets the following requirements: (a) it is uniquely linked to the signatory; (b) it is capable of identifying the signatory; (c) it is created using means that the signatory can maintain under his sole control; and (d) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable".[157] Lastly, the qualified electronic signature (QES), not defined in the Directive but is the generally accepted term for an advanced electronic signature which is created within a secure signature creation device

[151] *Marketrends Ltd v. Θεοδωρίδη* (2002) 1(B) Α.Α.Δ. 868; *Zevedheos v. The Republic* (1978) 2 CLR 47; *Savvas v. Mouzoura* (1973) 1 CLR 88.
[152] Article 2(1) of the Evidence Law (Cap. 9).
[153] See at present s. 13 of the English Civil Evidence Act 1995.
[154] [1987] 1 WLR 701.
[155] Adrian Keane, James Griffiths & Paul McKeown, *The Modern Law of Evidence.*
[156] Section 2 of the Law 188(I)/2004.
[157] Ibid.

(SSCD) and authenticated through a Qualified Certificate (QC).[158] In legal terms, all electronic signatures may have a legal value but QESs are automatically considered to be equivalent to holograph signatures under the Directive.[159]

5.2 Presumption of Correctness

Presumption of correctness exists for documents which form part of the records of a public authority or ecclesiastical authority. These documents may be received in evidence in civil proceedings without further proof.[160] A document which is shown to form part of the records of a business may be received in evidence in civil proceedings but its value is evaluated by the court.[161] A document is part of the records of a business, or pubic authority or ecclesiastical authority if there is produced to the court a certificate to that effect signed by an officer of the business or authority to which the records belong.[162]

According to Cross,this provision is intended to allow documents falling within it to prove themselves; that is not to require even the open-ended process of authentication demanded of "statements" in other forms of document. It merely secures admission of the documents; their effect will depend upon their weight and that in its turn will often depend upon the cogency of the evidence demonstrating the efficiency of the system of recording adopted.[163]

5.3 Evidential (Probative) Value of Public and Private Documents

In the case of a public document the mere production of the appropriate copy will suffice to put it in evidence, but something more than production is required in the case of a private document.[164] The general rule is that the content of a private document should be proven by "Primary Evidence", which is the presentation of the original document (The Best Evidence Rule).[165] "Secondary Evidence" which may take the form of a copy, a copy of the copy or oral evidence, is admissible only in the following cases: (a) not presentation of the original document by a litigant,[166] (b) the original document is in a stranger's possession who refuses to present it for a legally admissible reason, (c) the original document has been lost and it wasn't possible to be founded after a careful research,[167](d) the presentation of the original document is impossible and (e) Bankers Books.[168]The court will require to be satisfied that the private document was duly

[158] Ibid.
[159] Section 4 of the Law 188(I)/2004.
[160] Article 35 (1) of Chapter 9.
[161] Article 35 (2) of Chapter 9.
[162] Article 35 (2) of Chapter 9.
[163] Colin Tapper, *Cross and Tapper on Evidence*: 670.
[164] Colin Tapper, *Cross and Tapper on Evidence*: 77.
[165] TakisIliades, *TheLaw of Evidence: A practical approach*: 74-79
[166] Order 24 Rule 2 and Order 32 Rule 3.
[167] *Εθνική Τράπεζα Ελλάδος ν. Μασώνος* (1980) 1 CLR 195.
[168] TakisIliades, *TheLaw of Evidence: A practical approach*: 74-79.

executed. There are three types of evidence of handwriting: testimonial evidence, opinion and comparison.[169]

5.4 Taking of Written Evidence

Either party may call upon the other party to admit any document. In case of refusal or neglect to admit after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the Court shall certify that the refusal to admit was reasonable.[170] In addition, any party in any cause or matter may summon any person in Cyprus to attend and produce any document in his possession before any person appointed to take the examination in Cyprus, for the purpose of using his evidence upon any proceeding in the cause or matter in like manner as such witness would be bound to attend and be examined at the hearing or trial.[171] All evidence should be reproduced at the hearing. In *Κύπρος Αντωνίου & Υιός Λτδ v. Sigma Radio T.V. Limited,*[172] the Court of Appeal held that the litigant who presented a video tape as evidence should refer to its content explicitly. He should reproduce it.

6 Witnesses

Witnesses are the cornerstone of civil (and criminal) litigation in the common-law tradition. More generally, the law of evidence was built around the legal treatment of witness. In Cyprus, especially, witnesses are paid particular importance – the legacy, in part, of the British colonial judicial system and communal justice in the Byzantine and post-Byzantine eras, but also as a consequence of the relatively small and – until recently – homogenized society that allowed some confidence in getting to the thruth via witness testimony.

At the same time, witnesses are also the most inherently problematic source of evidence: memory may fail them, especially in protracted litigation, and they are likely to be influenced by their own biases or motivations in their testimony. Cross-examination is supposed to provide a safeguard, but it can also be used to intimidate witnesses and it carries its own degree of subjectivity.

6.1 Who Can be a Witness

In principle, all natural persons have the capacity to be witness in a case. However, the court may decide that a certain person is prevented "by reason of tender years, mental incapacity or any other cause of the same kind from knowing that they ought to speak the truth or from understanding questions put to them or from giving rational answers to those questions."[173]

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[169] Colin Tapper, *Cross and Tapper on Evidence*: 674-679.
[170] Order 24 Rule 2.
[171] Order 37 Rule 12.
[172] (2004) 1 ΓΑ.Α.Δ 1592.
[173] Article 13 of the Evidence Law (Cap. 9). See Eliades & Santis, 2015: 96-104.

6.2 Ordering the Examination of Witnesses and Summoning the Witness

The common-law adversary system of justice is based on the initiative of the parties in selecting their witnesses and inviting them to take part in the process. Parties bear primary responsibility for ensuring the presence of their witnesses in court.[174] Court authority is however often needed, both to ensure compliance and to provide certain procedural guarantees to litigants and witnesses. The Court has extensive powers in order to ensure that the appropriate witnesses do testify, but the parties have to apply for an order.[175] In the words of the Civil Procedure Law, that go back to the late nineteenth century: "On the application of any party to an action the Court may, where it appears necessary for the purposes of justice, and subject to such terms, if any, as the Court may direct, make any order for the examination upon oath before any person, and at any place within or without the jurisdiction of the Court, of any witness or person, and may give directions as to any matters connected with the examination as may appear reasonable and just, and may empower any party to the action to give the deposition in evidence therein."[176] The Civil Procedure Rules further explore the requirements, formalities and process for an order for a commission to examine witnesses.[177] The powers of the an order to examine witnesses in a foreign country.[178] The Court has the power to call a witness on its own motion[179] and a person which is in the Court to testify.[180]

According to the Civil Procedure Rules: "Any party in a cause or matter who desires the issue of a summons requiring any witness or person to attend for examination, or to produce any document, shall deposit a written application for the issue thereof with the Registrar giving the full name and address of such witness or person, and if the application for the issue thereof is made fifteen days before the day on which such person is required to attend, such summons shall be issued without further proceedings, but if the application be deposited at any later time, such summons shall not be issued without the leave of the Court or a Judge."[181] The Judge or Registrar may make such summons conditional upon payment by the requesting party of such sum as deemed "sufficient to satisfy any expenses which may be reasonably incurred by the witness or person to be served."[182]

If any witness objects to any question put to him before an examiner, the question and the objection are taken down by the examiner and transmitted by him to the Court to be there filed, and the validity of the objection is decided by the Court.[183] In the case where

[174] Colin Tapper, *Cross and Tapper on Evidence*: 291.
[175] See Orders 32, 36 and 37 of the Civil Procedure Rules.
[176] Article 8 (1) of the Civil Procedure Law (Cap. 6).
[177] Order 37 (titled "Evidence on Commission or Before Examiner").
[178] Article 8 (3) of the Civil Procedure Law (Cap. 6); Order 37 Rule 2.
[179] Article 48 of the Courts of Justice Law 1960.
[180] Article 52 of the of Courts of Justice Law 1960.
[181] Order 32 Rule 1.
[182] O. 32 R. 2 CPR.
[183] Order 37 Rule 7.

a person duly summoned by subpoena to attend for examination refuses to attend, or to be sworn or to answer any lawful question, a certificate of such refusal, signed by the examiner, is filed in Court, and the party requiring the attendance of the witness may apply to the Court or a Judge for an order directing the witness to attend, or to be sworn, or to answer any question, as the case may be.[184]

Where a person is duly summoned to attend and give evidence by virtue of Order 37 Rule 12, he is bound to attend and be examined at the hearing or trial and any party or witness having made an affidavit to be used on any proceeding in the cause or matter is bound on being served with such summons to attend before such person for cross-examination.[185]

A witness can refuse to attend for examination, but the party requiring the attendance of the witness may apply to the Court for an order directing the witness to attend, or to be sworn, or to answer any question, as the case may be.[186] Also, a witness can refuse to sign the note of his evidence but the note may be used as evidence whether he signs it or not.[187] If the called party received reasonable notification for the time and the place and he does not appear before the court and he does not give a sufficient justification for his omission, the Court may issue an order to force him to appear. The Court is empowered to impose a fine (up to 150) or imprisonment (up to 2 months) or both.[188]

