

**A comparative evaluation of Cypriot
corporate insolvency regimes in the light of
the 2015 reforms**



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Declaration

This thesis has not been submitted in support of an application for another degree at this or any other university. It is the result of my own work and includes nothing that is the outcome of work done in collaboration except where specifically indicated. Many of the ideas in this thesis were the product of discussion with my supervisor Professor David Milman.

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Abstract

This thesis looks into the Cypriot corporate insolvency regime and more specifically places focus on the 2015 amendments of the Cyprus Companies Law, Capital 113. These amendments were aimed at introducing a restructuring process for legal entities and promoting the rescue and restoration of business activities, as well as ensuring the protection of interests of all persons connected with insolvent companies and modernizing the liquidation procedures. At a general level, it describes the Cypriot legal regime on corporate liquidation and then evaluates the new insolvency laws and examines their effectiveness through a comparison between the new Cypriot corporate liquidation laws and the corresponding UK laws. This comparative method contributes in revealing the influences operating between these two jurisdictions and inspiring suggestions for additional changes in Cyprus in the future. At a more specific level, this thesis considers the new mechanism of Examinership which has been inspired by the corresponding Irish model, examines its relationship with the UK administration procedure and suggests that despite its promising rescue culture, the limited use of Examinership casts doubt on its effectiveness. It also considers the changes affecting the compulsory liquidation procedure and examines the similarities and differences with the corresponding UK law. The thesis examines views by commentators for and against the effectiveness of the new amendments, amongst others, in terms of speeding up liquidation process and reducing relevant costs and concludes that despite any doubts, the said amendments doubtless constitute a positive step in towards the modernization of the relevant framework. Finally, based on the comparative evaluation of the 2015 amendments and inspired by corresponding UK law, this thesis puts forward suggestions mainly focused on costs reduction and on the rapidity and simplicity of the proceedings.

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1. Introduction

1.1 Main Research aim

‘It has not escaped our notice that the number and nature of commercial transactions, in modern times, has substantially changed and therefore requires more flexible regulation that will meet the needs of the times and the immediacy imposed by trade relations. It depends on legislator’s discretion to take measures that are already applied in countries with similar to ours legal systems.’¹

The said excerpt is part of the Supreme Court’s findings and recommendations in *Nicolaou*² case in 2011, in regards to a specific anachronistic provision of the Companies Act, Capital 113 (Cap. 113), highlighting the need of law reform in the area of corporate liquidation law. The need for modernization of corporate liquidation law in Cyprus has been emphasized by the judiciary 4 years before enactment of the amendment laws of 2015 and has been confirmed after the financial downfall in Cyprus in 2013, which affected not only the banking sector but also every entity whose operation depended upon access to credit and financial institutions so as to cover its borrowing needs.

The main aim of this thesis is to analyze and evaluate the amendments in the Cyprus Cap.113 that came into force in 2015 with regards to companies’ liquidation. These amendments came into force, as a new package of insolvency laws and were part of the Bailout Program for Cyprus which aimed at assisting the Republic of Cyprus to cope with the challenges of the financial crisis. The analysis and evaluation of the new insolvency laws will shed light on the new provisions that have not been tested before the courts as yet and additionally, contribute in ascertaining whether the relevant amendments are efficient enough to serve the purpose for which they were introduced. In the course of serving the main research aim, this research will achieve additional important aims, namely a comparison of the law before and after the recent

¹ *Nicolaou v. Total Properties Ltd and others* [2011] 1 AAC 1358

² *ibid*

amendments, thereby disclosing the exact extent and nature of the change as well as a comparison between the new Cypriot corporate liquidation laws and the corresponding UK laws. This second exercise which will reveal the influence of the latter on the former and the extent to which the practical experience with the law in the UK could serve as an interpretation tool assisting Cypriot courts in the application of the new Cyprus laws.

Though Cyprus company law is largely codified, specifically in the Cap.113, the particular statute has strongly been influenced by the UK Companies Act of 1948 which it to a substantial degree copies.³ As Cyprus had been a British colony, the Cypriot legal system has greatly been influenced by English law and common law is still recognized as a main source of Cyprus law in Article 29(1) of the Court of Justice Law 14/60, which is applicable where there is no Cyprus legislation in force contradicting common law.⁴ Whereas Cyprus liquidation law is codified, meaning that common law is of limited applicability in the relevant area, still it would be very interesting to examine whether new Cyprus liquidation laws are identical or very similar to those of the UK as in this case relevant UK case law can serve as an important and useful source of guidance to the benefit of Cyprus courts, lawyers, the Cyprus Companies' Registrar and even companies which will have to deal with totally new legal provisions. The guiding role of the UK case law becomes even more important given the limited number of reported case in Cypriot case law, therefore an in-depth research will be conducted by accessing the legal database, British and Irish Legal Information Institute (Bailii).

1.2 Methodology – doctrinal/comparative

The thesis will mainly be based on doctrinal research involving primary and secondary sources of Cyprus and UK corporate law including the Companies' Acts and other legislation relating to liquidation as well as the explanatory reports and preparatory

³ Kyriacos Kourtellos and Demetris Roti, 'Cyprus: corporate insolvency – proposed reforms' (2015) 26(8) *International Company and Commercial Law Review* 59

⁴ Supreme Court of Cyprus, 'Legal System' (*Supreme Court*)

<http://www.supremecourt.gov.cy/judicial/sc.nsf/DMLLegSystem_en/DMLLegSystem_en?OpenDocument> accessed 3 March 2018

documents referring to the relevant amendments that took place in Cyprus in 2015 and case law. Because of the fact that these amendments in Cyprus are very recent and thus case law is scarce, referenced case law will mainly be derived from the jurisdiction of the UK. In addition to this, secondary sources such as books, scientific articles and websites will also be utilized to support the ideas and arguments of the writer. Given the fact that literature in Cyprus on liquidation law is also limited, this thesis will have to concentrate on primary resources with regards to Cyprus law and examined them by reference to and in the light of the more extensive literature on UK law.

As of the above, the main methodology of the said thesis will be based on comparative type of research of a doctrinal nature. This methodology will contribute in a better understanding of the law in force in both countries before and after the amendments, discovering common and different provisions and showing the influence between them, and this way achieve the above stated research aims.

Comparative legal research involves a comparative evaluation of human experience existed in a range of legal areas of different jurisdictions⁵ and may be doctrinal or non-doctrinal.⁶ There are some authors who refer to it as comparative law, however different authors have expressed opposing views on this matter, discussing whether it could be considered only as a method of research or a branch of law.⁷ It seems that most authors support the first view by noting that comparative law is simply a method or collection of methods, not a topic⁸ and examines legal systems via comparisons.⁹

It is worth referring to an excerpt from the work of K. Zweigert and H. Kotz who state that, *‘the method of comparative law can provide a much richer range of model*

⁵ P. Ishwara Bhat, ‘Comparative Method of Legal Research: Nature, Process and Potentiality’ (2015) Journal of the Indian Law Institute
<http://14.139.60.114:8080/jspui/bitstream/123456789/34748/1/009_Comparative%20Method%20of%20Legal%20Research%20Nature%20Process%20and%20Potenaiality%20%28147-173%29.pdf>
accessed 2 June 2018

⁶ *ibid*

⁷ *ibid*

⁸ Geoffrey Samuel, *An introduction to Comparative Law Theory and Method* (Hart Publishing, Oxford and Portland, Oregon 2014) 13

⁹ Roscoe Pound, ‘What we may expect from Comparative Law?’ (1936) 22 ABAJ 56, 59; K. Zweigert and H. Kotz, *Introduction to Comparative law* (3rd edn, Clarendon Press 1998) 40

solutions than a legal science devoted to single nation, simply because the different system of the world can offer a greater variety of solutions than could be thought up in a life time by even the most imaginative jurist who was corralled in his [or her] own system. Comparative law... extends and enriches the 'supply of solutions' and offers the scholar of critical capacity the opportunity of finding the 'better solution' for his [or her] time and place'.¹⁰

The above reference by Zweigert and Kotz, perfectly reflects the writer's view and reveals the reason why this method has been chosen in the context of this thesis. In fact, given the absence of practical experience in Cyprus, the comparison between the Cypriot corporate insolvency laws and the corresponding UK laws seems to be the only way to serve the main aim of the thesis as presented above.

The advantages taken into account so that comparative method to be chosen as the methodology that will be followed for the development of the thesis are numerous and can be summarized by stating that comparative methodology contributes to the comprehensive understanding of legal data and systems and supplying of solutions in case of problematic rules.¹¹ *'It goes beyond satisfying idle curiosity; it goes deep into the doctrinal rationales behind divergent legal systems; analyses traditions as storehouse of information and resource for reliance'.¹²*

There are, however, some limitations to the use of the comparative research method which should be taken to account by the writer. More specifically, there is the danger of concluding on the basis of an unfair comparison, which is rather superficial and is based on an incomprehensive knowledge of the elements of the two systems.¹³ It is suggested by some commentators that a satisfactory depth could be reached by examining specific regulations and legislation of legal systems, but not by *'studying*

¹⁰ Zweigert and Kotz (n 9) 40

¹¹ Bhat (n 5)

¹² *ibid*

¹³ Leszek Leszczyński, 'Legal Theory and the use of Comparative Research' (2015) 19 Comparative Law Review 29 <<http://apcz.umk.pl/czasopisma/index.php/CLR/article/view/CLR.2015.002/7560>> accessed 20 December 2018

reasoning, argumentation, legal axiology or legal and cultural phenomena'.¹⁴ It is also supported that insufficient knowledge of a specific matter could lead the researcher to rely on selected secondary sources that cannot be accessed correctly by him, while at the same time investigating another matter more deeply.¹⁵ This can happen as a result the conduct of asymmetrical comparison.¹⁶

Also, there seems to be a lot of discussion around the concept of legal transplants, which are usually studied when conducting comparative research in order for the research to be more comprehensive. Legal transplants have been described as '*the moving of a rule or a system of law from one country to another, or from one people to another*'¹⁷ and are used when legal solutions of foreign legal systems are taken over in the national legal system.¹⁸ A legal transplant could be considered as successful and useful only when they '*grow in its own body, and becomes part of that body just as the rule or institution would have continued to develop in its parent system*'¹⁹ and sometimes may be '*discrete and complex*' so that different elements of different countries are taken into account.²⁰ There are several examples which show that due to the existence of a different cultural context between two legal systems, successful elements of one legal system may fail to work in another legal system.²¹ Therefore, when conducting comparative research and examining legal transplantation from one system to another system, the different social, financial, technical and other circumstances between legal cultures and systems should be considered by the writer, as well as the reasoning behind choosing a specific legal rule to be transplanted and adopted.²²

¹⁴ *ibid*

¹⁵ Reza Azarian, 'Potentials and Limitations of Comparative Method in Social Science' (2011) 1(4) *International Journal of Humanities and Social Science* 113
<http://www.ijhssnet.com/journals/Vol._1_No._4;_April_2011/15.pdf> accessed 20 December 2018

¹⁶ *ibid*

¹⁷ Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, The University of Georgia Press 1993) 21

¹⁸ Danny Pieters, 'Functions of comparative law and practical methodology comparing, or how the goal determines the road!' <<https://www.law.kuleuven.be/personal/mstorme/Functions%20of%20comparative%20law%20and%20practical%20methodology%20of%20comparing.pdf>> accessed 20 December 2018

¹⁹ Watson (n 17) 27

²⁰ Pieters (n 18) 6

²¹ Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015)
<https://www.researchgate.net/publication/291373684_Methodology_of_Comparative_Legal_Research> accessed 20 December 2018

²² Irma Johanna Mosquera Valderrama, 'Legal Transplants and Comparative Law' (2004) *International Law Journal* 261 <<https://www.redalyc.org/pdf/824/82400207.pdf>> accessed 20 December 2018

In order to achieve the aims of this research, and be capable to make comparisons, doctrinal methodology will be also followed. It is generally recognized that doctrinal research has been used as the main legal method in the common law jurisdictions,²³ and ‘includes the tracing of legal precedent and legislative interpretation’,²⁴ as well as building of arguments based on several sources such as existing rules, principles, precedents, and scholarly publications.²⁵ More specifically, it could be summarized as the analysis of the relevant to the subject matter legislation and case law under the concept of critical thinking, so as to disclose and conclude to a statement relevant to the subject matter of the research.²⁶

It was also described as methodology which ‘provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments’²⁷ and involves connection creation between different doctrinal strands, and setting out of general principles from primary materials.²⁸ The importance of this methodology has been emphasized by stating that it is one of the main contributions made by legal scholars²⁹ and is directly connected with legal research.³⁰

1.3 Meaning of liquidation and legal framework in Cyprus law

²³ Terry Hutchinson, ‘The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law’ (2015) 3 *Eleve International Publishing* 130, 131
<https://www.elevenjournals.com/tijdschrift/ELR/2015/3/ELR-D-15-003_006.pdf> accessed 2 June 2018

²⁴ *ibid*

²⁵ Rob van Gestel and Hans-W. Micklitz, ‘Revitalizing Doctrinal Legal Research in Europe: What About Methodology?’ (2011) 05 *European University Institute Working Papers Law* 26

²⁶ Terry Hutchinson, ‘Valé Bunny Watson? Law Librarians, Law Libraries and Legal Research in the Post-Internet Era’, (2014) 106(4) *Law Library Journal* 579, 584

²⁷ D. Pearce, E. Campbell & D. Harding, ‘Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission’ (1987) Australian Government Publication Services

²⁸ Council of Australian Law Deans, *Statement on the Nature of Legal Research* (2005) 3 in Terry Hutchinson (n 23) 131

²⁹ M. Minow, ‘Archetypal Legal Scholarship – A Field Guide’, (2013) 63(1) *Journal of Legal Education* 65

³⁰ Hutchinson (n 23) 130

Cyprus liquidation law is governed by the Cap. 113, and the Companies (Winding-up) Regulations of 1933-2013. These Regulations regulate only the process after the issuance of the winding-up order and the submission of the statement of company's affairs to the Official Receiver.³¹ Accordingly, there is a regulatory gap in relation to the process before and after the decision in favour of the company's liquidation.³² Common law is also applicable since, as already explained above, constitutes a source of Cyprus law where there is no legislative provision on a specific matter. Therefore, liquidation can only operate as against a background of common law rights where gaps are identified. Cyprus courts are also guided by English case law which often sheds light on matters of liquidation law that have never been examined before and matters that are not sufficiently clarified by legislation.

Liquidation is the process taking place before the dissolution of the company and involves the appointment of a liquidator who is responsible to ensure that the assets of the company are collected, realized and distributed to the creditors of the company and, if there is a surplus, to any other entitled person.³³ After liquidation, the company is dissolved and ceases to exist as a legal entity,³⁴ and its name is removed from the Companies House Register.³⁵ The two main types of liquidation procedure in Cyprus are voluntary liquidation and compulsory liquidation, the latter being known as winding up by the Court. Voluntary liquidation can take two forms, namely, members' voluntary winding up and creditors' voluntary winding up.³⁶ These types of liquidation are recognized by the Cap. 113, Section 203. Section 203 also provides for liquidation under the supervision of the Court as an additional type of company liquidation.

The new mechanism of Examinership, which is now available under Part IVA of the Cap. 113, was also added to Cyprus liquidation law and mainly aims at establishing a rescue regime for companies which may avoid liquidation. Authors claim that this mechanism is not included in the definition of liquidation, but it constitutes an

³¹ Companies Act, Cap. 113, s 224; Companies (Winding Up) Regulations of 1933 to 2013

³² Andreas Poetis, *Liquidation of Companies* (2nd edn, Negresco 2015) 4

³³ *ibid* 8

³⁴ Peter Pafitis, *Company Law & Law of Partnership in the Republic of Cyprus* (Christodoulos G. Vassiliades & Co. LLC 2016) 679

³⁵ Companies Act, Cap. 113, s 326

³⁶ Derek French and others, *Company Law* (29th edn, Oxford University Press 2012-2013) 682

independent procedure in order to facilitate the survival of the company.³⁷ This thesis will however refer to this formal procedure too, since it is obviously related to liquidation and moreover, it became one of the most important measures taken in an attempt to promote a rescue culture in Cyprus.

1.4 Recent Amendments in the Companies Act, Cap.113

The new insolvency framework consists of the Companies (Amendment) (No.2) Law of 2015 (Law 62(I)/2015) and the Companies (Amendment) (No.3) Law of 2015 (Law 63(I)/2015) which aim to ensure the protection of the rights of guarantors, the company and the creditors and to contribute in the reservation, restoration and finally to debt restructuring of the company.³⁸ What is more, the above mentioned amendments contribute in the modernization of the procedure followed for the liquidation of a company since the aim has been to make it simpler, speedier and less costly.³⁹ The Amendment Law No.4 (Law 89(I)/2015) which was also introduced during 2015 mainly refers to procedural matters, such as timeframes for providing notices and methods of delivery of documents, which will not be discussed in this thesis.

The Law 62(I)/2015 introduces the new mechanism of Examinership, a process which is similar to the UK administrator procedure that was originally introduced by the UK Insolvency Act 1986,⁴⁰ but was modified greatly in 2003. This process was established as an assistance to insolvent companies in order to survive, and is followed only if the court is convinced that there is a prospect of survival.⁴¹ A successful application for an Examiner appointment results to judicial protection of the company in several different ways, which will be discussed in Chapter 3 below.⁴²

³⁷ Poetis (n 32) 9

³⁸ Antonis Paschalides & Co LLC, 'What the Companies (Amendment) (No. 2) Law of 2015 provides?' (*Antonis Paschalides & Co LLC*) <<http://www.paschalides.com/en/articles/banking/318-2-2015>> accessed 3 March 2018

³⁹ Kourtellos and Roti (n 3) 60

⁴⁰ Fiona Tolmie, *Corporate and Personal Insolvency Law* (2nd edn, Cavendish Publishing Ltd 2003) 105

⁴¹ Georgia Constantinou-Panayiotou LLC, 'Examinership and Insolvency – New Law in Cyprus' (*Lawyersincyprus*) <<http://www.lawyersincyprus.com/article/examinership-and-insolvency-new-law-in-cyprus>> accessed 2 June 2018

⁴² Companies Act, Cap. 113, s 202H

The Law 63(I)/2015 has mainly introduced changes affecting compulsory liquidation. One of the most important amendments is that despite the fact that the Official Receiver plays a significant role in the process of the liquidation, other licensed persons could be appointed as liquidator by the Court following a relevant application. The liquidator, under the rules of Insolvency Practitioners Law 64(I) of 2015, must be a licensed and regulated professional insolvency practitioner and can be appointed by the meetings of creditors and contributories of the company. A disposal of immovable property which is secured in favour of creditors is also now feasible⁴³ and provisions related to the specific mission of provisional liquidator have been introduced.⁴⁴ What is more, the period in which the compulsory liquidation can be completed has been restricted, so that the compulsory winding up process must be completed with 18 months period from the starting date.⁴⁵ The Cyprus Companies Act also introduces changes related to the powers and duties of the Committee, well-known to UK liquidation law, the 'Liquidation Committee' that is appointed by or consist of creditors and contributories of the company in order to assist and supervise the liquidator.⁴⁶ Furthermore, the Companies Act is amended in a way so that the compulsory liquidation process can now be initiated by a larger number of parties than before, and the definition of 'the inability to pay debts' has been expanded to include more statutory presumptions in favour of the company's inability.⁴⁷

The way those changes contribute in the modernization of Cyprus liquidation law and their effectiveness in serving the purpose for which they were introduced, will be discussed in the next chapters of the thesis.

1.5 Aims of the newly Introduced Liquidation Law in Cyprus

⁴³ Companies Act, Cap. 113, s 233A

⁴⁴ Companies Act, Cap. 113, s 227

⁴⁵ Companies Act, Cap. 113, s 239A

⁴⁶ French and others (n 36) 687

⁴⁷ Companies Act, Cap. 113, s 212

It is widely known that Cyprus has suffered a period of financial crisis that began approximately in 2011.⁴⁸ As a result, the government decided to sign a memorandum of understanding with the European Union, the European Central Bank and the International Monetary Fund, represented by the Troika,⁴⁹ in 2013 so as to receive financial assistance and *‘ensure the return of stability in the banking sector, implementation of fiscal consolidation measures and lastly structural measures, with emphasis on the restructuring of the public sector’*.⁵⁰ This bailout agreement requires enactment of an insolvency framework consisting of different bills relating to both corporate and personal insolvency,⁵¹ the first involving amendments relating to companies liquidation, companies debts restructuring and regulation of the profession of insolvency.⁵²

Due to the substantial growth of non-performing loans, the high levels of private debts and deterioration of financial and economic situation of Cyprus, there was an emergency in taking measures contributing to the continuation of the economic activity and the reduction of non-performing loans so as to avoid further damages to credit institutions and to develop and maintain viable businesses.⁵³ *‘The said objectives of the law were mainly based on the efforts to introduce an effective restructuring process for all legal persons aimed at debt restructuring and the rescue and restoration of business activity’*.⁵⁴ It should be noted here that an effective liquidation system became

⁴⁸ Yiannis Papadoyiannis, ‘Cyprus has gone from bust to boom in less than four years’ (*Ekathimerini.com*, 1 September 2017)

<<http://www.ekathimerini.com/221280/article/ekathimerini/business/cyprus-has-gone-from-bust-to-boom-in-less-than-four-years>> accessed 1 June 2018

⁴⁹ Prountzos & Prountzos LLC, ‘Cyprus and the Eurogroup Decision in March 25th, 2013’ (*Prountzos & Prountzos LLC*) <<https://www.pplegal.com.cy/en/news-archive/95-cyprus-eurogroup-decision-march-2013>> accessed 2 June 2018

⁵⁰ Ministry of Foreign Affairs, ‘Cyprus Economy and the Macroeconomic Adjustment Programme’ (*Ministry of Foreign Affairs*, 22 June 2016)

<http://www.mfa.gov.cy/mfa/mfa2016.nsf/mfa26_en/mfa26_en?OpenDocument> accessed 2 June 2018

⁵¹ Elias Hazou, ‘Troika officials unhappy with insolvency bills delay’ (*Cyprusmail online*, 14 November 2014) <<https://cyprus-mail.com/2014/11/14/troika-officials-unhappy-with-insolvency-bills-delay/>> accessed 2 June 2018

⁵² Baker Tilly, ‘Insolvency Law 2015’ (*Baker Tilly*, 21 April 2015) <<http://www.bakertilly.com.cy/latest-news/2015/april/insolvency-law-2015/>> accessed 2 June 2018

⁵³ See Preamble of The Companies (Amendment) (No.2) Law of 2015

⁵⁴ *In regard to the company K.X. Peratikos Limited v. Kyriakos Peratikos and others* [2018] Limassol District Court Application no. 586/17

necessary since it can work as an important tool which is critical to the operation of a healthy economy.

These measures had to be taken in an attempt to ensure protection of rights of guarantors, the company and creditors as well as in order to achieve or maintain a balance between them, and support economic growth and job creation in general.⁵⁵ In addition to the above, there was a need for reformation and modernization of compulsory liquidation legal framework *‘resulting in minimizing the time taken to complete the process, thus facilitating and expediting the return of productive assets on the market’*.⁵⁶

It has recently been noted by the Cypriot Courts that what resulted from the recent amendments, *‘especially in the light of the Preamble of the Amending Law, is the effort to maintain a balance between the interests of the creditors and the company that will result in a compromise in a way of making the company capable of repaying its debts and putting the creditor in a better shape than if the company were wound up’*.⁵⁷ A detailed reference to the aims of each amendment will be made in the relevant chapters below.

1.6 Literature Review

Kourtellos and Roti have assessed the latest amendments in Cap.113 with regards to companies’ liquidation, prior to the enactment of the new package of laws, and found that these amendments constitute *‘a long-awaited step in the modernization of the Insolvency regime in Cyprus’* and *‘a move in the right direction’* for simplification of procedures⁵⁸.

⁵⁵ *ibid*

⁵⁶ Loucas Haviaras, ‘Cyprus: New Insolvency Regulations in Cyprus’ (*Mondaq*, 18 April 2016) <<http://www.mondaq.com/cyprus/x/483702/Insolvency+Bankruptcy/New+Insolvency+Regulations+In+Cyprus>> accessed 2 June 2018

⁵⁷ *In regard to the application of Andreas Georgiou v. In regard to the company LND Estates Ltd* [2017] Supreme Court of Cyprus Civil Application no. 123/2017

⁵⁸ Kourtellos and Roti (n 3) 60-61

Criticism was given by several authors and writers, as will be revealed below, on the enforcement and effectiveness of the provisions introduced with these amendments, namely on the new mechanism of Examinership and the new rules of compulsory liquidation.

