

**THE JERSEY LAW COMMISSION**



**CONSULTATION PAPER**

**THE JERSEY LAW OF PARTNERSHIP**

The Jersey Law Commission was set up by a Proposition laid before the States of Jersey and approved by the States Assembly on 30 July 1996.

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**CONTENTS**

A.	Introduction .....	4
B.	Does Jersey have a Law of Partnership and/or does it recognise Partnerships in its customary law? .....	5
C.	Sources of the Jersey Law of Partnership .....	6
D.	Content and scope of the existing Jersey Law of Partnership .....	14
E.	Issues arising in view of the age of the source material of Jersey Law of Partnership .....	30
F.	Origins of English Partnership Law .....	32
G.	The current English Law of Partnership and the writings of Pothier compared .....	36
H.	Partnership Law of other jurisdictions .....	39
I.	Partnership Law of other Commonwealth and former Commonwealth jurisdictions .....	43
J.	Modern French Partnership Law .....	48
K.	Appropriate jurisdiction to which to have recourse in the absence of local authority .....	51
L.	A Partnership Law for Jersey? .....	52
M.	Acknowledgements .....	53
	Appendix 1: Extract of joint report on Partnership Law issued by the English and Scottish Law Commissions which summarises the essential features of the existing law in those jurisdictions .....	54
	Appendix 2: Written Ministerial Statement .....	64

## **THE JERSEY LAW OF PARTNERSHIP**

### **A. INTRODUCTION**

- 1.1 The Commission recognises partnerships as an important and long established part of the commercial world, being the simplest form of business arrangement enabling two or more people to carry on business together with the object of making a profit.
- 1.2 Whilst laws have been passed in Jersey concerning certain particular types of partnerships, and whilst those laws have acknowledged the existence of customary law in Jersey in the field of partnerships (see further Section B below) the basic Jersey law of partnership is not clear.
- 1.3 It is therefore proposed that this paper will address *inter alia*, the following general matters:
  - (a) does Jersey have a law of partnership and/or does it recognise partnerships in its customary law?
  - (b) If so, where in the customary law is the law of partnership set out?
  - (c) If Jersey does have a law of partnership, what is its content and scope? It is important, in order to preserve and enhance Jersey's reputation as a modern international commercial centre that its laws are clear and accessible.
  - (d) Is the content and scope of the customary law of partnership comprehensive? If gaps exist, or the statement of the law is too old to be applicable to the requirements of a modern commercial world to what other sources should lawyers have regard?
  - (e) Would the existing Jersey law, as may be identified, benefit from modernisation, and if so, in what areas and by what means? Would Jersey benefit from a Partnership (Jersey) Law, which sets out clearly the content of the law?

**B. DOES JERSEY HAVE A LAW OF PARTNERSHIP AND/OR DOES IT RECOGNISE PARTNERSHIPS IN ITS CUSTOMARY LAW?**

2 In 1994 and 1997, the States of Jersey enacted two laws relating to partnerships; the Limited Partnerships (Jersey) Law 1994 (“**the 1994 Law**”) and the Limited Liability Partnerships (Jersey) Law 1997 (“**the 1997 Law**”).

2.1 These laws addressed broadly the same subject areas as two English statutes, the Limited Partnerships Act 1907 (“**the 1907 Act**”) and the Limited Liability Partnerships Act 2000 (“**the 2000 Act**”). Save for the 2000 Act (which is stated in Lindley & Banks on Partnership 18<sup>th</sup> Edtn as not being a new form of partnership at all, and that no part of the law of partnership is applicable to it) the Jersey and English laws could be described as being founded upon basic principles of partnership law in their respective jurisdictions, their effect being to address and develop a specialist aspect of the broader partnership law.

2.2 However, whilst in England the majority of the basic principles of partnership law have been set out clearly in statutory form for some considerable time, namely in the Partnership Act of 1890, as amended, (“**the 1890 Act**”) no such clear statement of the Jersey law of partnership exists. There is no equivalent statute.

2.3 That is not to say that Jersey has no law of partnership. Article 40 of the 1994 Law states:

**ARTICLE 40**

**Saving**

The rules of customary law applicable to partnerships (“contrats de société”) shall apply to limited partnerships except in so far as they are inconsistent with the express provisions of this Law.

Similar wording appears in Article 48 of the 1997 Law.

2.4 As stated in the introduction, it is therefore clear that the existence of the law of partnership in Jersey customary law is acknowledged. But what is its content and scope?

## C. SOURCES OF THE JERSEY LAW OF PARTNERSHIP

- 3 There is no Jersey text book on partnership law. Nor are there numerous reported cases concerning partnerships decided by the Jersey courts.
- 3.1 The Jersey Law Reports (“JLR”) note just a handful of cases under ‘Partnership’ reported since 1950. The first of these, **Cooley v Wood**,<sup>1</sup> is not a partnership case as such but concerned a quasi-partnership between two shareholders of a company used as the vehicle for a property venture. The dispute was about the division of the profits. In giving the Royal Court’s judgment, Le Cras, Lieutenant Bailiff, said:

*“There was no local authority put to the Court; the [English] precedents relied upon by the parties, so far as is relevant, are very old. In those circumstances, the court finds the law is not settled and adopts the approach set out by, it would seem, the English Partnership Act 1890.”*

He then quoted a passage from *Halsbury’s Laws of England*<sup>2</sup> dealing with the application of assets after dissolution of a partnership. There was no further attempt to identify or analyse the relevant Jersey law.

- 3.2 **Golder v Viberts**<sup>3</sup> concerned the liability of partners in a Jersey firm of advocates to third parties for the acts and omissions of the partnership, but the judgment was primarily concerned with procedural matters relating to amendment of pleadings and misjoinder of parties under the Royal Court Rules 1992. In his judgment Crill, Bailiff, quoted a passage from the leading English textbook on partnership law, *Lindley & Banks on Partnership*<sup>4</sup>, relating to the liabilities of incoming and outgoing partners. He appeared to accept what was said there as consistent with Jersey law. Beyond noting that, there is no assistance to be derived from this case either in ascertaining the Jersey law of partnership.
- 3.3 **Leach v. Leach**<sup>5</sup> concerned ownership of property bought with monies from a joint account, but the judgment does not appear to provide any useful assistance on the Jersey law of partnership.
- 3.4 In the case of **Bennett v Lincoln**<sup>6</sup> the issue was whether there was in law a partnership between the parties. The judgment of the Court was given by Sir Philip Bailhache, Bailiff, who asked rhetorically what were the characteristics

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<sup>1</sup>[1993 JLR 24].