Regarding the taking of oath in Cyprus, the law states that any witness in a civil case has the obligation to take an oath which is usually used by people of the same religion with him/her or to give an affirmation.[189] In the case that a person refuses to take an oath or to give an affirmation for reasons not relating to his/her capacity to testify or to other reasons of consciousness, he/she commits an offense and he/she is liable to imprisonment not exceeding one month or to a fine.[190] In criminal procedure, a witness is also obliged to take an oath[191] or to give an affirmation.[192] It should be noted that in any criminal procedure, a person under the age of 14 may testify without taking an oath.[193] Courts may assess the capacity of a child to take an oath in any case.[194] Also, where a witness is called just for presenting documents[195] or the witness is a judge or a lawyer who is called for testifying regarding a case that he/she managed under his/her professional position, is not obliged to take an oath.[196]

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[184] Order 37 Rule 8; Article 8 (2) of the Civil Procedure Law.
[185] Order 37 Rule 12.
[186] Order 36 Rule 8.
[187] Order 36 Rule 5.
[188] Article 49 of the Courts of Justice Law 1960.
[189] Article 50 of the Courts of Justice Law 1960.
[190] Article 52 of the Courts of Justice Law 1960.
[191] Article 55 of the Criminal Procedure Law (Cap. 155).
[192] *Μούρτζινος ν. Του Πλοίου "Galaxias" και Άλλων* (1997) 1(A) Α.Α.Δ. 80.
[193] Article 55(3) of the Criminal Procedure Law.
[194] *R v. Powell* (2006) 1 Cr App R 31; *R v. Dunne* (1930) 21 Cr App R 176.
[195] *R v. Gilmore* (1961) NZLR 384; *Perry v. Gibson* (1834) 1 Ad & El 48.
[196] *Warren v. Warren* (1996) 4 All ER 664; *Wilding v. Sanderson* (1897) 2 Ch 534.

There is a general rule, that a witness must testify orally in the courtroom.[197] However, there is an exception to the above rule according to which a witness may produce a written testimony instead of an oral one. The Court has the discretionary power to accept testimony which is included in an affidavit when it is impossible for a witness to be present in the courtroom. In this case the Court may give guidelines so as a witness' testimony be taken by a Commissioner or an Examiner.[198]

The process of questioning is an important part of a trial and there are certain rules attaching the powers and duties of the parties. The parties and/or the Court should inform any witness that he/she must not discuss the case for which he/she is called, with third persons or other witnesses. The coaching or the training of a witness is an unacceptable practice.[199] Questions that suggest the particular answer or contain the information that the examiner is looking to have confirmed, are also prohibited.[200] Testimony which is produced from leading questions is not inadmissible but its evidential value may be significantly reduced.[201] However, leading questions are permissible for introductory issues, issues not contested[202] or the recognition of a person or an object[203] and where the witness is hostile[204] or he/she has memory difficulties[205] or he/she is called to correct another witness regarding phrases that the latter used.[206] Double or complex questions are also prohibited: the questions should be simple and understandable.[207] In addition, where a witness is testifying for something that happened a long time ago, he/she may refresh his/her memory by reading a document that he/she prepared or confirmed.[208] It should be noted that a litigant cannot doubt the reliability of a witness that he/she has called.[209] This may be happened by asking questions relating to the witness' bad character, past convictions or previous contradictory statements. Nonetheless, such questions are permissible when they aim at supporting a logical argument and not at doubting the reliability of the witness.[210] In the case that a witness gives an adverse testimony for the party that called him/her, the latter may ask the Court to declare that witness hostile by presenting previous contradictory statements of him/her at any stage of the proceedings. (even at cross-examination).[211] Therefore, such

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[197] See Article 55; Order 36 Rule 1 of the Civil Procedure Rules.
[198] See Order 36 Rule 1; *Cyprus Import Corporation Ltd v. Kaisis* (1974) 1 CLR 16.
[199] *R v. Shaw* (2002) EWCA Crim 3004; *R v. Momodou and Another* (2005) 2 All ER 571.
[200] *Mares v. Grand Trunk Pacific Rail Co* (1913) 14 DLR 70; *Parkin v. Moon* (1836) 7 C & P 408.
[201] *Moor v. Moor* (1954) 2 All ER 458.
[202] *R v. Robinson* (1897) 61 JP 520.
[203] *R v. Watson* (1817) 2 Stark 116.
[204] *R v. Thomson* (1976) 64 Cr App R 96.
[205] *Acerro v. Petroni* (1815) 1 Stark 100.
[206] *Courteen v. Touse* (1807) 1 Camp 43.
[207] See Takis Iliades and Nikolaos Santis, The Law of Evidence: Procedural and Substantive Aspects: 679.
[208] *Chrysostomides v. Panayi* (1927-1928) 13 CLR 24.
[209] Article 31 of the Evidence Law (Cap. 9).
[210] *R v. Ross* (2007) EWCA Crim 1457.
[211] *R v. Prefas* (1987) 86 Cr App R 111; *Βενιζέλου v. Powell* (1985) Crim LR 592.

a witness may be cross-examined by the delivering party.[212] A witness may be declared hostile only where the Court believes that the former has a hostile attitude against the delivering party and he/she shows that he/she does not intend to tell the truth to the Court.[213]

At the stage of cross-examination, the opposing party should examine whether the witness gave a testimony that affects his/her client's interests adversely and decide whether it is necessary to cross-examine him/her accordingly.[214] If the opposing party fails to cross-examine a witness as to a substantial part of his/her testimony, the Court has the discretionary power to consider that the opposing party accepts the arguments of the other side regarding points covered by the main examination.[215] The opposing party should be free to cross-examine without any undue intervention.[216] However, the cross-examination should not be extended. It should be brief and concise. The Judge should control the process by ensuring that relevant testimony is not precluded without any legal reason and preventing any unnecessary waste of judicial time.[217] The Court is obliged to set time limits when it finds that the questions are repeated and/or unnecessary.[218] Also, lawyers should not refer to the names of third persons where this is not relevant to the issues at stake;[219] make an extended introduction before questioning;[220] intimidate or underestimate a witness;[221] call a witness to refer to things that another witness said or it is expected to say;[222] require from a witness to develop arguments unless the latter is an expert or an investigator.[223] It should be noted that the opposing party has the right to make leading questions during cross-examination[224] but such questions should not be misleading or trappy[225] or call witnesses to speculate on matters for which they have not primary knowledge.[226]

During the process of questioning, the duty of the Judge is to hear the testimony, to establish and maintain the required procedural discipline and to ensure that lawyers

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[212] *Parkin v. Moon* (1836) 7 C &P 408.
[213] *R v. Norton* (1987) Crim LR 687.
[214] See Takis Iliades and Nikolaos Santis, The Law of Evidence: Procedural and Substantive Aspects: 703.
[215] *Δρουσιώτης ν. Αστυνομίας,* Ποιν. Εφ. 110/12, ημ. 18.7.13; *Philippou General Bonded Warehouse Ltd v. Νικολαϊδη* (2006) 1(B) Α.Α.Δ. 1057.
[216] *Φάνος Ν Επιφανίου Λτδ ν. Μελάρτα και Άλλου* (2002)1 (Α) Α.Α.Δ. 654.
[217] *R v. Ptohopoulos* (1968) 52 Cr App R 47.
[218] *Ορνιθάρης ν. Τμήματος Δημοσίων Έργων και Άλλων,* ΠΕ 232/10, ημ. 21.1.14.
[219] *R v. Flynn* (1972) Crim LR 428.
[220] See Takis Iliades and Nikolaos Santis, The Law of Evidence: Procedural and Substantive Aspects: 712.
[221] *Meschanical and General Inventions Co Ltd and Lawless v. Austin and the Austin Motor Co Ltd* (1935) All ER Rep 22.
[222] *North Australian Territory Company v. Goldborough Mort and Company* (1893) 2 Ch 381.
[223] *R v. Baldwin* (1925) All ER Rep 402.
[224] *Mares v. Grand Trunk Pacific Rail Co* (1913) 14 DLR 70.
[225] *R v. Coventry* (1997) 7 Tas R 199.
[226] *Palmer v. R* (1998) 151 ALR 16.

behave properly and follow the rules of evidence.[227] The Judge should make targeted and measured interventions.[228] He/she has the right to make questions but only regarding issues which arise from the testimony and require clarification.[229] Such questions should not affect or be able to affect adversely the arguments of the litigants.[230]

There are some cases (recognized mainly through case law) where a capable witness has the right to refuse answering a question. If his/her answer is covered by a privilege regarding his/her personal protection or the protection of the public policy, he/she may claim the particular privilege and refuse to give an answer. It does not matter whether or not his/her answer could be significant for the resolution of the disputed issues.[231] This rule relates to legal persons too. However, it is questioned whether the rule applies in the case of a director or an agent of a company due to the risk of its self-incrimination: It seems that there is not a strong legal principle which could exclude such a possibility.[232]

Regarding the exclusion of a testimony on the grounds of public policy, a testimony may be excluded where it could disclose information which may affect adversely the security of the State, the good administration of public matters and the overall justice. In such a case the general public interest should prevail over a litigant's interests.[233] The rule applies to both civil and criminal cases.[234]