In regards to Examinership, Neocleous,⁵⁹ Panayiotou and Papaxanthos⁶⁰ responded positively to the introduction of this new regime by considering it as an assisting tool to insolvent companies, and negative concerns were not expressed. Haviaras argued that the process of Examinership is '*a mechanism for the restructuring and rehabilitation of viable companies, allowing them to live rather than pushing them to die*'⁶¹ with its main purpose being to provide a chance for redirection of the company and prevention of its failure. Case law in Cyprus has also revealed the close relationship between the Cypriot and Irish regime, by using the latter as a guidance to interpret provisions of Cap. 113.⁶² It was also argued that the actual purpose of Examinership is '*to save a viable Cypriot company from closure and thereby save the jobs of the employee*'.⁶³

No research has been made yet as regards the relation between Cypriot Examinership regime and the UK administration regime, except from a minor reference by Neocleous that the first is akin to the latter.⁶⁴ It seems however that the Cypriot legislator decided to adopt the Irish Examinership idea and exclude some of the most significant characteristics of the UK Administration taking into account some disputed provisions that regulates the administration process, one of them being the purposes of their establishment. Given that the purposes of the latter are more than one, and are put in hierarchy it is supported by Fletcher that this hierarchy is 'somewhat complex'⁶⁵ and

⁵⁹ Elias Neocleous, 'Cyprus: Insolvency Reform' (2015) 26 (11) International Company and Commercial Law Review 85

⁶⁰ Andreas Panayiotou and Christos Papaxanthos, 'What is Examinership?' (Baker Tilly, 2017) <<http://www.bakertilly.com.cy/media/1170083/What-is-Examinership-PDF.pdf>> accessed 2 June 2018

⁶¹ Haviaras (n 56)

⁶² *In regard with the application of the company Polynikis Tourist Enterprises Ltd (HE 7795) v. Michalakis P. Charalambides and others* [2017] Paphos District Court Application no. 216/16

⁶³ Panayiotou and Papaxanthos (n 60)

⁶⁴ Neocleous (n 59)

⁶⁵ Ian Fletcher, 'UK Corporate Rescue' (2010) 5 European Business Organization Law Review 119, 136

that may result to disagreements and challenges.⁶⁶ Another characteristic of the UK Administration that differs from Cypriot Examinership and has faced criticism refers to the way of entering in such procedure, which that a company can enter into administration without a court order. Milman supports the view that on the one hand out of court appointment ‘enables directors to steer the company into a safe harbour’⁶⁷ by making the procedure simpler and less costly,⁶⁸ but on the other hand it is such an irony that in practice the courts have been inevitably involved in such a procedure since they were called to resolve defects in out of court appointments.⁶⁹

In regards to the part of compulsory liquidation, there are some commentators who focus on the importance of simplicity of the procedure, and others who criticize based on what they consider as practically enforceable and legally correct. For example, some authors consider that the relevant amendments lead to the right direction to make compulsory liquidation procedure simpler, speedier and less costly than before.⁷⁰ However, the success and effectiveness of these new rules depends on the approach will be adopted by the courts while implementing them, since ‘a more expeditious approach’ is required in order to reduce the time of completing a liquidation process.⁷¹ Other commentators clearly express their doubts as to the speed of the insolvency procedures under the amendments of the law⁷² since in most cases a litigation process is required and that process is time consuming.⁷³ For this purpose they suggest to allow the Liquidator to act under his discretion so as to avoid the delays that might occur during litigation.⁷⁴ Another group of authors claim that the problems of delay could be resolved by making procedures more predictable by providing guidance to the Court as

⁶⁶ *ibid*

⁶⁷ David Milman, ‘Administration: an evolving regime for distressed companies’ (2014) 351 Sweet and Maxwell's Company Law Newsletter 1

⁶⁸ *ibid*

⁶⁹ David Milman, Administration under Schedule B1 of the Insolvency Act 1986: recent developments (2017) 394 Co L N 1

⁷⁰ Kourtellos and Roti (n 3) 60

⁷¹ *ibid*

⁷² N. Mouktaroudes & Associates, ‘The new Insolvency Statutory Framework’ (N. Mouktaroudes & Associates) <<http://mouktaroudes.com/the-new-insolvency-statutory-framework/>> accessed 2 June 2018

⁷³ *ibid*

⁷⁴ *ibid*

the exercise of their discretion and that this way hearing process will be completed within reasonable time.⁷⁵

On the other hand, Poetis supported that there are provisions which set time frames as regards to the completion of certain procedures in order to make them faster, however he foresees that these time frames in practice will be proved limited.⁷⁶ Poetis has also criticized the enforcement of a certain provision introduced with the new laws by challenging its constitutionality as going against the right of property provided in Article 23 of the Constitution of the Republic of Cyprus which prevails any other legislation,⁷⁷ with the exception of European law which has supremacy over the national law.⁷⁸ This view stands in contrast to that of Haviaras who considers that the introduction of this provision in the law has contributed to addressing the delays occurred due to the involvement of the Court in the procedure of compulsory liquidation.⁷⁹

This thesis supports that a significant step in modernization of the insolvency regimes in Cyprus has been undoubtedly taken, however only the practical enforcement of the relevant measures can reveal their actual effectiveness. All suggestions in this thesis, will be made in the context of the comparison between UK and Cypriot law and will be seen as an opportunity to promote further amendments that will contribute to a more comprehensive regulation of the Cypriot corporate insolvency regimes.

1.7 Chapter-by-Chapter Synopsis

⁷⁵ H.P.H Haviaras & Philippou LLC, 'New Insolvency Regulations: Will it help live or will it push to die?' (*H.P.H Haviaras & Philippou LLC*) <<http://www.haviarasphilippoullc.com/new-insolvency-regulations>> accessed 2 June 2018

⁷⁶ Poetis (n 32) 159

⁷⁷ James Ker-Lindsay and Hubert Faustmann, *The Government and Politics of Cyprus* (Peter Lang AG 2008) 174

⁷⁸ Constitution of the Republic of Cyprus, s 1A

⁷⁹ H.P.H Haviaras & Philippou LLC (n 75)

As already stated, this thesis would consist of a thorough analysis of the Cypriot legal regime on corporate liquidation by reference to the latest amendments of Cap. 113 that came into force in 2015.

Firstly, in Chapter 2 a brief reference will be made to the Cypriot legal regime on corporate liquidation by reference to all liquidation types and also to the new mechanism of Examinership. A comparison between Cyprus liquidation laws with the respective UK law will follow in an attempt to reveal the differences between them.

In Chapter 3, the thesis will report in detail on the newly introduced process of Examinership under the Companies (Amendment) (No.2) Law of 2015. Moreover, the thesis will examine the procedure of administration under the UK Insolvency Act 1986 (IA) and the relevant improvements that took place with the Enterprise Act 2002. Afterwards, the thesis will compare the two procedures in order to disclose similarities and differences between them and comment on the effectiveness of the Cypriot regime based on the UK Administration experience. A relevant reference will be made also to the corresponding Irish Examinership so as to highlight its close relationship with the Cypriot Examinership.

Following this, in Chapter 4 a reference to the changes affecting compulsory liquidation will be made, based on the Companies (Amendment) (No.3) Law of 2015. Whereas the comparison performed in the second chapter refers to the two legal regimes in general, Chapter 4 will focus on a comparison between the two insolvency regimes of compulsory liquidation in the UK and Cyprus, by examining whether there are similarities and differences. This comparison will be made also in order to assess the efficiency of the latest amendments in Cyprus in serving the purpose for which they introduced and to identify factors affecting their potential success, as well as to show the influence of the UK law on the Cypriot law aiming to put forward some suggestions for other possible changes.

Finally, in Chapter 5 an evaluation of the latest amendments in the Cap. 113 will be conducted by addressing questions as how these changes contribute in the modernization of liquidation law in Cyprus in the end and if the these amendments are enough to really modernize liquidation law or are of limited scope or effectiveness. Furthermore an overall assessment of the influence of UK liquidation law on the corresponding law in Cyprus will be made and a synopsis of suggestions for other possible changes inspired by the UK liquidation law that may have to be introduced by the new law.

2. An overview of current Corporate Insolvency Law in Cyprus and a comparison with the corresponding UK Law

2.1 General remarks

This chapter first aims at describing the Cypriot legal regime on corporate liquidation by reference to all liquidation types as recognized by the Cap. 113, Section 203. A brief reference to the new mechanism of Examinership will be also made; this consists of an independent procedure⁸⁰ that was recently added in the context of Cyprus liquidation law in an attempt to facilitate survival of the companies.

Secondly, this chapter will engage into a comparison of the Cyprus liquidation law with the respective UK regime in search of and to highlight existing differences, since two regimes are largely the same, such as the one relating to whether liquidation under the supervision of the Court is recognized as an additional type of liquidation also in the UK or is part of voluntary liquidation by the company. Moreover, there will be a reference to liquidation in the public interest which is considered as a separate type of compulsory liquidation under UK law,⁸¹ but does not exist in Cyprus liquidation law. The only Cypriot comparator to this type of compulsory liquidation is the liquidation on just and equitable grounds since it may be argued that activities damaging the public interests, as for example companies exercising activities based on fraudulent and illegal purposes, could be terminated by dissolving the company on these grounds. In the UK, however, liquidation in the public interest and liquidation on just and equitable grounds are considered as separated grounds for initiating a compulsory liquidation.

This chapter will facilitate the basic understanding of Cypriot legal regime on corporate liquidation, which is critical in enabling evaluation of the amendments of Cap. 113 that came into force in 2015 and examining their effectiveness.

⁸⁰ Poetis (n 32) 9

⁸¹ Alan Dignam and John Lowry, *Company Law* (Core text series, 8th edn, Oxford University Press 2014) 469

2.2 The Cypriot Legal regime

2.2.1 The introduction of the Examinership to the Companies Act, Cap. 113

The Companies (Amendment) (No.2) Law of 2015, introduced a new regime which is now available under the Part IVA of Cap. 113, and is called Examinership. This regime has been inspired by the Irish Examinership procedure, which was introduced in Ireland in 1990.⁸² The influence of the Irish procedure to the Cypriot one, will be discussed in more detail later in this thesis. As it arises from Cap. 113 and relevant case law, the main aim of this procedure is to promote a rescue culture in the Cyprus legal system⁸³ and to be used as an assistant to insolvent companies in order to survive, providing a second chance to companies for restructure.⁸⁴

The concept of rescue culture has been discussed by Lord Browne-Wilkinson in *Watson*⁸⁵ case who stated that *'the rescue culture seeks to preserve viable businesses'*.⁸⁶ Corporate rescue has been considered as the extrapolation of the debtor protection trend which was also followed in bankruptcy, and the move from the strict approach of *pay what you owe*, to a more balanced approach of the *continuity of distressed companies*.⁸⁷ The objective of rescue culture is considered to be the continuation of the company in terms of value and some of the justifications for its enforcement are among others, the preservation of viable companies, and preservation of jobs, promotion of financial stability and maintenance of value of the company.⁸⁸ Based on this idea, the company continues to operate and at the same time a restructuring process starts so that the company *'emerges from bankruptcy protection to begin life anew'*,⁸⁹ and aims at keeping the company's assets intact and distribute new claims in the company to old

⁸² Fiona Reddan, 'Examinership process called into question' (*The Irish Times*, 14 September 2009) <<https://www.irishtimes.com/business/examinership-process-called-into-question-1.737567>> accessed 16 June 2018

⁸³ Haviaras (n 56)

⁸⁴ Georgia Constantinou-Panayiotou LLC (n 41)

⁸⁵ *Powdrill v Watson* [1995] 2 AC 394

⁸⁶ *ibid*

⁸⁷ Tim Verdoes and Anthon Verweij, 'The (Implicit) Dogmas of Business Rescue Culture' (2018) 27 *International Insolvency Review* 398

⁸⁸ *ibid* 401

⁸⁹ Christopher W. Frost, 'Bankruptcy Redistributive Policies and the Limits of the Judicial Process' (1995) 74(1) *The North Carolina Law Review* 75, 77

claimants so that there will be a value increase in relation to what could be obtained in a liquidation procedure.⁹⁰

Value creation can be the result of the so called ‘creative destructive’ process which refers to a process ‘*through which capitalist economies grow through a continual process of innovation and resulting obsolescence*’.⁹¹ Creative destruction does not focus on individual companies, which play a secondary role to the whole system, but focuses on the overall performance of the economy.⁹² Therefore, even if the market does obliterate non-valuable entities, the system will be considered as successful given that business turnover takes place which results to reallocation of resources.⁹³

All in all, it seems that company rescue could work as a tool that facilitates the creation of a higher value of the company and thus facilitates also the ‘creative destructive’ process which, based on the above analysis, benefits the economy system as a whole. This is something that cannot be achieved through the liquidation process which solely aims at distributing the company’s assets to the creditors and has as a result the dissolution of the company. This is considered to be the background of the introduction of the Examinership mechanism in Cyprus, which was suffering financial and economic crisis and there was an emergency in taking measures to support the economy.

The Appointment of the Examiner in Cyprus is regulated with Section 202A of Cap. 113, which sets out the cases where the Court can issue an appointment order. Therefore, such an order will be issued only where the Court is satisfied that certain conditions are met.⁹⁴

A section-by-section analysis of the Examinership procedure in Cyprus will be conducted in Chapter 3, as well as a comparison between the corresponding Irish procedure and the akin process of Administration under the UK Enterprise Act 2002.

⁹⁰ *ibid* 78

⁹¹ *ibid* 75

⁹² Verdoes and Verweij (n 87) 418

⁹³ *ibid*

⁹⁴ Companies Act, Cap. 113, s 202A (1) (2)

A reference to this regime will be made since it is generally acceptable that it constitutes a formal insolvency procedure aiming at company rescue.⁹⁵ Also, despite the fact that Examinership does not certainly comprise the core of the Cyprus liquidation regime, it was decided to be examined in detail at an early stage in this thesis and in any case before the compulsory liquidation process since it precedes liquidation and the latter could be the result of Examinership.

2.2.2 The Compulsory liquidation process

The compulsory liquidation process is one of the areas of corporate liquidation law that was mostly affected by amendments of 2015 and that will be also examined in detail in Chapter 4. For the purposes of this chapter, the reference to the said process will be limited to the grounds of compulsory liquidation provided in Section 211 of Cap. 113 only for the purpose of providing basic knowledge on this type of liquidation. Under this section, the company can be wound up in cases where a) the company itself has resolved by passing a special resolution that it be wound up by the Court, b) the company omitted to submit the annual report to the Companies Registrar or omitted to convene the Annual General Meeting of the company, c) the company has not commenced business within a year of incorporation or has suspended business for a whole year, d) the numbers of members of the company is reduced below seven in case of a public company, e) the company is unable to pay its debts, f) the Court is of the opinion that it is just and equitable, under the principles of equity, to wind the company up and g) the SE fails to remedy the situation according to Article 64 of Council Regulation (EC) No. 2157/2001 of 8 October 2001 concerning the Statute for a European Company (SE).⁹⁶

A thorough analysis will be carried out in Chapter 4 by presenting the most important changes affecting compulsory liquidation in Cyprus. It is worth noting that the Cypriot case law shows that the most common ground for compulsory liquidation in Cyprus is

⁹⁵ Begbies Traynor, 'What duties does an administrator have to creditors in a formal insolvency procedure?' (*Begbies Traynor*) <<https://www.begbies-traynorgroup.com/articles/rescue-options/what-duties-does-an-administrator-have-to-creditors-in-a-formal-insolvency-procedure>> accessed 3 September 2018

⁹⁶ Companies Act, Cap. 113, s 211

the company's inability to pay its debts and the vast majority of petitions filed with the Courts are based on one of the grounds listed in section 212 of Cap. 113.

2.2.3 The Voluntary liquidation process

The voluntary liquidation process is available under the Part V (III) of Cap. 113, and is of two different types, namely the members' voluntary liquidation and the creditors' voluntary liquidation. In order for the process to be started, there is a need of passing a resolution which will also determine the type of liquidation.⁹⁷ This type of liquidation depends on the circumstances provided in Section 261 of Cap. 113 based on which the company may be wound up voluntarily. The said section provides that a company may be wound up, firstly where the company passes a resolution in a general meeting due to the fact that the period fixed for the duration of the company has expired based on its Article of Association or the event occurs, on the occurrence of which the Articles of Association provides that the company is to be dissolved. Secondly where the company resolves by passing a special resolution to be wound up voluntarily and thirdly where the company resolves by passing an extraordinary resolution and that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.⁹⁸

Members' voluntary liquidation can be initiated in the case of which a declaration of solvency has been made and delivered to the Registrar of companies for registration by the directors of the company.⁹⁹ The directors are obligated to make a statutory declaration that they have conducted a full investigation into the affairs of the company, and that they are of the opinion that the company will be able to pay its debts in full within a period of up to 12 months from the commencement of the winding up.¹⁰⁰ This declaration of solvency, in order to be effective, it has to be made within the five weeks preceding the date of the winding up resolution and be delivered for registration to the Registrar of companies before the date of passing the resolution.¹⁰¹ In addition to this, the declaration must include a statement of the company's assets and liabilities as at the

⁹⁷ Companies Act, Cap. 113, s 261

⁹⁸ *ibid*

⁹⁹ Companies Act, Cap. 113, s 266 (4)

¹⁰⁰ Companies Act, Cap. 113, s 266 (1)

¹⁰¹ Companies Act, Cap. 113, s 266 (2)

latest practicable date before the making of the declaration.¹⁰² The importance of these requirements has been discussed in case law in which it was stated that the obligation to comply with them, serves the need of non-altering the financial position of the company against creditors' interests and clarifying which persons have the power to appoint the liquidator.¹⁰³

Despite the fact that the procedure of this type of voluntary liquidation is initiated by the directors at the time of making the statutory declaration, the voluntary liquidation is officially commenced when the relevant resolution is passed.¹⁰⁴ It was also claimed that the most important factor in this case, is not the solvency of the company, but the willingness of the directors to accept responsibility by declaring that the company is solvent.¹⁰⁵

Creditors' voluntary liquidation takes place in the case where the directors are unable to make a declaration of solvency.¹⁰⁶ It is worth noting that this type of liquidation is also initiated by the members of the company under the circumstances provided in Section 261 and shall be deemed to commence on the date of passing of the resolution for voluntary liquidation by the company.¹⁰⁷

Once the voluntary liquidation is commenced, the company ceases to carry on its business except so far as may be required for the beneficial winding up.¹⁰⁸ However, the legal personality of the company persists until the company is dissolved.¹⁰⁹

After commencement of voluntary liquidation any transfer of shares, without the prior approval of the liquidator, and any alteration in the status of the company is completely

¹⁰² *ibid*

¹⁰³ *In regard to the company Bakery Omiros Aristeidou Limited* [2018] Nicosia District Court Application no. 148/2018

¹⁰⁴ *Pafitis* (n 34) 717

¹⁰⁵ *ibid*

¹⁰⁶ Companies Act, Cap. 113, s 266 (4)

¹⁰⁷ Companies Act, Cap. 113, s 263

¹⁰⁸ Companies Act, Cap. 113, s 264

¹⁰⁹ *Poetis* (n 32) 444

void.¹¹⁰ After that, a general meeting will follow in case of members' voluntary liquidation or a creditors' meeting in case of creditors' voluntary liquidation for the purpose of appointing a liquidator.¹¹¹ The appointment of the liquidator results in the caseation of the directors' powers except in cases where the general meeting or the liquidator, in case of members' voluntary liquidation, or the creditors' committee or the creditors in case of creditors' voluntary liquidation, decide otherwise.¹¹² A creditors' committee can be appointed based on Section 240 and the rules under which it operates are explained in detail in Chapter 4, specifically on compulsory liquidation with reference to Committee of Inspection.¹¹³

The liquidator, during a members' voluntary liquidation, is obligated to call a general meeting at the end of the first year after the commencement of the liquidation and each subsequent year, and present an account of his acts and dealings, as well as of the conduct of the liquidation during the previous year.¹¹⁴ This is also the case during creditors' voluntary liquidation the only difference being that a creditors' meeting must also be called.¹¹⁵ Once the affairs of the company are fully wound up, the liquidator shall call a general meeting, and in case of creditors' voluntary liquidation, a creditors' meeting too, in order to present an account of the liquidation explaining the steps of conducting liquidation and disposing of the company's property.¹¹⁶ Disposition of the property should take place based on the principle of *pari passu*;¹¹⁷ a reference to this principle will be made in the next chapters.¹¹⁸

The liquidator's powers and duties are common for both types of voluntary liquidation. The Liquidator has the power of paying the creditors in full, making any compromise or arrangement with creditors and compromising all calls and liabilities to calls, debts, liabilities and claims, subject to the approval of the Court or the Creditors' committee in case of creditors' voluntary liquidation or with the sanction of an extraordinary

¹¹⁰ Companies Act, Cap. 113, s 265

¹¹¹ Companies Act, Cap. 113, ss 268 and 276

¹¹² Companies Act, Cap. 113, ss 268(2) and 279

¹¹³ See page 92 below

¹¹⁴ Companies Act, Cap. 113, s 272

¹¹⁵ Companies Act, Cap. 113, s 282

¹¹⁶ Companies Act, Cap. 113, ss 273 and 283

¹¹⁷ Companies Act, Cap. 113, s 285

¹¹⁸ See pages 99-100 below

resolution of the company in case of members' voluntary liquidation. He has also the ability to exercise any of the powers given to the liquidator in the compulsory liquidation without any approval,¹¹⁹ to exercise the powers of the court of making calls and settling a list of contributories, and to summon general meetings in order to get approval from the company by passing special or extraordinary resolution or for any other purpose he may consider appropriate.¹²⁰

Initiation of voluntary liquidation cannot block the submission of an application for compulsory liquidation, however the applicant is required to provide evidence before the Court for the necessity of such an order.¹²¹ A debt owed by company to the applicant is not considered enough evidence to make a compulsory liquidation order.¹²²

2.2.4 Liquidation under the supervision of the court

Liquidation under the supervision of the Court is recognized by Cyprus law as an additional type to the previously discussed main types of liquidation and is available under the Part V (IV) of Cap. 113. This type of liquidation can be initiated when the company has already passed a resolution for voluntary liquidation and the Court decides to make an order that the voluntary liquidation should continue under the supervision of the Court.¹²³ Some authors claim that it is the mixture of voluntary and compulsory liquidation.¹²⁴

This order may be made following an application by creditors, contributors or other interested parties.¹²⁵ Where such order is made, the liquidator continues to exercise all his powers, without the intervention of the Court, as in case of voluntary liquidation, subject to the proviso that the sanction of the Court is required in case of exercising

¹¹⁹ *Demos Galataki Ltd under management and liquidation v. Marapol Management Ltd and others* [2018] Nicosia Rent Control Court Application No. K2/16

¹²⁰ Companies Act, Cap. 113, s 286

¹²¹ Poetis (n 32) 424

¹²² *ibid*

¹²³ Companies Act, Cap. 113, s 293

¹²⁴ Poetis (n 32) 474

¹²⁵ *ibid*

powers which require approval by the Court or the Creditors' committee.¹²⁶ The Court may also appoint additional liquidator who will have the same powers and duties as if he had been appointed under the rules apply in voluntary liquidation.¹²⁷

The role of the Court during this type of liquidation is of a great importance given that it is up to its discretion to make an order for liquidation under its supervision, regardless of creditors' and contributors' desires.¹²⁸ However, the desires of the creditors and contributors are taken into account by the Court for matters relating to the appointment of the liquidator or other matters of the liquidation process.¹²⁹ It is worth noting that the issuance of an order for liquidation under the supervision of the Court does not change the date of commencement of liquidation, which is the date of passing the resolution for voluntary liquidation by the company.¹³⁰

2.3 Identifying the differences between Cypriot and U.K Legal regimes

The relationship between UK insolvency law and the Cypriot one, will arise from throughout this thesis, as this is one of its main purposes. However, as already mentioned in the first chapter of the thesis, it is generally recognized that UK insolvency law was the main source of inspiration for the Cyprus Insolvency law.

In the UK there are two types of liquidation, that is the compulsory liquidation referred to as winding up by the Court in Chapter VI of Part IV of IA 1986, and the voluntary liquidation referred as voluntary winding up in Chapter in Chapters II-V of Part IV of IA. Prior to the enactment of IA 1986, there was also available an additional type of liquidation, namely the liquidation subject to the supervision of the Court which was however abolished by IA 1985 due to its limited use.¹³¹ Despite the said amendment in the UK, the Cypriot legislator decided not to proceed with such an abolition and kept

¹²⁶ Companies Act, Cap. 113, s 297

¹²⁷ Companies Act, Cap. 113, s 296

¹²⁸ Poetis (n 32) 476

¹²⁹ *ibid*

¹³⁰ Poetis (n 32) 479

¹³¹ Len Sealy and David Milman, *Annotated Guide to the Insolvency Legislation 2017* (Volume 1, 20th edn, Sweet & Maxwell 2017) 97

this process available till now. Before the relevant abolition in the UK, liquidation under the supervision of the Court was recognized as an additional type of liquidation and not merely a part of voluntary liquidation, as it seems to be supported by Palmer who considers it as one of the types of voluntary liquidation.¹³² This view is shared by *Poetis* who claims that the liquidation under the supervision of the Court cannot be considered a subdivision of the compulsory liquidation, given that there are separated provisions regulating the said type of liquidation and this separation cannot be disputed due to the existence of the common requirement regarding the procedure initiation which is the passing of a resolution for voluntary liquidation.¹³³

The significance of the continued existence of liquidation under the supervision of the Court in Cyprus has been questioned by some authors who support that the issuance of such an order may have limited significance¹³⁴. This view is based on the argument of the existence of an alternative procedure which is available under Section 290 of Cap. 113 and enables the liquidator, the creditors or contributories to apply to the Court during the voluntary liquidation process in order for the Court to decide on any matter related to the process or exercise any of its powers as if the company were being wound up by the Court.¹³⁵ However, as stated by the case law, the purpose of this provision is to give the opportunity to the company or the contributors or the creditors to resolve their disputes without the need of applying for an order of compulsory liquidation or liquidation under the supervision of the Court.¹³⁶ In case the applicants do not manage to convince the Court that it is just and equitable to make the intended orders and their application is dismissed, they are free to proceed with applying for an order for compulsory liquidation or liquidation under the supervision of the Court, the issuance of which is up to its discretion of the Court.¹³⁷

¹³² Clive Schmitthoff and others, *Palmer's Company Law* (Volume 1, 22nd edn, Stevens & Sons Ltd 1976) para 18-01; *Poetis* (n 32) 8

¹³³ *Poetis* (n 32) 9

¹³⁴ *Pafitis* (n 34) 726

¹³⁵ Companies Act, Cap. 113, s 290; *Pafitis* (n 34) 726

¹³⁶ *Kismetia Ltd v. Lupusco Volga Farming Ltd and others* [2013] Nicosia District Court Application no. 585/12

¹³⁷ *ibid*

Consequently, the above Cypriot case law clarifies the purpose of the existence of the alternative procedure of Section 290 of Cap. 113, as explained above, and that this procedure can be used only during the voluntary liquidation process. At the same time, it makes it clear that voluntary liquidation and liquidation under the supervision of the Court are two different types of liquidation.

Under the UK law, there is an additional and separate type of compulsory liquidation, which is not available in Cyprus. That is the winding-up in the public interest which is available under Section 124A of IA 1986 and can be initiated '*where it appears to the Secretary of State that it is expedient in the public interest that a company should be wound up and the court thinks it just and equitable for the company to be so*'.¹³⁸ It is up to the Secretary of State to prove and convince the Court that it is just and equitable to wind up the company,¹³⁹ and the court based on the evidence provided should balance the reasons for winding up the company or not.¹⁴⁰ It was also clarified by case law that there is no requirement for the Secretary of State to prove illegal activities in the company¹⁴¹ and the company may be wound up '*if its business is 'inherently objectionable' because its activities are contrary to a clearly identified public interest*'.¹⁴² The definition of the 'inherently objectionable' was determined by the court which stated that it may involve 'a lack of commercial probity' that will negatively affect the public generally.¹⁴³ The Courts while interpreting such concepts must follow the policy of the law and be guided by case law free from any subjective moral perception.¹⁴⁴ In addition to this, while applying the public interest test, the Courts must take into account sufficient reasons justifying any decision made in the public interest.¹⁴⁵

It should be mentioned here that the applicant, who is the Secretary of State, is not obligated to prove the insolvency of a company, as the main purpose of the public

¹³⁸ Insolvency Act 1986, s 124A

¹³⁹ *Secretary of State for Business Innovation and Skills v PAG Management Services Ltd* [2015] EWHC 2404 (Ch)

¹⁴⁰ *Re Walter L Jacob & Co Limited* [1989] BCLC 345

¹⁴¹ *Re Senator Hanseatische* [1997] 1 WLR 515

¹⁴² *Secretary of State for Business Innovation and Skills* (n 139)

¹⁴³ *ibid*

¹⁴⁴ *Re Force Sun Limited* [2002] EWHC 443 (Ch)

¹⁴⁵ *Re Walter L Jacob* (n 140)

interest liquidation is to terminate any activity that damages the public.¹⁴⁶ Though this type of liquidation can be used in respect of solvent companies, the said thesis makes a reference to it in an attempt to serve comprehensively one the purposes of this chapter, which is to represent the differences between Cyprus and UK liquidation law.