<sup>2</sup>4<sup>th</sup> edn, vol.35, para. 200 at p.114.

<sup>3</sup>[1993 JLR 344].

<sup>4</sup>Now in its 18<sup>th</sup> edition (2002).

<sup>5</sup>[1969 JJ 1107].

<sup>6</sup>[2005 JLR 125].

of a partnership in law. He quoted the passage from Cooley quoted above and said:

*“15. Since that decision the legislature has however adopted the Limited Partnerships (Jersey) Law 1994 and the Limited Liability Partnerships (Jersey) Law 1997. Both are of course particular legal animals, but some assistance as to the nature of the species can nonetheless be drawn from the statutes. Article 41 of the 1994 Law provides that...” [see para. 2.3 above]*

He then quoted the more or less identical terms of Article 48 of the 1997 Law and continued:

*“ ...These statutory provisions make it clear that the source of our law of partnerships is to be found in the customary law.*

*“16. Counsel for the Defendant referred us to a number of authorities and to a useful article entitled Limited Liability Partnerships – true partnership – by Jonathan Walker, a solicitor of the Royal Court, published in (1993) 2 Jersey Law Review 1. Counsel for the Plaintiff did not suggest that the law was not correctly stated by the Defendant.*

*“17. Not much may turn however, certainly for the purposes of this case, on the genesis of the law of partnership. Indeed decisions of the English Court, interpreting the common law and even the 1890 Act, may occasionally be helpful. When considering the nature of partnership in Holme v. Hammond (1872) 7 Ex 218 at 234, Cleasby B described Pothier as ‘a very accurate writer’ and, referring to a translation of Pothier in an English textbook, stated ‘that, in my opinion, explains the general nature of partnership’. The customary law principles laid down by Pothier have much in common with the English common law. Indeed the definition of a partnership in section 1 of the Partnership Act 1890 is not dissimilar to Pothier’s definition of a ‘contrat de société’.*

*“18. Pothier defines a ‘contrat de société’ as follows –*

*“Le contrat de société est un contrat, par lequel deux ou plusieurs personnes mettent ou s’obligent de mettre en commun quelque chose, pour faire en commun un profit honnête, don’t ils*

*s'obligent réciproquement de se rendre compte”.*

*“19. In our judgment a partnership in Jersey law is a contractual relationship by which two or more persons oblige themselves to carry on business or to hold something in common with a view to an honest profit which they commit to share amongst themselves.”*

3.5 In the case of **Cannon v Nicol**<sup>7</sup> the issue was whether or not a partnership had been created. Birt, Deputy Bailiff, cited the constituent elements of a partnership cited by Pothier and identified in Bennett v Lincoln with approval. On the matter of the ability to terminate a partnership, the Court noted that under English law, if the partnership agreement had no fixed limit, it could be terminated under English law at any time by a single partner provided he was not acting in bad faith. The Court then went on to note that according to Pothier, a further condition applied, namely that such notice should not be given at an ‘unseasonable time’.

3.6 The Court commented as follows:

*“106 The Court is of course not bound to adopt Pothier when ascertaining the customary law of Jersey. Where the customary law of Jersey on a particular topic has not yet been declared by judicial decision, this Court will often look to some other source for guidance. In some areas the Court looks first to sources such as Pothier, in others it looks first to the law of England. But in neither case is it bound to follow the source to which it first looks. The Court’s duty is to declare the law of Jersey and it must do so for a community of the 21<sup>st</sup> century. It is not bound to adopt a rule or principle laid down several centuries ago if it is clearly inappropriate for modern times.*

*107 In our judgment there is a considerable question mark as to whether the principle that a partnership of unspecified duration (assuming no specific provision dealing with termination in the agreement) cannot be terminated ‘at an unseasonable time’ is appropriate for modern times. It is a very vague concept which could give rise to endless argument. One can imagine almost any partner who does not wish the partnership to be dissolved being able to raise some tenable argument that this is not the appropriate time and it would be better to defer dissolution. Accordingly we would wish to leave open the question of whether this second*

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<sup>7</sup> [2006]JLR 299

*limb referred to by Pothier should be adopted as part of the customary law of Jersey, particularly, as it would seem to us that any case where a partner deliberately chose a clearly inappropriate moment to terminate the partnership would be likely to result in his not acting in good faith. Be that as it may, neither party sought to argue that we should not apply both of Pothier's requirements and accordingly we do so in this case."*

- 3.7 These extracts from the Bailiff's judgment in Bennett v Lincoln, and the Deputy Bailiff's judgment in Cannon v Nicol show that the Royal Court considers that the proper and primary source of the Jersey law of partnerships is 'the customary law'. Noting however that in determining the content of the customary law of partnership, when this has not already been declared by judicial decision, the Court will not feel itself bound to one author or source, even if it is to that source that regard is normally had in that field of law, in the event it considers the law stated there to be inappropriate to the needs of modern day Jersey. The following should be read with this caveat in mind.
- 3.8 In ascertaining what constitutes the customary law of Jersey, recourse has been had to '*The Origin and Development of Jersey Law, An Outline Guide*' by the Island's former Solicitor-General, Stephanie Nicolle QC.<sup>8</sup>, several articles on the sources of Jersey Law and the 'hierarchy' of those sources that have appeared in the *Jersey Law Review*, notably those by Advocate Alan Binnington,<sup>9</sup> Mr Richard Southwell QC<sup>10</sup> and Advocate John Kelleher.<sup>11</sup> The reference in the Bailiff's judgment in Bennett to the 'customary law principles' in regard to partnership 'laid down by Pothier' in his '*Traité de Contrat de Société*' (as to which, see more below) reflects the weight given by Jersey courts to Pothier's writings in the field of contract law.
- 3.9 With regard to the sources of Jersey customary law it should be noted that:
- (a) There is no reference to the law of partnerships or *sociétés* in the *Très-ancien Coutumier*, the *Grand Coutumier*, the *Glose* or the *Coutume Reformée*.
  - (b) It follows that none of the recognised commentators on these Norman *coutumes* and, more particularly, neither Jean Poingdestre<sup>12</sup> and Philippe Le Geyt,<sup>13</sup> the two most notable commentators on the application of the *Coutume Reformée* and Norman customary law generally to Jersey law,

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<sup>8</sup>1999 revision.