As to the security of the State, a witness is not allowed to refer to facts or to present documents which may jeopardize the national security. This exclusion may be claimed by the State or a litigant. The Court has also the power to raise such an issue.[235] It is worth noting that only the Court is able to decide what the public interest requires. The criterion is the necessity of the presentation of the document or the statement for the proper functioning of the public services.[236] Where such a presentation could not cause damage to the public interest and it would be very significant for the conduct of the proceedings, the Court allows it.[237] Therefore, there could not be an automatic exclusion of such evidence even if the documents or the statements were prepared or made at the

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[227] *Jones v. National Coal Board* (1957) 2 All ER 155.
[228] *Yuill v. Yuill* (1945) 1 All ER 183.
[229] *R v. Howes* (2007) EWCA Crim 3219.
[230] *Iakovou Brothers (Constructions) Ltd v. Κρίκκη* (2004) 1 (A) Α.Α.Δ. 151.
[231] *Blunt v. Park Lane Hotel Ltd and Briscoe* (1942) 2 All ER 187; *R v. Boyes* (1861) 1 B & S 311; *Beatson v. Skene* (1860) 5 H & N 838.
[232] *Sociedale Nacional le Combustiveis de Angola UEE and Others v. Westinghouse Electric Corporation* (1978) 1 All ER 434; *Environment Protection Authorities v. Caltex Refining Co Pty Ltd* (1993) HCA 74.
[233] *Asiatic Petroleum Co Ltd v. Anglo-Persian Oil Co Ltd* (1916-17) All ER Rep 637.
[234] *Balfour v. Foreign and Commonwealth Office* (1994) 2 All ER 588; *Re Osman* (No 4) (1991) Crim LR 533.
[235] *Rogers v. The Secretary of State of the Home Department* (1972) 2 All ER 1057; *Papasavva and Another v. The Republic* (1974) 4 JSC 551.
[236] *Conway v. Rimmer* (1967) 2 All ER 1260.
[237] *McDonald v. Radio Telefis Eireann* (2001) 1 IR 355.

highest state level: The Court may examine their context and rule on the application of the privilege accordingly.[238] Regarding the exclusion of testimony relating to public services, the Courts are not so eager to apply the privilege.[239] For example, the Court allowed the submission of confidential reports relating to the promotion of public employees since such a disclosure would not cause more damage to the interests of public services.[240] In these cases, the Court weighs and compares the public interest in the proper administration of justice with the consequences of a possible submission of the documents in question to the national security.[241] The Court, also, takes into account the relevance of the evidence to the issues at stake,[242] any other possible sources of evidence[243] and the nature of the State's interests.[244] The same rules of privilege apply for documents or statements with political context[245] or for those relating to bodies established by law[246] or to local government.[247]

Apart from the factor of national security, the privilege on the ground of public policy has to do with police interrogation. In criminal cases, any questions regarding the identity of an informant or the content of the information provided or other information that could lead to the informant's identification, are prohibited.[248] However, where an informant intends his/her disclosure and there are no persuasive reasons to prohibit it such as the possibility of committing more offenses or the adverse effect on police operations, the Court may allow his/her disclosure.[249] Also, the Police Authorities are not obliged to disclose the identity of any person that allowed the use of his/her premises as a "watchtower" by the Police[250] and any police reports sent to the General Attorney of the Republic[251] or any communications between police forces or prosecuting authorities are privileged.[252]

As to privileges which mainly protect their holder, we may classify them into four categories: the self-incrimination, the professional secrecy, the marital privacy and the statements accompanied with the phrase "without prejudice".

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[238] *Παπαδοπούλου και Άλλης ν. Ράπτη και Άλλων* (1996) 1 Α.Α.Δ. 1306; *Νικολάου ν. Κοσάρη ή Κοσιάρη και Άλλου* (1995) 1 Α.Α.Δ. 660.
[239] *Re Grosvenor Hotel London* (No 2) (1964) 3 All ER 354.
[240] *Frangoulides v. The Republic* (1965) 3 CLR 531.
[241] *Νικολάου ν. Κοσάρη ή Κοσιάρη και Άλλου* (1995) 1 Α.Α.Δ. 660.
[242] *Hospitals Consolidated Fund of Australia v. Hunt* (1983) 76 FLR 408.
[243] *Air Canada and Others v. Secretary of State for Trade and Another* (No 2) (1983) 1 All ER 910.
[244] *Attorney General v. Jonathan Cape Ltd and Others* (1975) 3 All ER 484.
[245] *Smith v. The East India Company* (1841) 41 ER 50.
[246] *D National Society for the Prevention of Cruelty to Children* (1977) 1 All ER 589.
[247] *Campbell v. Tameside Metropolitan Borough Council* (1982) 2 All ER 791.
[248] *R v. Hardy* (1974) 24 St Tr 1999; *R v. Omar* (2007) ONCA 117.
[249] *Savage v. Chief Constable of the Hampshire Constabulary* (2007) ONCA 117; *R v. Denton* (2002) EWCA Crim 272; *R v. Adams* (1997) Crim LR 292.
[250] *R v. Rankine* (1986) 2 All ER 566.
[251] *Evans v. Chief Constable of Survey* (1989) 2 All ER 594.
[252] *Horseferry Road Magistrates' Court, ex parte Bennett* (No 2) (1994) 1 All ER 289.

The privilege against self-incrimination comes from the common law.[253] Where a witness testifies under oath and he/she claims the privilege against self-incrimination, the Court examines whether the question to the witness could lead to criminal charges against him/her and whether there is a "substantial or real risk" for that.[254] However, there is doubt as to whether the privilege against self-incrimination could also relate to criminal offenses which are recognized in the legal systems of other countries than Cyprus.[255] There is no "substantial or real risk" for criminal charges where the witness was called to testify in a trial of another person for the offense for which the risk of self-incrimination relates to or where the witness has already been tried for that offence.[256] It should be noted that a litigant could not claim the privilege against self-incrimination in cases of intellectual property and deny to present documents since such documents could not be used in a possible criminal procedure against him/her.[257] The Court is obliged to warn a witness on time where an answer to a question may lead to self-incrimination and to inform him/her about his/her right to not answer.[258] However, a witness has not the right to not answer a particular question because he/she believes or estimates that incriminating questions will follow.[259] Also, a witness may deny his/her privilege against self-incrimination and answer potentially incriminating questions and in this case, she/he could not refuse to answer subsequent questions regarding the same issue.[260]

Regarding the professional secrecy, any confidential information does not lead to the application of the privilege automatically.[261] The public interest for justice outweighs the necessity to maintain confidentiality. However, in some cases, Courts have recognized the maintenance of confidentiality as superior.

First, all communications between a lawyer or a legal advisor and his/her client are privileged.[262] Communications between agents or employees of the above parties are also protected.[263] The legal secrecy also covers communications between an attorney and prospective witnesses where the taking of judicial measures is expected.[264] In addition, where judicial measures are expected to be taken against an attoney's client and a third person, both of them are able to invoke the privilege.[265] For the successful invocation of the professional secrecy of lawyers, an attorney-client relationship should

[253] *A and Others v. Secretary of State for the Home Department* (No 2) (2006) 1 All ER 575.
[254] See Takis Iliades and Nikolaos Santis, The Law of Evidence: Procedural and Substantive Aspects: 27.
[255] Ibid.
[256] *O' Neill v. Wilson* (1983) JC 42.
[257] *Penderhill Holdings Limited και Άλλων v. Κλουκινά και Άλλων* (2011) 1(Γ) Α.Α.Δ. 1921.
[258] *Kirkwood v. Kirkwood* (1875) 3 R 235.
[259] *Don v. Don* (1848) 10 D 1046.
[260] *Bannatyne v. Banatyne* (1886) 13 R 619; *Greenan v. HM Advocate* (2006) SCCR 659.
[261] See Section 13 (1) of the Regulations (Ethics of Lawyers), 237/02.
[262] *Greenough and Others v. Gaskell* (1824-34) All ER Rep 767; *Bolton v. Liverpool Corporation* (1833) 39 ER 624.
[263] *R v. Derby Magistrates' Court, ex parte B* (1995) 4 All ER 526.
[264] *Smith v. Darnell* (1874) 44 LJ Ch 189.
[265] *Lee v. South West Thames Regional Health Authority* (1985) 2 All ER 385.

be proven[266] and the aim of the communication should be the giving or the acceptance of a legal advice and it does not matter if the advice was not extensive.[267] Communications may be privileged even if they do not relate to the provision of a certain legal advice. In some cases, there is a continual exchange of information between an attorney and his/her client which does not include any certain legal advice but it is so connected to the groundwork as to be an integral part of the transaction.[268] However, the privilege may not be invoked where an attorney acts for more than one client at the same time (e.g. in the case of a transaction) and one of his/her client wants to use a document against the other;[269] or where an attorney-client relationship aims at the commitment of a criminal offense.[270] It should be noted that a client may deny the privilege of his/her communications with his/her attorney either in an explicit way e.g. by submitting evidence consciously;[271] either in an implicit way e.g. by disclosing documents unconsciously[272] or by disclosing a part of a document[273] or where he/she has no interest to the existence of his/her privilege anymore.[274]

Even though the communication between a client and an accountant is not generally privileged, it seems that the privilege is applicable for the part of the communication that relates to the disclosure of any relevant and confidential legal advice.[275]

The banking secrecy is established by the Law 66 (I)/97 regarding the Credit Institutions in Cyprus. According to the section 29 (1), any person who has access to the files of a licensed credit institution is prohibited from providing, communicating, disclosing or using any information related to an account of any client, for his/her own interest. This rule applies even if his/her employment by the credit institution or the client's relationship with it, has been terminated. However, section 29 (2) provides some cases where the privilege does not apply e.g. the client or his/her agent gives his/her consent in written; the client is declared bankrupt, or if it is a company, where the company is under dissolution; legal proceedings have been instituted between the credit institution and its client regarding the account of the latter; the public interest or the protection of the interests of the credit institution require so.