Examples of cases in the UK where the Court granted orders for winding up in the public interest refer to companies operating ‘pyramid selling schemes’ given that these kind of schemes, according to the court, put at risk members who came later into the scheme and have no prospect of making profits or recovering their investment.¹⁴⁷ However, it seems that this rule is not absolute since there are cases where the judge refused such petitions in cases involving ‘pyramid selling scheme’, accepting evidence supporting that the company was dealing in good faith and there was no intention to deceive.¹⁴⁸ Moreover, companies provided services by misrepresenting potential customers in regards to the nature and geographical coverage of their services, and the exact amount paid for donation to charity by the company, have also wound up in the public interest.¹⁴⁹ It should be noted that based on the statistics released by the Insolvency Service, in the UK there was a decrease by 35% in 2016/2017 compared to 2015/2016 in the number of companies wound up in the public interest.¹⁵⁰

In conclusion, despite the fact that it is generally accepted that Cyprus insolvency law is mainly based and influenced by the UK Insolvency law, it became apparent that there are liquidation or liquidation-related procedures in the UK law that Cypriot legislator decided to exclude from Cyprus law and relevant procedures that were abolished in UK but are available in Cyprus. Briefly, liquidation on grounds of public interest exists in the UK but not in Cyprus and liquidation under the supervision of the Court exists in

¹⁴⁶ Vanessa Finch and David Milman, *Corporate Insolvency Law, Perspectives and Principles* (3rd edn, Cambridge University Press 2017) 464

¹⁴⁷ *Re Alpha Club (UK) Ltd* [2002] EWHC 884 (Ch)

¹⁴⁸ *Re Secure and Provide plc* [1992] BCC 405

¹⁴⁹ *Re Supporting Link Alliance Ltd* [2004] BCC 764

¹⁵⁰ The Insolvency Service, ‘Insolvency Service Enforcement Outcomes (Experimental Statistics) 2016/17’

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/613560/CORRECTED_Insolvency_Service_Enforcement_Outcomes_-_2016-17_-_web.pdf> accessed 12 July 2018

Cyprus but not in the UK. It is submitted however that that the Cypriot legislator should take into account the limited use of liquidation under the supervision of the court and consider the possibility of abolishing the relevant provisions. Though its purpose and motive is different from that of the standard liquidation types which compromise the main focus of this thesis, it is submitted that the Cypriot legislator might also want to consider the advantages of introducing the public interest liquidation in Cyprus in order to ensure effective control of activities that may harm the public interests. The introduction of this type of liquidation can also work as a preventive measure given that the court can intervene and decide in favour of the winding-up of the company at an early stage. This means that liquidation on the grounds of public interest can contribute in preventing companies, such as fraudulent or pyramid selling schemes, from reaching the stage of traditional liquidation after managing to deceive a major part of the public and leaving no assets in the company for distribution to the creditors.

3. Examinership in Cyprus in the light of the UK administration procedure

3.1 General remarks

The new regime of Examinership mainly aims at promoting a rescue culture in the Cyprus legal system and came into force on 7 May 2015. The need for the establishment of a rescue regime as a tool to reduce the impact of the financial crisis in Cyprus, became urgent due to the lack of fast procedures aiming at dealing with non-performing loans of the companies, which were calculated over 50% of the banking system.¹⁵¹ Another important factor was the high unemployment rate, which was over 15% and therefore there was a need for introduction of an effective mechanism that will contribute to the creation or maintenance of jobs.¹⁵² As of the above, the process of Examinership was established as an assistant to financial hardship companies in order to survive, providing a second chance to companies for restructure.¹⁵³

Furthermore, it has been said that the process of Examinership allows viable companies to live rather than dying in such '*a volatile environment as it is currently the Cypriot economy*'¹⁵⁴ which is still in the recovery stage after its major crisis in 2013. This process also aims at providing an otherwise unavailable chance to rescue and redirect the course of the company,¹⁵⁵ to mark a new start and prevent its 'death'.

This new mechanism is akin to the concept of UK Administration and allows an independent person who is qualified, to conceive proposals to rescue the financially

¹⁵¹ The Economist, 'Cyprus passes required foreclosure and insolvency laws' (*The Economist*, 22 April 2015)

<<http://country.eiu.com/article.aspx?articleid=1573086941&Country=Cyprus&topic=Economy&subtopic=Current+policy>> accessed on 2 August 2017

¹⁵² Eszter Balazs, 'IMF Survey: Cyprus Turns Economy Around, Successfully Exits IMF Program' (*International Monetary Fund*, 15 March 2016)

<<https://www.imf.org/en/News/Articles/2015/09/28/04/53/socar031516a>> accessed 2 August 2017

¹⁵³ Georgia Constantinou-Panayiotou LLC (n 41)

¹⁵⁴ Haviaras (n 56)

¹⁵⁵ *ibid*

distressed company; the said person is vested with the rights of the auditor of the company.¹⁵⁶ In general, a successful application for the appointment of an Examiner results in judicial protection and the company is under a strict regime of prohibitions.¹⁵⁷

This chapter's aim is to examine and analyze section-by-section the regime of Examinership in Cyprus and point out the similarities and differences between this process and the well-known process of Administration under the UK Enterprise Act 2002. It mainly purports to show the influence of the UK law on the Cypriot law and comment on areas that the Cypriot legislator decided to exclude from its regulation or which have remained unnoticed, which resulted in amendments of rather limited scope.

Given that the Cypriot case law on Examinership regime is very limited, and, given also that the Examinership process remains untested to date,¹⁵⁸ this section is confined to presenting the existing regime in Cyprus through an analysis of the relevant provisions of the Cap. 113 and to pointing out the influence that came from UK Administration regime.

3.2 Examinership in Cyprus under Part IVA of the Companies Act, Cap. 113

3.2.1 Appointment of Examiner

The Appointment of the Examiner is regulated under Section 202A of Cap. 113 and is feasible in cases where a) the Court is satisfied that the company is or is likely to become unable to pay its debts, and b) a resolution for winding-up the company has not yet been passed and published in the Government Gazette, and c) no order has been issued for winding-up the company¹⁵⁹.

¹⁵⁶ Companies Act, Cap. 113, s 202L

¹⁵⁷ Companies Act, Cap. 113, s 202H

¹⁵⁸ Elias Neocleous & Co LLC, 'Saving Viable Companies from Insolvency' (*Elias Neocleous & Co LLC*) <<https://www.neo.law/2017/04/28/examinership-saving-viable-companies-insolvency/>> accessed 2 May 2017

¹⁵⁹ Companies Act, Cap. 113, s 202A

The Court, being satisfied that these conditions are met, and after an application is filed, is empowered to appoint an Examiner for the purpose of examining the company's affairs and perform such duties in connection with the company, only in circumstances where it is satisfied that there is a reasonable prospect of survival of the company and of the whole or any part of its undertaking as a going concern.¹⁶⁰ The Examiner is considered to be a Court's officer and there is an expectation to act with honesty before the Court.¹⁶¹

The Court, in exercising its power under the above provisions of the law, it is 'asked' to interpret the phrase of 'reasonable prospect of survival' and decide whether the requirement is fulfilled. In this regard, reference must be made to the only one case that discusses this matter, namely *In regard with the application of Polynikis Tourist Enterprises Ltd*¹⁶² in which the Court was satisfied that there was a real reasonable prospect of survival of the whole undertaking as a going concern, given that the company was facing only temporary cash flow problems (liquidity issues) and its asset value (€22.445.234) was much higher than its liabilities (€16.008.461). The Court took also in account the fact that losses of the company were reduced from €1,600,000 to €200,000 within a year. Finally, the Court stated that the information provided before the court showed that an increase of company's assets was expected and that the turnover and operation costs of the company has decreased resulting in a significant reduction on losses.¹⁶³

According to Section 202A (3) company is considered to be unable to pay its debts when it is incapable of paying its debts as they fall due,¹⁶⁴ the value of corporate assets is below than its liabilities (considering its contingent or prospective liabilities)¹⁶⁵ or the provisions of Section 212 apply.¹⁶⁶ It is worth mentioning that Section 212 sets the

¹⁶⁰ Companies Act, Cap. 113, s 202A (1) (2)

¹⁶¹ *In regard to the company K.X. Peratikos Limited* (n 54)

¹⁶² *In regard with the application of the company Polynikis Tourist Enterprises Ltd* (n 62)

¹⁶³ *ibid*

¹⁶⁴ Companies Act, Cap. 113, s 202A (3) (a)

¹⁶⁵ Companies Act, Cap. 113, s 202A (3) (b)

¹⁶⁶ Companies Act, Cap. 113, s 202A (3) (c)

circumstances in which a company is deemed to be unable to pay its debts as a ground for initiating a compulsory winding up process.

It has been argued by Andreas Poetis that the ‘*contingent and prospective liabilities should be considered by the Court with a special circumspection and be regarded as already existing liabilities*’.¹⁶⁷ Otherwise, contingent and prospective liabilities may consist of unfounded claims which may create unfair situations¹⁶⁸ given that may include liabilities which may arise in the future without an existing contract.¹⁶⁹ It was also pointed out that it should be considered not only the current asset value, but also any asset that is reasonably expected to be received by the company.¹⁷⁰

A relevant discussion on the company’s inability to pay its debts and the widening of cases under which the company is considered as such, will follow in the chapter relating to compulsory liquidation, under which the same rules apply, with a detailed reference to the leading case of *Eurosail*¹⁷¹ in the UK. In that case, the Supreme Court discussed the application of the cash flow test and the balance sheet test which correspond to the provisions of Sections 202A (3) a and b accordingly.

According to Section 202A (4) of Cap. 113, the Court while deciding whether to issue an order for the appointment of an Examiner, could consider and take in account as regards to its inability to pay its debts whether the company has requested for substantial time extensions as regards discharging its debt to creditors, as well as whether the company has utilized restructuring process pursuant to the Central Bank’s Directives on Arrears Management issued under Section 41 of Business of Credit Institutions Law.

3.2.2 Who may present a petition?

¹⁶⁷ Poetis (n 32) 21

¹⁶⁸ *ibid*

¹⁶⁹ *Ibid*

¹⁷⁰ *Ibid*

¹⁷¹ *BNY Corporate Trustee Services Limited v Eurosail-UK 2007-3BL Plc* [2013] UKSC 28

A petition may be submitted by the company, or a current, contingent or prospective creditor (including an employee of the company), or a guarantor of any liabilities of the company, or shareholders who hold, at the time of submission of the application, at least one tenth of the company's paid capital that confers the right to vote in general meeting, or by all the above parties jointly or separately.¹⁷²

In one of the limited cases in Cyprus on this matter, namely *In regard with the application of Polynikis Tourist Enterprises Ltd*,¹⁷³ the petition was submitted by 5 parties jointly acting in their capacity as shareholders and guarantors of the company.

Any petition submitted pursuant to the above provisions, must contain a nomination of an examiner for appointment together with supporting evidence indicating that the applicant has a valid reason to apply for the appointment of an Examiner. Furthermore, in case that the application is presented by the company, it must include a statement of the value assets and liabilities of the company as they exist at a date not earlier than 14 days prior to the submission of the application and contains information as to whether there was any previous application for the appointment of an Examiner and/or an Examiner has in fact been appointed.¹⁷⁴ In addition to the previous elements, any petition must be accompanied by a report prepared by an independent expert, namely by the company's auditor or person qualified to be the company's auditor or any person qualified to be the company's examiner.¹⁷⁵ This report shall include details as to the names and addresses of the company's officers or other related legal entities, as well as a statement of company's affairs showing details on the value assets and liabilities of the company, names and addresses of its creditors, the existence of secured property and the name of its guarantors. It should also include the expert's opinion on several issues, whether there is any deficiency between value assets and liabilities of the company, whether the whole or any part of its undertaking has a reasonable prospect of surviving as a going concern and statement of all conditions required to give effect to such survival in terms of procedures relating to internal management and control

¹⁷² Companies Act, Cap. 113, s 202B (1)

¹⁷³ *In regard with the application of the company Polynikis Tourist Enterprises Ltd* (n 62)

¹⁷⁴ Companies Act, Cap. 113, s 202B (2)

¹⁷⁵ Companies Act, Cap. 113, s 202B (3)

procedures of the company.¹⁷⁶ Furthermore, amongst other matters, the report should include opinion on whether proposals for a compromise or scheme of arrangement would offer a reasonable prospect as to the survival of the company, whether an attempt of continuance of the whole or any part of its undertaking would be more advantageous than a liquidation procedure to company's member and creditors and details of funding that is required for the company to continue its business.¹⁷⁷

The petition has to be accompanied with the signed consent of the Examiner and copies of proposals for a scheme of arrangement or compromise regarding the company's affairs, if such proposals have been submitted to interested parties for approval.¹⁷⁸

Upon hearing a petition to appoint an Examiner, the Court may approve or dismiss the application or adjourn the hearing, conditionally or unconditionally, or issue an interim order or other order as it considers appropriate.¹⁷⁹

3.2.3 Protection of the Court and Effects of presenting a petition

The company shall be considered as being under the Protection of the Court for a period starting from the date of the submission of the petition, subject to the provisions on the Interim Protection Order, and ending after the expiration of a 4 months period or at the time of refusal or withdrawal of the petition, whichever occurs first.¹⁸⁰ It should be noted that in case *Capital Accommodation*,¹⁸¹ the Court mentioned that the protection period is primarily connected with the Examiner's appointment and his main mission during the process, therefore the Examiner can only perform his work provided that the company is already under the protection of the Court.¹⁸²

¹⁷⁶ Companies Act, Cap. 113, s 202B (4)

¹⁷⁷ *ibid*

¹⁷⁸ Companies Act, Cap. 113, s 202B (5)

¹⁷⁹ Companies Act, Cap. 113, s 202B (8)

¹⁸⁰ Companies Act, Cap. 113, s 202H (1)

¹⁸¹ *In regard to the application of Kypros Kourousi and others v. In regard to the company Capital Accommodation (Cyprus) Limited* [2018] Paphos District Court Application no. 217/2017

¹⁸² *ibid*

Once the company becomes under the Protection of the Court there are some rules that should be taken into account and which may have impact on the interested parties, such as the creditors of the company. There is a long list of provisions in Section 202H (2), the majority of which, contain prohibitive rules. Firstly, no liquidation proceedings can be initiated against the company, neither a liquidation resolution to be approved. This is only natural given that Examinership exactly aims at avoiding liquidation. In addition to this, a Receiver cannot be appointed, except in case that a Receiver was appointed before the submission of a petition then the applicable rules are contained in Section 202J as will be discussed below. No attachment, sequestration, distress or execution in relation to the assets of the company, no action can be taken against the company for the realization of the assets of the company in relation to any security such as a mortgage, lien or any other charge or pledge and no measures can be taken to repossess assets of the company under a hire-purchase agreement, but only with the prior consent of the Examiner. The above rules are applicable also where a third party, apart from the company is obliged to pay all or any part of debts of the company, plus general provision that no proceedings of any kind can be initiated against the third part to such debts.

There is also a separate provision, in relation to payments of debts that existed prior to the submission of the petition.¹⁸³ More specifically there is a prohibition of payments to be achieved during the protection of the Court period to the satisfaction or pay off of a liability created before the submission of the petition, unless the report of the independent expert recommends the liability to be paid or satisfied or the Examiner authorize such payment to be made. In addition to these, the Examiner or any other related person can proceed with submitting a petition to the Court and the Court may authorize such payment when it is satisfied that an omission of payment of that liability substantially reduces the reasonable prospect of the company to survive as a going concern.¹⁸⁴

¹⁸³ Companies Act, Cap. 113, s 202I (1)

¹⁸⁴ Companies Act, Cap. 113, s 202I (2)

3.2.4 Impact of Examiner's Appointment on a Receiver

There is a clear provision which imposes that the Court will not proceed with a hearing of a petition in case where a Receiver has been appointed by the company concerned and has been appointed for continuous period of at least 30 days prior to the submission of the petition.¹⁸⁵ This has also been confirmed in the case *Re LND Estates Ltd*,¹⁸⁶ where the Court made clear that the appointment of a Receiver at the same date with the date of filing an application for Protection by the Court and appointment of an Examiner did not affect its admissibility.

There is an interesting case in Cypriot case law, in which the judge comments and interprets the provision of Section 202B (7) with reference to the Irish Companies Act 2014. More specifically in case, *In regard with the application of Polynikis Tourist Enterprises Ltd*,¹⁸⁷ the applicant claimed that the temporary order which was issued prior to the submission of the relevant petition, and with which the two Receivers appointed was prohibited from exercising their powers, automatically suspended their appointment. Therefore, the criteria of Section 202B (7) were not met and the hearing could be progressed. The Court in its judgment stated that '*the relevant provision of Section 202B (7) does not link the appointment to the duties of the appointed Receivers*' and continued with by clarifying that the 30 days period set by law is not large or satisfactory enough so that the Receivers are able to be carried out.¹⁸⁸

It was also reported that as it arises from its title, the aim of Part IVA of Cap. 113 is the appointment of the Examiner according to the relevant conditions, and such appointment will not be achieved if there is an appointed Receiver for a continuous period of 30 days.¹⁸⁹ This deadline was set in order for the expert to be able to prepare his report in order to be submitted with the application, otherwise the company shall be regarded as being under the Court's protection for a period of 15 days in order to allow

¹⁸⁵ Companies Act, Cap. 113, s 202B (7)

¹⁸⁶ *In Regard with the application of Andreas Georgiou* (n 57)

¹⁸⁷ *In regard with the application of the company Polynikis Tourist Enterprises Ltd* (n 62)

¹⁸⁸ *ibid*

¹⁸⁹ *ibid*

for the submission of the report.¹⁹⁰ The Court also referred to Irish law, specifically Section 512 (4) of Companies Act 2014, from which the Cypriot legislator was inspired, and in which the continuous period of the Receiver's appointment is limited to 3 days prior to the submission date. This consider as an additional evidence that the sole aim of Part IVA of Cap. 113 is the appointment of the Examiner but not the conduct of duties resulted from this appointment.¹⁹¹ Finally, the Court concluded with stating that the appointment of the two Receivers was not suspended, was in force for a continuous period of more than 30 days, therefore the condition required by law was not met.

However, the legislator imposed a reservation with which it is provided that in case that the Receiver has been appointed within a period of three months prior to the date of entry into force of the Companies (Amendment) (No.2) Law of 2015, then the applicable provision is Section 202J Cap.113. Section 202 J (1) provides that in the event that at the time of submission of the petition a Receiver has previously been appointed, the Court may issue any order considers appropriate. Such kind of orders may include an order that the Receiver will cease to act as a Receiver as from a date specified by the Court, the Receiver will exercise his duties only in respect of selected specified assets defined by the Court as from a specific date, the Receiver shall deliver all books, papers and other records related to the company's property or undertaking within a period determined by the Court, the Receiver shall provide the Examiner with details regarding all transactions undertaken in respect of the company's property or undertaking.

3.2.5 Impact of Examiner's Appointment on a Provisional Liquidator

In case that at the time of submission of the petition, a Provisional Liquidator has previously been appointed, the Court may issue any order considers appropriate, including an order that the Provisional Liquidator or any other person be appointed as the Examiner of the company, that the Provisional Liquidator will cease to act as a Provisional Liquidator as from a date specified by the Court, the Provisional Liquidator

¹⁹⁰ *ibid*

¹⁹¹ *ibid*

shall deliver all books, papers and other records related to the company's property or undertaking within a period determined by the Court, the Provisional Liquidator shall provide the Examiner with details regarding all transactions undertaken in respect of the company's property or undertaking.¹⁹²

It should also be noted that no order will be issued by the Court in terms of the caseation of both Receiver and Provisional Liquidator in respect of all or selected specified assets of the company, unless the Court is convinced that there is a reasonable prospect of surviving as a going concern.¹⁹³

3.2.6 Interim Protection Order

Where an application has been submitted in accordance with Section 202A and the Court is satisfied that due to circumstances beyond the petitioner's control, which he could not reasonably foresee, an expert's report was not submitted together with the petition, then the Court may issue an order giving the company Court's protection for such a period as it considers appropriate in order to allow the independent expert to submit his report.¹⁹⁴ However, there is a qualification that the period of such order shall expire no later than the fifteenth day following its adoption.¹⁹⁵ When the independent expert omits to submit his report within the specified period, at the time of the order expiration period, the company ceases to be subject to protection of the Court. It should be mentioned that this rule applies without prejudice to the possibility of submitting any further application in accordance with Section 202A.¹⁹⁶

3.2.7 Related Companies

¹⁹² Companies Act, Cap. 113, s 202J (2)

¹⁹³ Companies Act, Cap. 113, s 202J (3)

¹⁹⁴ Companies Act, Cap. 113, s 202C

¹⁹⁵ Companies Act, Cap. 113, s 202C (2)

¹⁹⁶ Companies Act, Cap. 113, s 202C (6)

The Cap. 113 enables the Court to issue an order regarding an appointed Examiner to be the Examiner or to exercise all of some of the assigned powers and duties in regard to another company which is related to the company under examination.¹⁹⁷

The Court while assessing whether such order should be made shall take into account whether this would facilitate the survival of the company or the related company or both entities and the whole or any part of its undertaking as a going concern, and this order will be issued only if the Court is satisfied in favour of the existence of a reasonable prospect for the survival of the related company.¹⁹⁸ Section 202F provides for a definition of ‘related company’ which includes, amongst others, the holding or subsidiary company, companies with activities and operations which are carried out in a way that are not clearly distinguishable.¹⁹⁹ This provision contributes in saving money and time since the ‘related company’ can avoid the need to petition again and apply for protection by the Court in the context of a new and independent procedure.

3.2.8 Powers of the Examiner

During the period of Examinership, the legislator gave to the Examiner a wide range of powers, similar to that of a Receiver, so as to enable him to contribute to the survival of the company. This is obviously results from the relevant provisions regarding the powers of an Examiner which are long written but sometime requires the approval of the Court in order to act accordingly.

Firstly, the powers and rights that relate to company auditor pursuant to Companies Act or any other law, are applicable *mutatis mutandis* to the Examiner.²⁰⁰ He has the power to convene, setting agendas, to preside in meetings of the Board of Directors and general meetings of the company, to make proposals or resolutions and to make reports in such meetings.²⁰¹ The Examiner is also entitled to receive reasonable notice, including a

¹⁹⁷ Companies Act, Cap. 113, s 202F (1)

¹⁹⁸ Companies Act, Cap. 113, s 202F (2)

¹⁹⁹ Companies Act, Cap. 113, s 202F (5)

²⁰⁰ Companies Act, Cap. 113, s 202L (1)

²⁰¹ Companies Act, Cap. 113, s 202L (2)

description of the work being done, to attend and to be heard at the above mentioned meetings.²⁰² Another important power of the Examiner, is to take all necessary measures to stop, prevent or rectify the effects of any actual or proposed act, omission, conduct, decision or contract, by or on behalf of the company, its officers, employees, members, creditors or any other related person, in relation to the income, assets or liabilities of the company which may affect the company or any interested party.²⁰³ The above measures are taken subject to the rights of third rights acquiring an interest in the company's income, assets and liabilities in good faith and with valuable consideration. The Examiner can apply to the Court for the determination of any matter may arise during his appointment or with regards to the powers that the Court may exercise following a petition submitted by any member, contributor, creditor or officer of the company.²⁰⁴

The Examiner has the power to require the officers and agents of the company or related company to present to him all books and documentation of the company or that relates to the company, which are in their possession or under their control.²⁰⁵ They are also obliged to present themselves to the Examiner when requested to do so, and to assist the Examiner in the exercise of his functions as may reasonably be expected to do. The same duty exists with regards to any other person is called by the Examiner, where the latter considers that this person has in its possession any relevant information regarding the company's affairs.²⁰⁶ Current or past directors are obliged to present all documentation that relates to any individual or joint bank account in Cyprus or abroad to which it is believed that there are funds that were deposited or withdrawn and related to transactions, arrangements or contracts undisclosed in the company's accounts or are linked to acts or omissions by that director and were misconducted, either fraudulently or not, to the company or its members.²⁰⁷

²⁰² Companies Act, Cap. 113, s 202L (3)

²⁰³ Companies Act, Cap. 113, s 202L (5)

²⁰⁴ Companies Act, Cap. 113, s 202L (9)

²⁰⁵ Companies Act, Cap. 113, s 202M (1)

²⁰⁶ Companies Act, Cap. 113, s 202M (2)

²⁰⁷ Companies Act, Cap. 113, s 202M (3)

In case the officer or agent breaches his duty by refusing to act as described above, then the Examiner can duly confirm such refusal and the Court may issue any order as it considers appropriate after investigating the case and hearing witnesses against or in favor of the officer or the agent.²⁰⁸ The Court after hearing on the above matter, may order the officer or the agent to act as per the instruction of the Examiner or may decide that he is not obliged to follow the Examiner's instructions.²⁰⁹

The Court may also issue, upon a petition submitted by the Examiner, and in case of considering that is fair and in accordance with the principles of equity, an order that the directors' powers and functions is to be exercised only by the petitioner.²¹⁰ The Court may take into consideration that the company's affairs are being carried out in a way that are likely to affect the interests of the company, its employees or creditors, that the company or its directors have decided that such order should be requested, and that it is in the interest of the company, its employees or directors for such an order to be issued.²¹¹

The Examiner may request and the Court may issue an order that the Examiner has the power to dispose a property of the company which is secured by a floating charge, or to exercise its powers in relation to that property as though it were not subject to the security in question. In such case, the Court must be satisfied that such an order would contribute to the company's survival or the whole or any part of its undertaking as a going concern.²¹² The same rules exist in relation to the goods which are in the possession of the company under a hire-purchase agreement, and the Court may issue an order for disposal of such goods as though any goods under the hire-purchase agreement were vested in the company.²¹³ Once the order has been issued, it should be submitted to the Companies Registrar but no later than 7 days from the day of

²⁰⁸ Companies Act, Cap. 113, s 202M (5)

²⁰⁹ Companies Act, Cap. 113, s 202M (6)

²¹⁰ Companies Act, Cap. 113, s 202N (1)

²¹¹ Companies Act, Cap. 113, s 202N (2)

²¹² Companies Act, Cap. 113, s 202P (1)

²¹³ Companies Act, Cap. 113, s 202P (2)

issuance,²¹⁴ and in case of non-compliance the Examiner is subject to a fine up to €5000.²¹⁵

It seems that these wide-ranging powers constitute an important assisting tool for the Examiner enabling him to fulfill his duties, namely to examine the affairs of the company and develop a rescue plan for it.

3.2.9 Submission of Examiner's Report

Following his appointment, and the soonest possible, there is a duty of the Examiner to prepare proposals for a compromise or scheme of agreement for the company under examination²¹⁶. The Examiner is required to prepare the relevant Report within 60 days from the day of his appointment or within the period that the Court may permit.²¹⁷ In case that the report cannot be prepared within the 4 months period, namely the protection period, the Court may order an extension of up to 60 days.²¹⁸ When the Report is submitted, but beyond the above time-frame, the Court may further extend this period ex officio or following a petition by the Examiner so as to be able to examine the Report.²¹⁹

The Report of the Examiner has to include also, amongst others, proposals discussed in meetings, the results of such meetings, the composition of Creditor's committee, a statement of company's assets and liabilities, lists of company's officers and creditors and the Examiner's recommendations.²²⁰

3.2.10 Appointment of Creditors' Committee

²¹⁴ Companies Act, Cap. 113, s 202P (6)

²¹⁵ Companies Act, Cap. 113, s 202P (7)

²¹⁶ Companies Act, Cap. 113, s 202S (1)

²¹⁷ Companies Act, Cap. 113, s 202S (2)

²¹⁸ Companies Act, Cap. 113, s 202S (3)

²¹⁹ Companies Act, Cap. 113, s 202S (4)

²²⁰ Companies Act, Cap. 113, s 202T

The new framework has introduced the Creditors' Committee which is to be appointed upon the option of the Examiner or where the Court gives instructions to the Examiner to appoint a Creditors' Committee to assist him in discharging his duties.²²¹ The Committee is composed of up to five members and three of them are those who have the highest value of unsecured claims or their representatives.²²² The Committee is entitled to take and the Examiner gives the Committee copies of any proposals for a compromise or scheme of arrangement and may express its views on its behalf or on behalf of all creditors.²²³ This provision confirms the intention of the legislator to engage creditors to the process and give them significant role in it.

