

**JUDICIAL BENCHBOOK**  
**REPUBLIC OF THE MALDIVES**

**CRIMINAL COURT**

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PART A:  
INTRODUCTION

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## 1.0 THE MALDIVIAN CONSTITUTION

Article 1 of the Constitution of 1998 states that the Maldives shall be a sovereign, independent republic based on principles of Islam, and shall be a unitary state. The three fundamental principles of this constitution are on the Islamic, democratic and republic principles. These three principles are the main pillars of the Constitution.

Article 6 of the Constitution also states that the authority to govern the nation is vested in a unitary government and that there are no other governments governing in any region of the nation.

### 1.1 Constitutional Powers

The Constitution is the supreme law of the country. This means that all other Maldivian laws must not be inconsistent with the Constitution. This notion is implied from various provisions of the Constitution.

- Article 148 (1) states that no legislative authority or any other body with law-making powers shall make law in contravention of the Constitution or of the manner provided in the Constitution.
- Article 148 (2) states that any part of the proposed or existing law contradicting the Constitution shall be null and void.

It is clear from the above provisions that no other law made by any legislative body, or any other body with legislative competence, shall be superior to the Constitution.

Since under Article 148 of the Constitution any “law” contradicting the Constitution is null and void to the extent of such contradiction, it has to be determined whether Islamic Shari’ah is within the meaning of “law”. Article 156 of the Constitution states that Islamic Shari’ah is within the meaning of “law”.

Article 1 of the Constitution states that the Maldives is a nation based on Islamic principles and according to Article 7 the religion of the state is Islam. This implies that the laws enacted by the People’s Majlis, and all delegated legislation, shall not contradict Islamic Shari’ah. It also implies that all actions by the state and all judicial proceedings and rulings of the courts shall not contradict Islamic Shari’ah.

Under Article 4 of the Constitution, the powers of governing the state are divided into three areas:

- Judiciary;
- Legislature; and
- the Executive.

This Article also states that such powers emanate from the people. However, these three powers as described in the Constitution are not mutually exclusive. The rationale for dividing the three areas of the governing state is to ensure that people’s rights are not

violated or compromised. By doing so there is a check and balance between the powers and the right to bring an end to or prevent such a violation.

## **1.2 Fundamental Rights**

The fundamental rights and responsibilities of Maldivian citizens are contained in Chapter II of the Constitution. It is apparent from Chapter II of the Constitution that the Articles included in this Chapter are intended to secure these rights. These rights are conferred and guaranteed to the people through legislation. It can therefore be inferred from the second Chapter of the Constitution that there are ways by which the rights conferred by the Constitution could be limited. The definition of Law in Article 156 of the Constitution's interpretation section shows that there are other instruments with the weight of law, apart from legislation passed by the parliament, that could further limit the rights. From this we can comprehend the extent to which fundamental rights are guaranteed in the Constitution.

Article 31 states that if a law, or rules or regulations carrying the weight of law infringe the fundamental rights conferred by the Constitution, then the infringing laws or sections of those laws are void to the extent of the inconsistency.

## **1.3 Power to Maintain Fairness and Justice**

Article 4 of the Constitution states the powers for governing purposes: the executive, the legislative and the administration of justice. According to Article 4 (2) the power to administer justice shall be vested in the President and the Courts of the Maldives.

Chapters VIII and IX of the Constitution state that there are that two different bodies for hearing cases. Chapter VIII states that the High Court shall be one of the institutions that hears cases. Chapter IX states that there shall be in Maldives such number of courts at such places as may be determined by the President.

According to Article 4 (2), the power to administer justice shall be vested in the President and the Courts of the Maldives. Further, Article 39 of the Constitution states that the President shall be the highest authority for administering justice in the country, but this is not mentioned in Chapter VIII. When collectively considering the relevant Articles of the Constitution, according to two separate chapters, in the Maldives there are two different Courts that can hear cases. From this it can be seen that these two Courts are separate and independent.

Article 112 of the Constitution states that there shall be a High Court in the Maldives, which shall consist of the Chief Justice and such number of Judges as may be determined by the President. The President appoints the Chief Justice and the Judges.

Article 115 (1) of the Constitution states that all appeals from the Courts of the Maldives shall, in accordance with regulations promulgated by the President, be heard by the High Court. It can be noted from the provision that it is not clear to what Courts the phrase "Courts of the Maldives" is referring. The phrase could be interpreted either in a wide or in a

narrower sense. It can be noted that the President is the person who promulgates the regulations governing the hearing of cases in the Courts.

According to Article 115 (2), the function of the High Court is not only limited to hearing appeal cases. In some circumstance, first instance cases may also be heard at the High Court. Article 115 (2) states that the High Court shall hear cases directed by the President to be filed with the High Court from among the proceedings instituted by the State. To date in the Maldives, first instance cases which have been heard at the High Court fall in the categories of treason and cases of foreign fishing vessels trespassing into the exclusive economic zone of the Maldives. Election petitions are heard by the High Court.

#### **1.4 The Courts**

Article 118 of the Constitution states that there shall be in the Maldives such number of courts at such places as may be determined by the President, and that the President shall appoint the judges of these courts. The word ‘courts’ referred to in this provision implies any court other than an appeal court, such as trial courts and courts that hear first instance cases.

#### **1.5 The Maldivian Court System**

The courts in the Maldives can be divided into two main divisions. They are the lower courts under the supervision of the Ministry of Justice, and the High Court of the Maldives. The lower courts under the supervision of Ministry of Justice are the courts in which first instance cases are heard. The High Court of the Maldives is mainly an appeal court. Only in the exceptional situations described above (cases referred to the High Court by the President from among the proceedings instituted by the State: Article 115 (2) ) does the High Court hear first instance cases. If any individual is not satisfied with a ruling of the High Court, that person can appeal to the President. The decision of the President becomes the final ruling on the matter.

#### **1.6 The Lower Courts**

Chapter IX of the Constitution states that there shall be in the Maldives such number of courts at such places as may be determined by the President. It is not clear whether the courts referred in this Chapter are courts acting under the High Court. Taking into consideration the custom, rules and regulations governing the court system, it is apparent that the courts referred to in Chapter IX are the first instance courts established and administered by the Ministry of Justice.

#### **1.7 The High Court of the Maldives**

Article 112 of the Constitution states that there shall be a High Court of the Maldives, and that the High Court shall consist of the Chief Justice and such number of Judges as may be determined by the President. According to Article 112 (2), the President appoints the Chief

Justice and the Judges. There are five High Court Judges (including the Chief Justice (as at June, 2001)).

Article 115 (1) of the Constitution states that all appeals from the Courts of the Maldives shall, in accordance with regulations promulgated by the President, be heard by the High Court.

According to the 'High Court Regulations 1980', the functions of the High Court shall usually be carried out in Malé. However, upon the advice of the President, the functions of the High Court can be established in any other region of the country.

Article 9 (1) of the 'High Court Regulations 1980' states that if as a result of a judgment or order made by the lower court, if a party to the case feels that he/she has been injured due to the court's ruling or order, then he/she has the discretion to appeal to the High Court.

## **1.8 Appeals to the President**

Article 25 of the 'High Court Regulations 1980' states that for either of the two reasons mentioned below, within 60 days after the ruling of the High Court the parties involved can appeal to the President.

1. When trying the case the High Court did not comply with the rules and regulations of the legal system.
2. Justice has not been done by the judgment of the High Court.

This Article also states that if the President reviews the case and finds that the judgment is not right, he shall write to the High Court bringing to their attention his reasons for so holding. If the High Court agrees with the result of the President's review then it will be decided so. If the High Court does not acquiesce with the President's decision the High Court shall write to the President explaining the basis for their disagreement. After this procedure has been followed the judgment which is made by the President will be final.

PART B:  
PROCEDURAL LAW

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## 2.0 LAW COURTS IN MALÉ

### 2.1 Civil Court

#### 2.1.1 Divisions of the Civil Court

For the administration of justice, the court is divided into four branches. They are:

1. Property Division (land matters, estates of intestate persons, other property matters);
2. Commercial Division (trade matters, breaches of contracts etc.);
3. Summary Division (debt recovery, injunctions etc.); and
4. Registrar of the Civil Court.

#### 2.1.2 Jurisdiction of the Civil Court

Following are the categories of cases that fall within the jurisdiction of the Civil Court:

1. Property Division
  - a) Ownership;
  - b) Gifts;
  - c) Inheritance;
  - d) Joint property;
  - e) Claims for remedies or compensation for aggrieved parties;
  - f) Division of property;
  - g) Eviction;
  - h) Charitable Endowment (Waqf);
  - i) Possession of lost and found goods;
  - j) Bankruptcy or Insolvency;
  - k) Claims for damages; and
  - l) Residual cases: any case that falls within the ambit of the Civil Court which cannot be conveniently classified into, and delegated to, any particular division of the court.
2. Commercial Division
  - a) Breach of contract;
  - b) Trade matters or issues collateral to transactions in trade;
  - c) Mortgages;
  - d) Interdiction;
  - e) Recovery of debts the value of which exceeds Rf. 20, 000; and
  - f) All company matters including dissolution of companies.
3. Summary Division
  - a) Recovery of debts the value of which falls short of Rf. 20, 000;
  - b) Contested matters in fixing prices for commodities as well as labour;
  - c) Recovery of monies due for goods delivered or work services provided;



2. Statutory Division (Statutory or Penal Offences)

- a) Defamation (libel);
- b) Slander;
- c) Assault and battery;
- d) Breach of laws, rules and regulations;
- e) Public nuisance;
- f) Fraud and deceit;
- g) Criminal breach of trust;
- h) Embezzlement / Conversion;
- i) Robbery;
- j) Negligence of entrusted property / money; and
- k) Enforcing legally stipulated fines and other sanctions imposed by the courts.

3. Summary Division

- a) Violating an order for house arrest;
- b) Small-time offenders: assault and battery;
- c) Small-time offenders: public indecency;
- d) Using abusive or foul language (harassment);
- e) Theft cases where the value of the offence falls short of Rf. 2000 and both parties are in agreement as to compensation for the stolen goods;
- f) Unauthorised driving of motor vehicles on land (i.e., without a valid driving licence);
- g) Violation of lawful orders and statutory provisions; and
- h) Petitions for expeditious injunctions which could be dealt with, in the opinion of the court, in a reasonably short period of time.

## 2.3 Family Court

Following are the categories of cases that fall within the jurisdiction of the Family Court:

- a) Solemnisation of marriage, registration of marriages and matters dealing therewith;
- b) Establishing lineage;
- c) Paternity;
- d) Registration of divorces;
- e) Disputes in respect of divorce;
- f) Custody;
- g) Handing over to a person to bring up a child;
- h) Imprecation (Lia'n);
- i) Cases of 'Ila';
- j) Matrimonial disputes;
- k) Dissolution of marriages;
- l) Maintenance of wife;
- m) Ascription of wife to a person within prohibited degrees of marriage;
- n) Summary cases;
- o) Administrative measures in respect of cases heard in Island Courts; and
- p) Any other family dispute in addition to the above cases.

## 2.4 Juvenile Court

All cases against persons below 16 years of age.

### 3.0 ISLAND COURTS

According to the 'Regulations for Conducting Court Proceedings', there is no limit on the types of cases that can be tried in the Island courts. Therefore, as a rule any type of case can be submitted to the Island courts. Cases can be submitted to a court in any Island, irrespective of where the dispute took place. However, according to Circular MJC 11/99, cases falling under the categories mentioned below can only be tried in courts in Malé:

1. Murder;
2. *Prevention of Terrorism Act* (Act No. 10/90);
3. *Dangerous Drugs Act* (Act No. 17/77);
4. Theft, fraud, corruption, treachery, deceit cases exceeding Rf. 100, 000;
5. Counterfeiting of notes and coins; smuggling counterfeited notes and coins into the Maldives;
6. Chapter 1 of the *Penal Code*: offences falling under the heading; 'Acts against the government and acts threatening peace and security of the state';
7. Javiyani (General Laws – Act No. 4/68):
  - Section 8, Sub-section 1: propaganda to disseminate misinformation about the true principles and teachings of Islam; and
  - Section 8, Sub-section 2: propaganda to disseminate misinformation which could be a threat to the peace and security of the state.
8. Rape; and
9. Debt cases exceeding Rf. 100,000.

Circular MJC 11/99 has been amended by the Circular MJC 13/99 of the same Ministry. According to the latter, cases falling under the categories mentioned below can only be tried in courts in Malé:

1. Death cases, except:
  - involuntary negligent manslaughter;
  - death of a minor due to negligence of a person whom the child was under the care of (e.g. drowning); and
  - infanticide committed on a child born out of wedlock.
2. *Prevention of Terrorism Act* (Act No. 10/90);
3. *Dangerous Drugs Act* (Act No. 17/77);
4. Theft, fraud, corruption, treachery, and deceit cases exceeding Rf.100, 000;
5. Counterfeiting of notes and coins; smuggling counterfeited notes and coins into the Maldives;
6. Chapter 1 of the *Penal Code*: offences in the category of; 'Acts against the government and acts threatening peace and security of the state';
7. Javiyani (General Laws – Act No. 4/68):
  - Section 8, Sub-section 1: propaganda to disseminate misinformation about the true principles and teachings of Islam;
  - Section 8, Sub-section 2: propaganda to disseminate misinformation which could be a threat to the peace and security of the state;
8. Rape; and
9. Debt cases exceeding Rf. 100,000.

The effect of Circular MJC 13/99 is that it stipulates some wrongful death cases that can be heard in Island Courts.

### **3.1 Modes of Initiating Cases at the Island Courts**

Section 4 (5) of the Regulations Conducting Court Proceedings states that any person (other than the government) wishing to submit a case to the court shall submit it in writing. The Section also states that a party may be present in person in the court and submit his case.

## 4.0 CIVIL COURT

### 4.1 Submission of Cases to the Civil Court

The procedure for submitting the following categories of civil cases to the court will now be discussed:

1. cases submitted and tried in the Commercial Disputes division of the civil court; and
2. procedures that shall be followed when registering agreements and attesting documents.

### 4.2 Civil Court - Divisions

#### 4.2.1 Commercial Division Procedure

The procedural rules governing submissions to and processing of cases in the Commercial Division of the Civil Court are set out in the document entitled "Rules Regarding the Filing of Cases at the Commercial Division of the Civil Court". Cases submitted to the Commercial Division of the Civil Court shall be submitted either by using the relevant forms, or in writing in a manner similar to the forms issued by the court. The number of the appropriate form is M-002.

The plaintiff should submit at least three sets of the relevant form, one set each for the plaintiff, defendant and the court. If the claim is brought against more than one defendant, the plaintiff must submit to the court as many copies as there are defendants.

The plaintiff has to forward all the relevant documents with the case submission form (for example, in a contract dispute, a copy of the contract). If the plaintiff wishes to submit witnesses to the court then their names and addresses should be included in the case submission form. The plaintiff has to mention in the case submission form if he wishes to send someone else, or a lawyer, to represent him. The plaintiff must submit a letter informing of the appointment and also a letter of acceptance by the lawyer or the representative.

The Civil Court will only accept the case submission form if it is satisfied that the following conditions have been met:

- the form has to be completed correctly;
- all the related documents have to be submitted with the form; and
- there must be a prima facie case.

If these requirements are satisfied the court will ask the plaintiff to pay the case-filing fee of Rf. 25 (as at June 2001) to the court.

After the fee has been paid and the form has been registered as a case, the court will forward one set of the dispute or claim form to the plaintiff. One set is handed over to the Judge hearing the case and at this point the defendant is subpoenaed to attend the court. At this appearance in court, the defendant is given a set of the plaintiff's papers and ordered to

respond to the dispute or claim within 10 days. The defendant should answer the plaintiff's claim by completing the defendant's form M-003, or by submitting a written document similar in nature to form M-003.

The defendant should submit at least three sets of the relevant form, one set each for the defendant, plaintiff and the court. The defendant has to forward all the requisite documents with the form. If the defendant wishes to submit witnesses to the court then their names and addresses should be included in the form. The defendant must also state in the form if he wishes to send someone else or a lawyer to represent him. He has to submit a letter to the court informing of this appointment and also a letter of acceptance by the lawyer or the representative.

The defendant should submit the response form within 10 days as ordered by the court. These 10 days include government holidays. If the due date is a government holiday then the form should be submitted as soon as the government offices open after the holiday.

If the defendant does not submit the form to the court within the duration given, the court will treat this act as refusing to comply with a court order and will take action against the defendant. If the defendant submits the responding form to the court within the prescribed time then the plaintiff and the defendant will be brought before the court together.

If any documents submitted to court by the plaintiff or the defendant are in a foreign language, those documents should be submitted with a copy of their 'Dhivehi' translation.

#### 4.2.2 Summary Division

This division of the civil court will only hear cases such as smaller debt cases not exceeding Rf. 20,000 and claims for payment due for goods and services. Cases should be submitted through form M-004.

This form should be completed and submitted to the court with the required documents. The plaintiff should include all the relevant documents that are necessary to prove his case in court. If any document submitted to court by the plaintiff through the relevant form, is in a foreign language, those documents should be submitted with a copy of their 'Dhivehi' translation. If the plaintiff wishes to submit witnesses to the court then their names and addresses should be included in the form.

The plaintiff has to mention in the case submission form if he wishes to send someone else, or a lawyer, to represent him. The plaintiff must also submit a letter informing the court of the appointment and also a letter of acceptance by the lawyer or the chosen representative.

The summary court will order the plaintiff to pay a fee of Rf. 25 (as at June 2001) if:

- the form is correctly completed;
- if there is a prima facie case that could be tried in the Civil Court; and
- if the case fits into the categories of cases that may be heard in the summary division.

### 4.3 Registration of Agreements and Attestation of Documents

Form M-14 shall be used for the following purposes:

- registration of agreements, powers of attorney and other documents;
- to authenticate the documents which are submitted to the Courts; and
- to attest any signature of an individual that appears on a document.

To do any of the above, if the relevant form is submitted between 10 am and 11am, except on government holidays, it would be done on the same day.

If the application is for the registration of an agreement then all parties that are privy to the agreement and whose signatures are required have to be present at the court. If anyone wishes to sign any document then he has to be present in court.

If the application is for the registration of an agreement at the court, then the revenue stamp required by the law should be submitted to the court.

If any document other than an agreement is to be registered or attested a fee of Rf.100 will be charged by the court.

## 5.0 ROLE OF THE JUDGE

### 5.1 Introduction

The primary role of the judge is to dispense justice. Judicial power, according to Shari'ah, must always operate in conformity with equity, even to the benefit of the enemy and to the detriment of the relative. Shari'ah firmly establishes the rule of law, eliminating all differences between the high and the low. In dispensing justice, a judge must be upright, god fearing and should uphold the Constitution. Nothing should ruffle his mind from the path of rectitude. If he does wrong he is not only responsible to people but also to God. He must decide disputes with as much speed as possible. However, a judge should not compromise justice to arrive at a decision expediently. He must do everything to arrive at a just decision.

### 5.2 Decision-Making

The judge must consider the issues in dispute, the evidence and the relevant principles of law and procedure, and reach a just decision that is consistent with the law. The most important aspects of this role are:

- ensuring that all of the issues in dispute have been identified;
- ensuring that all evidence relevant to the issues in dispute, including oral evidence from witnesses, documentary evidence, and real evidence (that is, objects) is obtained and considered;
- analysing all of the evidence in terms of its weight and credibility, and obtaining other corroborative evidence where necessary or desirable, and if it exists;
- resolving conflicts in the evidence;
- reaching a decision; and
- preparing a written decision in every case and not delivering the judgment before completing the writing of the decision; and
- ensuring that the court enforces Hadd and Taa'zir judgments.

Circular MJC2/99 lists the particulars, which should be included in the case report. These are:

1. case number;
2. type of case;
3. mode of filing of the case;
4. date of filing;
5. date of closure;
6. name, permanent and present address, identity card number and age of the plaintiff;
7. name, permanent and present address, identity card number and age of the defendant;
8. summary of the claim;
9. documents related to the claim;
10. salient points noted; and
11. judgment.



### 5.3 Knowledge of Law and Procedure

The judge determines the relevant law and procedure that applies in a case based on the nature of the case and the issues in dispute. In the Maldives, the hierarchy of those laws is as follows:

- The Constitution
- Islamic Shari'ah
- Laws passed by the Majlis
- Rules and Regulations made by the government including circulars of the Ministry of Justice

### 5.4 What is the Role of the Judge where there are “Gaps” in Law or Procedure?

The question of how to fill gaps in the law is one that judges in all legal systems face to varying degrees, and especially legal systems in transition. It is therefore useful to consider what the judge's role might be in such situations. It is for the Majlis to make law and for the judiciary to apply those laws. When existing laws need to be amended or new laws prepared, the Law Commission is responsible for drafting those laws. In any society, and this is especially true of one that is developing at a brisk rate, the written laws do not always remain abreast of other developments. The inevitable result is gaps in the law. What does a judge do when called on to make a decision in a matter where there is a gap in the law, or to determine how a matter should proceed when there are gaps in procedural law? Judges have developed various ways of dealing with this situation. Here are some examples:

#### 1. Analogy

A law or procedural rule that is not directly relevant to the matter in dispute might contain statements of principle that can assist either in interpreting and applying the law in question or in resolving an issue where there seems to be a gap in the law.