An also important secrecy, is the protection of sources which is established by the Law 145/89 regarding Press Law in Cyprus. The section 8 (1) provides that a journalist may refuse to disclose his/her source of his/her information without being at risk to be prosecuted because of that. However, where the journalist publish information regarding

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[266] *Minter v. Priest* (1930) All ER Rep 431.
[267] *R v. Crown Court at Manchester, ex parte Rogers* (1999) 4 All ER 35.
[268] *Balabel and Another v. Air India* (1988) 2 All ER 246.
[269] *Re Konigsberg (a Bankrupt), ex parte the Trustee v. Konigsberg and Others* (1989) 3 All ER 289.
[270] *Nationwide Building Society v. Various Solicitors* (1999) PNLR 52.
[271] *Lyell v. Kennedy (No 3)* (1881-85) All ER Rep 814.
[272] *In Re Briamore Manufacturing Ltd (in liq)* (1986) 3 All ER 132.
[273] *Great Atlantic Insurance Co v. Home Insurance Co and Others* (1981) 2 All ER 485.
[274] *R v. Ataou* (1988) 2 All ER 321.
[275] *USP Strategies Ltd v. London General Holdings Ltd* (2004) EWHC 373; *Gotha City v. Sotheby's* (No 1) (1998) 1 WLR 114.

a criminal offense, he/she may be forced by the Court to disclose his/her source given that the Court is satisfied that the information is relevant to the offense; the information may not be taken otherwise and the protection of public interest requires such disclosure.[276] Additionally, a Court may decide for the disclosure of sources where the national security and the justice outweigh the privilege of a journalist to not disclose his/her sources.[277] It is worth noting that where the privilege collides with financial interests e.g. in the case of confidential documents relating to the financial position of a company, the former prevails over the latter.[278]

In the case of the medical confidentiality, the Regulations 100/91 regarding Medical Ethics, include special provisions for that kind of privilege. The section 9 establishes that the relationship between a doctor and his/her patient is sacred and a doctor may not disclose any information with which his/her patient provides him for diagnostic and treatment purposes. However, the law does not establish an absolute right of a doctor to not disclose the context of his/her professional communication with his/her client.[279] According to the section 13 of the above Regulations, where a Court orders a doctor to give certain information for a patient, the doctor may refuse to do that but in that case he/she has to accept the legal consequences of his/her refusal. Such a refusal is illegal but not unethical. Also, where a non-disclosure of information may put at risk the health or the physical integrity of others or to affect the society adversely, then the Court may order for such a disclosure.

As to the marital secrecy, it is not clear whether the potential of a spouse to not testify against the other spouse is a privilege. Many academics believe that it is just a legal principle which relates solely to whether the Court has the power to force a spouse to testify against the other spouse.[280] It should be noted that in criminal proceedings, a spouse may not be forced to disclose anything that was communicated from the one spouse to the other during the time of being married.[281]

Professional consultations between judges are also privileged. More specifically, consultations between judges in collective judicial bodies such as the Criminal Courts and the Supreme Court and notes that judges keep during the judicial process (other than the official ones) are covered by the judicial secrecy.[282] The same rule applies for consultations between a judge and staff helping him/her e.g. his/her clerk.[283]

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[276] Section 8 (2) of the Law 145/89.
[277] *Secretary of State for Defence and Another v. Guardian Newspaper Ltd* (1984) 1 All ER 453.
[278] *Goodwin v. The United Kingdom* (1996) 22 EHRR 123.
[279] *R v. Gayle* (1994) Crim LR 679; *R v. McDonald* (1991) Crim LR 122; *Campbell v. Tameside Metropolitan Borough Council* (1982) 2 All ER 791; *Hanter v. Mann* (1974) 2 All ER 414.
[280] Takis Iliades and Nikolaos Santis, The Law of Evidence: Procedural and Substantive Aspects, 1001.
[281] *Shenton v. Tyler* (1939) 1 All ER 827.
[282] *In the Matter of the Enforcement of a Sbpoena*, SJC 11117, MA S Jud Ct, August 9, 2012.
[283] Takis Iliades and Nikolaos Santis, The Law of Evidence: Procedural and Substantive Aspects, 1002.

The section 9 of the Law 18(I)/14 regarding the Right to Interpretation and Translation provides for another secrecy: any interpreter or translator is obliged to not disclose any information which he/she acquired during completing his/her professional duties under the above Law. Such an obligation does not exist for information taken during the public hearing before the Court.

A privilege of a great importance is that relating to the use of the phrase "without prejudice" in a document which is made as part of a genuine attempt to negotiate a settlement.[284] According to the rule, statements made by the parties or their attorneys "without prejudice" while attempting to reach a settlement either prior to the filling of the lawsuit either during the judicial process, may not be admitted as evidences. Statements made regarding the legal costs are also covered by the privilege.[285] However, there are some exceptions to the general rule e.g. where the litigant or the person who made a statement consents to its disclosure;[286] or the issue at stake is whether or not the negotiations reached an agreement;[287] or the document with the phrase "without prejudice" includes a threat against its recipient in the case that the latter does not accept a proposal.[288] It is worth noting that the privilege covers not only written statements but oral statements too: statements made during a consultation for a dispute resolution between both litigants or one of them and a mediator or other person such as a doctor or a family counselor are privileged.[289]

As to other forms of secrecies, it should be noted that English common law has not established a privilege regarding the context of a confession to a priest.[290] It is not clear whether there is such a privilege in Cyprus.

7 Expert Evidence

The litigants may ask the Court to allow an expert to testify regarding an issue. The Court has the discretionary power to accept or reject such an application taking into account whether an expert's testimony is necessary for the case and whether the proposed person has the required qualifications.[291] It is not up to the Court to propose the testimony of an expert and there is not a list of registered experts. However, the

[284] *Photiou Bros Co Ltd and Another v. Autolifts and Engineering Co Ltd* (1984) 1 CLR 422.
[285] *Reed Executive Plc and Another v. Reed Business Information Ltd and Others* (2004) 4 All ER 942.
[286] *Barnetson v. Framlington Group Ltd* (2007) 3 All ER 1054; *Skattou v. M/V "Koreiz" and Another* (1982) 1 CLR 804.
[287] *Tomlin v. Standard Telephones and Cables Ltd* (1969) 3 All ER 201.
[288] *Kurtz v. Spence* (1888) 58 LT 438.
[289] *Mole v. Mole* (1950) 2 All ER 328; *D v. National Society For the Prevention of Cruelty to Children* (1977) 1 All ER 589; *Theodoropoulas v. Theodoropoulas* (1963) 2 All ER 772.
[290] *Normanshaw v. Normanshaw and Measham* (1893) 69 LT 468; *R v. Griffin* (1853) 6 Cox CC 216.
[291] *R v. Francis* (2013) EWCA Crim 123; *Σιακόλα ν. Αστυνομίας*, Ποιν. Έφ. 53/11, ημ. 24.1.13; *Yaacoub ν. Δημοκρατίας*, Ποιν. Έφ. 72/13, ημ. 19.3.14.

Court has the power to call and examine any witness or expert at any stage of a civil or criminal procedure.[292]

The opinion of an expert is admissible where the issue requires special knowledge or experience. In *Θεοσκέπαστη Φαρμ ν. Κυπριακής Δημοκρατίας*,[293] the Judge Artemides said that the expertise on an issue depends not only on academic qualifications but on real experience too. In *Silverlock*[294] it was held that the capacity of an expert to testify it does not depend only on professional knowledge but on the preparation of a special project too.

Regarding the role of an expert, in *Davie v. Edinborough Magistrates*,[295] it was held that the obligation of an expert is to give to the Court the necessary scientific criteria/guidelines as to the evaluation of the correctness of their conclusions. In this way, the Judge will be able to express his own independent opinion using these criteria/guidelines. Similarly, in *Philippou v. Odysseos*,[296] the Judge Stylianides said that experts are being called to give scientific guidelines as to technical issues so as to the Court being able to create its own independent opinion using these guidelines.