3.2.11 Compromise and Arrangements by an Examiner

3.2.11.1 Content

The proposals for Compromise or Scheme of Arrangement which are prepared by the Examiner have to report issues regarding the classes of members and creditors of the company, defining which of these are remaining unaffected and which are affected and damaged by the proposals.²²⁴ A member is considered to be damaged by the proposals where there is a reduction in the nominal value of its shares, a reduction of the dividends which he is entitled to receive, a reduction in his interest to the company's total share capital, he is deprived of his member rights, he is no longer a member of the company.²²⁵ The proposals provide also for equal treatment to each class of creditors unless the creditors agree otherwise, the implementation of the proposals, any changes to be made in terms of the management or alterations to Memorandum and Articles of Association when it is considered as necessary and desirable to facilitate the survival of the company and the whole or any part of its undertaking as a going concern, the realization of the company's assets, restructuring of debts and any other debts arrangement, contract management and dispute resolution proposals, measures to protect the company from

²²¹ Companies Act, Cap. 113, s 202V (1)

²²² Companies Act, Cap. 113, s 202V (2)

²²³ Companies Act, Cap. 113, s 202V (3)

²²⁴ Companies Act, Cap. 113, s 202W (1) a, b, c

²²⁵ Companies Act, Cap. 113, s 202W (6)

the need to dispose or cease to use its business premises provided that the primary objective of the company to survive as a going concern is not undermined.²²⁶

Furthermore, the proposals must be accompanied by a statement of company's assets and liabilities, including contingent and prospective liabilities, and a description of the estimated financial outcome in the event of a company liquidation for each class of members and creditors.²²⁷

3.2.11.2 Acceptance by Creditors or Members

The proposals for a compromise or scheme of arrangement are considered as accepted by the creditors or class thereof, if the majority in value of the creditors or class of creditors vote in favor of the proposals.²²⁸ It should be noted that there is no equivalent provision in regards to the acceptance of the proposals by members of the company, therefore there is a gap with respect to the voting by members. Creditors may submit proposals variations, though they have to be accepted by the Examiner.²²⁹ Where the creditor or one of the creditors of the company is a governmental authority, then this authority shall be entitled to accept the proposals independently of the fact that its claims are damaged by the proposals or the provisions of any other legislation which may provide otherwise.²³⁰

3.2.11.3 Confirmation by the Court

The Examiner's report is then scrutinized by the Court at a hearing in the presence of the company, the Examiner, creditors who may be damaged by the proposals, or any other interested party and the Court may completely confirm or with variations, or decline to confirm the proposals taking into account the principles of equity, the continuance of business activities, protecting the employment position, the protection

²²⁶ Companies Act, Cap. 113, s 202W (1) d, e, f, g, h, i

²²⁷ Companies Act, Cap. 113, s 202W (2) (3)

²²⁸ Companies Act, Cap. 113, s 202X (3)

²²⁹ Companies Act, Cap. 113, s 202X (2)

²³⁰ Companies Act, Cap. 113, s 202X (5)

of creditors who must be placed in a more favourable position to that they would have been in case of a liquidation process.²³¹

In order for the Court to confirm the proposals, at least one class of creditors which is damaged by the proposals has to accept them and the Court must be satisfied that the proposals are just and equitable in relation to any class of creditors or members that has rejected the proposals and its interests or claims are damaged by the proposals, and that the interests of any interested party are not unfairly affected by them.²³²

Where the report of the Examiner is confirmed, the proposals are binding on the company and all members and creditors or classes of members and creditors which are affected by them.²³³ In such a case the proposals will come into force on the date to be fixed by the Court, but no later than 30 days of the date of confirmation.²³⁴

3.2.11.4 Objections to Confirmation by the Court

During the hearing in regard to the confirmation of the proposals, a member or creditor whose interests or claims are damaged can object to the Court's confirmation if an irregularity was noticed during the voting process under Section 202X, or the acceptance of confirmation was secured with inappropriate ways, the proposals intended to an improper purpose, or the interests of the objector are unfairly affected.²³⁵ Persons who has accepted the proposals may not object to the Court's confirmation, unless the acceptance was secured with inappropriate ways or following the acceptance it arose that the proposals intended to an improper purpose.²³⁶

This provision guarantees that the interests of all interested parties are secured given the opportunity to object, and especially protects the interests of a possible minority creditor

²³¹ Companies Act, Cap. 113, s 202Y (1) (2) (3)

²³² Companies Act, Cap. 113, s 202Y (4)

²³³ Companies Act, Cap. 113, s 202Y (6) (7)

²³⁴ Companies Act, Cap. 113, s 202Y (10)

²³⁵ Companies Act, Cap. 113, s 202Z (1)

²³⁶ Companies Act, Cap. 113, s 202Z (2)

who did not accept the proposals for compromise or scheme of arrangement, but these were previously accepted by the majority of creditors.

3.2.11.5 Court Declining confirmation

In the event that the proposals are rejected by the Court or if creditors do not agree as to the proposals, the Court may issue an order for liquidation of the company provided that it is fair and equitable or may issue any other order as it considers as appropriate.²³⁷

Furthermore, the company or any other interested party, may apply to the Court within 180 days from the date of confirmation of proposals in order to revoke such confirmation on the ground that it was secured by fraud.²³⁸ Once the Court is being satisfied that there was a case of fraud, then it may revoke the confirmation and impose terms with a view to protect the interest of parties who acquired property or interest in good faith and value after relying on that confirmation.²³⁹

3.2.12 Remuneration and Expenses of Examiner

The expenses of the Examiner are being paid by the income from operations of the company or the realization of company's assets. The Examiner is obliged to submit to the Court interim accounts related to his expenses every 2 months from the date of his appointment.²⁴⁰ These expenses, after being approved by the Court, are paid in priority to any other claims, secured or not, under any management of the company or liquidation process.²⁴¹

²³⁷ Companies Act, Cap. 113, s 202Y (12)

²³⁸ Companies Act, Cap. 113, s 202AD (1)

²³⁹ Companies Act, Cap. 113, s 202AD (2)

²⁴⁰ Companies Act, Cap. 113, s 202AF (2)

²⁴¹ Companies Act, Cap. 113, s 202AF (3)

A person is considered as qualified to act as an Examiner when he meets the relevant requirements of the Insolvency Practitioners Law of 2015.²⁴² His payment is determined under the Insolvency Practitioners Regulations of 2015,²⁴³ which provide that remuneration is calculated under Companies (Winding-up) Regulations as amended in 2013, namely the remuneration of Companies Registrar while acting as a practitioner.

3.2.13 Protection of guarantors

The new laws has also introduced new provisions for the purpose of providing protection to the guarantors of companies which are also under the protection of the court due to the Examinership process. No proceedings can be initiated against guarantors provided the guarantor is a natural person, the balance between the assets and liabilities of his personal and professional property does not exceed €750.000 and he has responsibility for a debt or liability of the company not exceeding €250.000 . In addition to the above, there are additional safeguard measures, applicable to guarantees of amounts up to of €500.000, which are similar to those applying to guarantors of companies under liquidation. These measures will be discussed in detail in the relevant chapter below. It should be noted that in case of Examinership, the relevant date is the date of publication of the Examiner's appointment to the official government gazette of Cyprus.

3.2.14 Removal of an Examiner and Exit from Examinership

The Examiner may be removed from his position by the Court on reasonable grounds.²⁴⁴ In case of resignation of the Examiner or where a vacancy arises for other reasons, the Court may issue an order in order for the vacancy to be filled after examining an application submitted by the Committee of Creditors, the company or any other

²⁴² Companies Act, Cap. 113, s 202AE

²⁴³ Companies Act, Cap. 113, s 202AF (8)

²⁴⁴ Companies Act, Cap. 113, s 202Q (1)

interested party.²⁴⁵ Any acts committed by the Examiner are valid, irrespective of any defects may be revealed in respect to his appointment or qualifications.²⁴⁶

The protection by the Court shall cease from the date the proposals for compromise or scheme of arrangement come into force or at an earlier date determined by the Court.²⁴⁷ Shall the company ceases to be under the protection of the Court, the Examiner's appointment is terminated at the cessation date.²⁴⁸

3.2.15 Fraudulent Trading

Where any person, during the Examinership procedure, is taken to have intentionally defrauded the company's creditors, or creditors of any other person or for any fraudulent purpose the Court may take a decision that such person is personally liable for some or all the debts of the company.²⁴⁹ That decision is to be taken following an application of the Examiner, a creditor or contributory of the company. That person is to be discharged of responsibility, where it can be proved that he acted honestly and reasonably in relation to the affairs of the company.²⁵⁰ In addition, and independently of any imposition of the above mentioned liability, that person may be guilty of the offence of fraudulent trading, and in case imposition of criminal liability he will be liable to a custodial sentence of up to 3 years and/or a fine of up to €2.562.²⁵¹

It is interesting to note that Cap. 113, does not impose liability on companies' directors for wrongful trading.²⁵² Such a provision could impose personal liability to current or former directors in cases where the director continues to trade notwithstanding the fact that he '*knew or ought to have concluded that there was no reasonable prospect that*

²⁴⁵ Companies Act, Cap. 113, s 202Q (2) (3)

²⁴⁶ Companies Act, Cap. 113, s 202Q (5)

²⁴⁷ Companies Act, Cap. 113, s 202AC (1)

²⁴⁸ Companies Act, Cap. 113, s 202AC (2)

²⁴⁹ Companies Act, Cap. 113, s 202AJ (1)

²⁵⁰ Companies Act, Cap. 113, s 202AJ (3)

²⁵¹ Companies Act, Cap. 113, s 202AK

²⁵² Maria Kyriacou and Elias Neocleous, 'Cyprus' in Bruce Leonard (ed), *Restructuring and Insolvency* (Getting the Deal Through, Law Business Research Ltd 2014) 117

the company would avoid entering insolvent administration or going into insolvent liquidation',²⁵³ as is the case under Section 246ZB of IA 1986 in the UK which works as a statutory duty of creditors to take into account the interests of the creditors.²⁵⁴ Under the previous regime, wrongful trading in the UK was applicable only in liquidations. Following the insertion of the above-mentioned section in October 2015 by the Small Business, Enterprise and Employment Act 2015 (SBEEA), application of wrongful trading has also been extended in administrations.²⁵⁵ Such a provision could be seen as an additional tool to protect creditors from dealing with financial vulnerable companies and should be considered by the Cypriot legislator in the context of possible future amendments. In addition to this, wrongful trading could also have a broader application to that of fraudulent trading given the absence of a criminal concept, which exists in the latter and it generally affects the standard of proof also in civil proceedings.²⁵⁶ Contrariwise, the concept of wrongful trading '*departs from an intention to defraud, to a position where liability would ensue where directors negligently opted to carry on trading at a time when they knew or ought to have known that there was no reasonable prospect of the company recovering*'.²⁵⁷ Therefore, a wrongful trading equivalent in Cyprus could contribute in establishing a higher and stricter level of competence by companies' directors.

3.3 The Administration as a guide in introducing the Examinership procedure

3.3.1 Similarities and Differences between two procedures

Undeniably, Cyprus company law is strongly influenced by UK company law given that Cyprus was formerly part of the British Empire, having only gained independence in 1960. Nevertheless, several amendments have been introduced through the years, so

²⁵³ Insolvency Act 1986, s 246ZB

²⁵⁴ Linklaters, 'How effective is wrongful trading legislation in holding rogue directors to account?' (Linklaters, May 2016) <https://lpscdn.linklaters.com/-/media/files/linklaters/pdf/mkt/london/gc6805_rogue_directors_bafs_final_a_screen.ashx?rev=8bdf673-e267-41d7-81b3-f89af822f5d4&la=ja-jp&hash=35FDEF13077861FAB996A77519D1A15E58132FB1> accessed 3 September 2018

²⁵⁵ Sealy and Milman (n 131) 226

²⁵⁶ A.G. Erotocritou LLC, 'Fraudulent Trading: Characteristics and deficiencies' (A.G. Erotocritou LLC) <<http://erotocritou.com/en/publications/118-fraudulent-trading-characteristics-and-deficiencies.html>> accessed 3 September 2018

²⁵⁷ *ibid*

that the Cap. 113, has now its own ‘independent character’. In this chapter, similarities and differences between the regimes of UK Administration and Cypriot Examinership will be discussed in order to be able to finally assess whether the experience of application of Administration in UK could be used as a guide in introducing and applying the Examinership procedure in Cyprus. A comparison of Examinership with the UK Company Voluntary Arrangements (CVAs) will be also conducted in order to assess whether they work as a better comparator to Examinership.

Before examining the relationship between Examinership and UK Administration, it should be mentioned that UK Administration was introduced by the IA in an attempt to promote the philosophy of the rescue culture²⁵⁸ and has been significantly reformed in 2002 by the Enterprise Act 2002 (EA).

Firstly, one of the most important differences between the two regimes is that the distressed company can enter into administration without a court order. This principal change was introduced in UK by the EA as an improvement on the process functionality given that obtaining an order of administration was expensive and time consuming.²⁵⁹ The power to appoint an administrator may be exercised by the holder of a qualifying floating charge, by the company itself or the directors of the company.²⁶⁰ Once an administrator is appointed by a holder of a qualifying floating charge, the latter shall notify the court by filing a notice of appointment and other prescribed documents.²⁶¹

The notice of administration must include a statutory declaration that the appointment was made in accordance with the provisions of the law, must identify the administrator and be accompanied by a statement by him in which he declares his consent to the appointment and expresses his opinion that the purpose of administration is reasonably likely to be achieved.²⁶² Same rules apply in the event of appointment by the company

²⁵⁸ Dignam and Lowry (n 81) 451

²⁵⁹ Roy Goode, *Principles of Corporate Insolvency Law* (4th edn, Sweet & Maxwell 2011) 389

²⁶⁰ Insolvency Act 1986, Sch. B1 paras 14 and 22

²⁶¹ Insolvency Act 1986, Sch. B1 para 18 (1)

²⁶² Insolvency Act 1986, Sch. B1 paras 18 (2) - (5)

or directors in relation to the notice of appointment,²⁶³ but special rules exist in relation to the notice of intention to appoint an administrator, a copy of which must be filed as soon as is reasonably practicable accompanied by a statutory declaration that the company is or is likely to become unable to pay its debts, the company is not in liquidation, the appointment is not prevented by the restrictions applied according to the law, and any other information may be prescribed.²⁶⁴ Despite the fact that the process to appoint an administrator differs when he is appointed by the Court, once the administration is running same rules apply in regards to Administrator's powers, duties liabilities.²⁶⁵

After filing an intention to appoint an administrator, an Interim Moratorium comes into effect and lasts until the period of ten business days expires.²⁶⁶ In relation to that matter, it is worth noting that in the very recent case of *JCAM Commercial Real Estate Property XV Limited*,²⁶⁷ it was made clear by the Court of Appeal that an Interim Moratorium could not be granted if there is no person to give the relevant notice under paragraph 26 (1) of Schedule B1, that is a qualifying floating charge or a person entitled to appoint an administrative receiver. In this case it was stated by Lord Justice David Richards that the respondent was not eligible to be benefited by the use of an Interim Moratorium when filing an intention to appoint an administrator, given that it was not subject to a qualifying floating charge. It is therefore emphasized by this decision that the Interim Moratorium has a limited scope of application and that the directors of the company could not be benefited by its application where the conditions are not fulfilled.

The idea behind establishing the out of court appointment was to '*enable directors to steer the company into a safe harbour*'²⁶⁸ that is to make things simpler and make the initiation of procedure less costly²⁶⁹. On the other side, an out of court appointment may make directors and qualifying floating charge holders 'prone to fail to observe the

²⁶³ Insolvency Act 1986, Sch. B1 para 29

²⁶⁴ Insolvency Act 1986, Sch. B1 para 27

²⁶⁵ Goode (n 259) 390

²⁶⁶ Insolvency Act 1986, Sch. B1 para 44 (4)

²⁶⁷ *JCAM Commercial Real Estate Property XV Ltd v Davis Haulage Ltd* [2017] EWCA Civ 267

²⁶⁸ Milman, 'Administration: an evolving regime for distressed companies' (n 67) 1

²⁶⁹ *ibid*

formalities' of the procedure and the relevant Rules,²⁷⁰ that inevitably results in an application before the Court in order to save the appointment.²⁷¹

Another difference that can be mentioned between Administration and Examinership, is that the powers of an Administrator are more extended as compared to the powers of Examiner's. The extension on the powers of the Administrator has been introduced by implementation of the Enterprise Act 2002 and the main divergence between these two regimes can be found on the power of the Administrator to make a distribution of assets or dividends to creditors of the company.²⁷² Though the Administrator can make payments by way of distribution to secured and preferential creditors without the permission of the court, a distribution to unsecured creditors can be released only under the permission of the Court. The Court authorizes distribution to unsecured creditors only when it is convinced that the interests of the creditors as a whole can be protected in case of distribution by the Administrator rather by a Liquidator.²⁷³ Under the Cap.113 the Cypriot Examiner is totally lacking in this power. Only a Liquidator can act as above and only under the supervision of the Court.²⁷⁴

However there are also common provisions on the power of both Administrator and Examiner, namely the power to dispose of property which is subject to a floating charge as if it is not subject to the charge, the power to dispose property subject to other security and the power to dispose goods in the possession of the company under a hire-purchase agreement as if the owner rights under the agreement were vested in the company.²⁷⁵ The only difference between the two regimes is that in Administration, there is no requirement of applying to the court for the purpose of disposing a property subject to a floating charge, as applied on the other cases. In Examinership, the Examiner will have to seek the permission of the Court in order to act in any case as described above.

²⁷⁰ The Insolvency (England and Wales) Rules 2016, SI 2016/1024

²⁷¹ *ibid*; *Minmar (929) Ltd v Khalastchi and another* [2011] EWHC 1159 (Ch)

²⁷² Insolvency Act 1986, Sch. B1 para 65

²⁷³ *Goode* (n 259) 451; *Re GHE Realisations Ltd* [2006] BCC 139

²⁷⁴ Companies Act, Cap. 113, s 233

²⁷⁵ Insolvency Act 1986, Sch. B1 paras 70, 71, 72; Companies Act, Cap. 113, s 202P

The final difference that will be discussed and reflects to the role of each procedure, is the purpose of Examinership and Administration. As it arises from the Cap.113 the main purpose of Examinership is the survival of the whole or any part of the business as a going concern. There is no explicit provision referring to the purpose of the Examinership in Cyprus, as exists in the Administration that provides for the purpose of the process, but it results from the relevant provision as regards to the power of the court to appoint an Examiner. More specifically, the Cap. 113 provides that the court has the power to appoint an examiner where there is a reasonable prospect of survival of the company and the whole or any part of the company's undertaking as a going concern.²⁷⁶ It has been argued that the actual purpose behind this provision is '*to save a viable Cypriot company from closure and thereby save the jobs of the employees*'.²⁷⁷

As regards the UK Administration regime, the rules around its purpose have been changed as a result of the Enterprise Act 2002 given that the provision on the plurality of purposes was abolished and replaced with a hierarch of three possible purposes,²⁷⁸ '*with rescue of the company taking pride of place*',²⁷⁹ given that is considered as the first priority. More specifically, there is a strict hierarchical order which gives guidelines on how to be followed by the administrator who will finally select a single purpose to perform his functions.²⁸⁰ The priority lists goes like that first in the list is the rescue of the company as a going concern, the second one is the purpose to achieve a better result for the company's creditors as a whole than would be like if the company were wound up which is selectable only if it is not reasonably practicable to achieve the first objective or this objective would achieve a better result for the company's creditors as a whole.²⁸¹ Finally, the third one is the realization of the property in order to make distribution to one or more secured or preferential creditors which can be pursued only if the administrator thinks that is not reasonably practicable to achieve either of the above mentioned objectives and that option does not unnecessarily harm the interests of the creditors of the company as a whole.²⁸² There is also a general obligation of the

²⁷⁶ Companies Act, Cap. 113, s 202A

²⁷⁷ Panayiotou and Papaxanthos (n 60)

²⁷⁸ Goode (n 259) 400

²⁷⁹ Milman, 'Administration: an evolving regime for distressed companies' (n 67) 1

²⁸⁰ Insolvency Act 1986, Sch. B1 para 3 (1)

²⁸¹ Insolvency Act 1986, Sch. B1 para 3 (3)

²⁸² Insolvency Act 1986, Sch. B1 para 3 (4)

Administrator to perform his functions in the interests of the company's creditors as a whole.²⁸³

It has been argued that the structure of paragraph 3 of Schedule B1 of the IA is 'somewhat complex'²⁸⁴ given that subjective and inexact expressions are used as guidelines in order for the administrator to pursue an objective, which may results to disagreements and challenges as to the election of the alternative objectives.²⁸⁵ Furthermore, despite the fact that the primary purpose of the Administration is the rescue of the company as a going concern, it seems that the provision of 3(2) intends to raise the interests of the creditors on the top of other benefits which provides opportunities to rescue the company, such as the maintenance of employees and generation and preservation of shareholder value.²⁸⁶

As regards to the Examinership, the preamble of the Amendment Law 62(I)/2015 provides that the legislator proceeded with the relevant amendments due to the need of a new mechanism intends to debt restructuring, survival and restoration of a business and aiming at maintenance of a viable business, which will contribute to the enhancement of competitiveness, economic improvement and employment maintenance. It could be argued that, the above clarification encompasses interpretation of the phrase '*the reasonable prospect of survival of the company and the whole or any part of the company's undertaking as a going concern*' and what it actually results from this, is that the leading purpose of Examinership is the company rescue. No explicit reference is made to the creditors so that, in contrast with the Administration, their interests remain at a lower level than the factors described above. However, the interests of the creditors could be taken in account, together with the interest of the members of the company, by the independent expert while preparing his report. This report should be submitted with the application for the Examiner's appointment, by the Court while issuing an order so that the powers of the directors of

²⁸³ Insolvency Act 1986, Sch. B1 para 3 (2)

²⁸⁴ Fletcher IF, 'UK Corporate Rescue: Recent Developments – Changes to Administrative Receivership, Administration, and Company Voluntary Arrangements – The Insolvency Act 2000, The White Paper 2001, and the Enterprise Act 2002' (2004) 5(1) European Business Organization Law Review 119, 136

²⁸⁵ *ibid*

²⁸⁶ *ibid* 137

the company to be exercised by the Examiner, as well as by the Examiner while preparing proposals for a compromise or scheme of arrangement which would contribute to the survival of the company.

Undoubtedly, creditors play a significant role in the whole process of the Examinership in view of the newly introduced Creditors' Committee which is to be appointed upon the option of the Examiner in order to assist him in discharging his duties, and also because of the need to accept the proposals of the Examiner for a compromise or scheme of arrangement. By these responsibilities, creditors could exercise significant influence and control on the Examiner and his proposals, however the legally recognized purpose of the procedure still make no reference to their interests.

It seems however that the Examinership mechanism presents more similarities with the UK CVAs than the Administration regime, despite the fact that up until now, the Cypriot literature does not consider them as a comparator to the former. This is supported by the below findings.

As resulted from the research of this thesis, one of the main similarities between Examinership and CVAs is that the directors of the company retain control of the company, based on the 'debtor-in-possession' rule explained in detail in the next sub-chapter, something that does not apply to the case of Administration,²⁸⁷ and an insolvency practitioner is appointed to act as a trustee or supervisor in relation to the CVA.²⁸⁸ The nominee is obligated to prepare and submit, within 28 days of being given relevant notice, a report expressing his views on the proposals setting out the company voluntary arrangement, which are drafted by the directors of the company. It is worth nothing here that in the case of CVAs, the proposals are prepared by the directors being guided and assisted by an insolvency practitioner²⁸⁹ and that the nominee prepares a report based on these proposals and the statements of affairs of the company, which are also submitted to him by the directors, expressing his view as to whether there is a

²⁸⁷ Tolmie (n 40) 91

²⁸⁸ Finch and Milman (n 146) 418

²⁸⁹ *ibid*

reasonable prospect that the arrangement is likely to be approved and implemented.²⁹⁰ Despite the fact that in Examinership, the proposals for a compromise or scheme of arrangement are prepared by the Examiner,²⁹¹ in both cases these proposals have to be approved by the creditors and members of the company and confirmed by the Court²⁹² and their objective is the rescue of the company.²⁹³ It is generally supported that CVAs are mainly used in order to avoid liquidation since they were designed to encourage company rescues,²⁹⁴ and are seen as a mechanism which provides to companies with *'the opportunity to mount a rescue attempt before the onset of insolvency'* and *'helps facilitate recovery in conjunction with other mechanisms'*.²⁹⁵ The same is true of Cypriot Examinership, which was, as already stated, introduced in order to promote the rescue culture in the Cyprus legal system.

As results from the above analysis show, there are many common rules between Administration and Examinership so that it can be argued that Examinership is akin to Administration.²⁹⁶ However, there are also significant differences which result to the conclusion that these two mechanisms are not identical. Also there are many common rules with that of the UK CVAs, so that it can be argued that they are indeed work as a better comparator to Examinership than the Administration. As it will be discussed below, however, the research showed that the Examinership is mainly based on Irish Company Law, namely the Irish Companies Act 2014.