Example: The Prophet is reported to have said, “The killer shall not inherit (from his victim)”. By analogy this prohibition is extended to bequests, which would mean that the killer could not benefit from the will of his victim.

#### 2. Accepted Practice

Judges might have responded over time to a gap in the law by developing a practice or an approach to deal with such matters. That practice or approach, although not formally a part of any written law or code, often becomes the accepted method for dealing with a particular problem. This is especially true of procedural matters, although it is not restricted to procedure.

#### 3. Reference to other similar legal systems

This is a less common way of filling gaps in individual case, but at the very least the courts of one country can occasionally find some guidance in the manner in which the

courts of other jurisdictions have dealt with a similar problem. (This approach is evident, for example, in common law countries, which are based on case precedent and which therefore have a comprehensive approach to reporting and publishing judicial decisions).

4. Reference to International Documents

If a country is a party to treaties, accords, conventions, or other documents, it is sometimes possible to refer to those documents for principles on which a decision may be based or justified.

Example: In the Maldives the principles in the *Convention on the Rights of the Child* could be referred to for assistance.

5. Principles of Fairness and Equity

Opinions of what is fair and equitable will vary from system to system, and even within systems. Many legal systems have developed sophisticated rules of equity and fairness to guide their decision-making. Even where those systematic rules do not exist, it is often possible to resolve a problem or issue (where there is no applicable written law or procedural rule) by identifying the result which is obviously the most fair and equitable result in the circumstances of the particular case.

Example: The decision might be made not to enforce the hadd penalty of amputation of the hand for theft during a widespread famine. Umar, the second Caliph, set aside the established law on ground of equity and fairness.

## 6.0 JUDICIAL ETHICS

The primary responsibility of a judge is to do justice between the parties according to the law. To achieve this aim, the judge must follow certain ethical rules and practices. While the nature of these ethical rules and practices varies from jurisdiction to jurisdiction, the following rules seem to have been widely accepted as the minimum ethical standards for judges:

1. Judges must hear and consider both sides of a dispute.  
It is impossible for a judge to do justice in a particular case according to law if he does not have the ability and the desire to listen to and to consider the arguments and submissions of all parties to a dispute.
2. Judges must be impartial and must be seen by the public to be impartial.  
The acceptance by the public of the authority and judgments of courts depends upon public confidence in judges. The public will have such confidence only if they think that judges act impartially. This means that the judge must ensure that his decision is not affected or influenced by any personal, business, financial or other interest.
3. Judges should avoid *impropriety* and the *appearance of impropriety*.  
This means, for example, that judges should:
  - respect and comply with the law in their professional life and their personal life;
  - act at all times in a manner that promotes public confidence in the judiciary; and
  - ensure that their family, social, business or other relationships do not influence their judicial conduct or judgment.

This requirement relates both to the professional and personal conduct of judges. Examples of professional impropriety would include making a decision knowing that it is inconsistent with the applicable legal principles, or without having given both parties to the dispute a chance to be heard. An example of personal impropriety would be the judge's violation of the law of the land.

Circular MJC 2 /95 requires judges not to meet the litigants and discuss the case outside the Court.

Circular MJC 1/99 lists the relationships where a judge should abstain from hearing a case. They are:

- a) father and step father;
- b) mother and step mother;
- c) children and step children;
- d) grandparents;
- e) wives;
- f) brothers, sisters, nephews and nieces;
- g) cousins;
- h) son and daughter in laws;
- i) father in law and mother in law; and
- j) brother in law and sister in law.

Even if there is no blood relationship, judges should abstain from hearing cases involving employees and business associates. If acquaintanceship is developed with a litigant after the commencement of proceedings, the judge should abstain from hearing the case.

## **7.0 ROLE OF THE ADVOCATE**

### **7.1 General Principles**

The way in which the lawyer's role as an advocate is viewed varies depending on the legal tradition in which that lawyer operates. In order to understand this difference we can consider and compare the common law and civil law traditions. One of the main procedural differences between these two legal traditions has often been characterised as "party control versus judge control". According to this distinction, the traditional common law approach is that the parties, through their legal representatives, control the pace at which the proceedings are conducted (subject, of course, to the relevant procedural rules regarding time limits and other similar requirements, and any court orders) and are responsible for gathering the evidence that the court will consider in reaching a decision. The traditional civil law approach, on the other hand, is that the judge determines the pace at which the matter will proceed, when it is necessary for the parties to appear, the issues and evidence that will be considered and at what stage they will be considered.

There is no system that fits precisely into either of these two categories. Common law systems, for example, are increasingly focusing on the judge taking a more active role in proceedings, mainly to address the problem of excessive delay that has become a negative feature of litigation in many common law systems. But considering these models helps to explain the difference between the roles of judges and lawyers in different systems.

In the Maldives the role of the lawyer is limited because the Court is responsible for gathering evidence and ensuring that procedural steps are taken.

### **7.2 Specific Duties**

It can be said that lawyers who appear in court for their clients have a duties both to the court and the client. The primary duties to the client include the following:

- Representing Client's Interests;
- Knowledge of Law and Procedure;
- Preparation of and Familiarity with Case;
- Assisting the Judge; and
- Case Management Role.

#### **7.2.1 Representing Client's Interests**

Lay people are usually not trained in the law, and are not familiar with the procedural requirements of courts. The role of the lawyer is to explain the relevant law and procedure to his client. If this is done by the lawyer, the judge can spend his time on the more important aspects of the case.

### 7.2.2 Knowledge of Law and Procedure

This follows from the role of the advocate as representing the client's interests. The only way to do this properly is to be familiar with the relevant laws and procedural rules. Without this knowledge, it will of course be impossible for a lawyer to explain the legal and procedural issues to his client.

### 7.2.3 Preparation of and Familiarity with Case

Again this duty flows from the primary duty of the lawyer to protect his client's interests. The lawyer must:

- identify and understand all of the relevant issues in the case;
- identify and consult with any appropriate witnesses;
- identify appropriate documentary evidence and ensure that it is collected; and
- examine the witnesses through the judge.

### 7.2.4 Assisting the Judge

It should be evident from the above discussion of the duties of a lawyer that lawyers can play a useful role in assisting the Court. In performing his duty to his client, the lawyer can assist the court in one or more of the following ways:

- reducing the time which the judge and other court officials must take to explain the law and procedure to a litigant;
- drawing the attention of the court to witnesses and documents that might assist in resolving the dispute or clarifying issues in dispute;
- assisting in gathering relevant evidence; and
- tracing whereabouts of witnesses to be brought before the court.

Another way in which a lawyer can assist the court is to suggest methods to deal with gaps in the law or procedure relevant to a particular dispute or issue in that dispute. (This could include, for example, drawing to the attention of the court materials to which the court might refer for assistance).

|   |
|---|
| <p><u>Example:</u> A lawyer, after going through the facts of the case, may have to advise the client that there is no cause of action. If such person had not obtained legal advice prior to filing the case, court time would have been wasted in proceeding with the case and giving judgment.</p> |
|---|

### 7.2.5 Case Management Role

Advocates as well as judges have a responsibility to ensure that the case proceeds through the courts as efficiently and expeditiously as possible. This includes:

- identifying issues and separating relevant from irrelevant issues;
- adhering to time limits and explaining those time limits to clients;

- being aware of settlement prospects and exploring these with the client; and
- ensuring that the client complies with all orders and directions from the judge regarding the conduct of the case.

## **8.0 CASE MANAGEMENT**

### **8.1 General Principles**

Institutions need to be managed efficiently and effectively. People who use these institutions will have more confidence in them if they know that the institutions are well managed. Courts are no exception. Courts will not have the confidence of the people for whom the courts exist if they do not do justice, and do it with as little delay as possible.

### **8.2 Definition and Explanation**

When we speak of case management we mean managing the progress of a case through the courts, from initiation to final disposition. The case management process requires that the judge take an active role in ensuring that all procedural requirements are met by the parties and the court, that there are no unnecessary adjournments of the proceedings, and generally that the case is dealt with as expeditiously as possible.

Historically, the focus on active case management has arisen in many countries as a result of court delay. This delay creates public dissatisfaction with the performance of courts, and people become unwilling to use the courts to resolve their disputes. It is to a considerable extent in response to this problem of delay that focusing on better court administration has become a priority. As the focus on court administration increased in response to unacceptable delay, case management became a priority, because effective management of cases was seen as the best way of reducing delay. It has been stated that the heart of case management is caseload management. Caseload management “involves the entire set of actions that a court takes to monitor and control the progress of cases, from initiation through trial or other ...disposition...to make sure that justice is done promptly.” (Steelman, et. al., “Caseload Management – The Heart Of Court Management in the New Millennium” p.xi)

It will be seen from these comments that effective case management reduces delay. However, effective case management is also a way to prevent delay, and while jurisdictions in which active case management has been adopted initially focused on reducing delay, they have increasingly come to use the same measures as a way to prevent delay.

### **8.3 Some Examples of Case Management Strategies**

The judge is responsible to ensure that the parties comply with all of the relevant procedural rules governing the conduct of the case, and that the case is dealt with efficiently and without delay. This topic is discussed in more detail below.

#### **1. Specialist “Lists”**

In some systems, the case is assigned by court officials to a particular list, depending on the subject matter of the case. For example, a typical listing arrangement would be to have the following categories of cases:

- Commercial



- Personal Injury
- Constitutional and Administrative
- Construction and Arbitration
- Admiralty and Maritime

There are several reasons for using specialist lists. One of the primary reasons is that cases in a particular category usually share common features, which are not shared by cases in other categories. By differentiating between the cases, it is possible to develop distinct procedures, timetables, forms and directions to apply only to one type of case.<sup>11</sup> Without such differentiation, cases would be dealt with in the order of when they were filed with the court and without any consideration for the unique features that distinguish them from other types of cases.

## 2. Jurisdictional Differentiation

The use of special lists is a form of what has been called differentiated case management (DCM). Another type of DCM, although less refined than specialist lists, is to assign cases to different courts depending on the value of the claim and/or the complexity of the issues in dispute. For example, many jurisdictions establish a “Small Claims Court” to deal with all claims below a certain value. In such courts:

- the procedural requirements and rules of evidence are simplified,
- the time from commencement to hearing is very short in comparison to other cases,
- the matter is usually dealt with and disposed of in only one hearing,
- the rules of procedure and evidence that govern the hearing are more relaxed than in other courts, and
- there is no judicial intervention at any stage prior to the hearing.

## 3. Specialist Judges

A benefit of the use of specialist lists is the development of judges with expertise in a particular type of case. In jurisdictions in which this approach to DCM is used, cases of a particular type are often consistently referred to the same group of judges. One result of this approach is that over time, this group of judges tends to develop an increasingly informed and sophisticated appreciation of the nature of this category of case and the kinds of issues that typically arise in such cases. This expertise increases the possibility of a speedier disposition of the case. Such judges are also well qualified to provide leadership in the development and reform of the law and procedure related to the category of case in which they have acquired special expertise. Law reform is a constant process in any legal system, whether developed or in transition. While the need for judges to be impartial and removed from the political process is essential to the effective operation of a judiciary, there are many ways in which judges can provide leadership in matters related to law reform.

## 9.0 RULES ON REPRESENTATION IN LITIGATION

The rules applicable to representation in litigation are “Rules Regarding Representation as a lawyer in Maldivian Courts” (Rule 231, as amended by the relevant Circulars discussed below. A person should have a licence granted by the Ministry of Justice to litigate in a Court of Law.

### 9.1 Civil Cases

Attorneys may litigate in general civil cases. If the plaintiff or the defendant is an individual, that individual must be present with the attorney.

If the plaintiff or the defendant is a company, organisation, party or any such legal entity, an attorney who has been granted a Power of Attorney by such an entity may represent the entity in a court. In such cases it is not necessary for the representative of the company, organisation, party or any such legal entity to be present with the attorney.

### 9.2 Criminal Cases

In criminal cases, an attorney may attend the hearing but cannot speak on behalf of the accused (Circular MJC 7/99).

### 9.3 Family Cases

For cases involving family matters other than matrimonial problems, custody of children and refusal to pay child care costs (or other costs that may have to be borne by the husband for the wife), an attorney may be present in court. However, the attorney is not allowed to litigate in such cases. } 2/2/20

### 9.4 Acknowledging an Attorney

A court is not necessarily required to acknowledge an attorney. However, attorneys are normally acknowledged in civil cases.

A court acknowledges an attorney upon submission of a Power of Attorney. Such Power of Attorney shall state that an attorney is authorised to litigate in the filed case and that the attorney consents to act on behalf of his client.

Even if the Power of Attorney is not submitted as a separate document, the court would accept the attorney, provided that the case submission form includes the name and address of the attorney and a letter from the attorney stating his consent to act on behalf of his client (as explained above).

If a person appears as a representative rather <sup>than</sup> ~~that~~ as an attorney, the same procedure must be followed.

## 9.5 The Attorney Acquiring any Knowledge of a Crime Committed or a Crime to be Committed

Whilst litigating or providing legal consultation, if the attorney acquires any knowledge of any crime to be committed and or any crime that has been committed, the attorney has to immediately notify the authorities concerned of the information that he has come by (Circular MJC 4/94).

The attorney must refrain from any act detrimental to the trial whilst litigating. If the attorney commits such an act, the judge has the power to penalise the attorney under clause 85 and 86 of the *Penal Code*.

## 9.6 Other Representation in a Trial

A plaintiff or a defendant who is unable to attend the trial may be represented by some other person (Circular MJC 4/94).

### 9.6.1 Conditions for Representation

Representation of a plaintiff or a defendant by another person is allowed in the following circumstances:

1. A person to be summoned is unable to attend the court due to ill health.
2. The person summoned to a court in an atoll other than the atoll in which he resides presents to the court justifiable reasons why he cannot leave behind his family and property.
3. A person is unable to stay in the island where the case has been filed due to acceptable reasons.

Representations to the court could be made for any of the abovementioned reasons. When a representation is made, the person who is making the representation must submit a letter to the court stating his willingness, a brief about the case and the consent of the person he is representing.

### 9.6.2 People who can be Representatives

People who can be sent as representatives are:

- Father;
- Mother;

- daughter/son;
- own sister/brother;
- sister/brother born of the same father;
- sister/brother born of the same mother;
- wife; and
- husband.

If the above mentioned people are not available, the nearest guardian may act as a representative. If there is no such guardian, a relative or a friend whom the court accepts may act as the representative. The court has the discretion to accept or deny the person to be sent as the representative.

A company, organisation, or any such legal entity cannot be represented in this way in a court of law. The person who represents the company should be a person which the constitution of the company, organisation, or such legal entity acknowledges as being the representative.

## **10.0 SENDING COURT ORDERS**

### **10.1 General**

Reference should be made to Circular MJC 2/97, amending Rule 19 and 20 of the “Rules for Conducting Legal Proceedings in the Courts”. A court order is sent to any person who has to be summoned to the court due to a charge that has been filed against him or by him, or to summon a person who has to appear in court for some other reason.

A court order can be sent in three different ways:

- by a representative of the court to the person at his given home address;
- by the post office (by courier); and
- through the island court of another island.

### **10.2 Times the Court Orders are Sent**

There is no specific time or day to send a court order. The representative of the court can deliver the court order at any time that is convenient for him. However, he cannot deliver the order during the late hours of the night.

### **10.3 Person to Whom the Court Order has to be Delivered**

The court order has to be delivered to the person indicated in the court order. If that person is not available or is not at home, any member of the household can receive the order for or on behalf of him. However, when penalising a person for not appearing in court as ordered, the punishment is not given to the person who received it but to the person indicated in the court order if he has received the order and intentionally failed to appear in court.

### **10.4 How the Court Determines that the Order has been Received**

The court determines that the court order has been received if there is a signature on the place indicated for the receiver to sign. If the court order has been sent by courier, the court determines that the person has received the court order if the procedures of the courier to confirm receipt have been followed. If the court order has been sent through the court of another island, the delivery of the court order is determined when that court summons the person to the court and informs him of the court order, and the person summoned signs it.

## **11.0 SUMMONING THE DEFENDANT TO THE COURT**

The defendant is summoned to the court by sending the court order to him. If the defendant appears in court at the right time the court will not take any action against the defendant. If the defendant does not appear in court after receiving the court order, the court has to determine the reason why he was unable to appear in court. If the defendant does not appear in court after receiving the order for the first time, the defendant would be fined Rf. 75 (as at June 2001). If the defendant does not appear in court after receiving the court order for the second time, the defendant would be placed under house arrest for 15 days. If the Court knows that the defendant resides at the given address and tries twice but is unable to hand over the order, the court has the discretion to paste the order on the front gate of the defendant's house. If the defendant does not appear in court after the order has been pasted on the front gate of the defendant's house, the defendant would be placed under house arrest for 15 days.

If the defendant refuses to take delivery of the court order for the first time he would be fined by Rf. 75 (as at June 2001). If the defendant refuses to take delivery of the court order for the second time, he would be placed under house arrest for 15 days.

## 12.0 WITNESSES

### 12.1 Subpoena

Definition:

A subpoena (subpoena ad testificandum) is an order of the court to attend proceedings for the purpose of giving evidence.

The court has the duty of subpoena ad testificandum in both civil and criminal cases according to accepted practice. It is not the duty of the party providing the names and addresses of the witnesses to bring them to court. In the event a party to be called upon as a witness is in a foreign country, he shall be brought to court through the Ministry of Foreign Affairs.

### 12.2 Allowances to be Given to Witnesses and Others Brought to Court

If the witnesses and others required to appear in court reside in any other island, other than the island in which the case is heard, an allowance shall be paid to them. Accordingly, the defendant(s), witnesses or any other person required to appear in court shall only appear after the plaintiff has deposited in court all expenses to be incurred by them.

The Ministry of Justice shall determine the amount to be so deposited. At present, Circulars MJC 20/93 and MJC 21/93 of the Ministry of Justice sets out the amount of deposit required to be made in respect of transport costs to and from one atoll to the other. In addition, Rf. 30.00 shall be paid for each day the witnesses or any other person remain in the island where the proceedings are being held. Normally the court will order ten days of deposit to be made.

In the event the case is decided in favour of the plaintiff the deposited amount will be given back to the plaintiff. If the case is decided against the plaintiff, his deposit will not be given back but will be awarded to the defendants, and the witness deposit will be awarded to the witnesses.

If a person residing in a foreign country is required to appear in court as a witness, the amount of money equivalent to his return ticket shall be deposited.

### 12.3 Testimony

There is no regulation governing the testimony of witnesses. However, the witness shall only be questioned in the presence of the plaintiff and the defendant. If both parties are not present during the testimony, evidence can be obtained by means of messages. This is because *Law relating to Obtaining Statements by way of Messages* (Act No. 78/82) gives provision for evidence to be given by means of a message, which means that a request can be

made to a court in another island to take the evidence of a witness and to submit that evidence in writing to the requesting court.

#### **12.4 Retraction of Admission**

Reference should be made to Circular MJC 61/74. There are two ways by which an admission of guilt can be retracted:

1. admission during the investigation, but retracting the admission at trial; and
2. initial admission in court and retracting it later in the trial and refusing to sign the proceedings statement.

Generally a person cannot retract in court an admission of guilt made during an investigation. The following procedure shall be followed in such a case:

1. If the case in which the person made the admission during the investigation and retracted the admission at the trial is one which involves rights of God or theft of a serious nature, the State shall immediately prosecute the person for perjury.
2. A person who admitted to adultery and later retracted the admission shall be sentenced to banishment for 1 year (for men) or house arrest for 1 year (for women) by virtue of Section 63 of the *Penal Code*.
3. If a person admitted to consuming alcohol and later retracted his admission, he shall be sentenced to banishment for 1 year under Section 63 of the *Penal Code*.
4. If a person initially admits to guilt in court and later retracts his admission and refused to sign the proceedings statement, the judge and any other court staff who heard the initial admission shall sign the statement, and the judge shall sentence the person (Circular MJC 8/98).
5. If a person admitted to guilt during the investigation and later retracted his admission in court, the persons involved in the investigation shall be summoned to court and there shall be a judicial inquiry into the matter.

#### **12.5 Contempt of Court**

It is an offence to disobey a judge. A person charged with contempt of court shall be punishable under Sections 85, 86, 87 and 88 of the *Penal Code*. If a lawyer is charged with contempt of court he shall be punishable under Sections 85 and 88 of the *Penal Code*. In addition, conduct of lawyers is governed by regulations pertaining to them.

#### **12.6 Admission to Hearings and Publication of News**



Reference should be made to Rule 200 of the *Rules for Conducting Proceedings in the Courts*. All persons are allowed to attend hearings to the extent of space available in the court room. This is the general rule, but family cases between husband and wife are an exception.

It is an offence to discuss anything regarding a case outside the court and to publish such news in any magazine or similar publication. If any such news is to be published, it shall be done by the Ministry of Justice or under the authority of that Ministry.

## 13.0 INTERIM ORDER

Definition:

An interim order is an order by the court regarding an ongoing case. This type of order is made if the court has reasons to believe that if such an order is not made, it would be detrimental to a right or property of a party involved in the case.