As to the facts on which an expert could rely on in *Δημοκρατίαν. Χαχολιάδης*,[297] and *Νικολάουν. Σταύρου*[298] it was held that they should be facts which could be proven using admissible evidence. Also, the expert should give opinion only as to issues which are included in his experience.[299] Expert witness was admissible for handwriting,[300] fingerprints,[301] medical issues[302] and voice recognition.[303] Expert witness was not admissible for legal issues.[304]

The same procedure is being followed when experts or when ordinary witnesses are questioned.[305] Experts are examined and cross-examined by the litigants as any other witnesses and a delivering party has the opportunity to confute his/her expert by calling another expert, when the first one proved to be unfavorable for his/her case.[306] Also, when the opposing party proposes another expert to the Court, the Court has the

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[292] Section 48 of the Law 14/60; Section 54 of Chapter 155.
[293] Πολιτική Έφεση 7182 της 27/11/1990.
[294] (1894) 2 QB 766.
[295] (1953) SC 34.
[296] (1989) 1 CLR 1.
[297] (1980) 1 CLR 481.
[298] Πολιτική Έφεση 5103 της 21/10/89.
[299] *Polivitte Ltd. v. Commercial Union Assurance Co.* (1987) 1 Lloyds Rep 379.
[300] *Stasoulis v. The Police* (1971) 1 CLR 300.
[301] *Charitonos v. The Republic* (1971) 2 CLR 301.
[302] *Kouppis v. The Republic* (1977) 2 CLR 361.
[303] *Bentum* (1989) 153 J.P. 538.
[304] *Γενικός Εισαγγελέας ν. Ιορδάνους*, Ποινική Έφεση 5675 της 9/6/1993; *The Seven Up Company v. The Republic* (1973) 3 CLR 612.
[305] Takis Iliades and Nikolaos Santis, The Law of Evidence: Procedural and Substantive Aspects, 601.
[306] *Ewer v. Ambrose* (1825) 3 B & C 746.

discretionary power to accept such an application given that there are substantial reasons.[307] However, some rules governing the procedures are quite different. During the questioning, experts express their opinion and they may be asked to answer to hypothetical questions or refer to writings.[308] Generally, when an expert refers to an excerpt of a writing, the Court is not bound by its content and it has the discretionary power to make conclusions based on other excerpts of that writing.[309] Experts should always submit the writings they referred to.[310] It should be noted that rules governing the taking of evidence from an expert appointed by the court and an expert appointed by the parties are the same.[311]

The testimony of an expert and an ordinary witness is assessed with the same principles.[312] Nevertheless, the behavior of an expert while testifying is not so important for assessing his/her reliability as for other witnesses.[313] Without any doubt, the seriousness and the responsibility with which an expert approaches his/her task[314] and the ground of his/her opinion are important factors for assessing his/her testimony.[315] The Court is not obliged to accept the testimony of an expert even if that testimony is not contradicted by the other side.[316] Where the opinions of different experts are contradicted, the Court may accept some of these opinions and reject others or reject all of them and proceed to its own analysis using the rest admissible and reliable testimony.[317] The Court should always justify its decision regarding the acceptance or the rejection of a testimony.[318]

8 Taking of Evidence

There are some areas of pre-trial activity regarding the taking of evidence which may arise in civil litigation: disclosure and inspection, exchange of witness statements, affidavits and commissions. Also, the availability of some types of injunctions such as "Anton Piller" or "Norwich Pharmacal" orders, ensures the taking of necessary

[307] *Daniels v. Walker* (2000) 1 WLR 1382.
[308] Takis Iliades and Nikolaos Santis, The Law of Evidence: Procedural and Substantive Aspects: 601.
[309] *Collier v. Simpson* (1813) 5 C & P 73.
[310] *R v. Taylor* (1874) 13 Cox CC 77.
[311] Takis Iliades and Nikolaos Santis, The Law of Evidence: Procedural and Substantive Aspects: 579-580.
[312] *Κοινοτικό Συμβούλιο Ομόδους ν. Κονναρή* (2011) 1(Γ) Α.Α.Δ. 2298; *Καουρής ν. Δημητρίου και Άλλης* (2008) 1(Β) Α.Α.Δ. 967; *Κίτση ν. Γενικού Εισαγγελέα της Δημοκρατίας* (2001) 1(Β) Α.Α.Δ. 1077.
[313] *Σιακόλας ν. Medousa Constructions Ltd*, Ποιν. Έφ. 161/12, ημ. 20.5.14; *Χαραλάμπους ν. Αβραάμ και Άλλης* (1999) 1(Β) Α.Α.Δ. 1441.
[314] *Μιτσιγιώργη και Άλλος ν. Αδελφών Γαλάζη* (1997) 1(Γ) Α.Α.Δ. 1811.
[315] *Παύλου ν. Ανδρέου*, ΠΕ 185/09, ημ. 26.3.14.
[316] *Νεοφύτου και Άλλων ν. Elma Holdings Ltd*, ΠΕ 288/09, ημ. 6.9.13; *Πελεκάνος και Άλλων ν. Πελεκάνου και Άλλου* (2010) 1(Γ) Α.Α.Δ. 1746.
[317] *Παπαχριστοφόρου ν. Κυπριακής Δημοκρατίας* (2000) 1(Α) Α.Α.Δ. 488.
[318] *Αρχή Ηλεκτρισμού Κύπρου ν. D & A Charalambous (Frozen Foods) Limited και Άλλου*, ΠΕ 270/08, ημ. 15.3.12.

evidence by the parties. Each of the above activities requires a mandatory sequence and special conditions to be satisfied.

Every application to the Registrar shall be in writing stating the nature of the request made and referring to the specific section of the Law or to the specific Rule of Court upon which it is founded. If the application relies on any facts which do not appear in the Court books or records, it shall be supported by affidavit.[319] Applications made ex parte or by summons shall set out at the foot thereof the name of every person to be served therewith and the address at which service is to be effected, which in the case of any person who has given an address for service in the action may be such address.[320] In the case of applications which may be made without affidavit, the facts relied upon (if any) shall be stated in the applications; and in the case of applications supported by affidavit, it shall be sufficient if reference is made thereto for the facts relied upon.[321] Where an application is made by summons an office copy thereof shall be served on all persons affected thereby; and where such application is supported by affidavit, an office copy of the affidavit shall be served together with the summons. The service shall be effected at least four days before the day fixed for the hearing of the application.[322] At least two days before the hearing of the application, the opposing party may file an objection supported by an affidavit in which he/she should specify the grounds for objection.[323]

Applications for taking evidence are made before hearing so as the parties be able to organize and support their case for the that stage in the best possible way. However, it is lawful for the Court/Judge, at any time during the pendency of any cause or matter, to order the production by any party thereto upon oath of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the Court shall think right; and the Court/Judge Judge may deal with such documents when produced in such manner as shall appear just.[324] Moreover, the Court of first instance has the discretionary power to accept the additional submission of evidence under certain conditions. The plaintiff has the opportunity to call and examine additional witnesses before the defendant begins presenting his/her own case.[325] The plaintiff has to explain why he/she did not call these witnesses at the beginning of the procedure. If he/she could find and call these witnesses on time and he/she failed to do so, his/her application for the presentation of additional witness will be rejected.[326] Similarly, the Court has the opportunity to allow additional evidence to be submitted by the defendant after the latter finishes with the presentation of his/her case.[327]

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[319] Order 48 Rule 1.
[320] Order 48 Rule 2 (2).
[321] Order 48 Rule 2 (3).
[322] Order 48 Rule 3.
[323] Order 48 Rule 4 (1).
[324] Order 28 Rule 4.
[325] *Επί Τοις Αφορώσι την Αίτηση του Γιαννάκη Μ Βασιλιτσιά* (1995) 1 Α.Α.Δ. 1119.
[326] *Abu Dhabi National Company for Building Materials v. Damiata Shipping Company Limited και Άλλων* (Αρ. 1) (2003) 1 (Β) Α.Α.Δ. 1163.
[327] *Χαραλάμπους ν. Δημοκρατίας*, Ποιν. Έφ. 180/07, ημ. 29.6.12.

As to the disclosure, any party may apply to the Court/Judge for an order directing any other party to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question therein. On the hearing of such application the Court/Judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may, in the Court's or Judge's discretion, be thought fit: provided that discovery shall not be ordered when and so far as it is not necessary either for disposing fairly of the cause or matter or for saving costs. If an order is made for discovery, such order shall specify the time within which the party directed to make discovery shall file his affidavit.[328] If a party ordered to make discovery of documents fails so to do, he cannot put in evidence on his behalf in the action any document he failed to discover or to allow to be inspected, unless the Court is satisfied that he had sufficient excuse for so failing.[329]

Also, any party may apply for an order to inspect documents except such as are disclosed in the pleadings, particulars or affidavits of the party against whom the application is made. The application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court does not make such order for inspection of such documents when it is not necessary either for disposing fairly of the cause or matter or for saving costs.[330] If any party refuses to allow inspection at the place named by him in that behalf and within the prescribed time of any document which he has not objected to produce, or if he fails to comply with any order for discovery or inspection of documents, he shall be liable to attachment. In the case that he is a plaintiff, he would be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence (if any) struck out, and to be placed in the same position as if he had not defended, and the party seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.[331]

In addition, in civil cases at common law the traditional position was that all evidence was normally given viva voce at the trial.[332] However, the evidence of any witness may be taken by leave of the Court or a Judge at any time as preparatory to the hearing of the action or any application therein before the Court or any Judge thereof, and the evidence so taken may be used at the hearing subject to just exceptions. Evidence so taken shall not be used at the hearing unless the party obtaining leave shall have given notice to all other parties to attend at the examination. Evidence shall be taken in like manner, as nearly as may be, as evidence at the hearing of an action is to be taken. The note of the evidence shall be read over to the witness, and tendered to him for signature. If he

[328] Order 28 Rule 1.
[329] Order 28 Rule 3.
[330] Order 28 Rule 5.
[331] Order 28 Rule 12.
[332] Colin Tapper, *Cross and Tapper on Evidence*: 278.

refuses to sign it a note shall be made of his refusal, and the evidence may be used whether he signs it or not.[333]