3.3.2 The Examinership procedure in Irish law and to what extent it influences Examinership in Cyprus

The Examinership procedure had been introduced in Ireland by the Companies (Amendment) Act 1990 and was mainly designed to provide opportunities to companies

²⁹⁰ Tolmie (n 40) 90

²⁹¹ See page 44 above

²⁹² See page 46 above and Insolvency Act 1986, s 4-4A

²⁹³ Lorraine Conway, *Company Voluntary Arrangements (CVAs)* (Briefing Paper No 6944, 2018) 5

²⁹⁴ *ibid*

²⁹⁵ John Tribe, 'Company voluntary arrangements and rescue: a new hope and a Tudor orthodoxy' (2009) 5 *Journal of Business Law* 454

²⁹⁶ Maria Kyriacou and Efrosini Monou, 'Cyprus Overview' (2017) *The European, Middle Eastern and African Restructuring Review* 2 <<https://www.neo.law/wp-content/uploads/2017/05/Cyprus-Overview-Revised.pdf>> accessed 22 June 2017

in order to survive under the supervision of the court.²⁹⁷ The Irish Examinership is very similar to the Chapter 11 bankruptcy procedure in the United States and it has been represented as '*the closest restructuring process in Europe to US chapter 11*'.²⁹⁸ According to the Examinership rules, the directors of the company retain management and control of day-to-day business, a rule that is akin to the 'debtor-in-possession concept' in US chapter 11.²⁹⁹ Chapter 11 aims at restructuring of debts and saving the company based on the 'debtor-in-possession' rule which refers to a debtor who keeps in its possession and control all of its assets while the process of restructuring is being induced without the appointment of a trustee.³⁰⁰ Despite that an appointment of a trustee or an examiner is possible under Chapter 11, in most cases the appointment is not followed and, as a rule, the debtor in possession runs the business and exercise the powers and obligations that a trustee generally has in other cases.³⁰¹

As it arises from the Companies Act 2014, which is currently in force in Ireland, the Examiner's principal function is to formulate proposals for a compromise or scheme of arrangement in relation to the company which is to be confirmed by the court and shall be binding on all the members or class or classes of members and on all the creditors or the class or classes of creditors of the company.³⁰² During this period the company is under the protection of the court which is beginning on the submission day of the relevant petition and is normally ending within 70 days of that date.³⁰³ Similarly, in the US the debtor in possession has exclusive rights to prepare the rescue plan, within the first 120 days, whilst being supervised by the court and subject to court approval.³⁰⁴ By

²⁹⁷ Harry Fehily, 'The legal concept of Examinership' (*Homs Solicitors*, 1 March 2010) <<http://www.homs.ie/publications/the-legal-concept-of-examinership/>> accessed 22 June 2017

²⁹⁸ David Baxter and Tanya Sheridan, 'Irish Examinership: post-eircom, A look at Ireland's fastest and largest restructuring through examinership at the implications for the process' (2012) 6(2) *Insolvency and Restructuring International* 27

<<https://www.algoodbody.com/media/InsolvencyRestructuringInternational.pdf>> accessed 22 June 2017

²⁹⁹ *ibid*

³⁰⁰ United States Courts, 'Chapter 11-Bankruptcy Basics' (*United States Courts*)

<<http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics>> accessed 22 June 2017

³⁰¹ *ibid*

³⁰² Irish Companies Act 2014, ss 534 and 541

³⁰³ Irish Companies Act 2014, s 520

³⁰⁴ Julie Murphy-O'Connor, 'Examinership - preserving the core value of a business' (*Financedublin*) <<http://www.financedublin.com/sponsors/article.php?i=193>> accessed 22 June 2017

contrast, in the UK the administrator takes over the general power to manage and control the affairs, business and property of the company.³⁰⁵

As regards the Examinership regime in Cyprus, it seems that the legislator decided to adopt the idea of Irish Examinership given that the main mission of an Examiner is to prepare the report with his proposals for a compromise or scheme of arrangement, whilst the affairs of the company being administered by the directors.³⁰⁶ The close relationship between the Cypriot and Irish regime is revealed also by Cypriot case law in which the judge made reference to the Irish Companies Act 2014, which was used as an authority to assess the purpose of a specific provision in the Cap. 113.³⁰⁷ In addition to this, a careful reading of both Companies Acts in Ireland and Cyprus can reveal the similarities between these two regimes.

3.3.3 Assessing the effectiveness of administration under the new regime in UK and how this may be taken into account to examine the effectiveness of Examinership in Cyprus

Given that it was evidenced that the administration procedure before the introduction of the Enterprise Act 2002 (EA) was not efficient enough as a rescue device as it was expected to be,³⁰⁸ the new law was introduced in order to make administration attractive to troubled companies for the purpose of its rescue³⁰⁹ and make the process more friendly to the interests of the creditors.³¹⁰ A comparison of the UK law before and after the enactment of EA, and an assessment of the effectiveness of the UK administration based on statistics of the UK Insolvency Service will follow in an attempt to discover the reasons why Cypriot legislator decided to follow the Irish model.

Under the UK pre-Enterprise Act 2002 regime, there were several provisions which made administration less desirable for companies than receivership. The new regime

³⁰⁵ Insolvency Act 1986, Schedule B1, para 59

³⁰⁶ Georgia Constantinou-Panayiotou LLC (n 41)

³⁰⁷ *In regard with the application of the company Polynikis Tourist Enterprises Ltd* (n 62)

³⁰⁸ Finch and Milman (n 146) 304

³⁰⁹ *ibid* 312

³¹⁰ Tolmie (n 40) 105

aimed at promoting the use of administration by introducing significant changes. More specifically, under the pre-Enterprise Act 2002 regime a debenture holder was entitled to appoint an administrative receiver even if the administration process was already been started.³¹¹ In addition to this, directors was able to call a member's meeting for the purpose of considering voluntary liquidation or discussing a winding-up petition.³¹² Furthermore, the administrator did not have a power to make distributions to creditors and the interests of the floating charge holders were not protected enough since they were losing control of the company assets in the event of administration appointment.³¹³

The old regime was also expensive since judicial supervision was required,³¹⁴ and a significant role was offered to the directors in regards to the management of the company's affairs and the power to nominate an Insolvency Practitioner who is sympathetic to their interests and positions.³¹⁵ Finally, another important factor that affected the efficiency of administration under the old regime was the stage at which the appointment of an administrator was permitted. It has been argued that an administrator could be appointed when the company was already at a declining stage, which is when the company was already insolvent or tended to become insolvent, so that the chances of rescue had been reduced.³¹⁶

Due to the above, there was a need to transform administration from an insolvency procedure to a pre-insolvency procedure which actually aims at corporate rescue³¹⁷ and restrict the influence of third parties to the Administrator. Major amendments have been introduced and due to these amendments, the statistics through the years showed that use of administration followed a growth path as compared to the use of receivership which has seen a significant drop over the past years.

³¹¹ Goode (n 259) 383-384

³¹² Finch and Milman (n 146) 303

³¹³ *ibid* 305

³¹⁴ Tolmie (n 40) 106

³¹⁵ Finch and Milman (n 146) 304

³¹⁶ *ibid* 306

³¹⁷ *ibid*

It is worth mentioning that in 2001 the figures of receiverships were more than triple to those of administrations, in contrast with 2006, when administrations figures were about six times higher than those of receiverships.³¹⁸ The very recent statistics published by the Insolvency Service show that Receivership appointments in 2015 were limited to 11, dropping in 2016 to a single figure, which is to 5 cases. Based on the statistics of the first quarter of 2018, there was only one receivership appointment.³¹⁹

Some of the most important amendments that affected the efficiency of administration were the introduction of an out of court appointment procedure and the extension of the range of administrator's managerial powers³²⁰ who is now acting as a company agent and takes over the management of the affairs and business of the company.³²¹ The administrator also has the capacity of the officer of the court³²² and owes a duty to act in good faith, honestly and independently.³²³ Furthermore, once the administration procedure is started, an administrative receiver may not be appointed and in case of an already appointed administrative receiver once the administration order takes effect then he shall vacate.³²⁴ In addition to the above, in contrast to the administrative receiver who owes a duty to act in the interests of the floating charge holder, the administrator has a general duty to perform his functions in the interests of the creditors as a whole and taking into consideration the list of objectives provided in Paragraph 3 of Schedule B1 of IA.³²⁵ Administration normally ends at the end of the period of one year beginning with the date on which it takes effect with the possibility of extension for a further 6 months, or following a court order on the application of the administrator.³²⁶

³¹⁸ John Armour, 'Corporate Insolvency in the United Kingdom: The impact of the Enterprise Act 2002' (2008) 5(2) *European Company and Financial Law Review* 8

³¹⁹ See the Insolvency Statistics, January to March 2018 (Q1 2018) (2018) 9

³²⁰ Rebecca Parry, *Corporate Rescue, Insolvency practitioner series* (Sweet & Maxwell 2008) 25

³²¹ Finch and Milman (n 146) 315

³²² Geoffrey Weisgard and others, *Company Voluntary Arrangements and Administrations* (2nd edn, Jordan Publishing Ltd 2010) 241

³²³ Finch and Milman (n. 146) 316; *Re Condon ex parte James* [1874-80] All ER Rep 388

³²⁴ Insolvency Act, Schedule B1, paras 41 (1) and 43 (6A)

³²⁵ Finch and Milman (n 146) 321

³²⁶ Insolvency Act, Schedule B1, paras 76 and 79

After the new administration regime came into force, it has been found that, the percentage which shows the use of this pre-insolvency procedure was significantly higher than before.³²⁷ More specifically, during the first years of commencement of the administration, the rise in its use was, according to statistics mainly due the introduction of the out of court procedure, which it seems to be popular especially in relation amongst small enterprises.³²⁸ This could be confirmed by the fact that, after a year of the introduction of the new administration procedure, 65.5% of small enterprises chose to enter into out of court administration while only 29.8% chose the appointment of administrator by court order.³²⁹ Furthermore, official statistics show that after the commencement of the Enterprise Act 2002, the administration figures showed a significant rise, while at the same time the receiverships showed a sharp decrease. Nevertheless, the picture has changed by 2014, when administration figures have dropped too, and remained at the same levels to date,³³⁰ as a result of the global financial crisis and the use of informal restructuring procedures.³³¹

It should be mentioned, however, that despite the general high numbers of administrations since the 2003, the statistics show that there are proportionally fewer rescues than under the pre-Enterprise Act 2002 regime.³³² The reason is because in many cases, as will be explained below, the administration has been used as a ‘liquidation substitution’,³³³ namely as an alternative route to liquidation and ‘*an important tool in providing a better return to creditors than would be like in a liquidation*’.³³⁴

A big issue that arose in relation to the administration procedure was pre-pack administrations which, though constitute a proportion of only 22% approximately of the

³²⁷ Finch and Milman (n 146) 323

³²⁸ *ibid*

³²⁹ *ibid*

³³⁰ See the Insolvency Statistics, January to March 2018 (Q1 2018) (n 319) 9

³³¹ Finch and Milman (n 146) 324

³³² *ibid*

³³³ *ibid*

³³⁴ Department of Trade and Industry, *Productivity and Enterprise Insolvency – A second Chance, The Insolvency Service* (The Stationery Office, CM 5234, 2001)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263523/5234.pdf> accessed 2 May 2017

overall administration figures, at the same time they are an important mechanism available under the UK Insolvency Law.³³⁵ Pre-packs are not regulated in the UK insolvency legislation but they have been explained by the Insolvency Service to refer to the situation in which the sale of the business of an insolvent company is negotiated prior to the entrance of the company into formal insolvency proceedings.³³⁶ The whole process is very quick given that, immediately after the appointment of an authorized insolvency practitioner the company is sold³³⁷ and there is no need to obtain the approval of unsecured creditors of the company or the permission of the court in order to proceed.³³⁸

It has been argued that pre-packs may have been seen as one of the most logical options to be followed regarding an insolvent company due to the fact that by this way risks and consequences of normal administration, such as destruction of company's goodwill, reduction of the sale price, and reluctance of potential lenders to lend money to the company are avoided.³³⁹ There are no limitations as to the purchaser of the company, who may be either an independent party,³⁴⁰ a competitor or a connected party, that is one of the existing owners or directors of the insolvent company, which is frequently referred as a phoenix company.³⁴¹

The pre-packs were firstly discussed and approved by the court in the case *DKLL Solicitors*,³⁴² in which the court made the requested order to enable the administrators to effect a pre-arranged sale of the business based on the paragraph 55.2 of Schedule B1, authorizing the proposal of sale to be executed regardless of the opposition of the majority creditors. It should however be noted that, as resulted from this decision, the

³³⁵ Pre Pack Pool, 'Annual Review 2016' (March 2017) 5, 7
<<https://www.prepackpool.co.uk/uploads/files/documents/Pre-pack%20Pool%20Annual%20Review%202016-17.pdf>> accessed 22 June 2017

³³⁶ Dignam and Lowry (n 81) 454

³³⁷ Andrew R. Keay and Peter Walton, *Insolvency Law Corporate and Personal* (3rd edn, Jordans 2012) 127-128

³³⁸ Lorraine Conway, *Pre-pack administrations* (Briefing Paper No CBP5035, 2017) 6

³³⁹ *ibid* 8

³⁴⁰ Christopher Mallon and Shai Y. Waisman, *The Law and the Practice of Restructuring in the UK and US* (1st edn, Oxford University Press 2011) 232

³⁴¹ *ibid*

³⁴² *DKLL Solicitors v Revenue and Customs* [2007] EWHC 2067 (Ch)

nature of the proposal, that is the pre-pack sale, did not play a decisive role in the judgment once the court considered that there was a real prospect that the objective will be achieved. On the other hand, the court took into account the interests of the employees and clients of the partnership, as well as the fact the liquidation of the partnership will be avoided.

In the same way, the Court issued an order approving a business sale using the pre-pack procedure in case *Re Christophorus 3 Ltd*³⁴³ noting that the pre-pack sale was ‘*the only way forward which offers any realistic prospect of saving the business of the group as a going concern*’,³⁴⁴ even if not satisfied that the company would be saved.³⁴⁵ There were also some comments on this judgement, namely on the fact that the court did not examine the economic or financial viability of the company and restricted itself to a role of examining the information provided by the directors of the company who had agreed on this sale.³⁴⁶ It was also supported that the decision on whether to inter into a pre-pack sale or not, must be taken by a practitioner due to its commercial nature, therefore the role of the court on the whole procedure remains limited.³⁴⁷

Despite the advantages of pre-packs, a discussion has been released regarding the lack of transparency resulted from insufficient information given to company’s creditors, something that affected the creditors’ interests.³⁴⁸ The process of pre-packs was also criticized as opaque given that in this case there is no need to follow the protective rule of traditional administration.³⁴⁹ In an attempt to increase transparency, the Statement of Insolvency Practice (SIP) 16³⁵⁰ was announced by the Association of Business Recovery Professionals as a guide to practitioners in order to, amongst others, disclose information to creditors regarding the pre-packaged sale. Moreover, in 2014 an

³⁴³ *Re Christophorus 3 Ltd & Anor, Re* [2014] EWHC 1162 (Ch)

³⁴⁴ *ibid*

³⁴⁵ Bolanle Adebola, ‘Proposed Feasibility Oversight for Pre-pack Administration in England and Wales: Window Dressing or Effective Reform?’ (2015) 8 *The Journal of Business Law* Issue 591, 595

³⁴⁶ *ibid* 603

³⁴⁷ *ibid*; Teresa Graham, *Graham Review into Pre-pack administration* (The Rt Hon Vince Cable MP, 2014)

³⁴⁸ Dignam and Lowry (n 81) 454

³⁴⁹ Adebola (n 345) 582

³⁵⁰ There are 3 different versions of the SIP, with the latest released on 1 November 2015. Association of Business Recovery Professionals, *Statement of Insolvency Practice (SIP) 16, Pre-packaged Sales in Administrations* (SIP 13, Version 16, 2015)

independent report, the Graham Review, was published on the pre-packs which focused on discussing concerns raised about pre-packs and making recommendations on how to improve the process efficiency³⁵¹ and the Pension Protection Fund has issued a guidance to insolvency practitioners as to how to act when appointed as administrators.³⁵²

In addition to the above concerns, it was argued that the out of court procedure did not satisfy the purpose for which it was introduced since relevant case law showed that court intervention was needed in order to examine applications related to appointment issues. This is because, as stated in the so called *Minmar*³⁵³ case, failure to follow the lawful procedure will result to the annulment of appointment. There were cases in which these applications resulted to annulment of appointment due to process faults such as lack of quorum in case of appointment by the directors of the company or the validity of the debenture in case of appointment by qualifying floating charge holder.³⁵⁴ It is worth noting that Court of Appeal allowed an appeal in *Randhawa & Anor*,³⁵⁵ where the Court held that the appointment of the administration was invalid given that the sole director of the company could not validly appoint administrators based on the Articles of association of the company that required two directors to make valid decisions, and that the Duomatic Principle³⁵⁶ could not apply given that the one of the two shareholders of the company did not assent to the appointments.

Therefore, the effectiveness of the out of court procedure is disputed indirectly by case law since the intended purpose to avoid involvement of the court was not achieved.³⁵⁷ In addition to this, it was argued by the European High Association (EHYA) that the new regime does not satisfy the needs of a modern restructuring process since court

³⁵¹ Graham (n 347)

³⁵² Sealy and Milman (n 131) 611

³⁵³ *Minmar (929) Ltd* (n 271)

³⁵⁴ Milman, 'Administration under Schedule B1 of the Insolvency Act 1986: recent developments' (n 69); *Re Armstrong Brands Ltd* [2015] EWHC 3303 (Ch), [2016] BCC 657; *Re BW Estates Ltd (No. 2)* [2016] EWHC 2156 (Ch), [2016] BCC 814

³⁵⁵ *Randhawa & Anor v Turpin & Anor* [2017] EWCA Civ 1201

³⁵⁶ Duomatic principle established *In re Duomatic Limited* [1969] 2 Ch 365 and can be applied 'where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be'

³⁵⁷ *ibid*

supervision is required. They suggest that the companies will face challenges when follow the out of court process due to the different interests involved in such cases where each party aim at protecting its interest in accordance with its own schedule, and in most of the times there is no intention of cooperation and consent to act in a joint project.³⁵⁸ Thus, unsupervised processes will lead to the rise of costs, delays and uncertainty in the progress in general.³⁵⁹

In the end it could be argued that statistics regarding the outcome of administration, that is the corporate rescue, did not meet the expectations of the legislator. Studies showed that most administrators did not focus on the first statutory purpose, but they are aiming at '*achieving a better result for the company's creditors as a whole*'³⁶⁰ than would be likely if the company were wound up.³⁶¹ Practically, the result of the new administration process is the realization of the company's assets which appears to be more beneficial to the creditors than a realization during a winding up process.³⁶² Despite the fact that this procedure appears to be favorable to creditors, there are doubts regarding its efficiency as a rescue device. It seems that there are also administration appointments with no clear statutory purpose and some commentators support the view that this kind of administration '*is being used as a quasi liquidation*',³⁶³ having only the purpose to wind up the company and not to be used a tool to save the company.³⁶⁴ It should not be omitted that the primary purpose of the Administration is the rescue of the company as a going concern, and not only to raise money for the creditors.

Taking into consideration the above statistics and findings it is the writer's view that the disputed efficiency results of administration and the doubts expressed by commentators 'did not go unnoticed' by the Cypriot resulting in the adoption of the idea of the Irish Examinership. The need of a supervised process in Cyprus it is also strengthened by the fact that Cyprus is a small island and connections between people

³⁵⁸ Vanessa Finch, 'The dynamics of insolvency law: three models of reform' (2009) 3(5) Law and Financial Markets Review 438, 439

³⁵⁹ *ibid*

³⁶⁰ Keay and Walton (n 337) 93

³⁶¹ *ibid*

³⁶² *ibid*

³⁶³ *ibid*

³⁶⁴ *ibid*

are very strong. Therefore there is a danger of the directors and qualifying floating charge holders failing to observe the formalities without considering the consequences on the appointment of the Examiner in order to protect and promote their interests against those of other interested parties. On an alternative note, out of court process should be accessible to small companies which do not afford the high costs involved under a court process but have also the right to ask for a second opportunity in order to survive. The same could be said in regards to the purpose of the process which, in Examinership, is the single purpose of rescuing the company. The Examinership model was not intended to be used as a *quasi liquidation* but as a restructuring process, during which the company is under the protection of the court and '*claims and debts against it are for the most part, frozen*'.³⁶⁵

3.3.4 Is Cypriot Examinership fit for its purpose or there is a need for amendments?

The question whether Examinership is efficient to serve the purpose for which it was introduced will be discussed below, based on the relevant statistics released in Cyprus. The findings will be thereafter used so as to discuss the need for more amendments in the future based on the UK administration model and experience.

Firstly, statistics show that Cypriot companies and creditors alike, did not respond with enthusiasm to Examinership given that they appeared to be reluctant to apply for it. More specifically, statistical data has been published by the Insolvency Service of Cyprus regarding the restructuring plans for companies and individuals, which show that after approximately eight months of implementation of the law, there has only been one application on Examinership until 31 January 2016.³⁶⁶ As of the above and given the fact that we have no evidence of companies that have gone under Examinership, it is not safe to draw conclusions about the effectiveness of the process in Cyprus.

³⁶⁵ Brian Foley, 'Court Protection of Ailing Companies - the Law of Examinership in the Republic of Ireland' (2002) 23(11) BLR 267

³⁶⁶ See Statistics of Insolvency Service available under this
<linkhttp://www.mcit.gov.cy/mcit/insolvency.nsf/page08_gr/page08_gr?OpenDocument>

As regards to the efficiency of Examinership in Ireland, researches show that companies that have been saved through Examinership show increasing figures of companies rescued since the number of saved jobs in first six months of 2017 was 66% higher than that of last year same period.³⁶⁷ In addition to this, a significant step in encouraging Irish companies to use the Examinership process for restructure purposes has been made through the ruling of the *Ladbroke's* case.³⁶⁸ More specifically, in this case the High Court highlighted the importance of the role of the Examiner in Ireland by ruling that he is the only person qualified to make commercial decisions during the Examinership process and that the Court should not intervene in his decisions, with the exception of the case where '*he has done something which is so utterly unreasonable and absurd that no reasonable man would have done it*'.³⁶⁹ The Court confirmed that the Examiner is not obligated to provide commercial information to potential investors of the company and allowed the Examiner to complete the restructuring process and save the company by finally dealing with another investor.³⁷⁰ This example should be followed by Cypriot too companies since the Irish experience showed that the Examinership can work as an effective tool to restructure companies.

It could be argued, however, that the statistics in Cyprus show that the whole process has failed to serve the purpose for which it was introduced given that the interested parties of the troubled companies did not get convinced in order to follow that pre-insolvency regime. Despite the independent nature of the process and the protection by the court, it seems that there are factors acting as barriers to the use of Examinership in Cyprus. One of these barriers, are perhaps the costs of the process. The Cap. 113 provides that these expenses are paid out of the revenue of the business of the company or the proceeds of realization of the assets, but it does not provide what happens in case of insufficiency of assets to enable the expenses to be paid in full. It must not be

³⁶⁷ Peter Hamilton, 'Examinership process saves 492 jobs in first half of 2017' (*The Irish Times*, 10 July 2017) <<https://www.irishtimes.com/business/economy/examinership-process-saves-492-jobs-in-first-half-of-2017-1.3149323>> accessed on 29 September 2017

³⁶⁸ *ibid*; *Ladbroke's (Irl) Ltd & ors & Companies (Amendment) Act 1990* [2015] IEHC 381

³⁶⁹ *ibid*; *In the matter of Eircom Ltd* (Kelly J. ex tempore 17th May, 2012)

³⁷⁰ Warren Baxter, 'Irish Court makes key ruling in Ladbroke's examinership' (*Deloitte*, 2016) <<https://www2.deloitte.com/content/dam/Deloitte/ie/Documents/Finance/Corporate%20Finance/ie-cf-Crystallisation%20of%20Floating%20Charges.pdf>> accessed 20 July 2018

overlooked that the value of business and assets of the company are falling sharply when the company is close to becoming insolvent, therefore the uncertainty on the costs and results of the whole procedure tends to make the Examinership less desirable to companies.

The reduction of the costs via an out of court procedure could have been the first step for a further amendment of the law on Examinership. However, the experience of UK administration it must be taken into account so that problems, such as the appointment of the Administrator are avoided. The solution between the total absence of an out of court procedure and the existence of an unsupervised process which may leads to costs, delays and uncertainty, it could be a fast track plan which is to be out of court in general, but it will require an application and relevant consents to be filed to the court. More specifically, this can be achieved by the introduction of a new restructuring tool which requires cooperation between all interested parties by submitting a petition for appointment of an Examiner jointly or by providing their consent to act in a joint project which was submitted either by the company, its creditors, members or a guarantor of its liabilities. Alternatively, in order to reduce court input, the new tool could be influenced by the idea of the CVAs;³⁷¹ an arrangement proposed by the directors of the company which enables the nominee to prepare his report, based on the proposals prepared by the directors, within 28 days of receipt of the relevant notice and submit it to the court. The proposed voluntary arrangement should be approved by the meetings of the company and of its creditors summoned in accordance with the law.³⁷² This plan would be ideal for ‘small companies’ which may be hesitant to apply for the Examinership, meaning that the new tool will be less costly and faster than the Examinership as it currently works.

³⁷¹Julie Murphy-O'Connor and others, “Examinership-lite” - changes introduced by the Companies (Miscellaneous Provisions) Act 2013’ (*Matheson*, 2 January 2014) <<http://www.matheson.com/news-and-insights/article/examinership-lite-changes-introduced-by-the-companies-miscellaneous-provisi>> accessed 15 May 2017

³⁷² Insolvency Act 1986, s 1-5

Regardless of the above, it should be noted that the search for improvement with regard to the pre-insolvency regimes continues in the UK and the Cypriot legislator should not remain uninvolved in the face of these proposed reforms.

Recently, and more specifically this August, the UK government has published proposals in the context of the Insolvency and Corporate Governance Reform based on which several improvements announced on the UK corporate insolvency regimes. Amongst other significant reforms, there is an intention to introduce a new moratorium that will mainly focus on business rescue, a process that is relative to Cypriot Examinership. This moratorium will have a duration of 28 days, with a possible extension of up to 56 days, and will follow the ‘debtor-in-possession concept’ since the directors of the company will retain the control of the business. It is proposed that an authorized supervisor, the Monitor, should be appointed in terms of securing the protection of the creditors. The government, in cooperation with some stakeholders, examined the concerns which were expressed with regard to the moratorium and proposed changes to the relevant measures which focus on the protection of creditors and the maintenance of balance between the interests of creditors and the company. The moratorium will be applicable to companies which face financial difficulties but at the same time are viable companies, not already insolvent companies, and will be open to all companies regardless of their size with only minor exceptions.³⁷³

In addition to the above, and in contrast to the Examinership procedure where in court appointment applies, in the case of the moratorium there will be an out of court appointment which will however require that several papers have to be filled in court, such as consents by the company or the company’s directors that the appointment of the Monitor meets the conditions of the law. Also, relevant notices will be sent to the creditors, the entrance to the moratorium will be registered with Companies House and creditors will have the right to object by filing application to the Court. The requirement for the court application by the creditors is justified based on the need to ensure the

³⁷³ See the Consultation on Insolvency and Corporate Governance: Government response, pages 42-58 available under this link
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG_-_Government_response_doc_-_24_Aug_clean_version__with_Minister_s_photo_and_signature__AC.pdf>

protection of rights of creditors and company too, and also ‘*to deter frivolous challenges that have little or no merit*’.³⁷⁴ Overall, the main aim of the proposed reforms and the responses given by government while addressing the concerns raised by the stakeholders, were mainly focused on the objective to eliminate the costs and risks in the restructuring processes and to adopt safeguard measures in favour of the creditors’ interests.³⁷⁵

The views and comments that were published with the relevant report by the Department for Business, Energy and Industrial Strategy and the changes decided which were based on the relevant responses provided by the stakeholders, should be taken into account by the Cypriot legislator. Given that Examinership presents more similarities with moratorium than those noticed with the UK administration, an inspiration based on the concept of this new pre-insolvency regime could be the next step in the modernization of Cypriot law so as to encourage Cypriot companies to use the Examinership.