<sup>9</sup>*Frozen in Aspic? The Approach of the Jersey Courts to the Roots of the Island's Common Law*, February 1997.

<sup>10</sup>*The Sources of Jersey Law*, October 1997, and *A Note on the Sources of Jersey Law*, June 1999.

<sup>11</sup>*The Sources of Jersey Contract Law*, February 1999.

<sup>12</sup>*Lois et Coutumes* and *Remarques et Animadversions sur la Coutume Reformée*.

<sup>13</sup>*Constitution, Lois et Usages* and *Privilèges, Loix et Coustumes*.

dealt with partnerships. There is therefore no assistance to be derived from these sources.

- 3.10 In the absence of specific guidance in the *coutûmes* on particular areas of law, it appears that Norman jurists would look to the French *droit commun* for guidance. This has been described as:

*“the complex result of the coming together ... of local custom with feudal law, Roman law in modified and elaborated form, canon law and the law merchant”*.<sup>14</sup>

Of these sources, the Roman civil law relating to contracts was the most influential: according to Poingdestre it was this that “the whole world” followed where customary law made no special provision.<sup>15</sup> Jersey seems to have been no exception. It has therefore been necessary to consider, firstly, the relevant Roman law and, secondly, the French *droit commun* relating to partnerships.

#### 4 Roman Civil Law

- 4.1 This report is not the place for a detailed history and analysis of Roman law. What follows is intended to be only a basic summary of the Roman law relevant to this paper.<sup>16</sup>
- 4.2 A contract of *societas* in Roman civil law was a contract whereby two or more persons agreed to make a contribution, whether of capital, property or labour, to some joint enterprise, usually for the purpose of a business venture. It was a branch of the law relating to co-ownership arising by a consensual contract under which the rights of the parties in respect of the co-owned property would primarily be governed by the terms of the contract and enforceable as between the parties by *actio pro socio*. The law relating to *societates* was codified at the behest of Justinian.<sup>17</sup>
- 4.3 There were four principal forms of *societas*:
- (a) A *societas omnium bonorum* – a partnership in which all property of the partners, whether previously in the separate ownership of individual partners or subsequently acquired during the subsistence of the partnership, became the common property of all the partners.

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<sup>14</sup>*European Legal History* by Robinson Fergus & Gordon (a quote lifted from Advocate Kelleher’s article referred to above).

<sup>15</sup>“Le Droit Romain, qui est celui que tout le monde suit en matière de contrats, & autres, ou les Coutûmes n’ont rien pourueu de plus particulier” – *Remarques et Animadversions sur la Coustûme Reformée*.

<sup>16</sup>This summary is taken mainly from *Leage’s Roman Private Law* 3<sup>rd</sup> edn (1964) but reference was also had to *An Introduction to Roman Law* by Barry Nicolas (1975) and *Textbook on Roman Law* by Borkowski & Du Plessis 3<sup>rd</sup> edn (2005).

<sup>17</sup>*Institutes*, Book III, Title XXV.

- (b) A *societas omnium bonorum quae ex quaestu veniunt* – a partnership in which the partnership property was limited to that acquired by the partners in the business transactions for which the partnership contract was made. This was the most common form of commercial partnership and would be presumed in the absence of evidence of an contrary intention.
- (c) A *societas alicuius negotiacionis* – most usually a partnership limited to sharing the profits earned in a particular business.
- (d) a *Societas unius rei* – a partnership which had as its object a single transaction.

4.4 The Roman law relating to *societates* was primarily concerned with defining and regulating the relationship between the members themselves rather than the relationships between the members and third parties. Thus:

- (a) Each partner was bound to make some contribution to the common purpose, whether in money, property or labour and skill.
- (b) The share of each partner in the partnership property and in partnership profits and losses was, absent agreement to the contrary, presumed to be equal.
- (c) Each partner was under a duty of good faith towards the others.
- (d) Each partner was entitled to share in the management of the partnership business – although this could, with the consent of all the partners, be delegated to a manager (who did not have to be one of them).
- (e) No individual partner was entitled to admit a third party to the management of the partnership business without liability to the other partners for any loss resulting from that person's acts and omissions.
- (f) Any partner called upon by a creditor of the partnership to pay more than his proper share as between the partners was entitled to a right of contribution from the others.
- (g) Each partner was bound to bring into the partnership whatever he might have acquired as a partner.
- (h) Enforcement of rights as between partners during the subsistence of the partnership were enforceable by *actio pro socio*. But on termination of the partnership, proper division of the partnership property could be enforced by *actio communi dividundo*.

4.5 A partnership could be dissolved in four circumstances –

- (a) *Ex personis* – i.e., on the death, loss of capacity or insolvency of a partner. Any of these events had the effect of dissolving the partnership as between the other partners as well as in relation to the deceased or incapacitated or insolvent partner, even though the partnership may have by contract provided otherwise (in which case there would be a new *societas* between the survivors).
- (b) *Ex rebus* – i.e., when the purpose for which the partnership had been established was completed or had become impossible of performance or further performance, or by the expiration of the term fixed for the duration of the partnership.
- (c) *Ex voluntate* – i.e., on the retirement of a partner by mutual agreement or by unilateral resignation of a partner. In either case the outgoing partner might be liable to compensate the others where his withdrawal unfairly prejudiced their interests or where his withdrawal was made from some secret motive (for example, to secure for himself some private gain at the expense of or to the detriment of his partners).
- (d) *Ex actione* – i.e., on an action brought *pro socio* against an individual partner to enforce partnership rights *inter se*.