Regarding affidavits, the Court or a Judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient cause to be dispensed with be examined by interrogatories or otherwise before a commissioner or examiner; and where any witness is in a country with which a convention in that behalf has been or shall be extended to Cyprus, the Court may order such witness to be examined before the competent Court or authority of such country or before any person appointed by such Court or authority: provided that, where it appears to the Court or Judge that the other party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.[334]

Additionally, the Court may issue an order for a commission to examine witnesses.[335] The procedure which shall be adopted where an order is made to examine a witness or witnesses in any foreign country with which a convention in that behalf has been or shall be extended to Cyprus.[336] If any witness shall object to any question which may be put to him before an examiner, the question so put and the objection of the witness thereto, shall be taken down by the examiner and transmitted by him to the Court to be there filed, and the validity of the objection shall be decided by the Court.[337] In the case that the witness refuses to attend, or if, having attended, he refuses to be sworn or to answer any lawful question, a certificate of such refusal, signed by the examiner, is being filed in Court, and thereupon the party requiring the attendance of the witness may apply to the Court or a Judge for an order directing the witness to attend, or to be sworn, or to answer any question, as the case may be.[338]

Last but not least, an injunction can be issued after a relevant application is filed in the context of a main procedure, such as an action commenced by a writ of summons or a writ of summons specially indorsed or even after an originating summons is issued. The application is supported by an affidavit made by a person who personally knows the facts of the case or who specifies the source of his knowledge. The respondent may then file an objection supported by an affidavit in which he/she should specify the grounds for objection. The hearing of the application is conducted on the basis of the facts stated in the application or in the affidavits reserving the right for cross-examination of the affiant. Section 32(1) of the Law 14/1960 aims to define the remedial powers of the Court to grant relief of an equitable nature, namely to issue injunctions and appoint receivers. Section 32 provides that every Court, in the exercise of its civil jurisdiction,

[333] Order 36 Rule 5.
[334] Order 36 Rule 1; Order 39 Rule 1.
[335] Order 37 Rule 1.
[336] Order 37 Rule 2.
[337] Order 37 Rule 7.
[338] Order 37 Rule 8.

has the power to grant an injunction (interlocutory, perpetual or mandatory) or appoint a receiver in all cases in which it appears to the Court just or convenient so to do. Furthermore, as the court stated in the case *Odysseos Andreas v. A. Pieris Estates Ltd and Another*[339] "the justice and convenience of the case is not the sole consideration to which the Court should play heed in the case of an interlocutory injunction, and no such injunction should be granted, unless all of the following conditions are satisfied: (a) A serious question arises to be tried at the hearing, (b) there appears to be "a probability" that plaintiff is entitled to relief and, lastly (c) unless it shall be difficult or impossible to do complete justice at a later stage without granting an interlocutory injunction". The issued interlocutory injunction may be under such terms and conditions as the Court thinks just and the Court may at any time, on reasonable cause, annul or modify the said injunction.

More specifically, the "Anton Piller" orders aim to preserve evidence and to prevent its destruction. A defendant is ordered to permit the claimant to enter his/her premises for certain purposes. In the leading English case *Anton Piller K.G. v. Manufacturing Processes Ltd*,[340] which was cited in a number of Cypriot cases,[341] the following pre-conditions were stated: (a)There must be an extremely strong prima facie case, (b) the damage, potential or actual, must be very serious for the applicant, (c) there must be clear evidence that the defendants have in their possession incriminating documents or things and (d) there is a real possibility that they may destroy such material before any application inter partes can be made.

"Norwich Pharmacal" orders aid the search and discovery of information and especially information which is necessary in order to identify a wrongdoer. Cyprus Courts follow the principle stated in *Norwich Pharmacal Co and others v. Commissioners and Custom* Excise[342] that "if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration". The conditions that have to be satisfied for issuing such an order is that "(i) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer; (ii) there must be the need for an order to enable action to be brought against the ultimate wrongdoer; and (iii) the person against whom the order is sought must: (a) be mixed up in so as to have facilitated the wrongdoing; and (b) be able or likely to be able to provide the information necessary to

[339] (1982) 1 CLR 557.
[340] (1976) Ch 55.
[341] In re Christoforos Pelekanos and Others (1989) 1 CLR 467.
[342] (1973) 2 All E.R. 943.

enable the ultimate wrongdoer to be sued".[343]

Generally, a Court/Judge has the power to reject any application for taking of evidence when all or some of the special conditions are not satisfied and its decision should always be justified.[344] Rejection of an application to obtain evidence may be based on *res judicata* too. The concept of res judicata may apply in certain circumstances wherein one court established certain facts and issued a final judgment regarding a case and another court examines a case in which the litigants, the status of the litigants and the disputed issues are the same with these of the former case.[345] A lawsuit/criminal charge may include different issues or facts which should be considered by the Court. A judgment as to an issue or a fact, prevent litigants from bringing it back for consideration.[346] This rule does not apply only regarding issues or facts relating to the base of the lawsuit/criminal charge.[347] However, where new evidence is founded that could not be discovered when the issue or fact at stake was being considered in the previous proceedings and the previous judgment proves to be legally wrong, the rule of res judicata does not apply.[348]

It should be noted that a court decision on evidence can be changed. The opposing party may apply to the Court of Appeal so as to cancel an Order on taking of evidence claiming that all or some conditions for issuing such an Order are not satisfied. According to Order 35, Rule 2 of the Civil Procedures Rules "… no appeal from any interlocutory order, or from an order, whether final or interlocutory, in any matter not being an action, shall be brought after the expiration of fourteen days, and no other appeal shall be brought after the expiration of six weeks, unless the Court or Judge, at the time of making the order or at any time subsequently, or the Court of Appeal shall enlarge the time. The said respective periods shall be calculated from the time that the judgment or order becomes binding on the intending appellant, or in the case of the refusal of an application, from the date of such refusal…"

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[343] *Mitsui & Co Ltd v. Nexen Petroleum UK Ltd* (2005) EWHC 625; *Avila Management Services Limited and others v. Frantisek Stepanek and others* (2012) Appeal No. 54/2012, dated 27/06/2012.

[344] Regarding the obligations of Courts to justify their interim or final decisions see article 30 (2) of the Cyprus Constitution.

[345] *Χριστοφορίδης και Άλλης ν. Λαϊκής Κυπριακής Τράπεζας Δημόσιας Εταιρείας Λτδ* (2011) 1(Γ) Α.Α.Δ. 2166; *Μιχαήλ ν. Σκουτέλλα* (2008) 1 (Β) Α.Α.Δ. 1125; *Πανέρας ν. Πανέρα* (2001) 1(Γ) Α.Α.Δ. 1684.

[346] *Duchess of Kingston's Case* (1775-1802) All ER Rep 623; *Hoystead and Others v. Taxation Commisioner* (1925) All ER Rep 56; *Παμπορίδης ν. Κτηματικής Τράπεζας Κύπρου Λτδ* (1995) 1 Α.Α.Δ. 670; *Theori and Another v. Djoni and Another* (1984) 1 CLR 296.

[347] Ibid.

[348] *Arnold and Others v. National Westminster Bank Plc* (1991) 3 All ER 41.

9 The Hearing

9.1 Presence and Participation of the Parties

Regarding criminal cases, the defendant is entitled to be present in Court throughout the proceedings, since he/she behaves decently. If the defendant does not behave decently, the Court may order the defendant to be transferred and remain in custody; continue the trial in his/her absence and make such arrangements as to ensure that the defendant will be informed of what happened during the trial. The Court may, if it considers it appropriate, to allow the defendant to remain outside the Court during the entire trial or part thereof, on such terms as it may deem fit.[349]

As to civil cases, there is not a legal provision relating to the presence of the parties during the trial. In most cases, lawyers appear on behalf of the parties. However, the Court/Judge, usually asks the presence of the parties during the hearing or at the stage when the judgment is going to be communicated.

9.2 Direct and Indirect (Circumstancial) Evidence

There is a distinction between direct and indirect (or circumstantial) evidence, with the former leading itself to prove a fact in issue and the latter leading to prove indirectly – with the association of other relevant evidence – a fact in issue. Direct evidence is only testimonial evidence which is produced by a witness who got aware of it directly by using his/her own senses. It may constitute among others, the testimony of an eyewitness.[350] In contrast, indirect evidence may refer to the defendant's motive; preparatory acts; opportunity for committing the civil wrong; ability; identification etc. It may be oral, written or real evidence.[351] In *Παφίτης άλλος ν. Δημοκρατίας*,[352] the Supreme Court held that the indirect evidence is not less powerful than direct evidence. There is no bias against circumstantial evidence. When it is deduced, it has the potential to destroy the possibility of human error.

9.3 Preparation of Witnesses

Witness preparation or coaching by counsel is common practice, even though the idea of witnesses being instructed or guided by advocates (or anyone for this matter) is certainly not viewed favorably by the law.