All in all, the Cypriot legislator decided to adopt the idea of Irish Examinership which is clearly a restructuring process and to follow the ‘debtor-in-possession’ rule based on which the debtor keeps in its possession and control all of its assets while the process of restructuring is being induced. In addition to this, the Cypriot legislator decided to exclude from regulation provisions regarding the out-of-court appointment of the Examiner taking into consideration the disputed efficiency results of out-of-court appointment of the Administrator in the UK. Therefore, it could not be said that there are areas that remain unnoticed and that the amendments of 2015 in Cyprus were of limited scope. Of course, there is always room for improvements, which can be based on the suggestions presented above and mainly based on the new moratorium plan.

³⁷⁴ *ibid* 45

³⁷⁵ *ibid* 43-44

4. Modernizing and streamlining the compulsory liquidation process in the Companies Act based on the UK model

4.1 General Remarks

Compulsory liquidation is governed by Sections 209-260 of the Cap. 113 and is performed by a court order on the basis of a relevant petition filed by any of the persons referred in Section 213 of Cap.113.

Following the new package of insolvency laws introduced in 2015, relevant amendments came into force the same year aiming at modernization of the liquidation process and securing financial stability in the Republic of Cyprus which was in a difficult economic situation. Those amendments were introduced by the Companies (Amendment) (No.3) Law of 2015 and most of them related to compulsory liquidation by court order. The Preamble of this Law provides that the new law aims to ensure the protection of rights of guarantors, who were facing difficulties in responding to their obligations following from loans taken by the formerly solvent company, the company and creditors as well to assure a balance between them, and to deal with over-indebted companies, the number of which has proven very high. Furthermore, it recognizes the insufficiency of the previous regimes and suggests that there is a need for modernization of the procedure in order to make it simpler, speedier and less costly. Facilitation of the return of productive assets in the market was also one of the main objectives of the new law.

This chapter's aim is to analyze the most important changes affecting compulsory liquidation in Cyprus, to examine how these changes contribute to the modernization of liquidation law and to assess their effectiveness by making reference to the relevant case law and statistics in Cyprus. Furthermore, it will illustrate the influence of the UK law on the Cypriot law while examining whether there are similarities and differences between the two insolvency regimes and to put forward some suggestions for other possible changes that could have been introduced by the new law, being inspired by the UK law.

4.2 Compulsory liquidation process in the Cyprus Companies Act

4.2.1 Grounds for initiating compulsory liquidation process

The compulsory liquidation process in Cyprus is regulated by Section 203 (1) (a) of Cap. 113, and can be initiated when a relevant order is issued by the Court. Section 211 of Cap. 113 explicitly refers to the circumstances in which compulsory liquidation is feasible, the seven different cases that were already listed above for the purposes of Chapter 2.³⁷⁶

The said provisions are interpreted by Cypriot courts in numerous cases, a reference to which will be made below, towards a better understanding of their context and application.

It was made clear by the Supreme Court of Justice of Cyprus in *Re Bell Transport Services Limited*³⁷⁷ that, in order for the Court to examine an application for winding up a company under Section 211 (a), it is not enough on the part of the applicant to refer to a special resolution that the company be wound up by the Court given its inability to pay its debts. The application, which was made by the company itself, has had to explicitly refer to Section 211 (a) and to be accompanied with an affidavit signed by an officer of the company describing the conditions related to this application. It was also noted that this application could only be examined under Section 211 (e) given that the background of the events described by the special resolution was the company's inability to pay its debts.³⁷⁸ As a result, the application was dismissed due to the fact that no inability was proved.

³⁷⁶ See page 20 above

³⁷⁷ *In regard with the company Bell Transport Services Limited v. Lombard Natwest Ltd* [2000] 1 AAD 2028

³⁷⁸ *ibid*

It should be noted that in regards to the case of the public company where the existing number of members are less than 7, the Court shall grant to the company a sufficient timeframe for the removal of the reason for winding up, and shall proceed with the winding up, only if the company declares inability to increase its number of members or cannot increase its members within the given timeframe.³⁷⁹

The majority of case law on compulsory liquidation relates to the company's inability to pay its debts. In regards to the other cases, Cypriot case law is very limited. Nevertheless, literature in Cyprus refers to UK case law in order to describe the situation under which the Court exercises its discretion in order to decide on an application regarding the commencement or not of the company's business within a year of incorporation or its suspension for a whole year.³⁸⁰ More specifically, it is stated in *Re Metropolitan Warehouse Co.*³⁸¹ that the Court will proceed with winding up the company if there is '*a fair indication that the company has no intention of carrying on business and is not likely to do so*'.³⁸² Reference is also made in case of *Re Middlesborough Assembly Rooms Co.*³⁸³ in which a petition was filed for winding up the company on the ground that it has suspended its business for more of a whole year. In this case the business of completion of a building for the purpose of using it as assembly rooms was suspended for more than three years due to a period of recession, however the Court held that it was not satisfied that the company was unable to carry its business on or intended to abandon its undertaking. As a result of this, and given that the majority of shareholders were opposed to the application expressing their intention to carry on business in the future, the Court dismissed the application.

The above-mentioned case law leads to the conclusion that the Courts in Cyprus, being affected by the UK case law, appear to be reluctant to allow an application for winding up if there is no clear intention expressed by the members of the company to stop exercising business for which it was incorporated.

³⁷⁹ Companies Act, Cap. 113, s 211 (d)

³⁸⁰ Pafitis (n 34) 679-80

³⁸¹ *Re Metropolitan Railway Warehousing Co. Ltd* [1867] 36 L.J.Ch. 827

³⁸² Approach endorsed by Lord Cairns in *Re Metropolitan Railway* (n 381)

³⁸³ *Re Middlesborough Assembly Rooms Company* [1880] 14 Ch D 104 (CA)

4.2.2 The company is unable to pay its debts

There are plenty of examples in case law of applications for the purpose of winding up a company on the ground that it is unable to pay its debts. The Cap. 113 provides for a definition on inability to pay debts, which is described in Section 212 of Cap. 113 and encompasses 4 different cases as proof of the inability. Therefore the company is deemed to be unable to pay its debts when a) a creditor to whom the company is indebted in a sum of more than €5000 has served on the company, by leaving it at the registered office of the company, a written demand for payment of the amount due and the company for three weeks thereafter has not proceeded with payment or securement or arrangement to the benefit of the creditor, or b) an execution or other process issued on a judgment or order by any Court in favor of a creditor is returned unsatisfied in whole or in part, or c) if the Court is satisfied that the company is unable to pay its debts as they become due, and the Court while determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company, or d) if the Court is satisfied that the value of the company's assets is less than its liabilities, taking into account the contingent and prospective liabilities of the company³⁸⁴.

The previous section was established in its present form following the amendment of Cap. 113 with the Law 63(I)/2015. The most important amendments were, the rise of the owed amount by the company which was previously about 500 Cypriot Pounds (no change was made after Cyprus has joined Euro area in 2008) which is now about €5000, the deletion of the requirement that the written demand in paragraph 212 a) has to be signed by the creditor, the insertion of the whole paragraph 212 d) and the amendment of paragraph 212 c) by adding the phrase when the debts become due.

Case law in Cyprus also referred to the corresponding provisions of the UK law while examining an application to wind up a company due to the existence of a debt exceeding

³⁸⁴ Companies Act, Cap. 113, s 212

the €5000. More specifically, the Court in *PAG Construction Ltd*³⁸⁵ before examines the application, noted that the content of Sections 211 e) and 212 a) of the Cap. 113 are very similar to Sections 222 e) and 223 a) of the Companies Act 1948, therefore guidance can be found in the UK case law and literature on this matter. It is worth wondering why the Court has chosen to refer to the predecessor of Section 123 of the IA, though the decision was released in November 2015, but in any case the general idea behind this comment was to pinpoint to the roots of the Cypriot law, thereby justifying the usage of the UK case law. In *Prinos Lachanagora*³⁸⁶ the Court being inspired by the UK case law, made clear that the dissolution of a company is one very drastic measure and a petition for pursuing it, may results in irreparable damage. Therefore, the court has jurisdiction to dismiss such petition when it seems that it is bound to fail. When for example there is a genuine dispute as to the existence of the debt, then the petition has to be set aside.³⁸⁷ It was also mentioned in *Eliades Leisure*³⁸⁸ that the failure of the company to comply with the notice given on the ground of Section 212 a) is not considered as negligence if a legitimate reason is shown behind this failure and a bona fide substantive defense is presented by the company.³⁸⁹

Taking into consideration the above and given that the Courts refuse to allow petitions by creditors which are used to put pressure on the company to pay a disputed debt,³⁹⁰ it seems that the legislator decided to amend the lowest amount required in order to allow a petition for winding up to be filed, so as to further limit the utilization of this drastic measure to debts that are of substantial amount. Payment of lower debts than of €5,000 can be settled with other less drastic measures to the benefit of the interests of the company. There is also a case by the District Court of Limassol in Cyprus,³⁹¹ commenting on the need of the recent amendment regarding the deletion of the requirement that the written demand in paragraph 212 a) has to be signed by the creditor.

³⁸⁵ *In regard with the company PAG Construction Ltd* [2015] Nicosia District Court Application no. 421/2014

³⁸⁶ *In regard with the company Prinos Lachanagora (Pallouriotissa) Ltd* [2016] Larnaca District Court Application no. 128/2015

³⁸⁷ *Stonegate Securities Ltd v. Gregory* [1980] 1 All E.R. 241

³⁸⁸ *In regard with the application of the company L Papamichael Holdings Limited v. In regard with the company S Z Eliades Leisure Limited* [2015] Nicosia District Court Application no. 930/2013

³⁸⁹ *ibid*

³⁹⁰ *Spanou Efi M v. GIP Constructions Limited* [1999] 1 CLR 315

³⁹¹ *Application by Palatino Constructions Limited* [2016] Limassol District Court Application no. 85/2014

The Court while assessing the arguments of the parties, and in particular the fact the written demand was in that case signed by the lawyer of the creditor, has noted that this amendment was made due to the need to ‘*speed up and simplify the liquidation process, and the need to introduce practical measures free of any formalistic regulations*’.

It was also mentioned in *Pan-Aman Hotels Ltd*³⁹² that an application based on the company’s failure to pay its debts in general, can be initiated only under a combination of Sections 211 (e) and 212 (c) and in this case the evaluation of solvency is needed, taking into consideration all of company’s liabilities, including contingent and prospective liabilities. In *Fortune Properties*³⁹³ the reference to a contingent debt to the Alpha Bank following a legal action against the company as a guarantor in a loan agreement, was not considered as enough evidence in favor of the insolvency of the company given that no proof was provided on the progress of the case. The Court also commented that the absence of evidence on the other liabilities and income of the company, as well as the fact that no evidence was provided as to whether the company continues to trade or not, cannot allow the Court to consider the financial situation of the company, therefore the application for winding up the company was dismissed.

Furthermore, with the amendment of Section 212 (c) with the Law 63(I)/2015 it was made clear that the significant time in assessing whether the company is able to pay its debts is the time when they become due. Cypriot literature suggests that, based on this amendment, the Court has to take into account not only the current assets of the company, but also any other income is reasonably expected in the company, in order to enable the Court to make a fair judgment as regards to the company’s ability to pay when the contingent and prospective liabilities become due.³⁹⁴

As regards the last amendment of Section 212 with the insertion of paragraph d), it seems that the legislator decided to add a second criterion that works in favor of the

³⁹² *Pan-Aman Hotels Ltd v. Commissioner of Value Added Tax* [2002] 1 CLR 1796

³⁹³ *In regard with the company Fortune Properties and Investment Ltd* [2017] Nicosia District Court Application no. 433/2016

³⁹⁴ Poetis (n 32) 21

company liquidation, which is the asset value of the company and not its ability to pay and which does not necessarily relate to the liquidity of the company. Therefore, Cyprus literature suggests that a relevant limitation should be provided, maybe in the form of defense, in order to enable company to prove that a possible realization of the assets can satisfy its debts so that the requirement of Section 211 (e) is not fulfilled. There is no case law on this matter to date, but what is expected to be followed is the UK case law which has interpreted Section 123 (2) and decided that it means that the petitioner has *‘to satisfy the Court on the balance of probabilities that the company has insufficient assets to be able to meet all its liabilities, including prospective and contingent liabilities’*.³⁹⁵

4.2.3 Who may present a petition

The Law 63(I)/2015 brought changes also in relation to the persons who may petition for winding up of a company. More specifically, following the relevant amendment of Section 213 the petition may be presented also by a liquidator of another member state based on the definition provided in Articles 2 and 3 of the Council Regulation (EC) 1346/2000 of 29 May 2000, which is now replaced by European Recast Regulation on Insolvency (EU) 2015/848, or a temporary liquidator who is appointed by the Court of another member state based on the Article 38 of the above mentioned Council Regulation, or by an Examiner, or by the Official Receiver based on Section 222 (1) of the Cap. 113. It is worth noting that the pre-amendment regime only allowed the company itself, or the creditors or contributories of the company to present a petition.

In order for a company to present a petition, there is a requirement for a special resolution to be passed,³⁹⁶ but this is considered unlikely to happen given that it is speedier and less costly for a company to proceed with a voluntary liquidation.³⁹⁷

³⁹⁵ *Eurosail* (n 171)

³⁹⁶ Companies Act, Cap. 113, s 211

³⁹⁷ *Pafitis* (n 34) 683

Not surprisingly, the most cases in Cyprus relate to petitions by the creditors of the company, and according to Section 213(b) the petitioners could also be any contingent or prospective creditors. Cypriot case law again referred to UK case law while examining the accurate definition of creditor in the context of petitions for winding up a company. More specifically, in *Spanou Efi*³⁹⁸ the Supreme Court has made a reference to Section 224(1) of the UK Companies Act of 1948 and to the cases of *Re William Hockley*³⁹⁹ and *Mann v. Golstein*,⁴⁰⁰ amongst other, by mentioning that a contingent creditor is ‘*a person towards whom, under an existing obligation, the company may or will become subject to a present liability on the happening of some future event or at some future debt but not a person whose debt is substantially disputed even if the company is in fact insolvent*’.⁴⁰¹ It proceeded by clarifying that a contingent or prospective creditor can be a creditor of an overdue debt or the guarantor who did not pay the company’s debts or the tenant in respect of future rents, but not a person the status of whom as a creditor is doubted or a person with a claim for unliquidated damages.⁴⁰²

Another important point on this matter that affects the allowance of the petitions by the Court is the debt dispute by the debtor/company. It was held in *Spanou Efi*⁴⁰³ that even if part of the claim of the petitioner consists of liquidated damages, he had no locus standi to present the petition since he is considered neither an existing, nor contingent or prospective creditor. The Court has also made reference to the UK case of *New Travellers' Chambers*⁴⁰⁴ in order to make clear that a winding up petition is not a legitimate means to enforce a company to pay a disputed debt, and may be considered as an abuse of process if it appears to have been used as a way of putting pressure to the company to pay the debt.⁴⁰⁵

³⁹⁸ *Spanou Efi* (n 390)

³⁹⁹ *Re William Hockley* [1962] 1 WLR 555

⁴⁰⁰ *Mann v. Goldstein* [1968] 1 WLR 1091

⁴⁰¹ *Spanou Efi* (n 390)

⁴⁰² *ibid*

⁴⁰³ *ibid*

⁴⁰⁴ *New Travellers' Chambers Ltd v. Cheese and Green* [1894] 70 LT 271

⁴⁰⁵ *Re a company* [1992] 2 All E.R. 797

Section 213 (1) (c) also allows a contributory or contributories to present a petition for winding up the company. The definition of contributories has been discussed in Cypriot case law by clarifying that based on Section 205 of Cap. 113 the term contributory means every shareholder who has not paid for his shares in full.⁴⁰⁶ Nevertheless the Court again referred to UK case law and stated that as an exception to the rule ‘*where a fully paid shareholder petitions for compulsory winding-up he must show, on the face of his petition, a prima facie probability that there will be assets available for distribution among shareholders*’.⁴⁰⁷

There is also a proviso in Section 213 (1), which is identical to Section 124 (2) of the IA mentioning that contributories are precluded from presenting a winding up petition unless the number of members decreases below 7 in respect of a public company or the shares in respect of which is a contributory, or some of them, where originally allotted to him or have been held by him and registered in his name for at least 6 months during the 18 months before the commencement of the winding up, or have devolved on him through the death of a former holder.

The Official Receiver can also apply for such a petition and shall include any other authorized person appointed for this purpose.⁴⁰⁸ The remarkable thing about this case is that the Official Receiver can present a petition only if a voluntary winding up or winding up under the supervision of the Court has already commenced and the Court shall issue the relevant order only if it is satisfied that the voluntary winding up or winding up subject to supervision cannot be continued with due regard to the interests of the creditors or contributories. There is a discussion in Cypriot literature regarding the need of this power given to the Official Receiver suggesting that, in the absence of this provision, a second petition in regard to the winding up of a company could be considered as an abuse of process resulting to a failure.⁴⁰⁹ Nevertheless, it is also

⁴⁰⁶ *In regard to the company Lindos Constructions Ltd* [1999] 1 CLR 1033

⁴⁰⁷ *In regard to the petition of the company Unibrand Secretarial Services Limited v. In regard to the company Tricor Limited (HE9769)* [2015] Nicosia District Court Application no. 310/13; *Re Othery Construction Ltd* [1966] 1 WLR 69, [1066] 1 All ER 145

⁴⁰⁸ Companies Act, Cap. 113, ss 213 (1) (g) and 213 (2)

⁴⁰⁹ Poetis (n 32) 53

suggested that the intention of the law was to strengthen the protection of the creditors and contributories interests and prevent a liquidation that may affect their rights.⁴¹⁰

Despite the fact that the amendment law introduced new potential petitioners as explained above, the absence of case law dealing with such petitions leads to the conclusion that there was no practical enforcement of this amendment until today. At the same time, petitions by the creditors of the company remain the most frequent cases examined by the Court.

4.2.4 Consequences of a Court order

The compulsory winding up of the company shall be deemed to commence at the time of submission of the relevant petition to the Court.⁴¹¹ This provision mainly aims at preventing company officers from disposing company's assets after commencement of winding up⁴¹². In cases where, before the submission of the petition, a resolution for voluntary winding up has been passed by the company, then the winding up is deemed to have commenced at the time the resolution was passed.⁴¹³

Once the Court order is issued, any acts related to the assets of the company that happened after the commencement of winding up are considered as void, unless the Court otherwise orders.⁴¹⁴ It is generally claimed that this provision aims at preventing any unlawful disposal and disappearance of the company's property, but the Court may approve transactions in the ordinary course of business, otherwise the petition will paralyze the operation of the company whether justified or not.⁴¹⁵

⁴¹⁰ *ibid*

⁴¹¹ Companies Act, Cap. 113, s 218 (2)

⁴¹² Christos A. Neophytou and others, 'Company Liquidation Process in Cyprus' (*Cyprus Law Digest*, 10 December 2012) <<http://www.cypruslawdigest.com/topics/insolvency-bankruptcy/item/158-company-liquidation-process-in-cyprus>> accessed 12 July 2018

⁴¹³ Companies Act, Cap. 113, s 218 (1)

⁴¹⁴ Companies Act, Cap. 113, s 216

⁴¹⁵ George Kakogiannis, *Cypriot Company Law* (Pilcaco Publishers Ltd 2001) 170; *In regard to the company Pap Hotels Limited (HE 52904)* [2013] Paphos District Court Application no. 53/13

As suggested by Poetis, the period after submission of the petition is suspicious in the eyes of the Court and any acts during this period may cause damages in the interests of the persons involved.⁴¹⁶ The Court referred to Poetis while examining the validity of a plot disposition following a sale agreement between two companies in case *Claridge Public Limited*⁴¹⁷ by also clarifying that the Court may validate only transactions that have been made in good faith and honest intention of the persons concerned, in the ordinary course of the business during the period between submission of petition and the issuance of the order.

In addition to the above, after the commencement of the compulsory winding up any attachment, sequestration, distress or execution started against the company is completely void.⁴¹⁸ In *Pampoukkas Construction Ltd*⁴¹⁹ the Court has expressly confirmed that if a judgement is made against the company while the winding up petition is pending, then no enforcement measures can be initiated against the company.

Additionally, no action or proceedings can be brought or maintained against the company without permission from the Court, on such terms as the Court may impose.⁴²⁰ Cypriot case law suggests that this provision aims at protecting the property of a company which is under dissolution, ensuring the equal treatment of creditors and preventing initiation of proceedings by some creditors in order to obtain benefits.⁴²¹ Nevertheless, as results from the case law, the Court usually gives its permission so that an action can be initiated and especially in case of secured creditors and the action concerns to the enforcement of a mortgage or security upon the company's property, or

⁴¹⁶ Poetis (n 32) 207

⁴¹⁷ *Claridge Public Limited v. Panayioti Pissaride and others* [2016] Limassol District Court Application no. 184/15

⁴¹⁸ Companies Act, Cap. 113, s 217

⁴¹⁹ *Water Board of Nicosia v. Pampoukkas Construction Ltd* [2015] Nicosia District Court Application no. 8134/13

⁴²⁰ Companies Act, Cap. 113, s 220

⁴²¹ *Pantrans Navigation Ltd v. The Official Receiver as liquidator of Always Travel Holidays Ltd and others* [1992] 1B CLR 900; *Stefanos & Andreas Cold Stores Trading Ltd v. KEAN Company Ltd* [1998] 1C CLR 1806

in case where the company is a necessary party to the action against it and other persons.⁴²²

As to the procedural part in regard to the consequences of the Court order, Law 63(I)/2015 amended Section 219 by providing that from now on, a copy of the order must be forwarded by the company to the Registrar of Companies not later than three working days from the date of issuance. One month later, the legislator decided to amend the relevant Section for a second time by adding that the Registrar shall register the Court order in his books and publish it on his official website.

Law 63(I)/2015 has also introduced a new obligation of all petitioners, except from the Official Receiver, to deliver a copy of the petition and the Court order to the Official Receiver, and where applicable to the Registrar of Companies, the Director of the Department of Land and Surveys, the Director of the Merchant Shipping Department, the General Director of the Cyprus Stock Exchange and the Director of the Road Transport Department.⁴²³ In addition to the above, the Official Receiver is now obligated to keep the Record of Winding-up Companies in electronic form and to upload it on his official site.⁴²⁴

4.2.5 Appointment of Provisional Liquidator

A provisional Liquidator can be appointed by the Court, in the context of a winding-up petition,⁴²⁵ following an application submitted at any time before the issuance of the winding-up order so as to protect the assets of the company and to maintain the existing company status quo.⁴²⁶ The explicit reference to the aim of his appointment and his specific mission resulted from the law amendment of 63(I)/2015 and the Court while examining such an application takes into account whether this role of the provisional

⁴²² *Application by Bank of Cyprus Public Company Ltd v. In regard to the company Klonaros Koliandris Development Ltd* [2016] Nicosia District Court Application no. 1003/2014

⁴²³ Companies Act, Cap. 113, s 219 (2)

⁴²⁴ Companies Act, Cap. 113, s 213 (3)

⁴²⁵ *In regard to the application of the Indigo Travel Retail Holding Limited v. Indigo Travel Retail Group Limited* [2017] Nicosia District Court Application no. 800/2015

⁴²⁶ Companies Act, Cap. 113, s 227

liquidator can be achieved. The new law also provides that the Provisional Liquidator has to be a person who is authorized to act as an insolvency practitioner by virtue of the Insolvency Practitioners Law.

In *Aggelos Christofi*⁴²⁷ the Court dismissed the application of appointment of a Provisional Liquidator on the ground that the company was already at direct risk of facing legal actions by its suppliers and creditors for non-payments, therefore there was no evidence to justify the feasibility of this appointment.⁴²⁸

It has been argued that the maintenance of the company's assets should not be confused with the maintenance of the company status quo, and that only the latter is considered as an objective of the Provisional Liquidator.⁴²⁹ It is also made clear that the company status quo definition includes, except from the assets of the company, the company liabilities, the terms of payment, the company creditors and any other factor that can affect the financial position of the company.⁴³⁰

It is also worth noting that the Court monitors the acts of the Provisional Liquidator given that, following the amendment of the relevant section with the above-mentioned law of 2015, he exercises the powers conferred on him by the Court.⁴³¹

4.2.6 The involvement of the Official Receiver

Once a winding-up Court order has been made or a provisional liquidator has been appointed, unless the Court order states otherwise, a statement of affairs of the company has to be prepared and submitted to the Official Receiver and shall contain details regarding the assets, the debts and liabilities of the company, personal information of its creditors, as well as information regarding the securities held by each of them, and

⁴²⁷ *Aggelos Christofi and others v. CA Wheels-Speed Trading Ltd and others* [2016] Limassol District Court Application no. 341/2016

⁴²⁸ *ibid*

⁴²⁹ Poetis (n 32) 89

⁴³⁰ *ibid*

⁴³¹ Companies Act, Cap. 113, s 227 (2A)

any other information may be required by the Official Receiver. A relevant clarification has been added with the amendment law of 63(I)/2015, providing that where the winding-up petition was submitted by the company, then there is a requirement that the petition to be accompanied with the statement of the company's affairs as existed at the time of submitting the said petition.⁴³²

The statement of affairs must be submitted within 30 days from the 'relevant date' or within such an extended period of time as may be granted by the Official Receiver or the Court for exceptional reasons.⁴³³ The said relevant date is also determined by the Cap. 113 and it means, in case of a provisional liquidator appointment the date of his appointment, and where no appointment is made, the date of the winding-up order.⁴³⁴ Before the amendment under the Law 63(I)/2015, the submission deadline was 14 days from the relevant date, and it seems that it was extended for practical reasons so as to allow enough time for the careful preparation of the statement, the importance of which is emphasized by the fact that in case of non-compliance with the law provisions by any person involved in this process, this person is found guilty of an offense and can be subject to a fine up to €427,15 for each of non-compliance.⁴³⁵

Following the submission of the above-mentioned statement of affairs, the Official Receiver shall also submit a preliminary report to the Court and publish it on his official website. This preliminary report shall contain information regarding the amount capital which is issued, subscribed and paid and an estimation of the company's assets and liabilities, the causes of failure, in the event that the company failed, and finally whether the Official Receiver is of the opinion that a further investigation is needed concerning the promotion, formation or the failure or the conduct of its business.⁴³⁶ A recent amendment introduced by the Law 63(I)/2015, allows the Official Receiver to proceed with a further investigation in order to investigate whether the company has failed, the reasons of the failure and matters concerning the promotion, formation, business,

⁴³² Companies Act, Cap. 113, s 224

⁴³³ Companies Act, Cap. 113, s 224 (3)

⁴³⁴ Companies Act, Cap. 113, s 224 (8)

⁴³⁵ Companies Act, Cap. 113, s 224 (5)

⁴³⁶ Companies Act, Cap. 113, s 225

transactions and affairs of the company and finally submit a further report indicating whether in his opinion any fraud has been committed by any person in the context of the above matters, and any other matters believes that would be desirable to bring to the attention of the court.⁴³⁷

The preliminary report has to be submitted as soon as is practicable after receipt of the statement of affairs or the issuance of the court order stating that no statement shall be submitted, and based on the amendment introduced by the Law 63(I), no later than 30 days before the creditors meeting, if such meeting takes place. It should be mentioned that the amendment law provides that such meetings are summoned in case the company is wound up by the creditors in order to choose a person to be the liquidator of the company.⁴³⁸ It could be argued that the addition of the 30 days period before the meeting of the creditors, is ensuring that the Court and the liquidator who will be appointed by the creditors in such meetings, are fully aware of the company's situation before the liquidator takes his responsibilities.