4.6 Although some sort of corporate status was permitted to certain bodies in Roman civil law by senatorial decree or imperial enactment, there were considerable restrictions on the grant of corporate status.<sup>18</sup> Moreover, corporations were not seen as separate entities from their members so much as a useful device for giving effect to collective rights. In general, *societates* did not have distinct legal entity in Roman law – known exceptions being societies for the collection (or ‘farming’) of taxes and the mining of gold, silver or salt, all of which activities were governed by particular senatorial decrees or imperial enactments. Therefore so far as relationships between a *societas* and third parties were concerned:

- (a) If all partners entered into a contract, all could sue and be sued on it. However, if a partner made a contract in his own name, only he could sue and be sued on it.

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<sup>18</sup>“Neque societas neque collegium neque huiusmodi corpus passim omnibus habere conceditur: nam et legibus et senatus consultis et principalibus constitutionibus ea res coeretur. Paucis admodum in causis concessa sunt huiusmodi corpora.” – Gaius, D. 3.4.1.

[“Not every association, college or similar body is allowed to have corporate rights; this is a matter that is controlled by statutes and decrees of the senate and by imperial enactments. It is only in a very few types of cases that such bodies are permitted corporate status.”]

- (b) Where an individual partner made a contract on behalf of the partnership, the partnership as such could not sue on it, although it could secure the benefit of it by compelling the partner concerned to cede his right of action on it to the partners. Conversely, the partnership as such could not be sued on the contract, but the other partners could be sued as individuals by *actio utilis* if the partner who made the contract was their *mandatarius* (agent) or in certain other limited circumstances.

## 5 French Common Law

5.1 The two commentators on pre-Code Civil French law to whom the Jersey courts have traditionally accorded great respect are Joseph Pothier and Jean Domat. Both wrote specifically and in some detail on the law of partnership: Pothier in his *Traité de Contrat de Société* and Domat in *Titre VIII* of his *Les Loix Civiles*.

5.2 Having considered these texts:

- (a) We find there is no material difference between them, although Pothier's *Traité* is the more detailed commentary.
- (b) They show how closely the French *droit commun* followed the Roman civil law relating to *societates* as outlined above, at least up to the mid-18<sup>th</sup> Century (and, given that the relevant parts of the *Code Civil* and *Code Commercial* so closely followed Pothier's *Traité*, even up to the time when those Codes were adopted in 1804).

We consider these commentaries in more detail below.

## **D. CONTENT AND SCOPE OF THE EXISTING JERSEY LAW OF PARTNERSHIP**

- 6 Jersey solicitor Jonathan Walker in the article mentioned by Sir Philip Bailhache in Bennett said that, where partnership matters have come before the Jersey courts, English case law and English textbooks have tended to be cited in preference to the usual commentators on customary law. That may be so. However, as noted above, in the few reported cases to which we have referred above, only one of the English decisions on partnership law which were cited before the court was specifically referred to in the Court's judgment. That was Holme v Hammond, referred to in Bennett only for the purpose of illustrating the respect accorded by the English courts in the 19<sup>th</sup> century to Pothier as a jurist and to note that the English common law relating to partnership had much in common with the principles of law in relation to partnership as set out by Pothier. In Cooley the judge held that the law of Jersey in relation to distribution of profits as between quasi-partners was not settled and therefore felt free to adopt the approach laid down in the English Partnership Act 1890 as explained in Halsbury's English Laws. In Golder the judge seemingly adopted the English law in relation the liability of incoming and outgoing partners.
- 6.1 We have found no evidence that the Jersey courts have to date departed from or developed the law relating to partnerships as expounded by Pothier and Domat to any significant extent. The cautionary note in Cannon is however to be remembered, namely that where no prior judicial decision exists on an issue, the Court is free not to adopt such writings when pronouncing what is the law of Jersey on that issue. Unless and until there is a judicial decision (or a statute) it cannot be said with certainty what is the law of Jersey on a particular point. What can be said is that in general terms in this field of law, the first port of call is normally 'x' or 'y'. With this in mind, there is no evidence that the Jersey Courts have generally followed or adopted either later French law or English law in preference to the principles stated by Pothier and Domat, if and in so far as these may differ from those. The only identifiable developments in the Jersey law of partnership have been the enactment by the States of the 1994 Law and the 1997 Law (neither of which appears to have given rise to any case law as yet).<sup>19</sup>
- 6.2 The 'Cannon caveat' being noted, we therefore conclude that the present Jersey law of partnership is essentially to be found in the works of Pothier and Domat mentioned above – save to the extent that the law in relation to limited partnerships and limited liability partnerships respectively has been altered by the 1994 and 1997 Laws. Thus what follows is a summary of the principles of

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<sup>19</sup>The latter appears to have been enacted largely at the prompting of prominent firms of accountants dissatisfied with the then absence of equivalent legislation in England & Wales and the apparent reluctance of the legislature to contemplate it.

partnership law as set out by Pothier and Domat<sup>20</sup> together with such limited comments or qualifications about the application of these principles in Jersey law as it is possible to make on the limited evidence of the decisions and approach of the Jersey courts in partnership matters.

## 7 Partnership Defined/Elements of Partnership

7.1 A partnership is a contract between two or more persons by which they oblige themselves to carry on some lawful trade or business together or to hold some asset in common with the intention of sharing between them the profits or losses which may accrue from that business or the use of that asset.<sup>21</sup>

7.2 It follows from this definition that there are four necessary elements to partnership:<sup>22</sup>

- (a) There must be a contract whereby each party binds himself to contribute something of material worth, whether capital, assets, skill, labour or other service, for a common purpose. It is not necessary that the partners' contributions should be of the same kind or equal in value.
- (b) The contributions made by the partners must be made for the common benefit of them all, not just for the benefit of one or some of them.
- (c) The purpose of the contract must be the generation of a gain or profit in which each partner can expect to share in proportion to the relative value of his contribution.
- (d) The trade, business or other venture which is the object of the contract, and the gain or profit from it in which it is intended the partners should share, must be lawful.