Reference should be made to the “Rules on Interim Orders and Injunctions of the Civil Court”.

### 13.1 Party Applying for an Interim Order

Only a party to a case can apply for an interim order. The court will not accept an application for an interim order by a party not involved in the case.

Circumstances under which an application for an interim order can be made:

1. If the absence of an interim order would cause damage to a party in a case;
2. To bring the case under the auspices of the court, if the party in possession of the goods or property is likely to cause damage to them;
3. If there is reason to believe that by the time a verdict is reached, it would not serve the purpose;
4. If there is likelihood of the defendant fleeing; and
5. If there is reason to believe that the goods will be carried out of the country, or the goods would be out of the jurisdiction of the court by the time a verdict is reached, or if the value of the goods would decrease if the Injunction was not given.

### 13.2 Application for Interim Order

1. If an application for an interim order is made under the Rules of Interim Orders and Injunctions of the Civil Court, such application must be made using form M-009 of the Civil Court.
2. Article 1 of the Rules of Interim Orders and Injunctions of the Civil Court states that, if an application for an interim order or an injunction by either party to a case is made before a verdict is reached, the court shall issue an interim order or make an injunction. Therefore, it is necessary that the case is filed before such an application is made. The interim order or injunction will be valid only until the verdict is given, after which time the decision of the court must be followed. Usually, an interim order or an injunction is made to protect a party involved in a case from any financial losses. Therefore, on the

application for an interim order, it would be necessary to specify the likely consequences if an interim order is not made.

3. When the form for the interim order is filed in the court, that form will be included in the file relating to the principal case. Since the application for an interim order is related to an ongoing case, it will not carry a separate case number. No fee is charged for the form. If the court decides to issue an interim order, a copy of the order will be included in the file containing the documents for the principal case.

## 14.0 OATHS

Definition:

An oath is a statement sworn in the name of God.

### 14.1 Oath Administered in Judicial Proceedings

Generally, in matters of oaths, Shari'ah law governs. If a person brings an action against another, and the defendant denies the claim, the plaintiff must present evidence. If the plaintiff fails to present evidence, the defendant would be required to deny the claim under oath. If the claim of the plaintiff is denied by the defendant by oath, the claim of the plaintiff will be rejected. The oath has been sanctioned in cases involving property and chattels but is not acceptable in penal matters involving God's rights. However, oaths can be taken to settle the compensation or civil wrong that is part of a criminal case.

If the plaintiff tenders the oath to the defendant, three courses can be followed. The defendant may:

1. take the oath;
2. refuse to take the oath; or
3. reply to the oath of the plaintiff.

As stated earlier, if the defendant testifies under oath that he is not liable for the claim made by the plaintiff, such claim would fail. There are three views on this:

1. The first view maintains that the oath is a weak method of proof and does not terminate the dispute. This means that evidence may be heard even after the defendant had denied the claim under oath.
2. The plaintiff is permitted to submit evidence in support of his claim after the defendant has testified under oath on condition that the plaintiff was not aware of the existence of his evidence when he asked for the defendant's oath.
3. The oath is decisive in a dispute and so that plaintiff may not give testimony later.

### 14.2 Defendant's Refusal to take Oath

The practice followed in the Maldives is that the refusal of the defendant to take the oath is not a sufficient ground to render judgment against him, because such refusal is a weak method of proof which must be corroborated by the oath of the plaintiff whether arising from the defendant's request or not.

### **14.3 Oath of Witness**

Any person making a statement in the court has to take oath to tell the truth. There is no requirement to hold or touch the holy Koran while taking oath.

### **14.4 Approval to Administer Oath**

Reference should be made to Circular MJC 4/85. Before administering an oath in a dispute, the permission of the Ministry of Justice must be obtained. The wording of the oath is set out in Circular MJC 7/98, and is as follows:

*“I swear by God that in responding to questions and in making any statements to this Court, I will tell the truth and will not say anything that is not true.”*

## **15.0 CASES FOR WHICH THE OPINION OF THE MINISTRY OF JUSTICE IS REQUIRED PRIOR TO COMPLETION OF THE TRIAL AND SENTENCING**

1. Cases of Li'an (mutual imprecation);
2. Cases of Shiqaq (annulment of abrogation of marriage) and Taf'reeq (breach of marriage agreement);
3. Marriage cases where the judge acts as the guardian;
4. Cases where oath is taken;
5. Murder cases;
6. All cases stipulated under Section 6 of the *Evidence Act* (Act No. 24/76);
7. Liquidation proceedings;
8. Cases for which the opinion of any government authority is required and if the opinion of the government authority is contrary to the prevailing government policy or contrary to a public announcement made by any government authority; and
9. Cases where the appellant is the State and insufficient evidence is brought forward.

## **16.0 ENFORCEMENT OF JUDGMENTS IN CIVIL CASES**

Reference should be made to Circular MJC 3/99. The steps taken to enforce judgments in civil cases may depend on the type of judgment which has to be enforced. The procedure used by private parties to enforce a judgment debt is highlighted.

### **16.1 Enforcement of Judgment Debt**

In judgment debt cases, private parties shall apply to the court for enforcement by using a specific form available for such purposes. The applicant must submit with the form the judgment report of the original case and a receipt for judgment debt. In such claims the court shall act as follows:

1. Where the payment has not been made according to the judgment of the court, the defendant shall be ordered to make the payment according to that judgment and shall be placed under house arrest for a period of 15 days.
2. Where the payment has not been made even after the person has been house-arrested for 15 days, a further period of one month shall be given to make the payments, and in the event that payment has not been made even after the one month period, the person shall be placed under house arrest for a further period of one month.
3. Where the payment has not been made after one-month of house arrest as above, the court shall endeavour to find a solution agreeable to both parties to make the payments. If an agreeable solution is reached, judgment shall be made accordingly. If not, a further period of one month shall be given to make the payment.
4. Where payment is not made even at the end of this period, the person shall be declared a bankrupt. In the event of bankruptcy, all property belonging to the person with the exception of land and buildings can be auctioned.

### **16.2 Court Procedures in a Claim to Enforce a Judgment Debt**

1. When a claim is made on a judgment debt, the court shall inform and get the signature of the debtor that he shall not, without the prior permission of the court, transfer the ownership of any property belonging to him at the time or transfer the ownership of any property for which an application has already been made to transfer ownership but the transfer has not been completed.
2. If the defendant in a claim for enforcement of judgment is under any form of confinement, the court shall order that the defendant act according to the terms of the original judgment, and shall be given a 15-day period to make payments according to the judgment, and if within this period the payment is not made, a further one month period shall be given, and in the event the defendant fails to make payment within this one month period, the court shall endeavour to find a solution agreeable to both

parties, and if there is such a solution then the court shall order accordingly. However, if a solution is not reached, a further period of one month shall be given to make the payments, failing which the case shall be suspended until such time as the defendant is released from confinement.

3. If the defendant fails to make the payments within one month of his release from confinement, the court shall proceed in the same manner as outlined above in connections with persons who were not in confinement when the claim arose.

### **16.3 Bankruptcy Proceedings**

Definition:

Bankruptcy proceedings refer to the auctioning of property belonging to the debtor where he is unable to settle a proven debt. In settling debts of private parties the court shall act according to Circular MJC 4/89 before resorting to bankruptcy.

### **16.4 Enforcement of Judgements other than Money Judgements**

In cases (other than those involving orders by the court to make payments) where the court has made an order to carry out an act and where the person has failed to so act, the procedure to be followed by the court is governed by Article 184 of the Rules for Conducting Court Proceedings.

Clause 1 of Article 184 states that if a claim is filed in the first instance for failure to act according to an order, the court shall penalise the person and order that he act in accordance with the original order.

Clause 2 of Article 184 states that, in accordance with clause 1, should 15 days pass after the person fails to comply, the order may be enforced by making an application in writing, if in Malé, to the Ministry of Defence and National Security to enforce the order. If outside of Malé, the application shall be made in writing to Ministry of Atolls Administration to enforce the order.

The Civil Court form for enforcement of judgment (*form 10*) should be used when filing an application to enforce court judgment where the opposing party did not act in accordance with a court judgment.

Where a claim is made to enforce judgment under Article 184 for the first time, and where the court finds that the party did not act in accordance with the judgment, the court shall act in accordance with clause 1 of Article 184.

In the event the case of an enforcement of judgment is decided for the first time, in determining the penalty for not acting in accordance with the judgment commonly the penalty shall be a fine of Rf. 75 (as at June 2001).



## **16.5 Cases of Proven Debts Payable to the Government**

The *Law on Recovery of Monies by Way of Debts or Otherwise Owed to the Government or Related Parties* (Act No. 27/76) states the actions that may be taken against a party who has failed to pay the required amounts at the required times to the government or government related party whether by way of debts, or by a court judgment, or otherwise.

Three steps that will be taken against such a party are as follows:

1. When he fails to pay the stated amount at the stated time, he will be put under house arrest until he pays.
2. When he fails to pay the stated amount at the stated time, he will be put under house arrest in accordance with 1 above, and if he fails to pay after being under house arrest for 1 year, the matter will be referred to the court for bankruptcy proceedings.
3. The matter is referred to the court for bankruptcy proceedings.

The President shall determine which step to choose from these three steps.

Where it has been held that a person should pay money to the Government, the court should send a chit which indicates proof of debt to the Ministry of Finance and Treasury. Where it has been held that a person should pay monies to a Government company, the chit shall be sent to that company (Articles 160 and 166 of the Regulations for Conducting Court Proceedings). When sending the chit to the Ministry of Finance and Treasury, the court shall hand over the debtor to the Ministry as well. Once the chit is sent to the Ministry of Finance and Treasury, the debtor shall make payment to the Ministry.

The debtor should pay a proven debt owed to a Government company to that particular company.

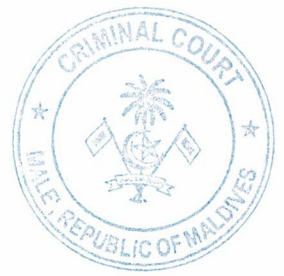
According to Article 216 of the Regulations for Conducting Court Proceedings, the court must ascertain the properties belonging to the debtor before a judgment is made on a case involving money payable to a Government or Government related party. The Article also states that the court shall inform and get the signature of the debtor that before the outstanding debts are settled, he shall not without the prior permission of the court, sell or give away any such property. The procedure to determine the properties belonging to the debtor is stated in Article 220 of the Regulations for Conducting Court Proceedings. According to Article 220, to determine the property belonging to a debtor the court shall inquire from the debtor himself, make written enquiries to relevant parties as to whether there are any properties registered in his name, and make written enquiries to the banks to see whether the bank holds any properties of the debtor.

Article 268 of the Rules for Conducting Court Proceedings, states that in the event that a payment is not made to the Government or Government related party and where bankruptcy proceedings have been brought under *Law on Recovery of Monies by Way of Debts or Otherwise Owed to the Government or Related Parties* (Act No. 27/76), and if the debtor's

land and buildings have to be sold, this decisions can only be made with the permission of the President's Office.

## **16.6 Enforcement of Judgments made by the High Court of the Maldives**

Article 258 of the Rules for Conducting Court Proceedings, states that in certain matters where a specific body or authority has been assigned responsibility to enforce judgment, the High Court will send such matters to that authority for enforcement. In instances where an authority has not been specified, and a lower court judgment has been appealed to the High Court, any final judgment will be enforced by the court in which the matter first arose.



PART C:  
SPECIFIC CASES: PROPERTY

## 17.0 DISTRIBUTION OF ESTATES

### Definition:

There is mixed opinion as to the meaning of inheritance amongst Islamic Scholars. Notwithstanding these different views, we can generally say that inheritance relates to the wealth and the belongings of the deceased including his rights in property.

### 17.1 Distribution of Estates

Issues of inheritance have to be raised by filling out the relevant form. This form then has to be submitted by one of the claiming heirs to the inheritance property. Where the deceased has no legal heirs, the Government will submit the claim.

### 17.2 Forms and Materials that have to be Submitted for the Inheritance Claim

If a land or a dwelling is included in the inheritance property, a copy of the registration form of the land or dwelling has to be submitted with the inheritance claim form. Apart from these papers, copies of any other documents that are necessary to prove any fact in issue have to be submitted to the court with the inheritance claim form.

### 17.3 Hearing Inheritance Claims

There are two different approaches adopted by the courts in the Maldives in resolving inheritance claims.

1. The inheritance claim and the distribution of the estate are dealt with as two different issues:

The identity of the heirs and the deceased's properties and estate are dealt with in one claim, and the heirs must then make a separate claim for distribution of the estate. This is how the Civil Court of the Maldives acts with regard to most inheritance claims.

Accordingly, when a claim of inheritance is submitted to the Civil Court, the Court will:

- a) confirm the death of the deceased;
- b) identify the heirs to the properties and estate; and
- c) ascertain the property to be inherited and the deceased's properties and rights.

There must then be a separate claim for distribution of the deceased's estate to the heirs. One of the reasons why some courts take this two step approach is that there might be other interests to consider, for example, a mortgage's interest.

2. The issues of inheritance and distribution are treated in a single claim:

This approach has been adopted and implemented in some of the Island courts. If a claim of inheritance is submitted to such a court, the court will first of all:

- a) confirm the death of the deceased;
- b) identify and ascertain the deceased's property and estate; and

- c) identify the heirs **and** ascertain the individual heir's share in the inheriting properties. If this approach is practised, a secondary claim for the division and distribution of the property is not necessary.

This approach is adopted by some courts for convenience. Any dispute as to the properties can be settled upon distribution of such properties.

#### **17.4 Procedure and Guidelines that have to be followed by the Courts in Hearing Inheritance Claims**

Upon the submission of an inheritance claim, there are certain procedures and guidelines that the court has to follow. These are:

1. Confirming the death of the deceased:  
This is done by the testimony of the heirs and two additional witnesses. In addition to the testimony confirming the death of the deceased, two other witnesses have to testify in court to substantiate the death of the deceased. Courts also accept the death certificate as evidence of the deceased's death. If the deceased died in a foreign country, the court will accept a written confirmation of the death by the relevant authority of that country. If there is a Maldivian embassy in the country where the deceased died, a written confirmation from that embassy would be accepted.
2. Proving the identity of the entitled heirs:  
In such cases the testimony of the purported heir could be accepted, and this is done because it is the belief of the court that the heirs are the individuals who would best know who are the deceased's heirs. If the heirs identify and give information about other heirs, the court accepts this. However, if the heirs are unable to prove the identity of other purported heirs, then the Court will put up a notice to find the actual heirs to the property. In such a situation the Courts should only accept and make a ruling about the rightful heirs if there is undisputed evidence submitted to court as to their authenticity, or the proven heirs accept them as heirs.
3. Identify and ascertain the deceased's property and estates:  
With regard to the identification of property, the testimony of the heirs will be accepted, except for the property, land and dwellings that are registered. If a dispute arises among the heirs regarding the properties of the deceased, the court has to inquire so as to seek the truth as to the issue in question. Disputes as to land and dwellings would be decided by inquiring at the registry. There are incidences where disputes arise among the heirs regarding the registered properties.

The deceased's money, which has been banked, must be accounted for by inquiring through the Ministry of Finance and Treasury. Here the court should ask the heirs to verify the existence of any bank accounts of the deceased. This is done because there have been instances where, after the court has ruled regarding the inheritance dispute, the heirs submit a new claim to distribute the money in the bank account of the deceased.

4. Determining whether there is anyone who wants to claim from the deceased's property either by way of a gift or by way of a will:  
This is judged by the rule of limitation emphasised by the *Law on Estates* (Act No. 25/75) which states that 60 days has to be given for any such claimants to come forward. For this reason, any inheritance claim should not be resolved for a period of 60 days from the date of the deceased's death. If a claim is brought to the court during this period the courts have to inquire into the matter according to the relevant rules and regulations. This claim should not be attended to as a separate case but should be considered as part of the original inheritance claim. If such a claim is submitted and proven in favour of the claimant, priority should be given to it before the distribution of the inheritance. Any claims submitted to the court after the due date for submission of such a claim should not be heard because according to the Law of Inheritance, if a claim has not been submitted within the 60 day period, the law will conclude that there are no such claimants.
5. Inquiring whether the property or part of the property has been either leased or kept as security:  
This can be substantiated by the testimony of the heirs. If any property has been leased or given as security, the courts have to determine details. Testimony given by heirs on the issue has to be considered as well. If the lessor or the creditor makes a submission to court regarding inheritance property that has either been leased or held as security, such a claim should be dealt with as part of the inheritance claim.
6. Resolving issues regarding any of the deceased's property that had been registered:  
The court does this by writing to the registered office to inquire whether there are any problems regarding the property in issue. In order to inquire about the deceased's land and dwellings, if the land or dwelling in issue is in Malé, the court has to write to the Malé Municipality and wait for their feedback. If the property is in the Islands, the court has to write to the Island Office and wait for their feedback. In dealing with property other than land and dwellings that has been registered, the court has to write to the relevant Authority or office where that property is registered. This is to comply with the *Law of Change of Ownership* (Act No. 9/68).

When writing to the relevant authority where the property is registered, if the inheritance claim is being heard in a court where the issues of inheritance and distribution are dealt with separately, there is no need to include the detail of the proposed distribution. The only requirement for writing to the authority in such cases would be to obtain their feedback regarding the registered property. However, if the inheritance claim is being heard in a court where these two claims are considered together, here the court has to include with its letter of inquiry the proposed distribution details.

If the land or dwelling is a privately owned property, there is no need to obtain the approval of the relevant authority where that property is registered. But when the court makes a ruling on the dispute, the ruling has to be communicated to that authority.

7. Checking for outstanding debts:  
In addition to the above inquiries, if an inheritance claim has been submitted the court has to go through the records of the deceased to check whether there are any outstanding debts. The court has to write to the relevant government authorities. There is no need to make a public announcement.

8. Valuation of the inheritance property:  
The Valuation Committee of the Ministry of Justice will carry out the valuation of the inheritance property. Valuating the property in the Islands should be done by a special committee appointed for this valuation. In the valuation process, the share of each individual heir should be valued separately. This process of valuation is carried out during distribution of the inheriting property. In the courts where claims of inheritance and of distribution are dealt with separately, courts should do the valuation during the hearing of the distribution claim.
9. Ordering the heirs to appear before the court:  
Usually all the heirs whose name are included in the claim submission form must be brought before the court. If the court needs to hear the testimony of an heir whose name does not appear on the submission form, that heir should be brought before the court. If an heir resides in an Island other than the Island where the case is being heard, the testimony of that heir can be obtained through the Island Court where the heir is residing. Only the courts where the inheritance claim and the distribution claim are dealt with separately follow this practice. If these two claims are treated as one claim, then all the heirs must come before the court where the dispute is being heard or their views on the issues must be obtained. The court must give consideration to the wishes of all the heirs regarding the distribution of the properties.
10. Voluntary grant of inheritance to other heirs:  
If an heir wishes to grant his share in the inheritance property to one or more other heirs, he has the discretion to do so. However, an heir cannot grant his share to any other party who is not an heir to the inheritance property.
11. Inheritance property subject to a lease or given as security:  
If there is an inheritance property that is leased or given as security, the court has to ascertain the share of every individual heir in that property. The courts cannot partition such properties. The court should also decide how the profits made from such property should be dealt with. If asked by the heirs to ascertain the interests in the profits, the court has to do so. The court will not distribute the property before the expiry of the lease or the security.
12. Final Case Report:  
In the final case report the courts must include the area and the location of the land. This is to comply with the Circular MJC 14/99.

After all the above-mentioned procedures have been followed, the next step would be to ascertain the interest of individual heirs according to the Islamic Shari'ah law.

In courts that deal separately with the inheritance claim and the distribution claim, the heirs should fill out and submit an application form to distribute the property. They should submit with the claim form a proposed plan for distribution of any state-owned land that is included in the property to be distributed.

### **17.5 Possible Problems that may Arise in an Inheritance Claim**

1. If an heir passes away during or before the inheritance claim, that heir's claim will be handled separately. (Circulars MJC 123/93 and 8/84).
2. If there is a request to divide land, and if the inheritance claim has already been settled before that request is received, the names of the heirs will already be written in the Land Title. When an heir lodges a request to divide the land, even though there was agreement among the heirs, the authority which registered the land may disagree on the terms. If such a situation arises, the land will be divided in favour of the person who registered the land. The heirs have discretion in selecting particular sections of the land.
3. Different sections of land will be distributed as agreed among the heirs. However, if there is disagreement among the heirs, the court has the right to make a decision, either by drawing lots or in a manner the court believes is fair and right in the circumstances.
4. When an issue regarding partitioning of land is settled according to the terms of the authority that registers the land, there might be a slight increase or decrease in the part received by each heir. If there is no formal complaint from any of the heirs about these increases or decreases, the issue will be settled according to the terms of the authority that registers the land. Any heir who requests compensation for such increases or decreases, must be provided with compensation after valuing the land according to the relevant rules and regulations.
5. When dividing inheritance items like boats, which cannot practicably be divided among different heirs, disputes might arise because such items are valuable assets that generate income. In such cases, if the registering authority had not chosen a recipient, the court has discretion as to how the issue will be settled. The court may draw lots or decide the matter based on what is just and fair in the circumstances.
6. In distributing privately owned land inherited as part of the inheriting land first priority must be given to the offspring of the deceased. The court should give second priority to the relatives of the deceased, in the absence of any offspring. If the court cannot ascertain any relative claiming as an heir, such property will be "bona vacantia" (i.e., property without any apparent owner), and taken by the Government. The court should write to the Male' Municipality to find out whether the Government wishes to obtain the land, or the monetary value of the land.
7. The issue of a share taken bona vacantia will be determined according to Circular MJC 30/80. This Circular states that sums less than Rf. 500 can be ignored after a formal request has been made to the President's Office. However, in practice this rule has not been followed, and the Court will make a decision about such property.
8. When settling inheritance claims, one should refer to Circulars MJC 35/94 and MJC 8/84.