It should be noted that in any criminal or civil proceedings, the Court may – if it considers that the justice requires so- to allow a witness who is abroad, to give his/her testimony via videoconference. The Court may impose any terms it considers necessary for the taking of evidence but these terms should not be inconsistent with commitments

[349] Section 63 of the Chapter 155.
[350] Takis Iliades and Nikolaos Santis, The Law of Evidence: Procedural and Substantive Aspects: 59.
[351] Ibid: 551-556.
[352] (1990) 2 Α.Α.Δ. 102.

undertaken by the Republic of Cyprus in bilateral or international conventions governing the issue.[353]

10 Costs and Language

10.1 Costs

As a matter of principle, each party is expected to bear its expenses for all types of evidence submitted. When the Court delivers an interim or a final decision, it orders the party against which the decision is issued, to pay the expenses of the other party. The Court has the discretionary power to make such an order regarding the expenses as it considers fit.[354] Parties as between themselves, and lawyers as between themselves and their clients are entitled to charge and be allowed such fees the Supreme Court accepts case by case; and where the claim in any cause or matter is not a claim for money, the value of the claim must be ascertained from the evidence in the case or, if it cannot, then from any admission made to the Registrar or evidence received by him.[355] The Court or Judge may allow, or order to be taxed, fees on a higher scale than those specified in Appendix B on special grounds arising out of the nature and importance or the difficulty or urgency of the case, and may in addition allow, generally or in regard to particular items, fees for a second lawyer on such scale as may seem fit, but not exceeding two-thirds of the fees allowed to the first lawyer.[356]

Cyprus courts are granted full discretion with regard to the estimation and allocation of "costs of and incident to any proceeding."[357] The court may authorize the payment of executors, administrators or trustees who have "not unreasonably instituted, or carried on, or resisted any proceeding … out of a particular estate or fund.[358] Where upon the trial of any cause or matter it appears that the same cannot conveniently proceed by reason of the lawyer for any party having neglected to attend personally, or by some other person on his behalf, or having omitted to give notice or deliver any papers or do any other act that was necessary, the lawyer shall personally pay to all or any of the parties such costs as the Court or Judge shall think fit to award.[359]

If in any case it appears to the Court or Judge that costs have been incurred either improperly or without any reasonable cause, or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the lawyer, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court or Judge may call on the lawyer of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the lawyer and his client, and also (if the circumstances of the case require)

[353] Section 36 A of Chapter 9.
[354] Order 30 Rule 2.
[355] Order 59 Rule 3.
[356] Order 59 Rule 5.
[357] Order 59 Rule 1.
[358] Order 59 Rule 1.
[359] Order 59 Rule 2.

why the lawyer should not repay to his client any costs which the client may have been ordered to pay to any other person; and may thereupon make such order as the justice of the case may require. Such notice of the proceedings or order shall be given to the client in such manner as the Court or Judge may direct.[360] Also, a set-off for damages or costs between parties may be allowed.[361]

It should be noted that where the Regulation 1206/2001 is applicable, the execution of a request by a Court in Cyprus does not give rise to a claim for any reimbursement of taxes or costs.[362] However, if the requested court so requires, the requesting court should ensure the reimbursement, without delay, of the fees paid to experts and interpreters, and the costs occasioned by the application of Article 10(3) and (4) of the Regulation regarding the any special procedure or the use of videoconference and teleconference. The duty for the parties to bear these fees or costs is governed by the law of the Member State of the requesting court.[363] A deposit or advance is not a condition for the execution of a request unless the opinion of an expert is required. In the case of an expert, the requested court has the potential to ask the requesting court for an adequate deposit or advance towards the requested costs, before executing the request.[364]

10.2 Questions of Language

Before we proceed with the precise rules and practice currently in force, a general note with regard to the language questions in Cyprus law and procedure is needed. During the British colonial era, English was the official language, including the language of the courts. The 1960 Constitution made Greek and Turkish (but not English) the official languages of the Republic of Cyprus.[365] Depending on the ethnicity of the litigants, Greek or Turkish (or both) was to be the court language in a specific case.[366] However, the Constitution also provided for a five-year transition period, during which court proceedings could be allowed to take part in English.[367] Colonial legislation not abolishe upon indenedence was also allowed to remain in use in the original (English) language during this transition period.[368] The withdrawal of Turkish Cypriot officials from government positions in 1964, and the ensuing adoption of the doctrine of necessity, gave the impetus for the constant renewal of the five-year transition period.[369] Even though all new legislation was promulgated in Greek, for about thirty years colonial statutes and the Civil Procedure Rules remained untranslated, and English remained in use in court, especially at the Supreme Court level, even in cases involving

[360] Order 59 Rule 6.
[361] Order 59 Rule 7.
[362] Article 18 (1) of the Regulation 1206/2001.
[363] Article 18 (2) of the Regulation 1206/2001.
[364] Article 18 (3) of the Regulation 1206/2001.
[365] Art. 3 of the Constitution.
[366] Art. 3(4).
[367] Ibid, Art. 189(b).
[368] Ibid, Art. 189(a).
[369] See the Laws and Courts (Text and Procedure) Law 1965, L. 51/65.

only Greek-speaking ethnic Greeks as counsel, judges, parties and witnesses: it only took one advocate to request English to be used.[370] Things changed dramatically subsequently to the Official Languages of the Republic Law 1988.[371] The law re-launched or at least expedited the thirty-year lingering process of translating statutes into Greek. It also prohibited the use of English as the language of court proceedings.[372] In fact, it has been held that excerpts from English case law or legal literature in court judgments or orders must be accompanied by an appropriate translation into Greek.[373]

Evidence calls for a more pragmatic treatment. Cyprus courts may accept documents such as affidavits, in any foreign language. The court has the discretionary power to order the translation of a document or a part of it into any of the official languages of Cyprus.[374] The court also has discretionary power to evaluate the language abilities of parties and witnesses and to order translation or an interpreter.[375] Moreover, any witness may testify in his/her mother tongue unless he/she feels that he/she does not need the help of an interpreter and therefore, he/she testifies in Greek.[376] In civil cases, when the Court decides that an interpretation is necessary regarding the testimony of a witness, the delivering party should manage to bring an interpreter to the courtroom at his/her own expenses. If the delivering party, finally, wins his/her case, he/she will receive a payment of his/her expenses by the other party. However, in criminal cases, the competent authority – Police Authorities or Criminal Courts – should provide interpretation (at its own expense), to a suspect or a defendant who does not speak and/or understand the language of the criminal proceedings, during the conduct of criminal proceedings before investigative and/or judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.[377] The interpretation provided should be of sufficient quality to ensure a fair trial; particularly to ensure that the suspect or the defendant is aware of the case against him and therefore, be able to exercise its right of defense.[378]

11 Unlawful Evidence

In the spirit of the European Court of Human Rights, which concerns itself with whether the method of obtaining specific evidence violates the right to a fair trial (leaving to national laws the admissibility on the whole of various types of evidence),[379] Cyprus law is concerned with illegality obtained evidence. A distinction is also being made

[370] See e.g. Koumi v. Kortari (1983) 1C.LR. 856.
[371] L. 67/88.
[372] Σοφοκλέους v. Στυλιανού (1992) 1 Α.Α.Δ.81]; *Hassanein v. Hellenic Island and/or Island και Άλλοι* (Αρ 1) (1994) 1 Α.Α.Δ. 303; Orams v. Apostolides (2006) 1 C.L.R. 1402.
[373] *Παύλου v. Αιγίς Ασφαλιστική Εταιρεία Λτδ* (2004) 1 Α.Α.Δ. 1006.
[374] Article 5(1) of the Official Languages of the Republic Law 1988.
[375] Eliades & Santis, 80.
[376] *Kabbarav. Αστυνομίας*, Ποιν. Έφ. 197/12, ημ. 19.2.13.
[377] Section 4 (1) of the Law 18(I)/2014 regarding the Right to Interpretation and Translation in Criminal Proceedings.
[378] Section 4 (6) of the Law 18(I)/2014.
[379] ECtHR, *Schenk v. Switzerland*, No. 10862/84, judgment of 12 July 1988, esp. paras. 45-46, as discussed in Paraskeva (2015), 515-517.

between evidence obtained in (technical) violation of an ordinary legal rule or provision and evidence obtained in violation of a constitutionally protected right. In the former case, the Court may retain the discretionary power to accept it. This is certainly not the case, however, with regard to the latter case.

The Supreme Court has also gone much further than the European Court of Human Rights,[380] by taking an absolute stance vis-à-vis the use of "evidence obtained in violation of the rights and liberties safeguarded by the Constitution."[381] Certainly, testimonies and confessions obtained in violation of fundamental constitutional rights – such as arrest without warrant, or in violation of the right of self-incrimination – are not admissible.[382] But this also holds true for instances such as the recording of a private conversation between the accused and a third person, recorded without the consent and knowledge of either party. In *Police v. Georghiades*, the taping, by a third party, of a conversation between the accused and his client was held to be in violation of both Article 15 (right to privacy) and Article 17 (right to the secrecy of correspondence).[383] In *Police v. Giallouros*, this prohitibion was used to deny the accused his request to introduce such a recording, as evidence either for its content or for identification purposes.[384] Following up on the constitutional case law, statutory law now expressly penalizes the interception of private communication and prohibits the use of content thus obtained in any criminal or civil process.[385]

However, the protection of privacy does not extend to evidence obtained by business correspondence between the parties,[386] or from private documents kept in a way that allows third persons access to and use of them.[387]

12 International Aspects

Compared to, notably, service of process, judicial cooperation in matters of obtaining evidence has remained more closely linked to the sovereignty of the State in whose territory evidence must be taken – perhaps because the evidence process was traditionally internal to the trial itself, but also because of the discretionary character

[380] See the discussion of pertinent case law in Paraskeva (2015): 516, for cases where the process as a whole was held not to violate Article 6 of the European Convention, even though evidence was obtained in a manner frowned upon by the law.
[381] Police v. Georghiades (1983) 2 C.L.R. 33.
[382] See respectively *Merthodjan v. Police* (1987) 2 CLR 227; *Ψυλλάς v. Δημοκρατίας* (2003) 2 ΑΑΔ 353.
[383] Police v. Georghiades (1983) 2 C.L.R. 33.
[384] *Αστυνομία v. Γιάλλουρου* (1992) 2 Α.Α.Δ. 147.
[385] See Articles 3 and 16 of the Protection of Private Communication Secrecy Law 1996 [L. 92(I)/96].
[386] *Ενωτιάδης v. Αστυνομία* (1986) 2 CLR 64.
[387] *Ψαράς v. Δημοκρατία* (1987) 2 CLR 132.

involved in many of the procedural acts involving the collection and evaluation of evidence.[388]

The common law of evidence, as mirrored in the general rules on civil procedure and evidence, allowed the court to order parties to produce evidence situated abroad but no mechanism to enforce such orders. Things have drastically improved by a succession of international and EU instruments, especially with the accession of Cyprus to the Hague Evidence Convention. Accession to the European Union and the entry into force with regard to Cyprus of the Evidence Regulation has dramatically changed the landscape – clearly with regard to the European Judicial Area but also spilling over to the general outlook of the Cypriot judiciary.