## 8 Different kinds of partnership

8.1 According to Pothier and Domat, Roman law distinguished between two kinds of partnership: 'general' (sometimes called 'universal') and 'particular'. Both were recognised in French law.<sup>23</sup>

8.2 General partnerships were of two sorts –

- (a) partnerships of all present goods – meaning one whereby the partners agree to place all their estate, both as existing at the date when the partnership is created and in the future, into the partnership; and

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<sup>20</sup>The footnote references to these authors given in the following paragraphs are to the relevant parts of Pothier's *Traité* and Domat's *Les Loix Civiles* in the English translations.

<sup>21</sup>*Pothier*, para 1; *Domat*, para 742; *Bennett v Lincoln* [2005] JLR 125, paras 18-19.

<sup>22</sup>*Pothier*, paras 8-14.

<sup>23</sup>*Pothier*, paras 28-63 ; *Domat*, paras 766-778.

- (b) partnerships of all profits – meaning one whereby the partners have agreed to put into the partnership all gains and profits either may make from all sources while the partnership subsists, but without putting their immovable assets as such into the partnership (as opposed to merely making available the use and benefit of them in the partnership ventures).
- 8.3 A general partnership arises only if the parties have expressly agreed that their partnership should be of this type; it is not to be inferred in the absence of express agreement. Although it is possible that some such partnerships may still exist in relation to, for example, family property, we have not found any remotely recent reference to such partnerships. We think these are probably now of historic and academic importance only in both French and Jersey law. We therefore do not think it necessary to consider them further in this report.
- 8.4 Particular partnerships were of three principal sorts –
- (a) partnerships in a certain thing, as where the partners agree to share in the profits generated by the use of specified property or chattels;
  - (b) partnerships where the partners agree to practise in common some art or profession and to share the profits and expenses; and
  - (c) partnerships in commerce or trade, where the parties combine to carry on a business or trade together with the intention of sharing the profits and risks.
- 8.5 In a particular partnership, the partnership property comprises only those assets which each partner has expressly agreed to contribute. The partnership business will be limited to that which the partners have expressly agreed should be the partnership business or, in the absence of express agreement, that business which they do in fact carry on in common. In a partnership relating to specified property or chattels, the agreement may extend to placing the property or chattel itself into the partnership property. Or it may be limited to placing the profits earned by the use of them, the individual partners retaining ownership of the property and chattels which they owned before the partnership was created. This depends on the intention of the parties at the time they entered into the agreement. In the event of subsequent conflicting claims about what was intended, it is for the court to judge what the evidence shows the original intentions were.
- 8.6 French law recognised three types of business associations (*sociétés commerciales*):<sup>24</sup>

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<sup>24</sup>*Pothier*, paras 56-63.

- (a) The first of these was the *société en nom collectif*, in which two or more persons combined to carry on a business or trade in the names of both or all of them or under a collective name such as XY & Cie. These are in most respects the same as unlimited liability partnerships in England which are governed by the Partnership Act 1890. Each member of a commercial partnership *en nom collectif* is jointly and severally liable for the debts of the partnership without limitation – provided those debts were incurred in the name of the partnership and by some one who had authority to bind all the partners.
- (b) The second was the *société en commandite*, in which a trader or businessman entered into partnership with a person who did not himself intend to carry on that trade or business but who provided capital for it in return for a specified share of the profits and agreed to bear the same proportionate share of any losses limited to, as a maximum, the extent of the capital he had contributed. The business was carried on and contracts were made in the name of the active trader or businessman alone. The partner *en commandite* was not entitled to play any part in the management of the business. Provided he did not do so, he incurred no direct obligations to third parties with whom the active partner contracted; his obligation was simply to indemnify the active partner against the debts contracted on behalf of the partnership up to the limit of his contribution. This type of commercial partnership has now effectively been superseded in Jersey by limited partnerships under the 1994 Law. The present Jersey law in relation to such partnerships is of course primarily that set out in that Law and does not require repetition here. However, as noted already above, Article 40 of the 1994 Law expressly provides that the rules of customary law in relation to partnerships generally continue to apply to such partnerships except in so far as inconsistent with the statutory provisions.
- (c) The third type of commercial association was the *société anonyme et inconnue*, in which the partners agreed to take shares in a business to be carried on by one or some of them in the name or names of that person or those persons alone or under some style other than the names of all the partners. The anonymous partner incurred no liability directly to creditors of the partnership. This type of commercial association has now been replaced in Jersey by the limited liability partnerships permitted and is governed by the 1997 Law.

8.7 For the purposes of this report, we are concerned essentially with the law relating to partnerships *en nom collectif* and do not give further specific consideration to limited partnerships or limited liability partnerships.

## 9 The nature of partnership<sup>25</sup>

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<sup>25</sup>*Pothier*, paras 4-7; *Domat*, para 753.

- 9.1 By its very nature, a contract of partnership is:
- (a) consensual – i.e., can arise only by mutual consent of all parties to it – and
  - (b) synallagmatic – i.e., imposes mutual obligations on each of the parties to it.
- 9.2 It necessarily follows that a contract of partnership is one of good faith, requiring honesty and fair dealing as between the partners themselves. Further, any partner dealing with a third party on behalf of the partnership, or in any circumstance where the partnership may incur obligations, owes his co-partners a duty to be honest and fair in his dealings with that third party.
- 9.3 Because of the requirements of mutual consent and good faith, no one partner can admit a third party to the partnership without the consent of all other existing partners. It follows that, on the death of a partner, his personal representative or heir does not become a partner in his place and, absent express provision to the contrary, the partnership comes to an end (as to which, more below).

## 10 Formalities for the creation of a partnership<sup>26</sup>

- 10.1 Both Pothier and Domat say that there is no particular formality required to make a valid partnership contract because (per Pothier) it is “a contract of natural right governed only by the principles of natural law, and a consensual contract, formed solely by the consent of the parties, it is not in itself subject to any form.”
- 10.2 It appears, however, that French law, pre- and post- the Code Civil, in fact did specify certain formalities in the case of commercial partnerships. The partnership agreement for a commercial partnership *en nom collectif* or *en commandite* had to be established by public acts or reduced into writing signed by the parties, and apparently no evidence could be admitted “against and beyond the meaning of the partnership deed” or as to what may be alleged to have been said before the deed was made, during its operation, or since. It seems this may even have applied to non-commercial partnerships where the issue involved more than 100 livres or 150 francs. A *société anonyme* could only be formed by public acts. Furthermore, it seems that an extract of the deed had to be registered at the registry of the local tribunal of commerce.<sup>27</sup> The extract registered had to include the full names, rank and addresses of the partners and any “*clause extraordinaire*”, an example of which given by Pothier being a clause providing that only a named individual partner is authorised to sign deeds in order to bind the partnership. Pothier comments that, notwithstanding the precision of the provisions of this Ordonnance, the

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<sup>26</sup>Pothier, paras 77-83; Domat, para 759.