## 18.0 CLAIMS AS TO OWNERSHIP

### Definition:

According to Islamic Jurists, ownership is an authority vested in an individual, or an authority given over a property to another person to whom the ownership has been delegated, to obtain a benefit or profit from the personal possession. According to legal scholars, ownership involves an authority possessed by an individual who has the right to legally use and exploit that property for his own benefit.

### 18.1 Submission of Ownership Claims to Court

An ownership claim can be submitted to court in two ways:

1. to prove ownership, or
2. as a claim of ownership of the property.

Any request to prove ownership can be brought before the court provided the property is any personal property which the individual has the authority and power to deal with as he sees fit. Any claim of ownership of property that is under the authority of another party, or the title of which is with another individual, can be brought to court to prove the claimant's title to the property.

Ownership claims have to be submitted by filling out the relevant form (M-001).

### 18.2 Procedure to be Followed in Ownership Claims

Upon the submission of a claim regarding ownership, there are certain guidelines that the court has to follow. They are:

1. The Court has to order a public announcement to be made giving the details of the property, so as to allow anyone to claim title to the property in issue.
2. If no party comes forward before the deadline stated in the public announcement to claim title to the property in issue, the court will decide the matter according to the claim of ownership in the property.
3. If any party comes forward before the deadline stated in the public announcement to claim title to the property in issue, such a claim has to be heard by the court. If it is proved, according to legal guidelines that the new claimant has good title to the property in issue, this has to be acknowledged and considered by the court.
4. In hearing the ownership claim regarding property which is in the possession of the purported owner, if no party comes forward before the deadline stated in the public

announcement to claim title in the property in issue, then the court will decide the claim in the presence of the claimant.

5. In hearing the claim of ownership in property which is in the possession of the purported owner, if any party comes forward before the deadline stated in the public announcement to claim title to the property in issue, then the court will decide the matter in the presence of the new claimant.
6. In hearing the claim of ownership in property that is in the possession of another party, the court will decide the case in the presence of the possessor.
7. If the property which is the subject of the ownership claim is a registered property, then the authority at which the property has been registered must be notified of the court's decision without delay.

## 19.0 GIFTS

Definition:

A gift is a transfer of property by one person to another without any valuable consideration and with the intention of benefiting the transferee.

### 19.1 Submission of Claims Regarding Gifts

Claims regarding gifts should be submitted by using the relevant form (M-001). These claims can be submitted to Court in two ways:

1. where the gift has already been made outside Court and the parties now want to attest to the gift in Court; and
2. where the parties want to grant the gift using the Court as facilitator.

### 19.2 Procedure to be Followed in Gift Cases

1. Upon submission of the claim, the Court has to check whether the property is registered. If the property is registered, the Court has to write to the relevant registering authority to find whether there is any objection to making the gift.
2. If the registering authority objects to the property being given as a gift, then the Court has no authority to hear the case. If the registering authority does not object to the gift, then the Court has to hear and decide the case.
3. The Court has to check whether the property has been mortgaged. If it has been mortgaged, then the consent of the mortgagee has to be obtained. If the mortgagee objects to the property being given as a gift, then the Court has no authority to hear the case.
4. If the gift is a property that has been leased, then the consent of the lessor has to be obtained.
5. If the gift property is privately owned land, there is no need to obtain approval from the registering authority. However, after making a ruling on the case the ruling has to be communicated to that authority.
6. While hearing a claim regarding property given as a gift, the Court should follow and comply with sections 1,2 and 3 of the *Change of Ownership Law*, number 9/68.
7. The case report has to be prepared and given to the donor and donee.

### **19.3 Conditional Gifts**

While overseeing gift claims, the court should note that a gift is made without any valuable consideration and with the intention of benefiting the transferee. The court should be cautious if the gift is made conditionally. If the condition is for the benefit of the donor, then the courts should carefully consider it. However, if the intention of the donor is to benefit the donee, such conditions will as a general rule be allowed.

### **19.4 Revocation of Gifts**

Donors sometimes ask to revoke gift they have made. Revocations of gifts made by parents to their children are allowed. Gifts made to any other party cannot as a general rule be revoked.

## 20.0 WILLS

### Definition:

There are disagreements as to the exact meaning of “will” amongst Islamic Jurists. According to the *Shaafee* school of teachings a will means a document conferring a benefit to another upon the death of the testator.

### 20.1 Submission of Disputes Regarding Wills

Such claims are submitted by using the relevant forms (M-001). There are three ways by which such claims can be brought before the courts:

1. a will was made out of court and the parties want the court to approve the will;
2. the parties want the will to be made with the court acting as facilitator; or
3. a beneficiary submits the will upon the testator’s death.

### 20.2 Procedure to be Followed by the Courts in Wills Cases

1. The court has to confirm the ownership of the property that is the subject of the will.
2. If the property is registered, the court has to inquire at the registering authority.
3. The court has to ensure that the testator who makes the will possesses the characteristics laid down by the Islamic Shari’ah Law.
4. The court has to ensure that the beneficiary possesses the characteristics laid down by the Islamic Shari’ah Law.
5. The court has to ensure that the property mentioned in the will possesses the characteristics laid down by the Islamic Shari’ah Law.
6. Apart from considering these matters, the court must also refer to the *Law on Change of Ownership* (Act No. 9/68).

### 20.3 Revocation of Wills

1. A will can always be revoked by the person who made it, because a will does not take effect until the death of the testator.
2. If someone alleges that the will was revoked before the death of the testator, and if this allegation is brought to court while the claim regarding the will is being heard, then the court must consider the issue and investigate it according to the relevant law.

## 21.0 DIVISION OF LAND

Claims regarding division of land can be brought to the court as claims separate from inheritance claims. They can be brought to court following a transfer of ownership either through a sale, gift, or by means of a will. Just as ownership of land that is transferred by inheritance is taken up by more than one party, ownership of the land in this situation can also be transferred to more than one party. The only difference between division of land in an inheritance claim and division of land that is acquired by way of sale, gift or will, would be the method through which the land has been acquired. Therefore there is little practical difference between these two methods of distribution.

## 22.0 CHANGE OF OWNERSHIP OF GOVERNMENT PROPERTY

A request to court to change the ownership of property that is registered in the name of the government should be submitted by using the relevant form (M-001). In dealing with such requests the court should follow and comply with the *Law Governing the Selling or Granting of Privately Owned property that is Registered With the Government* (Act No. 28/76).

### 22.1 Procedure to be Followed to Change Ownership of Government Property

According to the *Law Governing the Selling or Granting of Privately Owned property that is Registered With the Government* (Act No. 28/76), the following guidelines have to be met:

1. The court should inquire whether the prospective seller or transferor owes any debt to the government or any affiliated body.
2. The court should inquire in writing to other Courts, Police Headquarters and the Maldivian High Court whether there is a judgment debt due to be paid to any private party.
3. If the court finds that there are debts to be paid to any party, upon selling the property the creditor has to be paid from the sale proceeds.
4. If the selling price does not cover the debts, then the seller has to pay the creditor(s) in instalments.
5. If there are any surplus funds after selling the property, the surplus has to be paid to the seller.
6. If there are no such debts as mentioned above, the money received after selling the property should be given to the seller, and the authority where the property was registered must be notified about the sale and change of ownership.
7. In a case where there is a request to change the ownership of property by way of sale and it is proved in court that there is no outstanding debt, if a party asks the court for an injunction based on the allegation of the existence of a debt, the court should resolve this issue in the main action.

## **23.0 EVICTION OF UNLAWFUL OCCUPIER**

### **23.1 Submission of Eviction Cases to Court**

There are two types of eviction cases submitted to court:

1. implementing an eviction order made in a previous hearing to remove the trespassers; and
2. disputes arising because parents evicted children from the parental home or because children evicted parents from the children's home.

### **23.2 Procedure to be Followed in Eviction Cases**

Both such disputes are submitted to court by using the appropriate form (M-001). If there is a dispute as to carrying out a previous court order to evict occupiers who still remain in the dwelling as trespassers, then the Judge, accompanied by court officials, will usually visit the house and order them to leave. There is discretion for the Judge to take along police officers to evict the trespassers.

In disputes arising because parents evicted the children from the parental home or because the children evicted the parents from the children's home, the practice of the courts is as follows:

1. Judgment to evict the children from the parental house should be given if the children have another place to stay or have financial ability to rent a place, or the children harass and physically abuse the parents.
2. If these conditions are not met, the courts do not order the eviction of children.

Petitions to evict parents from the children's dwelling are not allowed by the courts.



## **24.0 REGISTRATION OF AGREEMENTS FOR THE LEASE OF HOUSES**

Circular MJC 7/81 stipulates the requirements for registering agreements for the lease of houses.

### **24.1 Lease Agreements**

#### **24.1.1 Regulations Concerning Agreements for the Lease of Houses**

Regulations concerning agreements for the lease of houses include those made by the Ministry of Justice and those made by the Male' Municipality.

The following are some of the procedures in these regulations. Therefore in order to consider whether a lease agreement is legally acceptable, the following factors should be considered.

#### **24.1.2 Compensate the Lessee in the Event the Lessee has Erected a Building at his Own Expense**

Circular MJC 47/94 stipulates that compensation for the cost of demolition and erection of new buildings shall only be awarded if the court is satisfied upon proof that the lessor and lessee have agreed on such compensation.

#### **24.1.3 Possession of Property Attached to Land**

Javiyani (General Laws – Act No. 4/68) stipulates that buildings and crops attached to any privately owned land shall be presumed to belong to the owner of that land in the absence of any evidence proving that another person owns the buildings or crops.

#### **24.1.4 Permission for the Lease of Houses**

Regulations concerning the lease of houses, rooms and such other places in Male' provide that a house, part of a house or a room shall only be given on lease after registering such places in the Male' Municipality.

#### **24.1.5 Maximum Lease Period**

Circular MJC 29/94 stipulates that buildings in state owned land shall be leased for a term not more than 10 years.

## **24.2 Construction of Building by Persons Other than the Person to Whom State Owned Land is Awarded**

Circular MJC 8/83 stipulates that a party who constructs a building on state owned land shall prove that he owns the constructed building, provided that he is not the person to whom the government has awarded the land.

## **24.3 Default on Rent by the Lessee and Keeping the Leased Places Locked**

Circular MJC 13/80 provides that if a lessor makes an application to the court in the event a lessee is in default of the rent and keeps the leased places locked, the following procedure shall be followed.

If the address of the lessee is known, serve a court order for such person to appear in court on a specified date, failing which the proceedings shall be commenced.

If the person does not appear in court pursuant to the court order, the leased place shall be opened in his absence and the lessee's property identified and sold at auction. The proceeds of the auction shall be deposited and the case shall then be concluded.

If the address of the defendant is not known, a notice of summons shall be pasted on the front door of the house. If the defendant appears on the stipulated date, proceedings shall be commenced. If he fails to appear, procedure step 2 (above) shall be followed (i.e., entry of premises and sale of lessee's goods).

## 25.0 MORTGAGES

### 25.1 General principles

The *Mortgages Act* (Act No. 9/93) governs mortgages in the Maldives. Any property, either real or movable, which is permitted to be traded, can be the subject matter of a mortgage. The purpose of mortgaging is to secure the rights of a lender (also called the mortgagee) in the event the borrower (often called the mortgagor) is in default.

The borrower need not be the owner of the property mortgaged. Therefore in the interest of the lender, any action, which the law allows to be taken against the borrower, (if he is the mortgagor), may also be taken against a third party if that third party is the owner of the property mortgaged.

If the borrower or a third party is mortgaging any property, the mortgagor shall have attained the age of 16 and shall be of sound mind. The mortgagor shall also be mortgaging his property freely and voluntarily and not by threat or force. The property mortgaged shall not be interdicted.

### 25.2 Formal Requirements of Mortgage Agreements

The *Mortgages Act* (Act No. 9/93) is silent on the formal requirements of mortgaging property. Therefore it would not be obligatory to obtain any permission prior to mortgaging any property. Nor is it mandatory to report to any government authority after any property is mortgaged or to register the mortgage with any government authority or office. However, the mortgagor and the mortgagee execute mortgages only after they have agreed to certain terms and condition, and those terms and conditions will then be included in a written agreement. The usual terms and conditions in a mortgage agreement would include:

- Identification of the parties to the agreement;
- Description of the property to be mortgaged;
- Amount of the mortgage loan; and
- Terms of repayment of the mortgage (e.g., time period, amount of periodic payments).

The parties are free to include other terms, for example, a prohibition against putting a second mortgage on the property until the first mortgage is paid.

### 25.3 Can There be two Mortgages on the Same Property at the Same Time?

The *Mortgages Act* (Act No. 9/93) does not specifically prohibit any mortgagor to mortgage the same property with a second lender whilst his first lender has not yet recovered the entire debt from him. However, this shall only be possible if the agreement between the first mortgagee and the mortgagor does not prohibit it. If the agreement between the first mortgagee and mortgagor is silent on this matter, the issue has to be decided on a case-by-

case basis depending on the circumstances of the individual case. However, rights of the first mortgagee shall not be prejudiced.

Example: Mr. A mortgaged his yacht worth Rf. 20 million and borrowed Rf. 2 million from Mr. B. He continued his re-payments according to the terms of the mortgage. When after some years he had almost finished his re-payment of the first mortgage, he decided to take a second loan of Rf. 3 million from Mr. C by mortgaging the same yacht (the second mortgage). The question is whether Mr. A is entitled to mortgage the same yacht with a second borrower prior to his completion of payment on his first loan.

Here, if the mortgage agreement between Mr. A and Mr. B prohibits Mr. B's right to mortgage the yacht with a third party during the period when the loan has not been fully re-paid, he shall not have the right to mortgage the yacht prior to his completion of his first loan with Mr. B. However if the agreement between Mr. A and Mr. B is silent on this matter, there seems to be no bar on the second mortgage if the circumstances so allow. In this case the total amount borrowed by Mr. A is considerably smaller than the value of his yacht. Even if he fails to re-pay both mortgage loans, he could rent his property and recover the amount due. In the worst situation it would be possible to sell the property and recover the unpaid amounts under both loans.

#### **25.4 Right of the Lender (Mortgagee) to Sue on the Mortgage Agreement**

By virtue of Section 8 of the *Mortgages Act* (Act No. 9/93), the mortgagee has the right to sue the mortgagor in the event the mortgagor is in breach of any of the conditions of the agreement between the mortgagor and the mortgagee.

If the court holds in favour of the mortgagee in such a case, the court may order the mortgaged property to be held in possession of the mortgagee in accordance with Section 9 (a) of the *Mortgages Act* (Act No. 9/93). However, the ownership of the property is not affected by such possession. According to the wording of the *Mortgages Act* (Act No. 9/93) it appears that the only thing which the mortgagee who is in possession of the property under Section 9 (a) is entitled to do to recover his money is to lease the property to a third party and obtain rent from it until the full amount of the loan is recovered. Further under Section 9 (b) of the *Mortgages Act* (Act No. 9/93), if the mortgaged property is already on lease to a third party, the court may order the rent from the property to be paid directly to the mortgagee.

The court order under Sections 9 (a) and 9 (b) will remain in force until:

- the court decides to cease the order; or
- the loan is fully re-paid by the mortgagee; or
- the mortgagor writes off the mortgage.

## 25.5 Order for Sale of Property

By virtue of Section 12 of the *Mortgages Act* (Act No. 9/93), if the loan is not recovered and in the opinion of the court it is not possible to recover the loan by court orders under Section 9 (a) (mortgagee given possession) or Section 9 (b) (rents paid to the mortgagee), the court may order the property to be sold after the consent to sell is granted by the mortgagor.

If the consent of the mortgagor is not given to such a sale, *and provided there is no other way to recover the loan*, and the mortgagee has asked the court to sell the property, the court has the right to make such an order to sell the mortgaged property. The distribution of proceeds of such a sale shall be determined by the court. This is provided under Section 13 of the *Mortgages Act* (Act No. 9/93).

**Example:** Adam mortgaged his land and obtained a loan of Rf. 2 million. However, he did not discharge his duty under the agreement and he did not do or attempt to do anything to pay back the loan. After 10 years, he is indebted by Rf. 9 million, i.e., the principal loan amount plus interest on the loan. The court has the right to make an order under Section 9 (a) of the *Mortgages Act* (Act No. 9/93) to transfer possession of the land to the Mortgagee.

In this case the property in question is land and the prevailing regulations on lease of land, (except private land) provide that the maximum number of years by which such land can be leased is 10 years. If the loan is to be recovered by leasing the land, the total amount recoverable from the lease, within 10 years shall be more than Rf. 9 million because the interest would have accumulated by then. Thus, if the court is of the opinion that the loan would be repaid by leasing it, then the court may exercise its rights under Section 9 (a). Or if the land is already on lease the court would take into account the remaining lease period and determine whether the period is sufficient to recover the loan by ordering the rent to be paid directly to the mortgagee under Section 9 (b) of the Act. However if the court is of the opinion that the loan would not be recoverable by the procedures in Sections 9 (a) and 9 (b) then it has the right to make an order under Section 12 of the *Mortgages Act* (Act No. 9/93) to sell the land and recover the loan.

In summary, the Court will only make an order to sell the mortgaged property after a request for sale is made by the mortgagee if it is impossible to recover the debt after transferring possession under Section 9 (a) or recovering rent from the property under Section 9 (b). In addition, if the mortgagor wants to sell the property rather than using the procedures under either Sections 9 (a) or 9 (b), the court will make an order of sale.

## 26.0 LAW OF CONTRACT

### Definition:

A contract is a binding agreement between two or more parties consisting of offer and acceptance.

The law governing contracts is the *Law of Contracts* (Act No. 4/91).

### 26.1 Elements of a Contract

#### 26.1.1 Offer

1. An offer is any proposal not prohibited by law.
2. An offer must be a proposal which should clearly stipulate that the *offeror* will abide by the same terms expressed in the offer and accepted by the offeree.
3. Notwithstanding the generality of the above provision, a proposal conveying only an intention to do or refrain from doing something, does not by itself amount to an offer.

Examples: a) "I might sell my car if I could negotiate Rf. 100, 000 for it", is not an offer but merely an intention to sell the car.

b) "I will sell my car for Rf. 100, 000", can be an offer because it is definite, embodying within it the offeror's intention to sell the car.

4. The following may be used to infer whether a proposal is an offer:

- i) if the basis of the proposal and its underlying conditions appeal to common sense;
- ii) if the terms stipulated in the proposal indicate a serious intention on the part of the offeror or to abide by the proposal; and
- iii) if it is reasonable, or feasible, to give effect to the terms of the proposal once the proposal is accepted by the offeree.

5. An '*invitation to treat*' is not an offer *per se*, because such an invitation is not capable of being accepted due to the fact that it amounts to no more than a mere invitation to make an offer. Thus, an offer must be a proposal capable of being accepted as it is.

Examples: a) Goods on display on shelves do not constitute an offer to sell by the shop owner.

b) A catalogue providing information on a product is just a mere invitation to

treat.

6. An offer is complete:

- i) when the offer has been communicated by the offeror to the offeree;
- ii) by word of mouth, telephone, or through written documentation; and
- iii) this communication has been received by the offeree.

7. Unilateral Offer:

- i) An offer can be made to a particular individual, or to the world at large.
- ii) While an offer made to a particular individual is a bilateral one, an offer made to the world at large is unilateral in nature, and acceptance of a *unilateral offer* is effected when the person or persons having knowledge of the terms of the offer fulfil the conditions of the offer with the intention to do so.

Example: Ahmed is unaware of a certain unilateral offer made by public notice. Without any intention to fulfil the conditions of the unilateral offer (because he has no knowledge of the offer), he completes the terms of this offer. This does not amount to acceptance on his part of the unilateral offer, because he had no knowledge of the offer.

8. Revocation of offer:

- a) As a general rule, any offer, before being accepted by the offeree, can be revoked by the offeror, by communicating the revocation of the offer.
- b) Communication of revocation of the offer would only be complete when the offeree has knowledge of such communication.
- c) An offer made with the promise that it will not be revoked for a certain time period, cannot be revoked before the passage of that stipulated time.

Examples: "I will sell my car for Rf. 100,000 if my offer is accepted within 7 days from today". This offer cannot be revoked before the lapse of 7 days from the time the offer was made.