In these matters, especially with international judicial cooperation, the Republic's competent authority is the International Legal Cooperation Unit of the Ministry of Justice and Public Order. This Unit mainly has the following responsibilities:

a) the drafting of bilateral agreements on judicial legal cooperation;
b) the study and accession of Cyprus to multilateral agreements relating to legal issues and
c) the implementation of the bilateral and multilateral agreements as well as the implementation of the acquis for issues of judicial assistance.

12.1 Hague Evidence Convention

Things were significantly improved by the accession, in 1983, of Cyprus to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. The Convention, child of the Hague Conference on Private Intenrational Law, is currenly in force between fifty-eight States.[389]

Cyprus has entered several reservations upon ratification of the Convention.

First, with regard to Letters of Request, Cyprus will allow "members of the judicial personnel of the requesting authority" to be present at the execution of a Letter of Request. like many other (especially European countries), Cyprus will not "execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents." This declaration, which is aimed at the aggressively expansive use of pre-trial discovery in U.S. litigation, targets any Letter of Request requiring a person "to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power" or "to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power." Finally, Cyprus refuses to accept Letters of Request in French.

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[388] Nikitas Hatzimihail, "General Report: Transnational Civil Litigation between European integration and global aspiration" in A. Nuyts & Nadine Watté, Transnational Civil Litigation in the European Judicial Area and in relations with third states (Bruylant, 2005): 595 ff., 671.

[389] See the – constantly updated – status table at the Hague Conference's website: http://www.hcch.net/index_en.php?act=conventions.status&cid=82.

Second, with regard to the possibility of foreign diplomatic officers, consular agents or commissioners to take evidence as prescribed in the Convention, such permission is made conditional upon the requesting Contracting State having "made a declaration affording reciprocal facilities."[390]

12.2 Bilateral Agreements on Judicial Cooperation

A number of bilateral agreements include provisions that enable the taking of evidence abroad.[391]

12.3 EU Evidence Regulation

The Evidence Regulation has taken things further than other international instruments. Within the narrower, more homogenous territory of the European Judicial Area (which nonetheless comprises about half of the Hague Evidence Convention's Contracting States), the Regulation made possible direct evidence-taking by the foreign court, as well as the taking into account of foreign procedural rules. It has also made it easier for the authorities of a Member State to execute requests and perhaps extent to third-country authorities some of the privileges extended to sister Member States – although the ability of a Cypriot or English judge to collect, under the Regulation, evidence in Germany for the benefit of a litigation taking place in Massachusetts is at best contested.[392] So far, we have not seen the fulfillment of wishes that the Evidence Regulation and its success would encourage the revision of the Hague Evidence Convention.[393]

The Regulation has already been producing case law in Cyprus. In Demetriou, the Supreme Court, after a (very) brief reference to the the purpose and aims of the Regulation, confirmed that execution of a request under the Regulation is not at the discretion of the court to which the request is addressed, the only grounds for refusal being those specified in Article 14 of the Regulation.[394]

In a previous case, the Limassol District Court allowed, on the application of the plaintiffs, the testimony of one witness – who for health reasons could not travel to and attend the hearing in Cyprus – to be given via teleconferencing in Germany, in accordance with Article 10(4) of the regulation.[395] The trial court noted that the absence of specific rules (such as the practice directions issued in the United Kingdom)

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[390] Declaration under Article 18 of the Convention.
[391] See a tentative list at Neocleous.
[392] Contrast, in the same volume [A. Nuyts & Nadine Watté (eds), *Transnational Civil Litigation in the European Judicial Area and in relations with third states* (Bruylant, 2005)] the positions taken by Chiara Beso, "Taking of Evidence Abroad" and Pascal de Vareilles Sommières, "Le Réglement communautaire."
[393] Hanna Buxbaum, "Improving Transatlantic Cooperation in the Taking of Evidence" in Nuyts & Watté: 361.
[394] *Δημητρίου v. Gondova* (2010) 1 Α.Α.Δ. 333.
[395] *IRZDRZ ao v FHL*, Πολιτική Αίτηση 2419/04.

regulating or providing for the due execution of the Regulation, and in particular certain procedural issues regarding the process of the taking of evidence, could in no manner affect the effectiveness of a directly applicable legal instrument such as the regulation.[396] The court reserved for itself the right to intervene, in order to rectify the situation in the interests of justice, in the event that technical problems could possibly interfere with the proper conduct of the hearing.[397]

[396] Ibid, citing *Beogradska Bank v Westacre Inc* (1999) 1 ΑΑΔ 124.
[397] Ibid.

Part II – Synoptical Presentation

1 Synoptic Tables

1.1 Ordinary Civil Procedure Timeline

Phase #	Name of the Phase Name of the Phase in National Language	Responsible Subject	Duties of the Responsible Subject (related only to Evidence) and Consequences of their Breach	Rights (related only to Evidence) of the Responsible Subject
1.	Application (Submission of the writ of summons). There are two types of writs, "Writ 2.1" for all actions and "Writ 2.6" for actions regarding liquidated demands.	Plaintiff		
2.	Within 10 days after the delivery of the writ, the Defendant should enter his appearance (Order 16, Rules 1-2).	Defendant	If he does not enter his appearance then the Plaintiff can apply for a judgement, under certain conditions (Order 17).	The Defendant can dispute the validity of the writ. He can make an application to set aside the writ (Order 16, Rule 9).
3.	Submission of the statement of claim (within 10 days from the appearance). There is no need of submission of claim in the case of "Writ 2.6".	Plaintiff	Preclusion	
4.	Submission of the defence within 14 days of the appearance.	Defendant		
5.	Reply	Plaintiff		
6.	Summons for directionswithin ten days from the time when the pleadings shall be deemed to be closed (Order 30).	Court		The Court among others can division that any particular fact or facts may be proved by affidavit or make an order for discovery and inspection or make such

				order for inspection of property.
7.	Discovery and Inspection (Order 28)	Plaintiff and/or Defendant		Request for the other party to deliver documents.
8.	Notice of Trial (Order 31)	Plaintiff or Defendant		
9.	Summoning witnesses (Order 32)	Plaintiff and Defendant		
10.	Hearing (Order 33)			
11.	Judgment (Order 34)			

1.2 Functional Comparison

Legal Regulation / Means of Taking Evidence	National Law	Bilateral Treaties	Multilateral Treaties	Regulation 1206/2001
Hearing of Witnesses by Mutual Legal Assistance (Legal Aid)			Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters: The court transmits the letter of request to the Central Authority of the requested State which forwards the letter to the Competent Authority in its country for execution. The law of the requested State applies to the execution of the letter of request. The requesting authority may also request the use of a special method or procedure for execution of the letter of request, provided that this is not incompatible with the law of the State addressed or impossible to perform.	The requestis directly transmitted by the requesting court to the competent requested one. The hearing is conducted by the requested court in accordance with the law of its Member State.
Hearing of Witnesses by Video-conferencing with Direct Asking of Questions	Article 36A of the Evidence Law (Cap. 9). In any criminal or civil case the Court may request a witness who is abroad to testify by video-conferencing. The Court may impose conditions which are not incompatible	Id.	Id.	Possible according to article 10, encouraged by article 17.

	with bilateral or multilateral treaties.			
Direct Hearing of Witnesses by Requesting Court in Requested Country	Evidence on commission or before examiner Order 37 of Civil Procedure Rules.	Id.	Article 8 ("A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorisation by the competent authority designated by the declaring State may be required.")	Possible according to articles 12 and 17.

Legal Regulation / Means of Taking Evidence	**National Law**	**Bilateral Treaties**	**Multilateral Treaties**	**Regulation 1206/2001**
Hearing of Witnesses by Mutual Legal Assistance (Legal Aid)			See above.	See above.
Hearing of Witnesses by Video-conferencing with Direct Asking of Questions	See above.	Id.	See above.	Id.
Direct Hearing of Witnesses by Requesting Court in Requested Country	No exact provisions, accepted in legal praxis (;)	Id.	See above. Cyprus has made no declaration under article 8 (;)	Id.

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