The new law 63(I)/2015 has also introduced a new provision stating that the preliminary and the further report, if any, are considered as being *prima facie* evidence of the information contained in them in any other relevant proceedings.⁴³⁹ In addition to this, the new law empowers the Official Receiver, subject to the prior approval of the Court to release a person from the obligation to act as per the Section 224 (1) or (2) or to extend the period referred to in Section 224.⁴⁴⁰

4.2.7 Appointment of a Liquidator

By virtue of the amendment of the Law, once the winding-up order is made, the Official Receiver can be appointed as the permanent Liquidator, and not a provisional one as it was the case before the amendment, unless another person is appointed following an application by the Official Receiver to the Court or an appointment by the creditors and

⁴³⁷ Companies Act, Cap. 113, s 225 (2)

⁴³⁸ Companies Act, Cap. 113, s 228 (A)

⁴³⁹ Companies Act, Cap. 113, s 225 (2A)

⁴⁴⁰ Companies Act, Cap. 113, s 224 (3A)

contributories.⁴⁴¹ Therefore, the role of the Official Receiver, since the amendment of the law, has become substantive.⁴⁴²

4.2.7.1 The powers and role of a Liquidator

The Liquidator has a range of powers either subject to the approval of the Court or the Committee of Inspection, or independently and without the requirement of any approval.⁴⁴³ The amending law 63(I)/2015 has introduced additional powers which are exercisable by the Liquidator in a way of ensuring the protection of the company assets and creditors.

The powers that were granted to the Liquidator⁴⁴⁴ from the time of enforcement of Cap. 113 can be summarized as follows. Firstly, the Liquidator has the ability to institute or defend any action or legal proceedings initiated in the name and on behalf of the company, to continue trading the business where considered necessary so as to ensure the beneficial winding-up of the company, to appoint an advocate to assist him in the carrying out of his duties, pay any class of creditors in full, to make any compromise or arrangement with creditors and to compromise all calls and liabilities to calls, debts, liabilities and claims. The new law 63(I)/2015 has introduced a new provision, which was added as a subparagraph in regards to the ability of paying the creditors in full, that concerns to the ability of the Liquidator to receive any funds required with the assets of the company as security.⁴⁴⁵ There is no case law on this matter until today since this power has not examined by the Court yet, however there are some comments concerning this addition that pinpoint a contradiction resulted by the law. More specifically, given that all of the above-mentioned powers may only be exercised with the prior approval of the Court or the Committee of Inspection, the relevant addition contradicts with the provision of Section 233(2) which enables the Liquidator to act without any authorization.⁴⁴⁶ Though the paragraph (e) of the said Section, which allows also the

⁴⁴¹ Companies Act, Cap. 113, s 228

⁴⁴² *In regard to the Realback Management Ltd* [2017] Larnaca District Court Application no. 193/2013

⁴⁴³ *Unibrand Secretarial Services Limited* [2016] Supreme Court of Cyprus Civil Application no. 56/16

⁴⁴⁴ Companies Act, Cap. 113, s 233

⁴⁴⁵ Companies Act, Cap. 113, s 233 (1) (dd)

⁴⁴⁶ Poetis (n 32) 128

receipt of funds under the same terms as provided by the amendment of Law 63(I)/2015, should have been abolished, the legislator decided to keep it in force. It was suggested that it seems that there was an oversight on the part of the legislator and his intention was to abolish this power without the prior approval of the Court or Committee of Inspection.⁴⁴⁷

The new law has also introduced an explicit provision stating the exact functions of the Liquidator which is to secure that the assets of the company are collected, realized and distributed to the creditors of the company and, if there is a surplus, to any other entitled person.⁴⁴⁸ This provision is aiming at securing that the Liquidator will act mainly to the benefit of the creditors and that the interests of the member will be served where there is a remainder of the assets.

The Liquidator also has the power, without any authorization, to sell the real and personal property and rights of the company by public auction or private contract, to execute and sign in the name and on behalf of the company all contracts, receipts and other documents, to verify and claim in the bankruptcy, insolvency or sequestration of any contributory, to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company, to receive in his official capacity letters of administration of any deceased contributory, to appoint an agent to act on behalf of him when unable to act, to do any other thing considered as necessary for winding up the affairs of the company and distributing its assets.⁴⁴⁹

In addition to the above there is a new provision requiring, in case where the Liquidator is not the Official Receiver and the company is being wound up by the Court, the Liquidator to furnish the Official Receiver with relevant information, to present and allow inspection by the Official Receiver of any books, papers and other records and

⁴⁴⁷ *ibid*

⁴⁴⁸ Companies Act, Cap. 113, s 233 (1A)

⁴⁴⁹ Companies Act, Cap. 113, s 233 (2)

provide any assistance required by the Official Receiver for the purposes of exercising his functions in relation to the winding up.⁴⁵⁰

The new law has also introduced a new specific provision regarding the power of the Liquidator to deal with the secured property of the company.⁴⁵¹ This power can be performed only upon issuance of a court order transferring the secured property in the name of the Liquidator or the Official Receiver, and authorizing him to take control of this property for the purpose of disposing of it or exercising other powers in relation to it. The Court shall issue the order only if it is convinced that the disposal of such property would lead to a more beneficial realization of the assets than would otherwise be the case.⁴⁵²

The legislator, whose intention was to protect the interests of the creditors, added also relevant provisions requiring the Liquidator to notify the secured creditors of his intention and allowing the secured creditors to intervene in the proceedings before the Court.⁴⁵³ In addition to this, the net proceeds of such disposal will be used at priority to the benefit of the secured creditors, and only in case of any available surplus this will be used to satisfy the unsecured creditors.⁴⁵⁴

The importance of this addition has been discussed by some authors who considered it as one of the most significant amendments that contributed to the modernization of the Insolvency regime in Cyprus;⁴⁵⁵ Nevertheless there are other authors claiming that this addition was unnecessary given that the secured property dealings is already covered by the existing power of the Liquidator to make compromise or arrangements with creditors.⁴⁵⁶ In addition to this it was claimed that the provision allowing the transfer of secured property in the name of the Liquidator is unconstitutional given that it goes against the right to property. It is suggested that the property which is subject to

⁴⁵⁰ Companies Act, Cap. 113, s 233 (2A)

⁴⁵¹ Companies Act, Cap. 113, s 233A

⁴⁵² Companies Act, Cap. 113, s 233A (1)

⁴⁵³ Companies Act, Cap. 113, s 233A (5)

⁴⁵⁴ Companies Act, Cap. 113, s 233A (4)

⁴⁵⁵ Kourtellos and Roti (n 3) 60

⁴⁵⁶ Poetis (n 32) 135

security, is also considered as a property subject to encumbrances, and because of the fact that the encumbrances are individual rights that cannot be deprived of, the secured creditors are deprived of their rights on this property.⁴⁵⁷ It is important to mention that there is a similar provision in the UK law, allowing the issuance of an order by the Court by which the property of the company will be vested in the name of the Liquidator.⁴⁵⁸

4.2.7.2 Duties and Liabilities of a Liquidator

The Liquidator is obliged to follow specific rules as regards to the payments made to him and the preparation of the audit accounts of the company, in a way that ensures the management of the money to the benefit of the company.

The amending Law 63(I)/2015 requires the Liquidator to maintain and deposit the money received by him during the winding-up process to a separate bank account of his choosing, which must be now available for inspection to the creditors or the Committee of Inspection.⁴⁵⁹ In case when the Liquidator retains an amount of more than €5,000 for a period of more than 15 days and without providing any justification for such retention, then he will bear negative consequences. The limit of the retained amount of money was increased with the amending law, so as to be compatible with the current economic conditions in Cyprus. He is also obliged, at least twice a year, to deliver for registration to the Official Receiver the accounts of receipts and payments made by him.

4.2.8 Duration of compulsory liquidation

The legislator has also decided to introduce a time-frame in which the compulsory liquidation must be completed, as part of the efforts to make the proceedings speedier and more effective. Based on this understanding, a relevant provision has been inserted in the law, stating that the compulsory liquidation must be completed with 18 months of commencement date.⁴⁶⁰ Any extension requests must be made through an application

⁴⁵⁷ *ibid* 136

⁴⁵⁸ Insolvency Act 1986, s 145

⁴⁵⁹ Companies Act, Cap. 113, s 236

⁴⁶⁰ Companies Act, Cap. 113, s 239A

with valid justifications to the Court and the Court, if convinced, will issue an order extending the time.⁴⁶¹

Until today, there is no case law in Cyprus examining and discussing the impact of this time-frame, however there are some writers who believe that the law requires completion in a very limited time-frame⁴⁶² so that in practice the provision will remain unenforceable.

4.2.9 Committee of Inspection

The new law 63(I)/2015 has also amended the provision relating to the appointment of the Committee of Inspection by the meetings of contributories and creditors, by introducing a new paragraph providing a list of powers and duties of the Committee.⁴⁶³

The general purpose of the Committee is to provide assistance to the Liquidator and exercise the powers and functions assigned to the Committee by the law.⁴⁶⁴ The powers and duties of the Committee of Inspection as per the amendment of the law can be summarized as follows, the determination of the liquidator's remuneration, the approval of continuation of the company's business and submission of a report on the company's activities on a quarterly basis, the approval of legal actions or defenses submitted in relation to cases against the company, the exercise of powers provided in Section 233 dealing with the Liquidator's powers, making calls based on Section 259 (d) which allows the exercise of specific powers by the Liquidator as an officer of the Court and subject to the control of the Court, demanding the submission of a report on the liquidation proceedings and submission of relevant accounts by the Liquidator so as to be reviewed by independent accountants.

⁴⁶¹ *ibid*

⁴⁶² Poetis (n 32) 159

⁴⁶³ Companies Act, Cap. 113, s 240 (2A)

⁴⁶⁴ Pafitis (n 34) 710

As per the above, it is clear that the Committee of Inspection plays a central role during the liquidation proceedings since the creditors and contributories, through the composition of this Committee, takes the advantage of supervision and influence the functions and decisions of the Liquidator. The importance of the existence of the Committee of Inspection and the legislator's intention to maintain its existence is also confirmed by the amendment of Section relating to the composition and inner working of the Committee, which provides that even in case of a vacancy the existing members Committee will continue to exercise their powers provided that the number of members is not reduced below the minimum of two.⁴⁶⁵

4.2.10 The Court's power in compulsory liquidation

The new law has also granted additional powers to the Court that can be exercised following the issuance of a winding-up order, therefore the Court's powers have been expanded in a way aiming at ensuring the protection of rights of guarantors, the company and creditors as well.

Firstly, the Court has now the authority to make an order, except of staying, alternatively interrupting the liquidation proceedings if satisfied to do so following an application submitted by the liquidator, or the official receiver, or any creditor or contributory.⁴⁶⁶ The relevant case law in Cyprus, by referring to UK case law, stated that any application to stay or sist the liquidation should be examined on the basis of the rules and principles that apply to applications to rescind a receiving order or annul an adjudication in bankruptcy, by taking into consideration the commercial morality but not necessarily the creditor's wishes.⁴⁶⁷ In this case law, it was also mentioned that the above power of the court is discretionary and the Court has the discretion to dismiss such application even in case of full repayment of debts.⁴⁶⁸

⁴⁶⁵ Companies Act, Cap. 113, s 241 (7A)

⁴⁶⁶ Companies Act, Cap. 113, s 243 (7A)

⁴⁶⁷ *Kismetia Ltd* (n 136)

⁴⁶⁸ *Blue Arrow General Trading Co. Ltd v. Nikita Mikrou* [2000] 1B CLR 1427

Following an introduction of a new provision in the Cap.113, the Court has also the power to make an order calling for public examination of the officers and managers of the company,⁴⁶⁹ irrespective of any authority to examine an officer who, in liquidator's opinion, has acted deceitfully in regard to the company's affairs.⁴⁷⁰ This power can be exercised upon application of the liquidator or the Official Receiver at any time before the dissolution of the company. More specifically, the persons who may be summoned based on this provision are, the officers or the contributories of the company, or any person who acted as an Examiner or Liquidator of the company, or any other person involved in the establishment and management of the company. There is no relevant case law in Cyprus on this matter yet, but it is expected that Cypriot courts will refer to UK case law and principles while examining such an application based on the equivalent provision of the IA.⁴⁷¹ It is worth mentioning that in the UK, the Insolvency Service has published a manual to help public examinations referring, amongst others, to the purpose of this procedure which is to impose attendance and cooperation of the persons involved with the liquidator and provide assistance on the official receiver's enquiries.⁴⁷²

4.2.11 Early dissolution

One of the most important amendments of the insolvency laws in Cyprus was the introduction of a new procedure, which is the early dissolution of the company. The early dissolution can be initiated provided that the liquidator is the Official Receiver and, following an application by him, the Court is satisfied that the company's liquid assets are insufficient to cover the liquidation costs and no further investigation of the company's affairs is required to be done⁴⁷³.

⁴⁶⁹ Companies Act, Cap. 113, s 256A

⁴⁷⁰ Companies Act, Cap. 113, s 256

⁴⁷¹ Insolvency Act 1986, s 133

⁴⁷² The Insolvency Service, 'Public Examinations' (April 2007)

<<https://www.insolvencydirect.bis.gov.uk/casehelpmanual/P/PublicExaminations.htm>> accessed 3 March 2018

⁴⁷³ Companies Act, Cap. 113, s 259A

This procedure contributes to time saving especially in liquidations where no payments will be made to creditors and no disqualification or criminal proceedings arise.⁴⁷⁴ As already explained above, the Cypriot case law on these matters is very poor, but it seems that the Official Receiver is more willing to use this new mechanism and procedures throughout the years than during the first years of its introduction. The most recent statistics show that during 2017, there were about 400 companies that were dissolved at an early stage in the liquidation, following an application by the Official Receiver.⁴⁷⁵ This number is expected to be increased this year, since there were already about 76 early dissolutions of companies during the period of the first month of 2018.⁴⁷⁶

4.2.12 Protection of guarantors

The protection of rights of guarantors has been achieved with the introduction of new rules aiming at limiting their liability that resulted from loans taken by company. Those rules apply only to natural persons and require by the creditors of the company to prove their debts during a specified period of 35 days from the date of publication of the winding-up order to the official government gazette of Cyprus, otherwise no proceedings can be initiated against guarantors.⁴⁷⁷ Also, there is a limitation of two years period from the date of admission of proofs by the liquidator or the official Receiver in order for the creditors to proceed with legal actions against guarantors.⁴⁷⁸ In addition to the above, the Cypriot legislator went one step further by introducing provisions that allow the full discharge of guarantors where the amount due to creditors is equal or less than the value of the secured property, and in cases where the value of secured property is less than that of the debt then the creditor is allowed to take legal proceedings only in relation to the amount exceeding the value of the secured property.⁴⁷⁹

⁴⁷⁴ *ibid*

⁴⁷⁵ See the Official Gazette of the Republic of Cyprus, Annex 5, Part 1, Dissolutions of Companies (Early)

⁴⁷⁶ *ibid*

⁴⁷⁷ Companies Act, Cap. 113, s 299 (1) (2)

⁴⁷⁸ Companies Act, Cap. 113, s 299 (11)

⁴⁷⁹ Neocleous, 'New Cyprus Insolvency Laws' (*Neocleous*, 6 May 2015)

<<https://www.neocleous.com/articles/news/new-cyprus-insolvency-laws>> accessed 11 August 2018

Additional safeguard measures were adopted in favour of the guarantors by providing that in cases where guarantors are obligated to repay the debts in monthly installments based on a court decision, then the amount of the monthly installments should be determined taking into account the guarantor's reasonable living expenses and other possible monthly payments that are payable in relation to guarantor's personal liabilities.⁴⁸⁰ In an attempt to secure that these provisions will be applied only to those cases where financial difficulties arose due to the financial crisis of 2013, there is a proviso that they are applicable only to guaranteed debts agreed before the enactment of the new insolvency laws in 2015 and will last for a period of six years.⁴⁸¹

All the above provisions are applicable only to guarantee agreements not exceeding the amount of €500.000, maybe as part of the effort to maintain a balance between the guarantors' interests and the interests of creditors who might be placed at a risk of losing high amounts of money.

4.3 The UK compulsory liquidation process as a guide to modernize Cyprus liquidation law

As was already resulted from the above analysis and the explicit references by the Cypriot courts to the UK case law, there is an undeniable influence of the UK law on the compulsory liquidation to the equivalent Cypriot law.

The influence of the UK law on the Cypriot law will be revealed below by pointing out similarities and differences between two regimes. In contrast with what applies in relation to the rules on Examinership where, as resulted from the previous Chapter there are major differences between the two jurisdictions, it seems that there are more similarities on compulsory liquidation and differences are only noticed in procedural matters. The Cypriot legislator decided to follow the UK rules and principles and keep differences where needed so that the law can be applicable to Cyprus reality.

⁴⁸⁰ Companies Act, Cap. 113, s 299 (8)

⁴⁸¹ Companies Act, Cap. 113, s 299 (9)

4.3.1 Similarities and Differences between two jurisdictions

The first matter that will be discussed on this sub-chapter concerns the main similarities of the two jurisdictions that are primarily connected with the aims of the new insolvency framework, as arisen from the preceding analysis of the amendments in Cypriot law. The second matter concerns the differences between two jurisdictions which will be used as an opportunity to comment the approach followed Cypriot legislator assess how this approach contributed to serving the purpose of the insolvency amendments.

The first similarity concerns to the rules on the inability of the company to pay its debts as being one of the most important areas that were affected by the recent amendments of the Law.

The Cypriot legislator decided to amend the relevant provisions being guided by the corresponding law of the UK in an attempt to strengthen the protection of the creditors. This is proven by adding provisions which enable the creditors to act in order to secure a winding-up order without being forced to serve letters or enforce court decisions. More specifically, by amending the Section 212 of Cap. 113, a winding up order could be issued by the Court while applying the cash-flow test and the balance sheet test.⁴⁸² The cash flow test relates to debts which are presently falling due, and those falling due in the reasonably near future⁴⁸³ and the balance sheet test relates to a situation when a company's liabilities are greater than its assets. These tests are also allowed in the UK by virtue of Sections 123 (1) (e) and 123 (2) of the IA and there is plenty of case law on this matter, which could be used as a guidance by the courts in Cyprus.

The leading case on the balance sheet test is *Eurosail*,⁴⁸⁴ where the judges discussed on the interpretation of Section 123 (2) of the IA. In this case, on appeal, Lord Neuberger MR mentioned that the purpose of the said Section is to cover cases that do not fall

⁴⁸² Brenda Hannigan, *Company Law* (4th edn, Oxford University Press 2016) 689

⁴⁸³ *ibid* 691

⁴⁸⁴ *Eurosail* (n 171)

under Section 123 (1) (e) but it is obvious that the company could not meet its future or contingent liabilities since it ‘*has reached the point of no return*’ by using its cash and assets for current liabilities and will not be able to meet its future or contingent liabilities.⁴⁸⁵ The case finally went to the Supreme Court where Lord Walker disagreed that the above-mentioned phrase that has been used by Lord Neuberger to interpret the meaning of Section 123 (2) of IA. More specifically, he agreed with the comments of Lord Toulson that the company should be considered as unable to meet its debts by taking into account its assets and prospective and contingent liabilities, even if it seems that it is currently able to pay its debts as they fall due. It is remarkable to refer to Lord’s Toulson conclusion that ‘*the more distant the liabilities, the harder this will be to establish*’.⁴⁸⁶

It could be argued that the approach of the Supreme Court is more creditor friendly than the approach followed by Lord Neuberger in the Court of Appeal, since it is not so strict and there are more chances of succeeding the test so that the company is considered as insolvent. Nevertheless, the judge in *Eurosail* concluded that in case where the liabilities of the company are being deferred for a number of years and the company manages to pay its debts as they fall due without having to borrow money, the court should be cautious during assessing whether the test is successful.⁴⁸⁷

Following this judgment, the Court of Appeal has also discussed the meaning of the cash-flow test in its judgment in *Carman*,⁴⁸⁸ by noting that present and reasonably near future liabilities are taken into account while assessing the solvency of the company, and that the cash flow insolvency could not be prevented when the company manages to pay its old debts by securing money from new investors or lenders.⁴⁸⁹ Therefore, the cash flow test should not be assessed only on debts due at the specific date of examination.⁴⁹⁰

⁴⁸⁵ *ibid*

⁴⁸⁶ *ibid* para 119

⁴⁸⁷ *Eurosail* (n 171)

⁴⁸⁸ *Carman (Liquidator of Casa Estates (UK) Ltd) v Bucci* [2014] EWCA Civ 383

⁴⁸⁹ *ibid*

⁴⁹⁰ Hannigan (n 482) 693

Another similarity that results for an amendment of a great importance, which has been made in the form of insertion in the Cap. 113, is the explicit provision as regards to the main function of the Liquidator,⁴⁹¹ as already discussed above, which is exactly the same with Section 143 (1) of the IA. The protection of creditors and members' interests were one of the main aims of the new package of the insolvency laws and with this provision the legislator attempted to ensure the intended protection, being inspired once again by the UK Law. Certainly, the liquidator's duty to act within the limits of the powers conferred upon him by the law is owed only to the company and not to creditors and member of the company⁴⁹² and he can only act subject to court's control as an officer of it.⁴⁹³

Firstly, the Liquidator is obligated to collect the company's assets and take control of them in order to clear up the availability of the assets that will be distributed to all entitled persons.⁴⁹⁴ Except of the assets that are clearly owed by the company, the liquidator should try to 'claw back' assets that have been disposed contrast to the law and handle all cases of the company that may resulted to an inflow of cash and assets to the company.⁴⁹⁵ Clawback claims, amongst others, relate to transfers concluded after the presentation of an application for liquidation, payments resulted following the completion of a legal process after the commencement of liquidation, transactions made as an attempt to defeat creditors, undervalued transfers and preferences to creditors prior to liquidation.⁴⁹⁶

Following collection and realization of the company's assets, distribution should take place based on the principle of *pari passu*.⁴⁹⁷ The meaning of this principle is known to Cyprus Courts and has been discussed in case law with explicit references to relevant UK case law in the context of examining applications requesting leave by the Court to

⁴⁹¹ Companies Act, Cap. 113, s 233 (1A)

⁴⁹² Paul Davies and Sarah Worthington, *Gower & Davies' Principles of Modern Company law* (9th edn, Sweet & Maxwell 2012) 1284

⁴⁹³ Dignam and Lowry (n 81) 453

⁴⁹⁴ Davies and Worthington (n 492) 1285

⁴⁹⁵ *ibid*

⁴⁹⁶ Tolmie (n 40) 341

⁴⁹⁷ *ibid* 395

commence or continue legal proceedings against the company. The Court noted that the primary purpose of the liquidation procedure is to collect and distribute the assets of the company equally and without priority redemption to each creditor, and provided that secured creditors have been satisfied.⁴⁹⁸ In the UK insolvency law, the *pari passu* principle is contained in Section 107 of the IA⁴⁹⁹ and was interpreted by the courts in several cases. The landmark case on this matter is the *British Eagle*⁵⁰⁰ where the House of Lords decided that the clearing house arrangement between several companies infringed the *pari passu* principle, therefore it was void and contradicted to public policy. Nevertheless, it is worth noting that there are some authors arguing that the importance of this principle was overemphasized.⁵⁰¹ Based on their view, the equality of creditors, which is the main idea of this principle, does not guarantee protection of creditors and they suggest that distribution should have been concluded on an equitable base, and not on an equal one. Consequently, ‘*the ranking..., and not the equality, that is the essence of creditors’ relationships more generally*’.⁵⁰²

There are however areas where differences have been noticed between the Cypriot and UK law, one of them being the rules on the appointment of a Provisional Liquidator. Notwithstanding the addition of a new provision which is exactly the same with the corresponding provision in the UK IA regarding the responsibilities which may be conferred to him by the Court,⁵⁰³ there are different approaches on the primary reason of his appointment. In contrast with the above findings in regards to the Cypriot law, in the UK the main objective of appointing a Provisional Liquidator is to ensure the maintenance of the company’s assets until a decision on the winding-up petition is taken.⁵⁰⁴ Authors in bibliography, while referring to the reason of Provisional’s Liquidator appointment, report that it is to safeguard the company’s assets from

⁴⁹⁸ *In relation to the company G M P Mirror Homes Ltd* [2016] Ammochostos District Court Application no. 07/2014 A

⁴⁹⁹ Insolvency Act 1986, s 107

⁵⁰⁰ *British Eagle International Limited v Compagnie Nationale Air France* [1975] 1 WLR 758

⁵⁰¹ Rizwaan Jameel Mokal, ‘The *pari passu* principle in English Ancillary Proceedings: Re Home Insurance Company’ (2005) 21(6) *Insolvency Law & Practice* 207

⁵⁰² *ibid*

⁵⁰³ Insolvency Act 1986, s135 (4); Companies Act, Cap. 113, s (2A)

⁵⁰⁴ Sealy and Milman (n 131) 154

dissipation⁵⁰⁵ or in other words to ensure preservation of the assets when they are in jeopardy.⁵⁰⁶

In Cyprus, there is case law in which, despite the fact that the judge referred to UK case law, he adopted a different view. Particularly, the Court being guided by UK case law on the necessity of his appointment, namely the *HMRC v. Rochdale Drinks Distributors Ltd*,⁵⁰⁷ noted that it took into account the principles for the implementation of Section 135 of the IA such as the risk that the collection and distribution of company's assets will be affected or frustrated, as well as the problems in relation to adequacy of the corporate governance and the quality of keeping statutory accounts. Finally, after referring also to Cypriot literature, the conclusion of the court was that the purpose of the appointment is both the protection of the company's assets and status quo, and the Provisional Liquidator retains the right to collect, the obligation to pay and act in relation to anything affecting the financial situation of the company.⁵⁰⁸ This approach seems to follow a combination of principles applied in UK and Australian Law, since under the latter '*the provisional liquidator's primary duty is to preserve the status quo to ensure the least possible harm to all concerned and to enable the court to decide, after a further examination, whether the company should be wound up*'.⁵⁰⁹

In addition to the above, there is another one area of the liquidation law in which we have noticed similarities and at the same time differences between Cypriot and UK law. This applies to the provisions related to the Committee of Inspection as called in Cyprus and the Liquidation Committee in the UK.⁵¹⁰ The role of the Committee is stated in the IR,⁵¹¹ which is to assist the liquidator in discharging his functions and monitor his actions exercised in the context of their powers.⁵¹² The functions of the Liquidation

⁵⁰⁵ Alex Horsbrugh-Porter and Michael Rogers, 'Appointment of a provisional liquidator in the Royal Court of Guernsey' (*Ogier*, 26 May 2017) <<https://www.ogier.com/publications/appointment-of-a-provisional-liquidator-for-the-first-occasion-in-the-royal-court-of-guernsey>> accessed 12 July 2018

⁵⁰⁶ Keay and Walton (n 337) 221

⁵⁰⁷ *The Commissioners for Her Majesty's Revenue and Customs (HMRC) v Rochdale Drinks Distributors Ltd* [2011] EWCA Civ 1116

⁵⁰⁸ *In regard to the company Tricor Limited* [2016] Nicosia District Court Application no. 310/13

⁵⁰⁹ *Asic v. ActiveSuper Pty Ltd* (No 2) [2013] FCA 234

⁵¹⁰ Insolvency Act 1986, s 141

⁵¹¹ The Insolvency Rules (England and Wales) 2016, r 17.2

⁵¹² Dignam and Lowry (n 81) 460

Committee and the relevant rules regarding its formation is mainly regulated by the IR 2016⁵¹³ and the IA following an amendment introduced by the SBEEA. There are many similar rules between UK and Cypriot law on this matter, nevertheless there is no equivalent explicit provision for the exact powers of the Committee in the UK. These powers can be concluded by the case law, or by a reading combination between other provisions on the liquidator's powers, which are amongst others to approve compromise of claims, institution of legal proceedings, and receive notices in relation to disposes of property to connected persons and employment of a solicitor to assist the Liquidator.⁵¹⁴

In Cyprus, the new package of insolvency law, gave a number of additional powers to the Committee of Inspection, as already described above, in an attempt to empower its role and put it in a hierarchical position in relation to that of the Liquidator. This approach makes clear that the Cypriot legislator has followed a more creditor's friendly attitude, who are now in the position to affect the whole management of the company. It is worth noting that in the UK in relation to small businesses, following an amendment in 2015, a liquidator is no longer obligated to obtain the approval of the liquidation committee or the court to be able to exercise the powers provided to him by the IA,⁵¹⁵ therefore the role of the Committee in case of small businesses is limited.