9. Counter-offer:

When an offer has been made by the offeror, and the offeree makes, without accepting the terms inherent in this offer, a *counter-offer* in relation to the original offer, then the initial offer becomes void and the subsequent counter-offer becomes an offer by itself capable of being accepted

Examples: Person A proposes: "I will sell my car for Rf. 100,000".

Person B counters: "I am willing to buy it for Rf. 80,000".  
Then Person A says: "I cannot sell it for that price".  
Person B finally says: "In that case, I will take it for Rf. 100,000".

In this example, the acceptance (by Person B) in the last sentence cannot be said to be in response to the offer (by Person A) in the first sentence, because the counter-offer (by Person B) in the second sentence has already made Person A's the initial offer in the first sentence invalid.

### 26.1.2 Acceptance

1. Acceptance of an offer must be in accordance with the terms of the offer, without making any changes to the original offer. As such, acceptance in any way contrary to this would be regarded as a counter-offer.
2. Acceptance can be either in words or in action.

Examples: "I will offer a reward to you if you find my lost cat". This offer could be accepted either by the offeree conveying his acceptance of the offer by words, or by finding the cat and claiming the reward for fulfilling the terms of the offer by his actions.

3. If an offer stipulates that it must be accepted in any particular or specified manner, then acceptance of such an offer is valid only if the offer is accepted in that stipulated manner.

Examples: Acceptance in relation to an offer is to be carried out in writing if it is so stipulated in the offer, and as such any other manner in which the offer is accepted, such as verbally, would not be valid.

4. If an offer does not stipulate any particular manner in which the offer should be accepted, then any reasonable method employed for accepting such an offer would be valid acceptance. Reasonableness can be inferred from the circumstances surrounding the offer and the usual nature of acceptance employed in such cases.

Examples: If an offer is made for the sale of a car by means of a newspaper advertisement, then reasonable modes of conveying acceptance of such an offer could be by telephone, writing, messaging, or a personal meeting.

5. Acceptance of an offer is complete when acceptance has been communicated to the offeror. Acceptance is deemed to be communicated to the offeror only when the offeror has knowledge of such acceptance.



## 26.2 Who Are Competent Persons to Contract?

A party to a contract should be at least above the age of 16 and should possess a sound mind. If a party to a contract is only temporarily insane, then such persons can enter a legally binding contract provided it is proven at the time of the contract that the person is sane.

## 26.3 Conditions Precedent

Where a contract provides for its performance after the occurrence of an event or the fulfilment of a condition, such performance need not be made until the occurrence of the event or the fulfilment of the condition.

## 26.4 Void Contracts

The following types of contracts are deemed void by law:

- contracts prohibited by law;
- contracts whose object is unlawful;
- contracts whose object is deemed immoral;
- contracts entered into by use of force or under coercion;
- contracts entered into by misrepresentation or fraud;
- contracts entered into by use of undue influence; and
- contracts made without free consent.

### 26.4.1 Some Specific Types of Void Contracts

1. Contracts caused by coercion or intimidation:
  - Using force or the threat of force, or causing injury, or threatening to cause injury, amounts to coercion.
  - Threat of causing injury to a person, or the person's wife or husband, or the person's children, or the threat of causing damage to the person's property amounts to causing intimidation to that person.

It must be proven that the person who has apparently used coercion or intimidation is a person capable of causing, and in a position to cause, coercion or intimidation.

**Examples:** It cannot be generally accepted that a young and strong man was forced into a

contract unwillingly by someone much older and weaker through coercion or intimidation.

2. Contracts induced by undue influence:

- For a contract to be induced by 'undue influence', the relations existing between the parties must be such that one of the parties must be in a position to dominate the will of the other party
- The relations existing between the parties must be such that one party uses his position to obtain an unfair advantage over the other party
- The party in the dominating position must hold some real or apparent authority over the other
- Unless such authority is used by one party to dominate the will of the other to obtain an unfair advantage, it cannot be said that the contract was induced by undue influence.

3. Contract induced by fraud:

- The fraudulent statement must be material to the contract.
- When such statement is made, the *intention* must be to defraud the other party.
- The defrauded party must have believed such expression to be true.
- The defrauded party must have entered the contract because of belief in the statements.
- In situations where the defrauding party is under an *obligation to reveal the truth* and if under such circumstances he conceals the truth by remaining silent, then this amounts to fraud.

4. Mistake as to the subject matter of the contract:

- A contract is made when the parties to the contract are concurrently of the same mind as to the subject matter of the contract
- If the subject matter of a contract changes without the knowledge of one of the parties, then it cannot be said that the two parties to the contract are of the same mind. Such a contract would be deemed invalid.
- A *mistake of fact*, must relate to the subject matter of the contract.
- Being unaware of the price of goods or services in relation to a contract does not amount to being unaware of the subject matter of the contract. The knowledge one should lack must be that of the subject matter itself, or any consequent changes to it, in order for there to be a mistake of fact.

Example: If a contract is made in relation to a property, then that property must be in existence at the time of entering into the contract.

5. Illegal contracts:

- These are contracts whose object is unlawful; or
- Contracts the object of which, if allowed, would defeat the purpose of the law.

## 26.5 Contracts in Restraint of Employment or Trade

1. If an agreement restrains a person from employment or from carrying out trade with a view to earning an income, then such a constraint should be a reasonable one. It is unlawful to disallow or restrain a person from employment or trade on which he depends to sustain life *without just cause*.

Example: After selling the goodwill of a famous business enterprise to another trader, an agreement to restrain the vendor from carrying on any similar business in the same geographical area for a specific period of time in the future, which would be in direct competition with the buyer, would be a valid contract.

2. An agreement which restrains a person from entering a certain trade by reason only of competition is not a valid one; restraint of trade can only be justified in circumstances such as that provided in the illustration above, and must be reasonable.
3. An agreement made between a partner and the other members of a certain partnership forbidding him from carrying on the same business or profession in close proximity to the geographical area in which the partnership carries on its business, is a valid covenant.

## 26.6 Termination of Contracts

Contracts come to an end in the following circumstances:

- the parties to a contract have completed all obligations stipulated under the contract;
- the parties to a contract are in agreement as to the completion of the obligations stipulated under the contract;
- a contract is brought about to an end by unforeseen circumstances;
- the obligations arising out of a contract cannot be lawfully carried out due to a prohibitory statute which came into force after the contract has been made but before the contract has been performed;

- a party to a contract acts in breach of the terms of the contract;
- after entering into a contract, it becomes *impossible* to carry out the obligations accruing as a result of the contract due to either unforeseen circumstances or laws coming into effect after the contract has come into existence. However, a contract cannot be deemed impossible *by reason only of the obligations* imposed by its terms being *difficult* or inconvenient to carry out, or if the *cost* of carrying out such obligations turns out to be more than what was projected before the contract was entered into. Therefore, in such circumstances, the contract does not come to an end and would still be valid and subsisting.

## 26.7 Remedies for Breach of Contract

- Damages - The aim of an award of damages is not to punish the defendant. The purpose is to, so far as money can do it, to place the innocent party in the same situation as if the contract had been performed. This principle is referred to as *restitutio in integrum*.
- Specific Performance of the Contract – This is an order issued by the Court to the party in breach to observe the terms of the contract.

### 26.7.1 Measure of Damages

A person who breaches a contract will be liable for damages for the loss arising from the breach. Such loss refers to:

1. the loss arising directly from the breach; and
2. the loss which was known by the parties to the contract to be a probable result of the breach.

### 26.7.2 Compensation for Loss or Damage

If a party to a contract is in breach of the contract, and the other party suffers loss or damage due to the breach, then the aggrieved party has a right to recover such loss or damage in monetary terms.

With regard to the above provision, such loss or damage should not be remote, that is, there must be a direct link between the actions of the party in breach and the subsequent loss or damage suffered by the aggrieved party.

As a corollary to the preceding provision, actual loss arising out of the breach of contract must be actions which could be reasonably foreseen by both parties to be capable of causing such damage. The loss directly arising from a breach is the loss that is known to arise in the

normal course of dealings as a result of such breach. Therefore, damages may not be awarded in cases where the loss arises from special circumstances, unless the special circumstances were known by the parties.

If there is a liquidated damages clause in the contract, then the amount stipulated shall be paid in the event of a breach; i.e. as damages for the breach. However if the amount is stipulated as a penalty clause, it must be determined whether the amount is reasonable. Damages shall only be awarded to the extent of the actual loss suffered.

### 26.7.3 Payment for Part Performance

In the event that part of a service or a work is performed in accordance with a contract and the impossibility of completing the performance of the service or work was due to the other party, the party who discharged the service or work shall be remunerated for the service or work done.

### 26.7.4 Specific Performance

The party in breach of contract is as a general rule liable to pay damages to the innocent party. However, there are circumstances in which such monetary compensation cannot be awarded or is inadequate or is otherwise not the most appropriate remedy. In such cases, it might be more appropriate to require the person in breach to perform the contract.

|                 |  |
|-----------------|--|
| <u>Example:</u> | A person agrees to sell land, or an interest in a resort, and later refuses to do so. The innocent party can sue for specific performance of the contract. |
|-----------------|--|

## 26.8 Arbitration

Arbitration is permitted in law subject to limitations. It is permitted as an initial solution without prohibiting either party to refer the matter to the court. If the arbitration clause prohibits either party from referring the matter to the Court, the clause shall be null and void.

## 26.9 Application of Internationally Accepted Law

Parties to a contract may choose an internationally accepted law as the governing law for the contract. Any dispute arising out of such a contract may be referred to the relevant local court in accordance with such law. A judgment by a foreign court is not accepted by Maldivian courts; the case must be heard in the Maldives.

## 27.0 SALE OF GOODS

### Definition:

A sale of goods is an agreement between the seller and the buyer to transfer the property in goods from the seller to the buyer for a determined price. This agreement shall be referred to as a contract for the sale of goods: Section 2, *Sale of Goods Act* (Act No. 6/91). A contract for the sale of goods is similar to any other contract and consists of offer and acceptance.

According to Section 5 of the *Law of Contract* (Act No. 4/91), where one party makes an offer and the person to whom the offer is addressed accepts the offer, a contract will be deemed to have been formed.

### 27.1 Capacity

Parties to a contract for the sale of goods shall have the capacity to enter into a contract. A minor or a person incapable of entering into a contract shall pay a reasonable price in respect of necessaries sold and delivered to him (Section 3, *Sale of Goods Act* (Act No. 6/91)). The practice is that the Court would require the legal guardian to pay during the period of minority.

### 27.2 Existing or Future Goods

Goods sold under a contract shall be either existing goods or future goods. "Existing goods" are goods which are owned or possessed by the seller. "Future goods" refers to goods that will be manufactured or acquired by the seller after entering into the contract (Section 4, *Sale of Goods Act* (Act No. 6/91)).

### 27.3 Sale of Goods and Agreements to Sell

The contract for the sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a determined price. The contract for sale includes both actual sales and agreements to sell.

Agreement to sell is a contract of sale where the transfer of the property in the goods is to take place at a future time or subject to some condition yet to be fulfilled. An agreement to sell is a contract, while a sale is a contract plus a transfer.

Example: Aisha asks Ahmed, a carpenter from Jasmine Carpentry, to make a wardrobe to her specifications. Ahmed agrees to have the wardrobe finished and ready for sale within one week. Since Ahmed has yet to work on the wardrobe, and the wardrobe will not be available for sale until one week later, it is understood that there is an agreement to sell between Aisha and Ahmed, and that the actual sale will take place later.

## 27.4 Ownership

The ownership in the goods shall be transferred to the buyer at the time determined in the contract (Section 8, *Sale of Goods Act* (Act No. 6/91)). Sale occurs when the ownership or property in goods passes to the buyer. Ownership must be distinguished from possession.

Where there is no express provision in the contract that the seller has the right to sell the goods, and no contrary provision appears in the contract, it shall be implied that the seller has the right to sell the goods in question. The right of the seller to sell the goods at the time of agreement to sell shall be considered valid if the ownership in the goods transfers to the buyer. (Section 7, *Sale of Goods Act* (Act No. 6/91)).

## 27.5 Measure of Damages

According to Section 23 of the *Law of Contract* (Act No. 4/91), the party in breach of the contract shall compensate the other for the losses which arose from the breach. The following types of losses are compensatable:

- a) loss arising naturally, where there is knowledge of the real possibility that the loss can occur; and
- b) loss arising in special circumstances, where the contract breaker had knowledge that breach of contract in those circumstances would probably result in the loss being suffered.

## 27.6 Duty to Mitigate

The plaintiff claiming for breach of contract (whether as buyer or seller) must take reasonable steps to mitigate the loss, otherwise any damages to which he is entitled due to the defendant's breach of contract will be reduced. According to Section 24 of the *Law of Contract* (Act No. 4/91), parties who fail to take reasonable precautions shall not be entitled to recover damages resulting from that failure.

Example: Ahmed agreed to buy furniture for his new restaurant from Mohammed. Mohammed failed to deliver the furniture as agreed. Ahmed sued Mohammed for damages for breach of contract. Ahmed claimed damages for being unable to operate his restaurant business because Mohammed did not provide the furniture as required by the sale of goods contract. Ahmed will have to show that he took measures to mitigate his loss by looking elsewhere for replacement furniture at the lowest price reasonably obtainable.

## 27.7 Fitness for Purpose

Where the seller sells goods in the course of business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied term (i.e. condition) that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgement of the seller.

According to Section 9 of the *Sale of Goods Act* (Act No. 6/91), goods sold under a contract shall be considered reasonably fit for a particular purpose where such purpose has been made known to the seller by the buyer. The following are points should be taken into consideration:

- a) Where the consumer has made known to the seller a particular purpose demanding a higher standard of the goods than the standard required of such goods for normal purposes, the goods must be fit for the particular purpose.
- b) Where the purpose is obvious, it is made known by implication, but if the purchaser requires the goods for an abnormal purpose, that purpose must expressly be made known to the seller.
- c) The onus of proof is on the seller to show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill or judgement. In the case of a purchase from a retailer, the reliance will be in general inferred from the fact that a buyer goes to a shop in the confidence that the tradesman has selected his stock with skill and judgement.
- d) The goods need only be 'reasonably' fit for their purpose.

**Example:** Aisha bought a dress made out of polyester. When she bought it she did not tell the seller that she had abnormally sensitive skin. She later suffered from an allergic reaction to the polyester material. The seller should not be held responsible, because in general polyester does not cause allergic reactions, and it was a condition unique to the purchaser.

## 27.8 Remedies of Seller

### 27.8.1 Damages for Non-delivery

Where the seller neglects or refuses to deliver the goods, the buyer may sue for damages for any loss suffered as a result of the seller's breach of contract. Such damages shall be the difference in value between the agreed price and the market price of the goods at the time specified in the contract as regards delivery, or the difference in value between the



agreed price and the expenses incurred by the buyer in acquiring similar goods from a third party (Section 21, *Sale of Goods Act* (Act No. 6/91)).

Therefore, it is expected that the buyer will mitigate his losses by buying elsewhere.

**Example:** A seller agrees to sell a water pump to a buyer for Rf. 1400. The market price for the same product was Rf. 1600. The seller ran out of the product and was unable to deliver to the buyer. The purchaser could claim the difference of Rf. 200.

The normal outcome of breach of contract by a seller will be that the consumer will be able to buy the goods elsewhere and recover any additional expenses incurred.

### 27.8.2 Specific Performance

According to Section 25 of the *Law of Contract* (Act No. 4/91), specific performance will be available where an award of damages is an insufficient remedy. The result of this requirement is that the seller would only be directed to perform the contract specifically where the goods were in some way unique (e.g., an antique) and not otherwise available. Where specific performance is obtained, it does not preclude an award of damages as well.

### 27.8.3 Action for the Return of Price

Where the buyer neglects or refuses to pay for the goods, the seller may sue to recover the price (Section 20, *Sale of Goods Act* (Act No. 6/91)). Section 11 of the *Consumer Protection Act* (Act No. 1/96) addresses the remedy available to the buyer to claim the price he had already paid where he justifiably rejected the goods, e.g., he discovered after deliver and after he had paid that the goods were not reasonably fit for the purpose.

### 27.8.4 Rejection of Goods for Breach of Condition

- a) The buyer is not bound to accept any quantity of goods delivered by the seller that is more than or less than the amount which the buyer contracted to buy.
- b) Where the seller delivers to the buyer a quantity of goods less than the amount the buyer contracted to buy, and if the buyer accepts them, the buyer shall pay for them a rate proportional to the agreed price.
- c) Where the seller delivers to the buyer a greater quantity of goods than the buyer contracted to buy, the buyer may accept the quantity of goods for which he contracted. Where the buyer accepts the whole of the goods so delivered, he shall pay for them at the rate proportional to the agreed price.

- d) Where the seller delivers to the buyer the goods included in the contract together with goods not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or reject the whole.
- e) In the event of any defect in goods, the buyer may reject the goods provided such defect occurred prior to delivery from the seller to the buyer. (Section 14, *Sale of Goods Act* (Act No. 6/91)).

Damages will be available in appropriate cases, as well as the remedy of rejection of goods and consequent return of the price.

Where the buyer justifiably rejects the goods he need not return them to the seller, unless otherwise agreed, but may simply inform the seller that he rejects the goods. It is advisable for the customer to return goods where they are portable and claim for any incidental expenses incurred (e.g., delivery or transport expenses to return the goods).

### 27.8.5 Damages for Breach of Warranty

The measure of damages for breach of warranty has not been established. However, it is assumed that Section 23 of the *Law of Contracts* (Act No. 4/91) will address this problem. Where there is breach of warranty, the buyer may be able to bring actions under either Section 8 (h) of the *Consumer Protection Act* (Act No. 1/96), which addresses misrepresentation with regard to quality and warranty and benefits of a particular product, and/or Section 16 of the *Law of Contracts* (Act No. 4/91), which deals with the issue of misrepresentation.

The cost of repairs may be recoverable where defective goods are reasonably repairable.

## 27.9 Remedies of Seller

### 27.9.1 Action for the Price

The action is open to the seller where property in the goods has passed to the seller (Section 20, *Sale of Goods Act* (Act No. 6/91)). Where the buyer neglects or refuses to pay for the goods, the seller may sue to recover the price. The buyer will not be liable to pay the price if there is an unexpired credit (Section 18, *Sale of Goods Act* (Act No. 6/91)), or if the buyer can validly reject the goods. The seller can only sue for the price where he is ready and willing to deliver the goods. (Note that where the buyer wrongfully refuses to accept and pay for the goods, damages claimed by the seller may include a reasonable charge for the care and custody of the goods).

### 27.9.2 Lien on the Goods

1. The seller has the right of exercising a lien where:
  - a) the seller has not received credit;

- b) the goods have been sold on credit and the term of credit has expired; and
- c) the buyer becomes insolvent.

(Section 18, *Sale of Goods Act* (Act No. 6/91))

2. The seller shall resell the goods where:

- a) the goods are perishable in nature;
- b) the buyer fails to settle payment of the price within a reasonable period after the buyer has been given notice of the intention to resell the goods; and
- c) it has been stipulated that upon breach of the contract by the buyer the seller is entitled to resell the goods to a third party, and the buyer is in breach of the contract.

## 28.0 COMPANIES AND PARTNERSHIPS

### 28.1 Companies

Definition:

A company is an independent legal entity created according to the law, and capable of conducting business and owning property in its own right.

#### 28.1.1 Types of Companies

1. Government Owned Companies:

*Muizzu ...*

2. Public Limited Liability Companies:

Ten or more persons can, in accordance with the provisions of the *Companies Act of the Republic of the Maldives* (Act No. 10/96) form a public limited liability company ("limited liability" is defined below).

3. Private Limited Liability Companies:

A minimum of two and a maximum of fifty persons can, in accordance with the provisions of the *Companies Act of the Republic of the Maldives* (Act No. 10/96) form a private limited liability company.

4. Sole Proprietors:

These are individuals who carry on a business or a profession independently, but without partnership or corporate structures. There is no separation of the proprietor's legal identity and that of the business. Consequently, a sole proprietor has full legal:

- a) authority to incur obligations and liabilities in the course of business;
- b) liability for all obligations and liabilities; and
- c) entitlements to all profits generated in the course of business.

#### 28.1.2 Limited Liability

As an extension of the concept of a company having an independent legal identity, members (also called shareholders) of that company will have only limited liability as regards the obligations and liabilities incurred by the company. Consequently, in circumstances where a company is being wound-up, or where creditors sue for unpaid debts, the extent of a member's liability is limited to the amount that the member has agreed to pay for shares in that company.

Example: a) Ahmad agrees to buy 50 shares of a company at a value of Rf. 200

each (the total value of the shares being Rf. 10,000). If he pays the Rf. 10,000 for the shares, his liability for company obligations and liabilities will have been extinguished.

- b) Ahmad agrees to buy 50 shares at a value of Rf. 200 each (the total value of the shares being Rf. 10,000). If he actually only pays Rf. 6,000 for the shares, still owing the company Rf. 4,000 and if the unpaid amounts on shares are called in by the company, Ahmad's total liability will be limited to the Rf. 4,000 remaining to be paid on the shares he purchased.