<sup>27</sup>L'ordonnance du commerce de 1673, tit.4, art.1, later Art.1325 of the Civil Code.

formalities of registration and publication had fallen into disuse and were no longer observed.

- 10.3 We have found no evidence that Jersey customary law required partnership agreements to be in writing and registered in some manner. However, it would appear from the limited relevant case reports available that, if this ever was the case as regards partnerships *en nom collectif*, it is not so now and has not been for some considerable period. Registration of limited and limited liability partnerships is of course required by the 1994 and 1997 Acts.

## 11 **Commencement and duration**<sup>28</sup>

- 11.1 The commencement date and duration of a partnership are matters for agreement between the parties. However, in the absence of any express agreement to the contrary:

- (a) the partnership will be treated as having started from the date of the agreement to enter into the partnership, and;
- (b) it will be deemed to have been made for the duration of the joint lives of the partners.

## 12 **Management of the partnership business**<sup>29</sup>

- 12.1 In the absence of agreement to the contrary, all partners in a partnership *en nom collectif* are entitled to share in the management of the partnership business and to enter into obligations on behalf of the partnership – subject, of course, to the overriding requirement of good faith. The partnership agreement may, however, provide that the management be delegated to one or some only of the partners, subject to such limitations or restrictions as all the partners may think fit. As noted already above, the ‘sleeping’ partner in a partnership *en commandite* has no right to be involved in the management of the partnership business if he wishes to retain his limited liability, and in a *société anonyme* the management of the business is always delegated.

- 12.2 In the absence of any express limitation or restriction, the powers of the managing partner(s) will be treated as equivalent to those conferred by a general power of attorney given by one individual to another to manage his property. Thus the managing partner may do anything necessary for the carrying on of the partnership business and will bind the partnership. In the case of a commercial partnership he would be able to sell the stock in trade of the partnership because that is precisely what it is there for, but he would not be entitled to sell the business premises or the moveable property necessary to conduct the partnership business. Nor may he compromise claims made by or brought

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<sup>28</sup>*Pothier*, paras 64-65; *Domat*, para 762.

<sup>29</sup>*Pothier*, paras 66-72.

against the partnership without the consent of all the partners, because that goes beyond the powers which would be conferred by a general power of attorney.

12.3 Where the power of management is conferred on one or several partners by the partnership agreement in circumstances that it was a condition of that partner or those partners entering into the partnership that he or they should have the management of the partnership business, that power is irrevocable while the partnership subsists. If, however, the power of management has been granted subsequently, that takes effect as a revocable mandate which can be revoked by the remaining partners at any time.

### 13 **Partnership shares**<sup>30</sup>

13.1 In the absence of any agreement to the contrary the partners are deemed to have contributed in equal shares and are therefore presumed to be entitled to share in the profits of the partnership and obliged to bear any losses in equal shares.

13.2 It is not necessary that each partner's contribution should be the same in value and kind. The partnership agreement may ascribe relative values to the respective contributions. If so, in the absence of any agreement to the contrary, the entitlement to a share in the profits and the obligation to bear a share of any losses will be in proportion to the relative value of each partner's contribution. Alternatively, the partnership agreement may specify the relative proportions in which the profits and losses are to be shared irrespective of the relative value of the contributions. It may also specify that a partner's entitlement to share in the profits and his obligation to bear a share of the losses may be in different proportions, or that these are dependent upon a specified condition being met, or even that, as between the partners,<sup>31</sup> an individual partner is not obliged to bear any part of the losses.

13.3 A further possibility is that the agreement may provide for the shares to be determined by one of the partners or by a third party "according to the rules of equity". If they do, there is a presumption that the decision is equitable and it can only be challenged if it is obviously inequitable – the test of that presumably being equivalent to the English 'Wednesbury test' i.e. no reasonable person informed of the facts could have come to the decision.

### 14 **Rights of the partners in relation to partnership property**<sup>32</sup>

14.1 Each partner is entitled to use any partnership property, provided he does so for the purposes for which it was intended to be used and not contrary to the interest of the partnership – i.e., does not prevent its use for the purpose of earning a profit for the partnership or deprive his co-partners of a fair

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<sup>30</sup>*Pothier*, paras 73-76; *Domat*, paras 743-750.

<sup>31</sup>But not in regard to third parties dealing with the partnership.

<sup>32</sup>*Pothier*, paras 84-90

opportunity to derive the benefit from it which it was intended they also should have.

- 14.2 Each partner is entitled to require his co-partners to join with him in meeting any expense necessary to preserve and maintain the partnership property.
- 14.3 A partner is not entitled unilaterally to alter partnership property, even though the alteration might be an improvement and therefore ultimately advantageous to the partnership.
- 14.4 A partner (other than one to whom a power of management has been given which includes the power to do this) may not, without the consent of all partners, alienate or charge partnership property – although he may do so in respect of his own share.
- 14.5 A partner may, without the consent of his co-partners, take a third party into a separate partnership with him in regard to his own partnership share. But, if he does so, the third party does not thereby become a member of the first partnership and there is no contractual relationship between the third party and the other members of the first partnership.

## 15 **Mutual obligations of partners and enforcement of these**<sup>33</sup>

- 15.1 As already noted above, a contract of partnership imposes on the partners reciprocal obligations which can be enforced by one or more of the partners against the others. Pothier says that the principal object of these obligations are twofold.
- 15.2 The first of these is the obligation of a partner to account to his co-partners for whatever he may owe the partnership, after deduction of whatever he is properly owed by the partnership. What a partner may owe the partnership falls broadly under three heads:
  - (a) that which he has agreed to contribute to the partnership as his share but has not yet delivered;
  - (b) that which he has withdrawn from the partnership funds for his own use and benefit, and;
  - (c) any loss that he has caused to the partnership.
- 15.3 In the case of the first head:
  - (a) where the promised contribution is a sum of money, the partner is also liable to account for interest on that sum from the day on which the money should have been paid to the partnership – i.e., the specific date

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<sup>33</sup>*Pothier*, paras 108-137; *Domat*, paras 779-800.

agreed for such payment or, if no date for payment was specified, the date when his co-partners lawfully made demand for such payment.