There are also some differences of a procedural nature which show that the Cypriot legislator has followed a stricter approach than that of the UK legislator probably in order to ensure a speedier procedure and the same time an effective control on the affairs of the company by the Official Receiver. The first difference related to the duration of the compulsory liquidation. Despite the introduction of a relevant time-frame in Cypriot law, it is worth noting that there is no equivalent provision in the UK law given that the duration depends on the circumstances of each case. Moreover, some differences have been noticed in relation to the involvement of the Official Receiver in the process of compulsory liquidation. This is because under UK law, the submission period of the statement of affairs to the Official Receiver is 21 days starting from the day on which a

⁵¹³ The Insolvency Rules (England and Wales) 2016

⁵¹⁴ Keay and Walton (n 337) 303

⁵¹⁵ Small Business, Enterprise and Employment Act 2015, s 120

relevant notice is given by the Official Receiver.⁵¹⁶ By contrast, under Cypriot law, the time-frame is wider and the relevant date is the date of the winding-up order, since no relevant notice is given by the Official Receiver. In addition to the above, while in both jurisdictions there is an obligation for the Official Receiver to investigate the matters, under UK law it is upon the discretion of the Official Receiver to decide whether a relevant report is required to be submitted to the Court, something that under Cypriot law is obligatory.⁵¹⁷

4.3.2 Are the new amendments efficient to serve the purpose for which they introduced?

The main objective of this chapter is to discuss the efficiency of the new amendments based on empirical findings and statistics in Cyprus. Many authors, though they argue that the new package of insolvency law introduced changes of a limited scope, in the specific area of compulsory liquidation they comment in favour of its efficiency. More specifically, based on their research, they believe that these changes lead to the right direction to make compulsory liquidation procedure simpler, speedier and less costly than before.⁵¹⁸

On the other hand, there are voices doubting the speed of the insolvency procedure under the amendments of the law.⁵¹⁹ Despite the introduction of the liquidator's power to apply for an order calling for public examination of the officers and managers of the company,⁵²⁰ as well as the introduction of the new power to apply for an early dissolution,⁵²¹ in all cases the required litigation is time consuming⁵²² until the final decision of the Court. Therefore they suggest that the Liquidator or the Official Receiver when acting as a Liquidator, should have been free to act under their discretion in order to avoid such delays.⁵²³

⁵¹⁶ Insolvency Act 1986, s 131 (4)

⁵¹⁷ Insolvency Act 1896, s 132

⁵¹⁸ Kourtellos and Roti (n 3) 60

⁵¹⁹ N. Mouktaroudes & Associates (n 72)

⁵²⁰ Companies Act, Cap. 113, s 256A

⁵²¹ Companies Act, Cap. 113, s 259A

⁵²² N. Mouktaroudes & Associates (n 72)

⁵²³ *ibid*

There are also suggestions of a different approach, arguing that problems of delay should be resolved by making procedures more predictable, namely by providing guidance to the Court as to the exercise of their discretion.⁵²⁴ This approach will contribute in completing the hearing within reasonable timeframes, and also will assure the balance of interests between all interested parties.⁵²⁵ One can also argue that the possibility of the Liquidator to appoint a lawyer in order to assist him with the public examination creates additional unnecessary costs charged to the company's property,⁵²⁶ so as to result to deterioration of company's financial situation.

In addition to the above, the attempt to eliminate costs and avoid delays in the process which achieved with the introduction of process of early dissolution of the company is also of a limited scope, since early dissolution is available only where the liquidator is the Official Receiver. The enforcement of this new process could be introduced for a much wider use if it would be available for all liquidators, provided that all requirements apply and the Court examined and allowed the application.

Unfortunately, the accessible statistics from the Company's Registrar website do not disclose information regarding the duration of compulsory liquidations or the costs of them, in order to enable us to discuss whether the new amendments are efficient to serve the purpose for which they introduced.

4.3.3 The effectiveness of amendments on compulsory liquidation in the light of Cypriot case law

The effectiveness of this new package of laws should be tested based on Cypriot case law and the approach followed by all parties involved in general, including the liquidator, creditors, or any other applicant requesting a winding up order since in most

⁵²⁴ H.P.H Haviaras & Philippou LLC (n 75)

⁵²⁵ *ibid*

⁵²⁶ Companies Act, Cap. 113, s 256A (5)

cases the outcome of the application is dependent on the information presented before the Court.

Most cases in Cyprus relate to applications on the ground of the inability of a company to pay its debts when the company omits to pay one of its creditors once three weeks have elapsed after the written demand for payment of a sum of more than €5000 has been served to the company. The majority of these applications are accepted by the Court, however the success of these applications is mainly due to the ‘clearness’ of the relevant provision of the law and the easiness of proving the inability of the company.

Such cases are now easier to fulfil the requirements of the law since the amendment laws abolished the explicit requirement that the demand has to be signed by the creditor and not by his representative or any person who can sign on behalf of him.⁵²⁷ Before this amendment there were cases where the application was dismissed due to the fact that written demands requiring the company to pay the sum so due, were signed by the lawyer of the creditor and not by the creditor itself.⁵²⁸ Therefore, the new laws have made the process easier and free from procedural matters that make the process more complex. The need for such an amendment was often mentioned by the Cypriot Courts which considered the relevant provision as ‘*anachronistic under the circumstances of the nature of new transactions*’.⁵²⁹

The other amendments and, specifically, the amendment related to the time taken into account while assessing inability of the company, was discussed by the Court in several cases, a reference to which will be made below, and it seems that the presentation of the overall situation of the company is the most important factor affecting the final decision of the Court.

⁵²⁷ *In regard to the company Hanworth Enterprises Ltd* [2018] Limassol District Court Application no. 543/12

⁵²⁸ *In regard to K & Y Theodorou Investments & Construction Ltd* [2017] Larnaca District Court Application no. 10/2015

⁵²⁹ *Georgiou Nicolaou v. Total Properties Ltd* [2011] Supreme Court of Cyprus Civil Appeal no. 124/2010; *In Regard to Azovmashinvest Holding Ltd* [2017] Limassol District Court Application no. 380/14

In the case of *Tricor*⁵³⁰ the Court assessed the inability of the company to pay its debts as they become due, having taken into account the contingent and prospective liabilities of the company. In this case the applicants have provided evidence that there was an increase on the unpaid debts of the company since the date of petition submission, as well as on the legal actions raised against it. This evidence was enough in order for the Court to permit the issuance of a winding-up order. It is worth noting that the Court also referred to an excerpt from a book which was used by applicant's lawyer during hearing process stating that '*an admission on behalf of a company that it is unable to pay its debts is sufficient evidence of that fact*'.⁵³¹ Here the applicant was acting as the secretary of the company and was therefore in a good position to prove the company's debts.

On the other hand, in the case *Nicholas Tsokkas*⁵³² the Court noted that the applicants did not provide evidence in order to prove the insolvency of the company based on its inability to pay its debts as they become due. The only reference to the fact that the company is insolvent was considered as insufficient proof while at the same time the Court mentioned the importance of a reference, which was missing, to the overall financial position of the company taken into account the contingent and prospective liabilities of the company.⁵³³ In the end, the Court allowed the winding-up order on the legal basis of Section 211 (e) which is generally examined in the context of the general inability of the company and is not limited to cases provided in Section 212, which provides statutory presumptions in favor of the company's inability.⁵³⁴

In addition to the above, the Court in the case of *Betomix*⁵³⁵ stated that the fact the applicant did not provide evidence for the activities and obligations of the company

⁵³⁰ *In regard to the company Tricor Limited* (n 508)

⁵³¹ Derek French, *Applications to Winding Up Companies* (2nd edn, Oxford University Press 2008) 447

⁵³² *In regard to the company Nicholas Tsokkas Estates Agents Ltd* [2016] Paphos District Court Application no. 85/14

⁵³³ *ibid*

⁵³⁴ *M. Mouletaris Machinery Co. Ltd v. Zenonos* [2001] 1C AAC 1649

⁵³⁵ *In regard to the company Mikis Natar Sons Limited, Creditor of NPP Betomix Limited v. In regard to the company NPP Betomix Limited* [2016] Nicosia District Court Application no. 765/14

more broadly and was limited to its own debt was crucial for the dismissal of the application.⁵³⁶

As regards to the new provision on the inability of the company to pay its debts when the value of the company's assets is less than its liabilities, taking into account the contingent and prospective liabilities of the company, the case law is very poor. However there are some cases that provide indication on how the Courts are handling such applications. More specifically, in case *SCM Financial Overseas*⁵³⁷ the Court while examining an application to strike out for abuse of process, has made reference to the factors that are taken into account in order to permit the liquidation of a company, which is amongst others providing information as to the current liabilities of the company that exceed its assets of a substantial amount of money and that the company disposed assets to affiliated companies in an attempt to put assets out of the reach of creditors.⁵³⁸

All in all, it could be argued that the attempt of the legislator to broaden protection of creditors by adding additional criteria that work in favour of the company liquidation was successful, but in the end what is worth the most is the evidence provided to support the relevant application and how the courts will interpret and enforce the law in combination with the evidence presented to it.

4.3.4 Is there a need for more amendments in the future based on the UK experience?

As resulted from the above analysis, Cyprus law on corporate liquidation is influenced the most by UK law, therefore it is undeniable that Cypriot legislator has already taken into account the UK experience while assessing the need of these amendments. However there are minor areas which need re-regulation so as to support direct implementation of the new laws.

⁵³⁶ *ibid*

⁵³⁷ *In regard to the company SCM Financial Overseas Limited* [2017] Nicosia District Court Application no. 1045/16

⁵³⁸ *ibid*

It is generally recognized that the new package of laws has strengthened the role of Court and that new Rules are required for practical implementation of the laws.⁵³⁹ There are also suggestions for establishing guidance to the courts so as to make the process faster, especially during hearings, and the whole regime predictable.⁵⁴⁰

The Insolvency Rules 2016 in English Law, which were also introduced in an attempt to modernize insolvency procedures and make them more efficient, can be used as a guidance for equivalent Rules in Cypriot insolvency regime, due to the major similarities between the two regimes and the absence of practical experience in the application of the Cypriot rules.⁵⁴¹ There were major procedural amendments related, amongst others, to the ability of electronic delivery of documents and publishing of notices on the website,⁵⁴² as well as restrictions on holding physical creditors meetings. However, there are also other Rules of a substantial importance which were in force before 2016 and can be also introduced in Cyprus law. More specifically, there are specific rules providing details as to the content of petition⁵⁴³ guiding by this way the applicants to fill out the petition with all necessary information and the courts to examine it based these standard rules in order to reduce complexity of procedure and dismissal of applications for non-substantive issues.

In addition to the above, another important amendment in the UK law which can be followed also in Cyprus law is that of the abolition of the requirement that the liquidator has to obtain sanction of the court or the liquidation committee before exercising the powers given to him by the law.⁵⁴⁴ This amendment was introduced by the SBEEA and was added so as to *'brings the provisions for liquidations into line with*

⁵³⁹ See Seminar on New Cypriot Insolvency Framework, Address by the President of the Supreme Court Myron M. Nicolatos on 6 November 2015 available under this link <<http://www.supremecourt.gov.cy/Judicial/SC.nsf/All/635A2825E0239F34C2257EF8003D4B2E?OpenDocument>>

⁵⁴⁰ Haviaras (n 56)

⁵⁴¹ See page 7 above, comments on the Companies (winding-up) Modal Regulations of 1933-1999

⁵⁴² The Insolvency Rules (England and Wales) 2016, rr 1.45-1.51, 15.4 and 15.6

⁵⁴³ The Insolvency Rules (England and Wales) 2016, r 7.4-7.24

⁵⁴⁴ Hannigan (n 482) 698

administration'.⁵⁴⁵ In *Re Longmeade Ltd*⁵⁴⁶ the High Court discussed the role of the Courts following this amendment by stating that the courts should follow their established approach to the exercise of powers by liquidators that did not require sanction, therefore they should not interfere in commercial decisions made by liquidators.⁵⁴⁷ These decisions are entrusted to liquidator's discretionary judgement on what is in the best interests of the company.⁵⁴⁸

Such an amendment could be helpful by speeding up the process, since the liquidator will act immediately after a specific matter arises and also by making the process less costly since there will be no need for paying court expenses. On the other hand there may be some doubts on whether the Liquidator will act mainly to the benefit of the creditors given that, liquidators are not obligated to follow wishes creditors before taking a decision to act.⁵⁴⁹ However, case law made clear that where the majority of or all the creditors put forward reasoned views based on their capacity as persons having interest in the insolvency company and free from extraneous factors, then the liquidator should give effect to their views.⁵⁵⁰ It should also be taken into account that the exact function of the Liquidator is to secure that the assets of the company are collected, realized and distributed to the creditors of the company, therefore interests of the creditors should not be overlooked while exercising his powers.

It is also worth referring to the introduction of a new rule in the UK that contributes to simplicity of procedures for proof of debts,⁵⁵¹ given that creditors are not any more obligated to prove small debts for the purpose of taking part to the process of liquidation and be entitled to receive a distribution.⁵⁵² Small debts refer to debts which do not exceed £1,000.⁵⁵³ Despite the fact at the time being the impact of these rules cannot be assessed since they are on an early stage of their enforcement,⁵⁵⁴ an equivalent provision

⁵⁴⁵ See Explanatory Notes to the Small Business, Enterprise and Employment Act 2015, para 717

⁵⁴⁶ *Allen and another, Re Longmeade Ltd (in liquidation)* [2016] EWHC 356 (Ch)

⁵⁴⁷ *ibid*

⁵⁴⁸ *Re Greenhaven Motors Ltd (in liquidation)* [1999] 1 BCLC 635

⁵⁴⁹ *ibid*

⁵⁵⁰ *Allen and another* (n 546)

⁵⁵¹ Finch and Milman (n 146) 483

⁵⁵² Small Business, Enterprise and Employment Act 2015, s 131

⁵⁵³ The Insolvency Rules (England and Wales) 2016, r 14.1(3)(c)

⁵⁵⁴ Finch and Milman (n 146) 483

in Cyprus is expected to contribute to general modernization of the liquidation process given that creditors will not hesitate to ask for recovery of a small debts just for procedural purposes.

The necessity of implementing all the above-mentioned suggestions can be revealed after enforcement and impact assessment of these measures in the UK.

Cyprus should also follow the UK example of making amendments to the Insolvency law, which took place in the form of introduction of the Insolvency Amendment (EU 2015/848) Regulations of 2017 that was introduced in an attempt to facilitate the operation of the Recast Regulation 2015/848,⁵⁵⁵ regardless of its direct effect in the UK.⁵⁵⁶ It is worth noting that the Recast Regulation, as explained by the Insolvency Service guidance, *'deals with cross-border jurisdiction, cooperation, recognition and enforcement of insolvency proceedings in the EU, [and] replaces EC Regulation (1346/2000) (the original Regulation) making changes to existing provisions and introducing areas of new policy'*.⁵⁵⁷

The Amendment Regulations in the UK replaced all references to the old Regulation (EC) 1346/2000 with the new Recast Regulation 2015/848 and introduced new provisions to the IA in order to ensure compliance with the new Regulation. It should be noted that these Regulations do not apply to proceedings opened before 26 June 2017 since these proceedings continue to be governed by the applicable law at the time they were committed.⁵⁵⁸ The Insolvency Amendment (EU 2015/848) Regulations of 2017 introduced new provisions in the IA related, amongst others, to the obligation of the liquidator, in both cases of a voluntary liquidation and compulsory liquidation as well as the Official Receiver when applying for the early dissolution of the company, to

⁵⁵⁵ Council Regulation (EU) 2015/848 on insolvency proceedings OJ [2005] L 141/19

⁵⁵⁶ See Guidance on the recast Insolvency Regulation (EU 2015/848) published by the Insolvency Service available under this link

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/621695/Guidance-The_recast_EU_Insolvency_Regulation.pdf>

⁵⁵⁷ *ibid*

⁵⁵⁸ Insolvency Amendment (EU 2015/848) Regulations 2017, r 3

inform the Registrar about insolvency proceedings open in other member states,⁵⁵⁹ and the possibility of a member State liquidator not to consent with the dissolution of the company and that the company will be dissolved only where the liquidator gives his consent or the insolvency proceedings in other member states are closed.⁵⁶⁰ Relevant amendments were also made in the IR 2016.⁵⁶¹

Despite the direct applicability of the Recast Regulation in Cyprus, which means that this Regulation becomes part of the national law without the need for intervention by the legislator, similar amendments as those introduced in the UK should be made in Cyprus; especially all references to the old Regulation should be replaced with the new one, in order to avoid any confusion that may arise to the parties involved in insolvency proceedings and also to ensure that the insolvency practitioners, when acting as liquidators, will act in compliance with the new Regulation.

All in all, the UK compulsory liquidation law should continue to be used as a guidance by the Cypriot legislator in order to ensure implementation of the new laws and simplicity and rapidity of the procedure.

⁵⁵⁹ Part 1 of Schedule of the Insolvency Amendment (EU 2015/848) Regulations 2017, rr 3, 7 and 10

⁵⁶⁰ Part 1 of Schedule of the Insolvency Amendment (EU 2015/848) Regulations 2017, rr 9 and 12

⁵⁶¹ Part 2 of Schedule of the Insolvency Amendment (EU 2015/848) Regulations 2017

5. Conclusion

5.1 Final evaluation of the recent amendments in the Companies Act

The present thesis presented the latest amendments in Cap. 113 in an attempt to serve the main aim of the thesis, that is to analyze and evaluate them. Additionally, a comparison between the new Cyprus corporate liquidation laws and the corresponding UK legal regime has been conducted, and the influence of the latter on the former has been illustrated.

The evaluation of the relevant amendments led to the general conclusion that a major step has indeed been taken in the modernization of Cyprus Insolvency Law, there are however minor matters, which affect their successful application in practice.

In regards to the introduction of the new mechanism of Examinership in Cyprus, despite the positive criticism and its promising rescue nature, relevant statistics lead to the conclusion that the process has failed to serve the purpose for which it was introduced; the extremely limited case law and use of the mechanism prevents the writer to draw valid conclusions about its effectiveness. Based on the finding that it is very similar to the Irish Examinership, the writer suggested that there should be more interest in using the Examinership in Cyprus given that the Irish experience showed that it can be used as an effective tool to save financially distressed companies and maintain jobs.

After assessing the characteristics of the Examinership, the writer concluded that the most important factor preventing the companies from using it, is the high cost of the process. It is understandable that where the company is or is likely to become unable to pay its debts, there will be no available revenue or proceeds from the assets realization in order to be used so as to cover the expenses of the process. Accordingly, the need to cover costs during a period in which the company faces financial difficulties, makes the Examinership less desirable to companies.

With regard to the changes affecting the compulsory liquidation, this thesis presented two opposing views discussing their effectiveness. The first regards them as effectively simply on the ground that compulsory liquidation procedure will be made simpler, speedier and less costly than before. The opposing, which appears to be shared by more commentators, expresses doubts about the speed and the low costs of the process due to the time-consuming litigation which is frequently required in order for the process to be completed. Their suggestions to eliminate costs and time focus on strengthening the role and involvement of the Liquidator and at the same time eliminating the involvement of the Court, or providing guidance to the Courts on how to exercise their discretion so as to secure completion of hearings within reasonable timeframes and therefore with lower costs.

The writer's view is somewhere in the middle of those views. No one can doubt that there were taken significant steps in favour of the reformation and modernization of compulsory liquidation legal framework, and the weaknesses noticed in regards to some procedural matters cannot "*overshadow*" the attempt of the legislator to ensure the protection of rights of guarantors, the company and creditors, something that became obvious from several provisions of the Cap. 113 discussed in the previous chapter.

Of course, there is always room for more improvements and the suggestions expressed by several authors, as well as the suggestions were put forward by the writer, have to be taken into account by the legislator for possible future amendments. Nevertheless, the amendment laws cannot be considered as an ineffective attempt to get the compulsory liquidation process modernized.

5.2 The assessment results on the influence of UK liquidation law on the corresponding law in Cyprus

UK law was the main source of inspiration for the Cypriot legislator and this is demonstrated by the fact that the Cap. 113, in its largest part, is a copy of the UK Companies Act of 1948. As it has arisen however from Chapter 3 of this thesis, the

Examinership is not based on UK law since there are substantial differences between Examinership and the corresponding UK Administration.

The most important differences between these two regimes relate to matters that were also introduced in the UK law after the improvements that took place with the implementation of the Enterprise Act 2002. These different provisions were not part of the UK Administration since its establishment under the IA 1986, and was introduced based on the finding that it was not efficient enough to work as a rescue device for the companies. These differences boil down to the possibility of entering into administration without a court order, something that is not available in Examinership, the extended powers given by the law to the UK Administration in comparison to those of the Examiner, which can also be exercised without permission of the Court. There are also different provisions in relation to the main purpose of each procedure; while the Examinership's single purpose is the survival of the whole or any part of the business as a going concern, the purpose of the UK Administration can be selected by the Administrator based on a hierarchy of three possible purposes.

All in all, despite that there are some common rules between the two procedures, it cannot be supported that the Examinership has been strongly influenced by the UK Administration, the former is essentially a copy of the Irish Examinership. The said conclusion is also confirmed by Cypriot case law in which the Irish Companies Act 2014 and the relevant Irish case law was used as an interpretation tool in determining a provisions of the Cap. 113. Therefore, it seems that it is safer and more appropriate for the insolvency practitioners and the Courts in Cyprus to use the Irish Examinership, rather than the UK Administration, as a guidance in the application of the new rules on Examinership.

On the other hand, the changes introduced in regards to the compulsory liquidation in Cyprus are mainly based on the UK law and more specifically on the IA which was used as a guidance by the Cypriot legislator. The major amendments in Cyprus law, which were made so as to strengthen the interests of the creditors, incorporate rules and principles of the UK law such as the application of the cash-flow test, the balance sheet

test and the *pari passu* principle, as explained in detail in Chapter 4 of this thesis. The amendment laws have also introduced the new procedure of the early dissolution of the company, extended the powers of the Liquidator, expanded the definition of "the inability to pay debts", and allowed to a larger number of parties to petition for winding up a company. All these amendments are based on equivalent provisions of the IA.

There are only minor issues on which differences have been noticed, such as the broader powers of the Committee of Inspection in Cyprus, the different reason of appointing a provisional liquidator and the insertion of a time-frame during which the compulsory liquidation must be completed. These, however, are not enough so as to enable one to conclude that the UK law did not influence the Cypriot one. The writer's view is that, these differences were part of the intended effort of the Cypriot legislator to follow a more creditor friendly approach and render the proceedings speedier in order to serve the specific aims of the newly introduced liquidation law. It should be recalled that this became necessary due to the need of dealing with the consequences of the financial crisis, something that did not exist in the UK reality. Therefore, it is the writer's view that in the case of compulsory liquidation, the experience with the law in the UK could serve as an interpretation tool in the application of the new Cyprus insolvency law.

5.3 Synopsis of suggestions for other possible changes in Cyprus

The analysis and evaluation of the latest amendments in Cyprus Insolvency Law has inevitably led to the submission of suggestions for other possible changes that could have been introduced. These suggestions were mainly inspired by the UK law which has already been tested in practice.

The most important suggestion in regards to the improvement of the Examinership procedure focuses on the costs reduction. Taking into account the UK Administration reality it is suggested to introduce an out of court procedure that will however require a joint submission of several consents and applications by all interested parties. By this way unnecessary and costly procedures will be avoided and questionable matters with

regard to the appointment of the liquidator will not be raised. Alternatively, there was a suggestion for introducing a new plan based on the company voluntary arrangements example, which will require approval by the members and the creditors of the company, and can be completed within a limited time and with lower costs than those arising in the case of the Examinership procedure. Regardless of the above suggestions, it is further recommended the Cypriot legislator should also take into account the concept of the new moratorium restructuring plan which is proposed to be introduced in the UK insolvency system and it seems that it is very similar to the Examinership.

The suggestions for possible changes on the compulsory liquidation process are more than those referred to above in relation to the Examinership, due to the nature of the process which is exactly the same with the corresponding process in the UK. The suggestions which mainly concern the rapidity and simplicity of the proceedings can be summarized in the modernization of the Insolvency Rules which can be conducted with the introduction of provisions that will meet the needs of the times and allow the use of electronic means, and the abolition of the requirement for the liquidators to obtain the prior of the consent of the Court or the Liquidation Committee so as to enable him to exercise his powers. The liquidator must act based on his discretionary judgement on what is in the best interests of the company without the intervention of the Court.

Furthermore, relevant provisions could be added to simplify the rules of proving small debts in an attempt to provide further protection to the creditors who are expected to be more encouraged to ask for debt recovery, as well as amendments that will contribute to the adjustment of the law with the Recast Regulation.

Finally, the writer has also put forward suggestions relating to Insolvency law in general based on the findings that have arisen from the wider comparison of the UK and Cypriot insolvency regimes. Relevant amendments could be introduced in Cyprus based on the example of the UK public interest liquidation so as to ensure control of company activities that may harm the public interests.

All in all, the Supreme Court's recommendations as represented by the excerpt referred to in the very first paragraph of the present thesis, seems to have been taken into account by the legislator. A major step as to the modernization of the liquidation law has undeniably been taken, and it is now upon his discretion to proceed with taking further measures for further improved regulation. As far as the Courts are concerned, they should continue correctly using as a source of guidance the UK law given the great similarities with Cyprus law.

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