### 28.1.3 Incorporation – Creation of a Company

Incorporation is a legal process by which an 'artificial or independent' legal entity is created. Through registration of:

- i) a Memorandum of Association ;
- ii) Articles of Association; and
- iii) related documents as required by legislation and government regulations;

with the Registrar of Companies, a separate 'legal personality' is created called a company. This legal personality has an independent legal identity, capable of owning property, buying and selling goods, employing persons in its own right and being passed on to successive owners through sale or inheritance.

### 28.1.4 Directors and Director's Duties

In the Maldives, every company must have at least two directors. Although a company has an independent legal entity, it is unable to act independently on its own behalf. Directors, as a company's principal officers, can represent, act as agents, and perform acts on behalf of the company in the course of the company's business. Every director, therefore, can act as an agent for the company, but not as agent for the other directors.

In fulfilling their role within the company, directors owe the company and its members three fundamental duties. These are:

1. Duty of Care:

This is the requirement that directors **act with skill and care**. The level of care exercised is that which may reasonably be expected from a person with the director's knowledge and experience. Additionally, if a director acts negligently, this is in breach of his duty of care to the company.

2. Fiduciary Duty:

This duty relates to the director's undertaking to act on behalf, or in the interests, of the company. The fiduciary duty is a duty to act in **good faith** and to exercise his powers for their proper purpose, namely for the benefit of the company.

3. Duty to Avoid Conflicts of Interest:

The director must have regard to and **promote the interests of the company** its members and employees before his own. As such a director cannot abuse the trust placed in him by the company, and must avoid all circumstances where his personal interests may conflict with those of the company.

### 28.1.5 Liability and Obligations of Directors

Due to the nature of a limited company as a legally recognised identity, there is generally a strict separation of the company from its directors, members and employees. Usually, therefore, only the company can be held liable for obligations entered into in the course of its operation. There are several exceptions to this position, including:

1. Statutory Exceptions:

If a statute specifically states that certain defined actions on the part of a director will result in him being personally liable, then the independent identity and liability of the company is displaced.

2. The Principle of Agency:

As directors conduct the business of a company as agents for the company, there is an obligation on the director when engaging in the company's business to clearly state that he is acting on behalf of the company. If the director does not clearly communicate that he is acting on behalf of the company, then that director can be held personally responsible for any liabilities incurred by those actions.

3. The Principle of Ultra Vires:

Through incorporation, companies register their memorandum of association stating the objectives for which the company is being incorporated. The company, therefore, must conduct its business within the scope of these objectives. A director who conducts company business that is *ultra vires* - business that is **beyond the power or the objectives** of the company - can be held personally responsible for the liabilities incurred by those actions.

4. Tortious Actions:

A director is not automatically liable for torts committed by the company. For personal liability to occur, the tortious act must be committed either as the agent for, or jointly with the director. The director, therefore, must either:

a) be personally involved in the tortious act; or

b) the tortious act must have been committed at the instigation, or with the knowledge, of the director.

5. Criminal Acts and Breaches:

As with tortious liability, a director is not automatically liable for any criminal act or breach of statute committed by the company. For personal liability to occur, the criminal act or breach must be committed either:

- a) with the personal knowledge or involvement of the director; or
- b) as a result of negligence on the part of the director.

## 28.2 Winding-up – Dissolution of Companies

### 28.2.1 General Principles

A *registered company* may be dissolved either by a decision of its Board of Directors, or by an order issued by a court of law: *The Companies Act of the Republic of the Maldives* (Act No. 10/96). The process of dissolving a company can be a voluntary act of the company, or can be done by court order. Both of these methods are discussed below.

### 28.2.2 Voluntary Dissolution

A company must fulfil the following conditions, in the particular order stated below, in order to wind itself up voluntarily. These provisions are stated in Section 76 of the *Companies Act of the Republic of the Maldives* (Act No. 10/96):

1. The decision to wind-up must be approved by its board of directors;
2. The approved decision must then be confirmed by the members of the company in a general meeting of the company by special resolution, whereby any motion must be passed by a majority of at least three-quarters of the members having voting rights;
3. The members must appoint, at such meeting for the purpose of winding up, a person or persons to undertake the process of dissolution, and shall also determine the remuneration for such person or persons for the assigned task;
4. The following information must be made available to the person or persons appointed to undertake the process of winding up:
  - balance sheet of the company,
  - details of its assets and liabilities,
  - names and addresses of its creditors
  - information on all its debts,
  - details of any other obligations,
  - if any of its capital is secured by a mortgage, details of those mortgages should be made available to the person or persons appointed to undertake the process of winding up.

5. The person or persons appointed to undertake the process of dissolution shall, within seven days of such appointment, inform the Registrar of Companies of such appointment;
6. Such person or persons appointed for the purpose of undertaking the process of winding up shall, after giving notice of such appointment by public announcement, commence the process of dissolution;
7. The company shall, after passing the resolution to wind up, cease from carrying out its business except so far as is necessary for the process of its dissolution;
8. A general meeting shall be convened by the person or persons appointed to undertake the process of dissolution as soon as the affairs of the company are fully wound up;
9. The members of the company shall be informed by public announcement of such meeting by the appointed person or persons mentioned above; and
10. An account of how the winding up process was conducted as well as the manner in which the assets, liabilities, and other obligations of the company were disposed of should be presented to the members by such appointed person or persons at such meeting.

### 28.2.3 Removal of the Person(s) Supervising the Process of Winding-up of the Company

If, in the opinion of The Registrar of Companies, the person or persons undertaking the process of dissolution has conducted [or is conducting] the affairs incidental to winding up in an unacceptable manner, the Registrar may then relieve such person or persons from their duties and direct the company to apply to the court for dissolution instead.

**Example:** Person X is appointed to undertake the process of dissolution of a company. Person X fails to notify the Registrar of the appointment or to begin the winding-up process. The Registrar can relieve Person X and direct the company to apply to the Court for dissolution.

### 28.2.4 Dissolution by Court Order

A company can be wound up by an order from a court of law, in accordance with Section 75 (b) of the *Companies Act of the Republic of the Maldives* (Act No. 10/96). The following persons may petition the court for a winding-up order.

1. A company *per se*;
2. A member (shareholder) of a company;



3. A creditor of a company; and
4. The Registrar of Companies.

Following a petition for winding-up a company, the court shall make all due inquiries and conduct a full investigation before an order for winding-up is issued.

### 28.2.5 Circumstances under which Courts may make an order for Dissolution of a Company

The circumstances under which courts may issue a winding-up order are enumerated in Section 75 (b) of *The Companies Act of the Republic of the Maldives* (Act No. 10/96), and are as follows:

1. The company, by special resolution at a general meeting, decides to dissolve the company by a court order and makes a petition to the court for such effect.
2. The Registrar, after concluding that the company has not commenced business within a year from its incorporation, makes a petition to the court for an order to wind-up the company.
3. The company is found to be bankrupt. For such purposes, Section 80 (b) of the *Companies Act of the Republic of the Maldives* (Act No. 10/96) stipulates that the following factors should be taken into account by the court in determining whether a company is insolvent:
  - a) The company has failed to repay any debts exceeding Rf. 5, 000 in value within 15 days from the date on which notice was given by the creditor to the company to settle the amount due.
  - b) The court had issued a judgment debt against the company and the company had failed to comply with the order to pay the full amount of the debt.
  - c) It has been proved that the company has *repeatedly* failed to perform obligations required by law.
  - d) It has been proved to the court that the business carried out by the company is illegal.
  - e) It has been proved to the court that the directors of the company have been conducting the business of the company in a manner beneficial to their own personal interests but detrimental to of the rights of the members (shareholders) of the company.
  - f) Winding-up the company is, in the opinion of the court, the most just and equitable course of action in a given situation.

### 28.2.6 Procedure Following a Decision of the Court to Wind-up the Company

If after receiving a petition to wind-up the company and after making the necessary inquiry, the court is satisfied that the company ought to be wound up, the court will take the following steps:

1. The court shall appoint a person or persons to undertake the process of dissolution and to inform the Registrar of such appointment giving details of the appointed person or persons within seven days of such appointment.
2. The court shall issue an order to the company to make the following information available to the person or persons appointed to undertake the process of winding-up:
  - a) the balance sheet of the company;
  - b) all details of the company assets, liabilities, and other obligations;
  - c) names and addresses of the company's creditors; and
  - d) details of mortgaged properties belonging to the company, if any.
3. The court shall give notice of the dissolution proceedings of the company by public announcement.

### 28.3 Partnerships

Definition:

A partnership is a group of persons carrying on a business or profession with the aim of making profits.

#### 28.3.1 Creation of a Partnership

A partnership 'firm' is created by agreement between the partners without any action by the State (registration of incorporation). A firm, therefore, is not incorporated and has no legal status separate from the individuals that form the group. The ways in which a partnership may be created can vary, and no formality is required. Consequently, an oral agreement is sufficient to create valid partnership.

Elements that are required to create a valid partnership include:

1. an agreement to form a partnership – either oral or in written form;
2. intention to make a profit (note: making an actual profit is not necessary); and
3. sharing of profits.

### 28.3.2 Powers and Obligations of Partners

1. All partners have the **power and the right to bind the partnership**. This power is vested in individuals either by:

a) Express Authority:

Where the powers of the partners are defined and set out in the partnership agreement or deed.

b) Implied or Usual Authority:

Where a partner acts within the usual course of the partnership's business.

Example: Mr A enters into a contract with Mr B for a delivery by Mr B to Mr A of sinks and piping. As Mr A is a partner in a plumbing firm specialising in bathrooms, the plumbing firm will be considered liable for the contract and payment will have to be made.

c) Apparent Authority:

Where the partner is represented (by the other partners to a third party) to have authority.

2. Every partner is an **authorised agent** of the firm, having power to bind and to incur liability on behalf of the partnership;

3. Every partner in the firm has **unlimited personal liability** and is individually liable for all the debts and obligations incurred by the partnership (this personal liability is due to the fact that the firm has no independent legal personality or identity as in the case of a company); and

4. All partners have a general duty of **good faith** to each other. Each partner, therefore, must:

a) present true accounts of the firm's position (both assets and liabilities);

b) give full account of all matters that affect the partnership; and

c) make known to the partnership any secret profits that have accrued as a direct result of the partnership, its property, business or name.

### 28.3.3 Rights of Partners

All partners in a firm have several basic rights. These rights, however, are subject to the express provisions of the partnership deed or agreement (where one exists), and include:

1. the right to share all profits and losses;

2. the right to be indemnified by the firm for all payments made or liabilities incurred in the normal course of the firm's business;
3. the right to take part in the decision making of the firm;
4. the right to inspect the books and accounts of the firm; and
5. no right to receive a salary in addition to their share of the profits (unless otherwise stated in the partnership agreement).

#### 28.3.4 Termination of Partnerships

All partners can be terminated in one of several ways, including by:

1. Agreement - either by:
  - a) Mutual agreement to suspend activities between the partners at any time; or
  - b) Definition of a time limitation on the life of the partnership in the partnership agreement.
2. Bankruptcy:  
In circumstances where a partnership files for bankruptcy or is declared bankrupt, the partnership will be terminated.
3. Dissolution - by:
  - a) Court Order – this can be for one of several reasons including:
    - permanent incapacity of one of the partners;
    - persistent, wilful breaches of the partnership agreement;
    - it is equitable that the partnership is dissolved; or
    - business can only be carried out at a loss.
  - b) Illegality – in this circumstance dissolution is automatic.

**Example:** Where the partnership is set up to trade for a specific **legal** purpose – for example to sell tobacco - and subsequent to the partnership's establishment tobacco is declared illegal, the partnership would be automatically dissolved due to illegality.

- c) Meeting Grounds for Dissolution:  
Where grounds for dissolution (the meeting of some obligation or the happening of an event) are set out in the partnership agreement and that obligation has been met or event occurs, the partnership will be dissolved.
4. Death/Retirement of Partner:  
Unless provision is specifically made in the partnership agreement a partnership will be terminated on the death/retirement of any one of the partners.

## 29.0 BANKING

### 29.1 General Principles

The *Maldives Monetary Authority Act* (Act No: 6/81), governs banking in the Maldives. All banks shall obtain a licence from the Authority prior to operating banking business in the Maldives. The Authority is charged with the duty to supervise all banking activities in the country. The Authority also determines the amount of reserves of banking institutions and the manner by which profits, service charges, and credits are given.

The *Negotiable Instruments Act* (Act No. 16/95) also regulates financial services in the country. Under this Act, “negotiable instrument” include bills of exchange, cheques and promissory notes. In the Maldives, cheques are the most commonly used bill of exchange.

### 29.2 Negotiable Instruments: Cheques

A person writing a cheque must sign it. If a company writes the cheque, the person authorised to sign on behalf of the company may sign it and stamp the check with the company seal. The method of writing on a cheque is not provided in the *Negotiable Instruments Act* (Act No. 16/95). However, Section 4 deals with bills of exchange and provides that the writing should be legible. By virtue of Section 22, all sections of the *Negotiable Instruments Act* (Act No. 16/95) which deal with bills of exchange shall also be equally applicable to cheques. Therefore cheques must be written in ink or must be type written. Cheques can also be written in pencil but if the bank has reason to believe that a cheque written in pencil is altered, the bank shall obtain the permission from the drawer before issuing payment for the cheque.

By virtue of Section 26 (a), it is not the duty of a bank to ascertain the genuineness of an endorsement on a cheque. If the bank acted in good faith, then by virtue of Section 26 (b) the bank shall not be held liable even if the endorsement on a cheque is forged or written without permission of the true owner.

### 29.3 Crossed Cheques

The drawer of the cheque may generally or specially cross a cheque. A generally crossed cheque is one that has two parallel lines drawn across it. A specially crossed cheque is one on which the name of a banker is written between the two parallel lines. If a payee receives an uncrossed cheque, he may cross it generally or specially. If a payee receives a generally crossed cheque, he may specially cross it. This is provided for by Section 23 of the *Negotiable Instruments Act* (Act No. 16/95). The effect of crossing from the point of view of the payee is that the cheque must be paid into a bank account and cash cannot be obtained over the counter at the paying bank.

## 29.4 Countermanding a Cheque

A customer may countermand a check by giving notice to his bank. The bank shall comply with such an order. This is in accordance with Section 29 of the *Negotiable Instruments Act* (Act No. 16/95). There is no requirement in the Act that the stop notice must be in writing. Therefore it would be acceptable to make the communication by telephone, but a written confirmation should be sent to the bank in order to have evidence of the stop order. The stop order must also be clear and unambiguous. Special attention shall be attached to the number of the cheque, as this is the one unique detail of the cheque.

## 29.5 Other Rights ad Duties Regarding Cheques

### 29.5.1 What Happens if a Payee Loses a Cheque?

**Example:** The bank receives notice from the payee of a cheque that the cheque has been lost. The bank is unable to treat this as a ground for not paying and can only advise the payee to contact the drawer who may or may not choose to countermand the lost cheque and issue a new cheque. If the bank pays the cheque meanwhile, it may lose any legal protection. However if the bank fails to pay, it risks a breach under Section 21 of the *Negotiable Instruments Act* (Act No. 16/95), violation of an order to pay on demand. Therefore in order to avoid any possible dispute it would be advisable for a bank in a similar situation to inquire from the drawer whether to issue cash for a cheque which the bank knows has been lost.

### 29.5.2 When may the Bank Refuse to Pay the Payee of a Cheque?

A drawer of a cheque can give the bank notice to stop payment on the cheque. If the bank receives a stop payment notice, the bank cannot pay the payee of the cheque. However, if the stop notice is later cancelled, and the bank fails to pay for such a cheque, the bank is in breach of its duty under Section 21 of the *Negotiable Instruments Act* (Act No. 16/95). Therefore a bank must pay a cheque drawn by the drawer, payable on demand, if there is no current stop order for the cheque.

Other instances in which a bank cannot pay the payee of a cheque are the following:

- the bank has actual notice of the drawer's death;
- there is a court order not to pay from a particular account;
- there is not enough money in the account; and
- there is an overdraft facility provided to the account and the amount of the cheque exceeds the agreed overdraft limit.

There is a collecting bank for every cheque issued. There is also a paying bank involved in many transactions.

Example: A person, after purchasing goods from a shop, paid with a cheque from Bank of Ceylon. The account of the shop is at Bank of Maldives, so the shop deposited the cheque to its account in Bank of Maldives (collecting bank). Hence, Bank of Maldives will obtain payment from Bank of Ceylon (paying bank). By virtue of Section 27 of the *Negotiable Instruments Act* (Act No. 16/95), if the cheque is a crossed cheque and Bank of Ceylon made the payment to Bank of Maldives in good faith and without any negligence, it is deemed that the person entitled to payment (the shop) has received payment.

The Bank is not at fault and does not have to pay any money to the payee or face any liability, if the Bank, in good faith and without negligence credited the account of the person who submitted the cheque to the bank and even if that person has withdrawn money from his account, and it is later known that the said person is not the payee. This is in accordance with Section 28 of the *Negotiable Instruments Act* (Act No. 16/95).

## 29.6 Forgery

Maldivian law is silent on the subject of forgery as it relates to the duties and rights of both the bank and the holder. However, based on established principles from other jurisdictions, we can identify the following rights and responsibilities regarding forged cheques:

1. If a customer's signature on a cheque is forged, the bank has no authority to pay and it is likely that the bank will be held accountable if it pays the payee of the forged cheque; however
2. If the forgery happened due to lack of care of the drawer, then it might not be reasonable to make the bank 100% liable because the drawer might be liable for contributory negligence.

Examples: a) Company X hired Mr. B, an inexperienced person, to be responsible for all of the company's accounting and bookkeeping affairs. There was no proper accounting system in place. Mr. B committed fraud by forging his signature on several cheques. He was able to do this because of the company's inadequate accounting system. It is likely that Company X must accept responsibility for this loss.

b) A son had been forging the signature of his old father on his father's cheques over a period of ten years. The father was aware of this but he did not report it to the bank. However, he and his son had a difference of opinion after which the father immediately made a formal complaint to the bank, directed the bank to stop payment to his son on any subsequent cheques, and demanded all of the money his son had been paid by the bank over the entire ten year period. In such circumstances, the silence of the father during the ten year period would prevent him from claiming all of the money withdrawn by his son during those ten years. However, from the

moment the bank became aware of the forgeries, it had no authority to pay the son on any subsequent cheques and had to obey the stop order from the father.

- c) An employee of a company forged many company cheques. The bank was suspicious of the cheques and queried them with the directors of the company, who answered that they were genuine. The bank therefore continued paying the employee. The company later discovered that the cheques had been forged by the employee, and asked the bank to re-credit its account. It is likely that the company would be estopped from recovering the money, even for those amounts paid before the bank first queried the cheques.

### **29.7 Other Potential Problems Regarding Cheques**

There are also other instances where a person can obtain money from a bank account through deception. A payee, for instance, may seek to increase the amount for which the cheque is payable by altering a cheque of Rf. 200 to Rf. 2000. In such a situation an estoppel may again prevent the drawer from asserting his rights because there is a duty on the part of the drawer to take reasonable precautions to prevent forgery when he draws cheques by, for example, drawing a straight line after writing in the figure and writing properly in words. However, in such instances the authority from the drawer to the bank is to pay the original amount (Rf. 200), not the forged amount (Rf. 2000).

Mistaken crediting of a customer's account is another predicament which might be encountered. In such situations, there is a prima facie case in favour of the bank to re-debit funds from the account of the customer to whose account the payment was made by mistake. However if the customer changes his position as a result of the crediting, there might be cases where the bank may find it difficult to re-claim the funds.

**Example:** A bank was administering an account of a customer, Mr. T, Mr. T's account was credited by payment from Company X, in which Mr. T was a shareholder. Since Company X was making huge profits, Mr. T's income from the company was increasing every month. The bank, in error, credited more than the amount that Company X had deposited to Mr. T's account. Mr. T, believing in good faith that all the money in his account belonged to him, withdrew the money and used it for himself. After several months the bank discovered its mistake and claimed all of the money back from Mr. T. In such circumstances, it is unlikely that the bank will be able to recover the amounts it mistakenly credited to Mr. T, because Mr. T believed in good faith that he was entitled to the money and altered his position to his detriment by spending the money.

The result would be different, however, if the bank had informed Mr. T of the mistaken credit before Mr. T had in good faith altered his position by spending the money. In those circumstances, Mr. T would have to issue a cheque immediately to the bank to debit his



account by the amount credited by mistake. If he spent the money knowing it had been credited to his account by mistake, he would have to repay the money to the bank.

## 30.0 INSURANCE LAW

Definition:

Insurance is a device used to spread risks in order to protect persons or property against loss resulting from expected or unexpected events.

### 30.1 What is an Insurance Contract?

A contract of insurance, found in a document called a **policy**, is one whereby

- an **insurer** (the person who is prepared to cover the whole or a portion of the loss and who is either an **insurance company** or an **underwriter**),
- in consideration of the payment of a sum of money (the **premium**),
- **agrees to indemnify the insured/assured** (the person taking out the insurance), against some **risk** such as fire, accident or theft, or to pay a fixed sum on the happening of a certain event, such as death.

Under a contract of insurance, the insured is indemnified against unforeseeable loss or damage, which may or may not occur, such as damage to property by fire or loss by burglary.