- (b) Where the promised contribution is a particular asset which is a usufruct, the partner is also liable to account for all such fruits of that asset which he has taken since the inception of the partnership, whether or not he was obliged to deliver the asset itself at that date. If he was required to deliver the asset itself at the date when the partnership commenced, or at some subsequent date, then he is also liable to account even for such of its fruits after that date as he has not actually taken.
- (c) Where the promised contribution is an asset to be used in the partnership business, or, if not the asset itself but its use and enjoyment for the benefit of the business, the partner is liable to account for any profit which could have been earned during the period between the date when that asset should have been delivered or made available to the partnership.

#### 15.4 As to the second head:

- (a) The obvious example is where a partner has taken drawings which prove to be in excess of his entitlement for the period in question. In such a case the partner is liable to repay the excess together with interest.
- (b) Another example given by Pothier is where a partner has obtained a profit by selling his services (being of a kind which he had agreed to contribute to the partnership) otherwise than through or for the partnership, then he must account to the partnership for that profit.
- (c) A further example is where a partner is personally owed a debt by a debtor of the partnership and receives money from that debtor; in such a case the partner is required to appropriate the money received pro rata between the personal debt and that owed to the partnership.
- (d) A partner who receives a benefit from a third party to whom he has been introduced in the course of the partnership business and would not have met otherwise is not required to account for that benefit if conferred on him otherwise than in connection with the partnership business or what should be the partnership business.

#### 15.5 The obligation to account for losses caused to the partnership extends only to those losses caused by a breach of the duty of care owed by partners to each other in the conduct of the business and management of the assets.

- (a) The standard of care owed under this duty appears to be a subjective standard – the care of which the partner in question is capable and which he applies to his own affairs. However, there is an objective minimum standard in that each partner is presumed to be capable of “the ordinary

care which the least intelligent persons exhibit in the management of their affairs”.

- (b) A partner who has caused a culpable loss to the partnership is not entitled to set off that loss against a profit which he may have made for the partnership in some unrelated transaction in the course of the partnership business. This is because he is under a duty to account to the partnership for that profit in any event.

15.6 The second category of reciprocal obligations is the obligation of an individual partner to account to his co-partners in proportion to his share for anything which is owed to them by the partnership. It is not necessary to cite examples in this category. However, it should be noted that where one of the partners is insolvent and so unable to contribute his share of the debt owed by the partnership to another partner, the shortfall falls to be borne by the creditor partner and the other, solvent partners in equal shares (or pro rata to their respective shares).

15.7 A further, important mutual obligation on the partners is to submit to the distribution of the partnership assets at the termination of the partnership. This is more conveniently dealt with under the heading of dissolution.

15.8 Enforcement of these reciprocal obligations is, as in Roman law, by *action pro socio*.

- (a) This is a personal right of action: it may be brought or continued by the personal representatives of a deceased partner, and it brought or continued against the personal representatives of a deceased partner.
- (b) The principal object of such an action is to secure the distribution of the partnership assets on termination of the partnership. However, an action may also be brought to compel performance of particular obligations while the partnership still subsists. The essence of the action is one for an account and payment of what may be found due on the taking of the account.
- (c) Pothier says that each of the parties to an action of this kind has the right to demand that the claim be referred to arbitration. Indeed, the Ordonnance of 1673<sup>34</sup> expressly provided that all partnership agreements should include an arbitration clause. There is, of course, no equivalent Jersey Law and it would seem therefore that this is probably not a requirement of Jersey law.

## 16 **Dissolution**<sup>35</sup>

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<sup>34</sup>Tit.4, art.9.

<sup>35</sup>*Pothier*, paras 138-154; *Domat*, paras 801-816.

- 16.1 There are four circumstances in which a partnership can be dissolved:
- (a) Effluxion of the time specified for its duration.
  - (b) Completion of the business or extinction of the thing which comprised the object of the partnership.
  - (c) The death or insolvency of a partner.
  - (d) One or more of the partners wishing to terminate the partnership.
- 16.2 The first of these is self-explanatory. It is only necessary to add that the parties to a fixed-term partnership may of course agree to prolong it beyond the specified term, but that must be done by means of a deed complying with the formalities required of a partnership deed.
- 16.3 The second circumstance is also self-explanatory and requires no further comment.
- 16.4 Any type of partnership, even a fixed-term partnership, is dissolved on the death of one of the partners.
- (a) As noted already, the personal representatives and heirs of the deceased partner do not become partners in his place; they merely become entitled to enforce or are bound to discharge the dead partner's rights under the partnership crystallised as at the date of his death. This was the position under Roman law. However, Pothier suggests that under French law a stipulation in a partnership agreement that, on the death of a partner, his heirs shall become a partner in his place is binding and enforceable.
  - (b) The death of one partner does not merely dissolve the partnership as between him and his co-partners; it also dissolves it as between the surviving partners, unless the partnership agreement expressly provides to the contrary.
- 16.5 The insolvency of one of the partners has the same consequence for the partnership as would his death. Permanent physical or mental incapacity does not have the same consequences, but would be a ground for termination by notice (see next).
- 16.6 A partnership can be dissolved at any time by the mutual consent of all partners. Where only one or some of the partners wishes to terminate the partnership, the position is more complicated.
- (a) In the case of a partnership without limitation of time, any one of the partners may give notice to his co-partners that he no longer wishes to remain in the partnership. However, it is a prerequisite that such notice must be given in good faith. The giving of notice to dissolve the

partnership in order that the partner giving notice may take for himself some benefit for which, if the partnership were to continue, he would have to account to the partnership would not meet the requirement of good faith.