An insurance contract is an **aleatory contract**, which means that it depends on the happening of an uncertain event. This can be distinguished from an ordinary business agreement. In the case of an insurance contract, the insured person knows that he is paying a sum (the premium) far less than the insurer is going to have to pay if the event insured against occurs. This is known as an aleatory contract, where the conditions are an essential part of the bargain and performance of the contract is limited to the agreed risks.

### 30.2 Classification of Insurance Contracts

Insurance can be classified in three different ways:

1. According to the nature of the event on which the sum assured becomes payable:
  - **Accident insurance** – payable on happening of an event, covering both property and persons, but not death;
  - **Life insurance**- payable on death;
  - **Fire insurance** - payable after a fire; and
  - **Marine insurance**- payable after a marine disaster.

2. According to the nature of the interest affected:

- **Personal insurance** - The specified event operates on the person of the insured or on a third party and covers life, personal accident and sickness insurance.
- **Property insurance** - The specified event operates on the property of the insured and covers fire, burglary, solvency, fidelity accidental loss of property.
- **Liability insurance** - The insured is protected against liability on the happening of a specific event to third persons. This includes public liability and employer's liability insurance.

3. According to the nature of the insurance:

- **Contract of indemnity** - The amount recoverable is measured by the extent of the insured's pecuniary loss and covers all insurance contracts except life, personal accident and sickness insurance.
- **Non - indemnity contracts** - The amount is payable to the insured whenever the specified event occurs, covering life, personal accident and sickness insurance.

### 30.3 What is Insurable Interest?

At common law, the insured in every contract of general insurance had to have something called "insurable interest". It was a right in law or equity and had to be present at the time that the contract was entered into.

Example: Macaura owned a timber yard. The timber in the yard was covered by an insurance policy. He subsequently sold the timber to a company (Company X) of which he was the only shareholder, though the purchase money for the timber remained owing to him. After the sale, Macaura failed to assign the fire insurance policy on the timber to Company X and that company failed to take out a new policy over the timber. A fire subsequently broke out in the timber yard and destroyed the timber. When Macaura attempted to claim on the insurance policy, the insurance company refused to pay, arguing that Macaura had no insurable interest in the timber. The Court held that the insurance company did not have to pay. Company X was a legal entity in its own right, separated from its shareholders, and while it was the owner of the timber and had insurable interest, it had no insurance policy. Macaura, on the other hand, had a policy, but because he had assigned the timber to Company X he had no insurable interest.

However, this rule has been removed in some jurisdictions. Therefore, in such jurisdictions the insured is entitled to recover any loss suffered provided that the loss is covered by the insurance contract, irrespective of whether they have an insurable interest at the time of loss. In cases of general insurance, insurable interest is now stated in economic terms as pecuniary or financial loss.

#### 30.3.1 Examples of Insurable Interest

An insurable interest exists if a person is liable to pay money in the event of a loss. This applies to:

1. the purchase of goods if they are at the purchasers' risk;
2. mortgagees and mortgagors;
3. landlords and tenants; and
4. common carriers.

### 30.3.2 Change of Insurable Interest

If the nature of the insured's interest changes, this does not affect the validity of the insurance contract unless something to the contrary is clearly stated in the terms of the policy. Usually the policy does provide for notice to be given to the insurer where this occurs.

Where the policy does not make provision for notification of changes during the life of the policy, the principle of good faith and the duty of disclosure will operate on renewal of a policy. This means that all material facts arising between the date of the original contract and the date of renewal should be disclosed before renewal of the policy.

### 30.4 Indemnity (Return to a Pre-Loss Position)

The aim of all insurance contracts, except life insurance contracts and some accident insurance contracts, is to put the insured person in the position they occupied before the loss occurred. This is known as **indemnity** and it aims to enable people to purchase protection against loss, to the extent of their insurable interest. It is not intended that the insured could make a profit out of the loss. How much the insured is entitled to claim will depend on the amount of coverage specified in the policy.

If the insured has recovered in full from the insurers and also damages from a third party who was responsible for the damage or loss, the insurer is entitled to reimbursement from the insured.

### 30.5 Over-insurance

Indemnity is usually settled by payment of a sum of money that the parties have agreed to in the policy. The insured is only entitled to the cost of replacement.

### 30.6 Double Indemnity

If the insured has taken out two or more policies in relation to the same risk - a double indemnity - and the total of the policies exceeds the loss sustained, a choice exists as to the insurer from whom to claim. However, the insured cannot recover more than the loss. If one insurer does not provide full indemnity, the insured can claim the balance from the other insurers.

### **30.7 Making the Contract of Insurance**

The contract of insurance must contain the basic elements of a contract. The person seeking the coverage (proponent or proposer) usually makes the offer.

### **30.8 Disclosure Requirements**

The proponent must disclose all material facts that could affect the risk. It does not matter whether there is a question on the proposal form or not. If it is a joint policy, the policy of disclosure applies to each of the insured persons (the co-insureds). If one of the co-insureds fraudulently completes the proposal form, the insurer could avoid the contract.

### **30.9 Non-Disclosure**

Insurance contracts are contracts of the utmost good faith, or *uberrimae fidei*. This is because the parties are not in an equal position with respect to knowledge of the possible risk involved. The person with the greatest knowledge of the risk involved is the proponent and it follows that they should have to disclose all those facts that could influence the insurance company's decision to accept the risk.

### **30.10 How Long Does the Duty of Disclosure Last?**

The duty to disclose all material facts lasts right up until the contract is concluded, which is usually when the proposal is accepted by the insurer. Any new material facts arising after the proposal has been completed, but before it has been accepted, must also be disclosed.

### **30.11 What is the Doctrine of Subrogation?**

Subrogation puts the insurer 'into the shoes' of the insured, but only after the insurer pays for the insured person's loss. Thus it only applies to contracts of indemnity such as fire and motor vehicle insurance. Subrogation gives the insurer all the rights of the insured against any third party who may have been responsible for the damage giving rise to the claim. This prevents the insured from making a profit on the loss by also bringing an action against a negligent third party.

## 31.0 CARRIAGE OF GOODS BY SEA

### 31.1 General Principles

Carriage of goods by sea is governed by various international conventions. The most important international convention dealing with sea transport is the *Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (The Hague Rules)*. The Hague Rules were further amended by a Protocol in 1968 (the Visby Rules), and together they are known popularly as the *Hague/Visby Rules*. The main purpose of these rules is to prevent ships from contracting out of all liability for loss or damage to goods, and to impose upon carriers the duty of carrying the goods with care and of providing a seaworthy vessel at the commencement of the voyage. The carrier can only escape liability if he brings himself within one or more of a number of exceptions listed in the Convention. These include:

- perils of the sea;
- fault or neglect of the master in the navigation or management of the ship;
- fire; or
- if he proves that the loss or damage to the goods arose from any other cause arising without the actual fault or neglect of his agents or servants.

These Rules apply when a bill of lading has been issued and covers the period from loading of the goods until discharge from the vessel.

The Maldives is not a party to any of these conventions relating to carriage of goods by sea. However, most of the shipping of goods done by sea to and from the Maldives is done pursuant to bills of lading, which incorporate the Hague/Visby Rules.

### 31.2 The Contract of Carriage of Goods by Sea

The general course of business in sea transport may be illustrated by the following example.

**Example:** A company processing fish in the Maldives has to send a container of canned tuna to London and wishes to carry out this arrangement itself. Therefore, it has to conclude a **contract of carriage** with a **ship owner** or with a person who, for the time being, as against the ship owner has the right to enter into a contract for carriage of goods in the owner's ship (the **charterer**). The charterer undertakes to carry the goods from the Maldives to London. This contract is known as the contract of carriage by sea.

The exporter must first decide whether the quantity of goods to be exported warrants the charter of a complete ship. If it does, the terms of the contract of carriage will be embodied in a document called the **charterparty**. In most instances, the goods form only part of the intended cargo of the ship and they are carried in the ship together with goods belonging to other shippers. In these circumstances, the terms of the contract of carriage are evidenced by a document called the **bill of lading**. The bill of lading is in effect a receipt from the ship

owner acknowledging that the goods have been delivered to him for the purpose of carriage, and reiterating the terms of the contract.

Bills of lading are usually issued in a set of two or more original parts, all of the same tenor and date. If goods are delivered against one part, the other parts are void. Unless payments are arranged under a letter of credit, the various parts of the set are forwarded to the consignee by airmail. It is crucial that at least one part of the shipper set should be in the consignee's hands before or at the arrival of the ship, because the ship owner is not bound to hand over the goods unless a bill of lading is delivered to him.

In instances where the exporter sells under a letter of credit, he normally hands all parts of the bill of lading to the advising or nominated bank, and that bank forwards the documents to the issuing bank.

The principle of freedom of contracting applies to charterparties and the ship owner may modify his normal liability as a carrier without any limitations. However, contracts of carriage evidenced by bills of lading are to a large measure regulated by the Hague-Visby Rules, which restrict the contractual liberty of the parties and especially restrains the ship owner from introducing exemptions from his liability beyond those permitted by the Rules.

### 31.3 Types of Charterparties

There are generally three types of charterparty arrangements:

1. Voyage Charter,
2. Time Charter, and
3. Demise (Bareboat) Charter.

One of the main differences between these types of charterparty arrangements is the degree of control that the charterer has over the vessel. The greater the control that the charterer has over the operation of the vessel, the greater is his share of the cost.

#### 31.3.1 Voyage Charter Party

In a voyage charterparty, the owner agrees:

- a) to make available his ship at the port specified in the charterparty;
- b) to load a full cargo of goods;
- c) to carry such cargo to the destination; and
- d) to deliver the cargo upon being paid freight.

In order to determine the allocation of costs and risks, the voyage may be conveniently divided into four stages:

1. Preparations Stage - During this stage the vessel sails to the port of loading. At this stage all risks are borne by the owner.

2. Loading Stage - The vessel is at port, waits for its berth and then loads its cargo. There is cooperation between the owner of the vessel and charterer. The risk of delay may be differently allocated between the parties. When it is part borne by the charterer, the charterer pays liquidated damages (called **demurrage**) to the owner on account of delay. The cost of loading is usually borne by the charterer.
3. Voyage Stage - All risks and costs are normally borne by the owner.
4. Unloading Stage - This stage commences upon arrival of the vessel at the port of discharge. Thereafter the risk of delay may be differently allocated between the parties. The costs of discharge are usually borne by the charterer. During this stage, there is cooperation between the owner and the charterer.

### 31.3.2 Time Charter Party

In a time charter, the charterer has the right within the contractual period to use the vessel. The charterer can also directly order the master to perform the voyage he decides to make. The ship owner is paid with reference to the time during which the vessel is placed at the disposal of the charterer, normally on a monthly basis in advance. The charterer has to pay the cost of loading and discharge and has to pay for bunker and port charges.

### 31.3.3 Demise Charter (Bareboat Charter)

These contracts are regarded as contracts of lease as opposed to voyage and time charters which are contracts for services. The possession of the vessel is transferred from the owner to the charterer. The master and the crew are also employed by the charterer and are paid by him.

## 31.4 Liability of the Ship Owner for Loss or Damage to Cargo

Voyage charter parties are contracts for the carriage of goods and therefore the ship owner takes charge of the goods and assumes, under the general law, liability for loss or damage. The compulsory regulation of the carrier's liability provided in the Hague Rules and the Hague Visby Rules is not applicable. However, the Hague rules or the Hague Visby rules may be voluntarily incorporated by reference in voyage charter parties.

Time charters are also considered to be contracts of carriage and several forms of charter parties specifically provide that the owner undertakes to carry the cargo which the charterer will load on to the ship. Moreover, some forms contain a paramount clause incorporating the Hague Rules.



### **31.5 Bills of Lading**

Contracts for the carriage of goods primarily relate to bills of lading. Although the claims contained in a duly tendered and signed bill of lading represent, in law, the terms of the agreement between the shipper and the carrier, the shipper has little discretion in negotiating the terms of the bill of lading. The liability of the carrier for goods carried on the ship is governed by the bill of lading.

### **31.6 Cargo Excluded**

Under the Hague/Visby Rules, two types of cargo are excluded from the application of the Rules (Article 1(c)). These are live animals and cargo which is stated as being carried on deck and is actually carried on deck. In both cases parties are free to negotiate their own terms for such carriage. As for the carriage of deck cargo, two requirements have to be met to avoid the operation of the Rules:

- the cargo must actually be stowed on deck, and
- this fact must be clearly stated on the bill of lading.

The Rules would therefore not be applicable in the following situations:

- where the bill of lading makes no reference to deck carriage but goods are nevertheless stowed on deck; and
- where the bill of lading contains a statement that goods are to be carried on deck but in fact they are stowed in the hold

### **31.7 Safety of Goods and Excepted Perils**

The responsibilities of the carrier in respect of safety of goods entrusted to his care are discussed in detail in Article III. The Rules contain, in Article X, a long list of matters in respect of loss or damage for which the carrier is not liable. The burden of proof rests upon a ship owner who wants to rely on one of the excepted perils. The ship owner has to prove that the goods were lost without his fault.

### **31.8 Maximum Limit of Ship Owner Liabilities**

The maximum limits for the carrier's liability for damage to or loss of the goods shipped are provided in Article IV (5). The maximum limits may be increased by agreement of the parties or by adoption of the following procedures:

1. a declaration of the nature and value of the shipped goods, and
2. insertion of the declaration in the bill of lading.

The maximum limits for the liability of the carrier cannot, by agreement, be reduced below the limits provided in Article IV (5)(a).

### **31.9 Protection of Servants**

The Rules provided in Article IV provide that a person employed by the carrier can, when sued by the cargo owner (e.g. for negligent damage to the cargo), plead the protection of the maximum limits of liability and other defences which the ship owner could have pleaded under the Rules if he had been sued.

### **31.10 Notice of Claim and Title of Claim**

The Rules in Article III (6) require that notice in writing of such loss or damage be given to the carrier or his agent at once, and for suit founded on such claim to be brought within a year of delivery or intended delivery of goods. The time limit in Article III (6) is only applicable to claims for loss of or damage to goods. It does not apply to other claims against the carrier such as a claim for delay in delivery.

PART E:  
SPECIFIC CASES: CRIMINAL

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## 32.0 THEFT

### Definition:

It is stipulated in the *Penal Code*, Section 149(1) that theft is the appropriation of property belonging to another without the knowledge of the owner or the possessor of the property. Based on this definition, one could commit theft without having any intention to do so. However, according to the *Rules for Conducting Court Proceedings*, volume 5, Section 183, Circular MJC 32/94, the intention of the person to commit theft is a requirement to establish his guilt.

There are three categories of theft, with different types of punishment, in the *Penal Code*. These are found in sections 131 to 149. They are:

1. Petty thefts:

These thefts carry a lenient sentence. The thefts in this category are those where a person commits a theft for the first time and the value of the money or property stolen does not exceed Rf. 10,000.

2. Thefts attracting a lenient sentence due to the circumstances in which the crime is committed:

The thefts in this category are thefts committed due to hunger and thefts committed by minors under the age of 16.

3. Thefts which carry harsh punishments:

Thefts in this category are those which do not fit in either of the above two categories. Reasons for a harsh punishment are:

- repeatedly committing theft;
- stealing money or property worth more than Rf. 10,000;
- organised theft;
- committing theft by breaking into or damaging property;
- stealing from dwellings;
- theft with arms;
- thefts committed at night; and
- stealing government property.

### 32.1 Acts that Amount to theft

According to Circular MJC 32/94, the following acts are theft:

- hiding stolen property;
- illegal logging of State owned plantation;
- logging of privately and community owned plantation without formal consent;
- not disclosing things found on private property to the owner; and
- not disclosing things found in State owned property to the registered owner of the property.

The act of illegal logging without the consent of the owner is also categorised as theft in the *Penal Code*, Section 149 (1).

### **32.2 Preparing to Commit Theft**

Preparing to commit theft means to prepare oneself to commit theft and intending to commit it, but not actually committing theft due to external factors. For example, stealing and duplicating keys of a safe, or obtaining tools required for a break-in, could constitute conspiracy even if the person did not actually open the safe or break in to property. The sanction is half of the sentence for theft.

### **32.3 Valuation of the Stolen Property**

In valuing stolen property, the courts will consider the market value of such property at the time of the theft. If the item is not in the market at the time of the trial, the value of that item will be the market price of that particular item at the time it was available. If the item is valued in a foreign currency, the court has to value the item in that currency.

### **32.4 Important Points that the Courts should Consider in Theft Cases**

1. Theft cases are brought to court on behalf of the state after investigating the crime. However, the court has to be cautious because crimes like robbery committed with the threat of force, black mailing, and using the threat of force to commit a theft are very similar in nature. Therefore, serious consideration has to be given to this issue, and the court must be satisfied that the person has been charged with the most appropriate crime in the circumstances.
2. Cases submitted as theft cases might involve the conduct of an accomplice, but not the actual theft. Therefore the court has to ensure that the most appropriate offence has been charged.
3. The court has to consider the following issues: whether the theft was an organised theft or an armed theft, the time and place at which the theft was committed, the nature, quantity and value of the goods stolen, and the technique used by the thieves. These factors are relevant to the sentence.
4. The value of the stolen property has to be ascertained. The method that has to be followed in valuing the property is described in the *Penal Code*, Section 148.

### **32.5 The Laws and Circulars that have to be Considered in Theft Cases**

Sections 131 to 149 of the *Penal Code*, and Circular MJC 32/94 must be considered in hearing theft cases. If a minor commits theft, Circular MJC 4/99 has to be followed.

## 33.0 EMBEZZLEMENT

### Definition:

Section 149(3) of the *Penal Code* states that embezzlement is maliciously using, or changing the nature of, or destroying, or otherwise dealing with, property that belongs to another and is in the possession or safekeeping of the alleged embezzler.

Failure to submit lost and found items to the relevant authority, or tampering with the electricity meter in order to deceive, can amount to embezzlement. The courts will also consider it as an act of embezzlement if property has been put under the responsibility of a particular individual based on certain rules, and some of the property goes missing or the possessor cannot explain, upon an audit, the reason why the property is missing. In this case it should be proved that the possessor contravened the rules that he was supposed to follow in dealing with the goods.

### 33.1 Important Points to Consider in the Definition of Embezzlement

Section 149(3) defines embezzlement in a very wide sense, but in order to establish embezzlement the intention of the party has to be considered. There are, however other types of offences apart from those mentioned earlier, that are considered as acts of embezzlement but for which the presence of intention is not a pre-eminent requirement. If the possessor acts contrary to the stipulated rules or regulations in dealing with the property or goods, and cannot provide a reasonable explanation why the goods or property are missing, this shall be considered as embezzlement.

### 33.2 Similarities and Differences between Theft and Embezzlement

Embezzlement and theft are both crimes of the same magnitude. The offences are dealt with in the same provisions of the statute. Therefore both of these offences are charged under the same provisions. Similarly, the penalty for both offences is decided according to the same provisions. The differences between theft and embezzlement are that theft is committed in secrecy, because the property is not in the possession of the perpetrator, whereas acts of embezzlement can be done openly since the property or goods are in the possession of the perpetrator. Further, according to the definition of theft, the issue of intention of the wrongdoer is not emphasised in the *Penal Code* (although intention is described as an essential element of theft in Circular MJC 39/94, discussed above), whereas in the case of embezzlement, the *Penal Code* specifies that the intention must exist in order to prove the crime of embezzlement. In embezzlement cases, the time of the act is not of any importance, whereas in theft cases, the time of the act is significant (e.g., the fact that the theft was committed at night would be an aggravating circumstance). In both cases, the importance of the owner of the goods or property and the position of the alleged person is specified in the various provisions of the statute. Similarly, the place where the goods were placed also plays an important role.

### **33.3 Situations where the Punishment is Harsh**

As in theft cases, there are instances where the punishment is harsh in embezzlement cases. Such instances include embezzlement of State owned property and embezzlement by the person in whose possession the goods or property of another are with, for example, failing to return property lost and found.

### **33.4 State Owned Property**

This is any property, ownership of which belongs either to the State or to any party which has the meaning of the State. The Government's share holding companies and State owned companies are included in this category.

## 34.0 DECEPTION

### Definition:

As stipulated in Section 149(4) of the *Penal Code*, deception includes those acts from which a benefit is incurred by hiding a truth and causing damage in doing so. The law states that misleading **for the purpose of gaining a personal benefit and by harming another person** are essential elements of deception.

Therefore, every incident of misleading is not necessarily the crime of deception. The two requirements of harming another person and the intention of obtaining a personal benefit must be fulfilled in order to make an act the crime of deception.

### 34.1 Differences and Similarities between Tekun and Deception

Both of these two crimes are about deceiving. They are committed by deceiving verbally, by saying something that misleads, or by conduct (e.g. projecting something that is a fake as real).

Both tekun and deception are crimes that cause damage.

Both of these crimes are committed with the motive of obtaining an illegitimate benefit from another individual.

In deception cases, the party perpetrating the alleged crime does not take money from the individual being deceived. In the case of tekun, however, the perpetrators do take money from the individual whom they are deceiving.

It is not of relevance to show that a benefit has been gained by the deception, but as for tekun cases there has to be a benefit obtained from the individual who is being deceived.

### 34.2 Submission of Cases that fall under Deception

Since this is a crime against society, action will be brought by the state against the perpetrator. The court has to be certain that cases filed do actually fit in this category.

### 34.3 How the Trial should be Conducted

The case should be heard in the presence of the party bringing the action in court i.e. the Attorney General (AG) or a representative of the AG, and the defendant or the accused. If the person on whom the accused perpetrated the alleged crime asks to be present in the hearing, the court should grant this request. The court has the discretion to conduct the trial



without the presence of the person who was deceived, since the claim for damages could be brought to court as a separate case.

## 35.0 ASSAULT AND BATTERY

### Definition:

Section 126 of the *Penal Code* stipulates that if two people or a group of people make physical contact with the intention of harming that amounts to assault and battery. If assault and battery takes place within a group of people gathered, not in an illegal gathering, such conduct shall be considered under this section.

According to this provision, if there is a mere physical contact between two people or a group of people, it cannot amount to assault and battery. But, if this physical contact was made with the intention of harming and without the consent of the other party, then it amounts to assault and battery. According to Section 46 of the *Penal Code*, assault and battery amounts to those assaults and batteries taking place among a crowd of people who have not illegally assembled.

### 35.1 Reasons Behind Sentencing for a Harsh Punishment

There are different ways in which the crime of assault and battery can be committed, as stated in the statutes, and there are different degrees of punishments that are given as well. Using a sharp object in the assault, causing grievous bodily harm, and amputations resulting from the assault, are among the situations where harsh punishments are given. If due to the assault and battery an amputation of a body part takes place, and if that amputated body part is considered as a part of the body that upon its amputation would merit compensation under the Islamic Shari'ah Law, in this situation the courts will pass a harsher punishment.

## **36.0 DISOBEDIENCE TOWARDS THE COMMANDS OF LAW**

This is the most common criminal offence charged. The relevant provision is Section 88 of the *Penal Code*. Offences that come under this category are those offences, which do not provide for any punishment or when one acts in contravention to any command of law or commits an act prohibited by law, which does not carry any penalty or sanction. There are four degrees in which offences falling under this category are assessed.

### **36.1 When no Harm is done to a Person Physically or no Damage done to Someone Else's Property**

In such circumstances, the penalties consist of imprisonment for a maximum period of 6 months or banishment for the same period, or a fine of no more than Rf. 150.

### **36.2 When a Person is Physically Harmed or when Damage is done to Property**

If harm of a physical nature results in injury or harm to the senses of the human body or damage to property, the penalties are: imprisonment for a period of one year, or banishment for the same period, or a fine of no more than Rf. 250.

### **36.3 Acts of Disobedience that could be Threatening to Life**

If a person commits such a crime the penalties are, imprisonment for a period of 2 years, or banishment for the same period, or a fine of no more than Rf. 1000.

### **36.4 Acts of Disobedience Resulting in Death of a Person**

The punishment for such a crime is the punishment stipulated in the Islamic Shari'ah Law for killing another human being.

#### **36.4.1 Points to be Noted**

Section 88 of the *Penal Code* governing the acts of disobedience to commands of law demands that the intention of the party perpetrating the act be considered.

## **37.0 DRIVING MOTOR VEHICLES WITHOUT A VALID LICENSE**

### **37.1 Driving Land Motor Vehicles without a Valid License**

The driving of motor vehicles used on land without a valid license is an offence prohibited by law. This is stipulated in the *Law Governing Vehicles Used on Land* (Act No. 7/95), Section 21.

#### **37.1.1 Penalty**

The penalty for driving without a valid license is either banishment, or imprisonment for not more than three months, or a fine of Rf. 1500.

### **37.2 Driving Land Vehicles without the Possession of a Valid License**

If a person who has a valid license, does not have it on him or inside the vehicle when he is driving, he could be fined Rf. 100.

## 38.0 ADULTERY AND FORNICATION

### Definition:

The insertion of the circumcised part of the penis of a man or if it has not been circumcised, the part that would have been circumcised, into the vagina of a woman to whom he is not married. If the act of adultery or fornication is committed as stipulated in this definition, the adulterer or fornicator will be subjected to whipping (Hadd).

The law does not penalise a subject by whipping for:

- anal intercourse with a woman;
- intercourse with an animal; or
- intercourse with a woman to whom he is married where the marriage is void and null ab initio.

If these acts are committed, there shall be other punishment for the perpetrator.

### 38.1 Two Categories of Adulterers

There are two categories of people who commit adultery: those who commit adultery without marrying, and those who commit adultery while married or after at least once being married.

#### 38.1.1 Penalty for those who commit adultery without marrying

If proven he/ she will be whipped 100 times. In addition, if a man commits this crime he shall be banished for 1 year, whereas a woman who commits the crime will be put under house arrest for the same duration.

### 38.2 Non-Muslims

Adultery or fornication committed by non-Muslims is not subjected to the punishment of whipping, but non-muslims they are subjected to other types of penalties. According to the Islamic Shari'ah law the only Non-Muslims who are whipped are the citizens of that particular nation.

### 38.3 The Instances where the Penalty for Adultery are Harsh

1. having sex without the consent of the woman. The court has to consider cases which are submitted under this category with extra caution. The court has to consider to what extent the woman refused.

2. committing adultery with a person prohibited by law to marry, or having sex with a minor. Here sex with a prohibited person includes people to whom marriage is both permanently and temporarily prohibited. Details as to the above issues can be found in Circular MJC 2/92.
3. committing adultery with someone else's wife or with a woman in the 'waiting period' after a divorce.

### **38.4 Proving Adultery Cases**

This can be done either by the adulterer's confession or by testimony of witnesses.

If the alleged adulterer confesses, the crime will be established. According to some scholars, the person must confess four times if the confession is to be accepted. Other scholars accept that even one confession is sufficient. Adultery is a crime involving a man and a woman. The crime will be proved only against the person who confesses. Adultery cannot be proved against a person who does not confess to the alleged crime.

If witnesses testify that adultery has been committed, then the courts in establishing adultery will consider this testimony. There have to be four witnesses and none should refuse to give evidence. There is a difference of opinion as to whether the witnesses should be whipped for falsely accusing a person for adultery. Most scholars support the idea of whipping such witnesses, but there are opinions supporting the view that the witnesses should not be whipped if they had no intention of falsely accusing.

### **38.5 Revocation of Confession in Adultery and Fornication Cases**

If a person revokes a confession of adultery or fornication, he will be charged in the same proceedings under Section 63 of the *Penal Code*.

### **38.6 Specific Issues Regarding Sentence**

Refer to Circular MJC 2/89. A woman becoming pregnant out of wedlock cannot be subjected to whipping (Hadd), unless either she confesses or two witnesses testify that she committed the crime.

If a woman gets pregnant after committing adultery and if the father of the child is not known, then the penalty for such a crime would be house arrest for one year.

If a married woman becomes pregnant despite being away from her husband for a year, the children born in such situations are considered illegitimate. The presumption is that the woman committed adultery and that the father of the child is not known. The penalty for such a crime is house arrest for one year.

### **38.7 The Lineage of Children Born Without a Known Father**

Situations where the courts will hold that children are without any lineage would be:

- children born before the earliest period of conceiving;
- children born after the latest period of conceiving;
- children born out of wedlock; and
- illegitimate children whose purported father testified against being the natural father.

### **38.8 False Accusation of Adultery**

Definition:

A false accusation of adultery occurs when a person verbally accuses or addresses another person in a manner implying that the other person has committed adultery, and that verbal accusation is not proved in court.

In Islamic Shari'ah the penalty of whipping for false accusation of adultery is allowed if the person accused is a chaste person who in his/her whole life never been accused or found guilty of committing adultery. If the accuser cannot prove the act of adultery in Court, then that accuser will be subjected to whipping (Hadd). If the accuser had repeatedly accused the other person of adultery, he will be subject to whipping only once. If parents falsely accuse their children of committing adultery, upon proving that the accusation was false the parents shall not be subjected to whipping.

### **38.9 Proving a False Accusation of Adultery**

The offence can be established upon the testimony of two witnesses and the confession of the accuser. If the accuser brings four witnesses to Court to prove his accusation, he will be relieved from falsely accusing a person and the alleged adulterer will be whipped for committing the crime.

### **38.10 An Individual Falsely Accusing a Group of People of Adultery**

There are disputes as to the number of whippings one should be subjected to upon falsely accusing a group of people. It is argued by some that the false accuser should be whipped for every individual person that he falsely accused of adultery. The contrary argument is that he should be whipped only once. It seems that the most acceptable approach would be that if the accuser accuses the whole group generally, he should be whipped as if accusing one person, and if the accuser accuses the members in the group individually, then he should be whipped for each person he falsely accused.

## 39.0 INDECENT BEHAVIOUR

The different types of indecent behaviour and their penalties are stipulated in Circular MJC 2/92, Volume 5, and Section 173 of the *Regulations for Conducting Court Proceedings*. From this Circular it is clear that there are circumstances (i.e., aggravating factors) when the punishment for indecent acts will be more harsh. Such circumstances include:

- the place where the act was committed;
- the nature of the act;
- the relationship between the people involved in the act;
- the marital status of the people involved in the act; and
- the age and sex of the person involved.

### 39.1 Simple Indecent Behavior

The Regulations do not specify what simple indecent behaviour is. However, considering the aggravating circumstances mentioned above regarding indecent behaviour, we can conclude that any sexual act that does not fall under those categories can be considered as simple indecent behaviour.

### 39.2 Gross Indecent Behavior

Gross indecent behaviour is those acts which are more despicable than those listed in the Regulations. The determination of the degree of unpleasantness of such acts is the responsibility of the Judge hearing the case. The Judge, while doing this can use the acts listed in Section 5 of the Regulations as a guide.

### 39.3 Other Possible Issues in Indecent Behavior Cases

In some cases there might be more than one ground to justify a harsh punishment, depending on the circumstances of the case. Committing indecent behaviour with one's own child is an act for which the punishment can be harsh on more than one ground. In such situations, the act which carries the harshest punishment will be considered when making a ruling, and the punishment will be for that act.

### 39.4 Homosexual Acts

Homosexuality is any sexual act between individuals of the same sex. In this regard, a man having sexual relations with another man or with different men and a woman having sexual relations with another woman or with different women will be considered as acts of sodomy. Such acts are punishable under the penalties stipulated in the Circular MJC 2/92, and the *Rules For Conducting Court Proceedings*. Any person who commits a sexual act with a minor of the same sex will be charged and punished according to the penalties and



punishments specified for the crime of indecent behaviour with a minor. Comparing the punishment for both crimes, the punishment is harsher for the crime of indecent behaviour with a minor.

### **39.5 Different Treatment based on Gender in Indecent Behaviour Cases**

There is a difference in the punishments, as stipulated in the Circular MJC 2/92, for men and women found guilty of indecent behaviour. The punishments for men include banishment and imprisonment, whereas women are sentenced to house arrest.

## 40.0 INTOXICATION

Definition:

Regardless of the name of a liquid, any liquid capable of intoxicating people is considered as 'Khamir' (intoxicant).

Refer to Circular MJC 1/96.

### 40.1 Proving Consumption of Intoxicants

Intoxication can be proved upon the confession of the person or upon the testimony of two witnesses. As stipulated in Circular MJC 50/94, consumption of an intoxicant can be proved by the smell from the mouth of the individual, and with additional evidence.

### 40.2 Cases of Repeated Intoxication

When a person is brought before the court more than once for the same crime, then on each of those occasions an additional period of one year shall be included in the sentence. If the person is charged for the first time, but it has been proved that he/she has committed the crime more than once, then the punishment will be same as for a person committing the crime for the first time.

### 40.3 Revocation of a Confession in an Intoxication Case

If a person revokes a confession about an issue of intoxication he shall be charged in the same proceedings under Section 63 of the *Penal Code* and, if convicted, shall be sentenced to banishment for one year.

### 40.4 Consuming Liquid Containing Alcohol Which is not a Drink Referred to as Liquor

A people who consumes liquids such as cologne, cough syrup and other liquids containing intoxicants, shall be tried under Section 88(a) of the *Penal Code* and punished as stipulated in that Section (see the above discussion, "Disobedience to the Commands of Law, and Circular MJC 9/96).

## 41.0 NARCOTICS

The *Narcotics Act* (Act No. 17/77), identifies the circumstances under which punishment will be awarded for those convicted under the Act. It applies to those who misuse or consume drugs except as provided in the Act (for medical purposes or those narcotics stipulated in the Act). A list of prohibited narcotics is annexed to the Act. Annex II of the Act lists drugs used for medical purposes.

### 41.1 Consumption of Narcotics

Persons consuming narcotics shall be charged under Sections 4 (a) (i) and 4 (a) (ii). Section 4 (a) (i) deals with prohibited narcotics. Section 4 (a) (ii) deals with drugs used for medical purposes. If any other type of narcotics is consumed for the purpose of intoxication, such person shall be charged under Section 4 (a) (3).

### 41.2 Intoxicants and Narcotics

Section 20 of the Act states that ‘intoxicant’ is exempted from the definition of “narcotics” as used in this Act. No person shall be charged for consumption of alcohol under Section 4 (a) (ii).

### 41.3 Treatment for Drug Addicts

The Act provides that prior to convicting any person charged on consumption of narcotics, the opinion of the Committee for the Treatment of Convicts as stipulated in Section 11 (a) of the Act shall be obtained. Therefore it might be advisable for the Judge to obtain the opinion of the Committee by writing to the Narcotics Control Board, together with all the investigation reports, even if the person has not yet been brought to trial.

If the Committee fails to send a reply within a reasonable period of time, the Court shall write for the second time requesting a prompt reply.

### 41.4 Advice for Treatment

#### 41.4.1 Acquittal

In the event the accused person is found not guilty for the offence charged under Section 4 of the Act, the court shall not have the jurisdiction to order the person to be sent to the treatment centre for treatment.

#### 41.4.2 Conviction

The following procedure shall be followed in the event a person is found guilty of the offence of consuming narcotics:

- a) Sentence the person for that offence. Punishment for consuming narcotics under Section 4 (c) is imprisonment, banishment, or house arrest for a term not less than 5 years and not more than 12 years.
- b) An order by the judge to keep the person at a Treatment Centre.
- c) A court order to defer the sentence provided in Section 4 of the Act to 3 years.

#### 41.5 Conviction for First Time Offenders Over the Age of 16

If a person over the age of 16 years commits a first offence as stipulated under Section 4 of the Act, provided that the person has served half of his sentence without committing any other offence, the judge shall defer the remaining part of his sentence to be served until such time as his full sentence period is completed. This is provided under Section 14 (b) of the Act.

Example: Mohammed was sentenced to house arrest for six years. He did not commit any offence during the first three years of his sentence. As a result, the judge does not have to order a new sentence for the purpose of deferment. The order for deferment (as a result of not committing any offence during the term of the first half of his sentence) is included in the original judgment by the court.

#### 41.6 Sentence for Narcotics Offences

##### 41.6.1 Producing, Disseminating and Trading in Narcotics

- 1 gram or less than 1 gram - Imprisonment, banishment, or house arrest for a period not less than 5 years and not more than 12 years (Section 2 (c)).
- More than 1 gram - Life imprisonment.

##### 41.6.2 Unlawfully Importing, Exporting, Producing and Cultivating Narcotics Used for Medical Purposes

- Imprisonment or banishment for a term not more than 15 years and not less than 10 years.

#### 41.6.3 Unlawfully Trading, Offering, Selling and Possessing Narcotics Used for Medical Purposes

- Imprisonment or banishment for a term not more than 15 years and not less than 10 years (Section 3 (d)).

#### 41.7 Person Under the Age of 16 Found Guilty of Consuming Intoxicating Substance

Even if the person who was charged for consuming narcotic substances was under the age of 16 years, the advice of the Committee shall be obtained.

Section 14 (a) of the Act provides that if the person convicted of the offence under Section 4 of the Act, is a person below the age of 16 years, and provided it was the first time such person was convicted for that offence, the Judge shall order his sentence to be deferred for 3 years.

This shows that if a person below the age of 16 years commits such offence as provided under Section 4 of the Act and if it was his initial conviction, the judge is obliged to defer his sentencing. It also shows that the deferment is not as a result of an advice for treatment of the offender. In other words, even if the Committee does not recommend treatment of the offender, the judge has no choice but to defer sentencing.

#### 41.8 Is it Necessary to Obtain the Opinion of the Committee Regarding Treatment, the Offender was not a First Time Offender?

Section 9 of the Act provides that the most severe punishment shall be awarded for those repeating the same offence. Therefore, the question is as to whether the opinion of the Committee is necessary prior to sentencing, in cases where the convicted person was a person who was previously found guilty of the same offence. *Circular MJC ...* answers this. The Circular provides that the opinion of the Committee shall be obtained for each individual case.

#### 41.9 Consumption and Trading in Narcotics

If a person is charged for consumption and trading in narcotics, the opinion of the Committee shall only be obtained after the court finds him not guilty for trading in narcotics.

#### 41.10 The Maximum Punishment

Section 9 of the Act prescribes the circumstances under which the most severe punishments can be awarded.

#### **41.11 Commission of an Offence During the Period the Sentence was Deferred**

There are two circumstances under which a person whose sentence was deferred can be sentenced (Section 15 (a)):

1. Commission of an offence within the period the sentence was deferred.
2. Failing to complete the conditions provided under the *Narcotics Act*.

## 42.0 SUSPENSION OF SENTENCES

### Definition:

A suspended sentence is a punishment imposed by a court that does not include a period in jail, however, requires the offender to be on good behaviour (not commit any new offences) for a defined period of time.

The purpose of suspended sentences is to provide an opportunity for first time offenders of certain categories of crimes to repent and be useful members of the society.

Refer to Circular MJC 1/95.

### 42.1 Categories of Offences for which a Suspended Sentence is not Possible

- Hadd (Prescribed Offence);
- Fraud;
- Embezzlement; and
- Any offence committed with the use of weapons or explosives or with the threat of use of force.

### 42.2 Punishment Provided for the Offence

The maximum punishment provided for the offence should not exceed 6 months.

### 42.3 Accused

The offender should not previously have committed any other offence.

### 42.4 Period of Suspension

Sentences are suspended for a period of three years from the date of sentencing. In the event a person whose sentence had been suspended commits any other offence during the three year period, the court shall cancel the order of suspension of the previous sentence and order the suspended sentence to be served immediately or subsequent to serving the second sentence.

## **42.5 Other Law and Procedure Issues Regarding Suspended Sentences**

If the maximum sentence provided for the offence does not exceed three months, it is mandatory for the court to suspend the sentence *if all other requirements are met*. If the punishment provided for the offence is between 3 and 6 months, the court has the discretion to suspend the sentence or not.

The court should before sentencing, ensure that the accused has not been convicted of any offence in the past. Therefore, criminal records should be checked and the accused should be asked whether he had been convicted before. Since island courts have no access to criminal records, the MoJ should be contacted to find the records. Island courts are also required to write to the MoJ with the draft judgment before imposing any suspended sentence.



## 43.0 RULES RELATING TO OFFENCES COMMITTED BY JUVENILES

Definition:

Juveniles are children under 16 years of age.

### 43.1 Extent of Liability of Juveniles

Children under 7 years of age will be exempted from criminal liability. Children between 7-14 years of age will be exempt from criminal liability except for offences specified in Article 20 of 4/99 of Ministry of Justice. Children above 14 years and below 16 years shall assume responsibility for offences committed by them.

### 43.2 Investigation of Offences Committed by Children

Offences committed by children will usually be investigated at a special place, or at a special place for children at the Police HQ. The person investigating shall not wear a police uniform. Children shall not be kept under circumstances specified in Article 5 of Ministry of Justice Circular MJC 4/99. These cases must be investigated in camera and shall be dealt as a matter of urgency.

### 43.3 Trial of Juvenile Delinquents

Such trials must be held in the presence of a guardian of the child, and an official from the Unit for children's rights. The trial shall be conducted by a judge specialised in such matters.

### 43.4 Determining the Age of the Delinquent

If there is any official document, the court will look at that document for determining the age of the child. In the absence of such a document, the age shall be determined by the judge with advice from a doctor.

### 43.5 Sentencing Juveniles

The age of the child must be taken into consideration in passing sentence. As such, if a child between 7-14 years commits an offence specified in Article 20 of Circular MJC 4/99, the penalty specified in that Article will be given. If such a child commits an offence under Article 3 (b) of the Circular, the court must order the child to reside in a community centre.

If a child over 14 years and below 16 years is found guilty of an offence for which the Judge has discretion to pass a lenient sentence, the sentence shall be for house arrest for a period of 5 years.

#### 43.5.1 Points to be Considered when Sentencing Children

1. Children who repeatedly commit offences shall not be dealt with the same as in the case of adults.
2. T`auhzeer punishments shall not be given to children.
3. Fines shall not be imposed for offences for which the judge has discretion to impose a fine or any other punishment.

#### 43.6 Civil Liability for Damages Arising out of Offences Committed by Children

No claim will be made against a child under 16 years for civil damages arising out of an offence committed by a child. This claim will be made against the child's guardian. The party suing has the right to claim for such damages with the criminal charge or as a separate civil claim.