- (b) As noted in paragraphs 3.5 and 3.6 above, according to Pothier, it is also a prerequisite that the notice should not be given at “an unseasonable time” – i.e., when it would be in the common interest of the partnership to defer dissolution. Whether this requirement should form part of Jersey law was questioned in the Cannon case.
- (c) In the case of a fixed-term partnership, a partner cannot give notice of dissolution unless he has good cause for dissolution before the expiry of the agreed term. Good cause for this purpose may be persistent breach of the terms of the partnership agreement or bad faith on the part of his co-partners or some one or more of them. It would also include a partner’s incapacity to participate in the affairs of the partnership, whether by reason of impaired physical or mental capacity or otherwise, especially if those affairs are such as require his personal attention, and this may work either way: the incapacitated partner having good cause, or the other partners having good cause.
- (d) To be effective a notice of dissolution must be given in writing and to all other partners.
- (e) Where the right to serve such a notice is likely to be controversial, it is open to the partner giving the notice to bring his co-partners before a court in order to establish its validity.

## 17 **The consequences of dissolution**<sup>36</sup>

- 17.1 The essential consequence of dissolution is that the authority of each partner to bind his co-partners and their mutual rights and obligations as partners are terminated – save in so far as it is necessary for the winding up of the partnership’s affairs. The former partners are under a mutual obligation to do all that may be necessary to enable the affairs of the partnership to be wound up. What is necessary for the winding up of the partnership’s affairs includes completion of any transaction or business commenced before dissolution. If that transaction or business is completed by one of the former partners, he must account to the partnership for any profit. On the other hand, if this results in a loss, his co-partners must bear their proportionate share of the loss.
- 17.2 Dissolution does not put an end to debts owed by individual partners to the partnership or debts owed by the partnership to individual partners. These must be accounted for in the winding up of and the final account for the partnership.

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<sup>36</sup>*Pothier*, paras 155-180; *Domat*, paras 817-822.

- 17.3 If the cause of dissolution is the death of one of the partners, the personal representatives and heirs of the dead partner have a duty to complete those transactions which he had commenced for the partnership and to account to the partnership for any profit resulting from it. Again, if a loss results, the other partners must acquit the estate of the dead partner from all but his proportionate share of that loss.
- 17.4 Where a partner, in good faith and before he has learnt of the dissolution, enters into new transactions on behalf of the partnership after the date of dissolution, those transactions will bind the partnership and the profits or losses resulting from them will have to be accounted for to or by his co-partners in the usual way. Thus the estate of a dead partner whose death has caused the dissolution will be entitled to a proportionate share of any profit and obliged to bear a proportionate share of any loss notwithstanding that those transactions were entered into after the partner's death.
- 17.5 The same reasoning applies to a trader who has in the course of his business supplied goods or services to one partner on account of the partnership. If goods or services are supplied in good faith and in ignorance of the dissolution, the debt in respect of these will be a partnership debt and all partners or their heirs will be bound. However, there is a distinction to be drawn between partnerships for a fixed term and those which are not. If goods or services are supplied after the expiry of the fixed term, the trader or artisan concerned cannot claim ignorance of the dissolution because "those who have business with persons in partnership ought to inform themselves of the terms of the partnership".<sup>37</sup>

## 18 **Distribution of partnership assets**

- 18.1 Following dissolution each former partner has the right unilaterally to demand a distribution of those assets which remain in common. Such demand should be made against all the former co-partners (or their respective estates). It can be enforced by the *action pro socio* as mentioned earlier. If all former partners are not cited, those who have been cited can require the plaintiff to join those who have not, and any former partner not cited can intervene without waiting for the plaintiff's summons to join them.
- 18.2 The demand for a distribution can usually be made immediately after dissolution. However, if the partners have agreed to delay the distribution for a certain period or to postpone it until a time which they consider would be more advantageous for disposing of the common property, a claim for distribution would not be usually be entertained until that period has expired or that time has arrived.

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<sup>37</sup>Per Pothier citing *Gomez, Resolutionum tom.ii, tit.5.*

18.3 It is a prerequisite of a distribution that a final account should be taken of what each of the former partners owes to or is owed by ‘the community’. According to Pothier, in French law there was an established and somewhat complicated procedure for this. Because we do not find this procedure altogether clearly expressed, in either the original or the English translation, we think it sensible to set out what Pothier says more or less in full in the English translation:

(a) Firstly, an account should be taken of what each former partner owes to the community and what is owed to him by the community (including whatever has become due from one to the other since the date of dissolution by way of both principal and interest). The total owed by each former partner to the community should be set off against the total which he is owed by the community and, “what remains, after such set-off, should be put to the debit or credit of the community”. For this purpose, the ‘book of the partnership kept by one of the partners’ is proof as between the partners of what has been received or expended for the partnership.

(b) Secondly,

*“the common stock is set forth that is to say, a detailed account of all the different things of which the community is composed; and there is comprehended in this stock, amongst the (dettes actives) debts due to the community, the sums which each of the parties (after the set-off has been made) owe to the community; and on the distribution of the community their own debt is to be deducted from their share.*

*“An account also of the (dettes passives) debts due from the community is prepared, and there is comprehended in it the sums which (after a set-off has been made) are owing to each of the parties by the community.*

*“These sums ought to be taken by them before the partition of the community.”*

For this purpose, the non-monetary assets have to be valued, whether by agreement between the former partners or by an independent valuer appointed by them or, in default of agreement, by the court.

(c) After the stock has been taken, the distribution can take place.

(d) The distribution should begin with the moveables. Each of the former partners has the right to demand that his share of the moveables be given in kind and that, for this purpose, the moveables should be made into parcels to be drawn by lots. His co-partners cannot insist on a sale unless the partnership has debts (including any owed to the former partners which they have a right to receive before distribution) which

can only be discharged by a sale of the moveables – in which case so much as maybe necessary of the moveable must be sold, starting with any perishable items. Where a former partner contributed as his share or part of his share some thing in kind (as opposed to merely its use or fruit) and that thing remains part of the partnership assets on dissolution, he has no greater entitlement to take that thing back on distribution than do his co-partners. It must be lotted like any other asset.

- (e) After the moveables have been distributed, the immoveables should be distributed in the same way. Where, as is likely, the value of each lot differs, Pothier says that equalisation is obtained by means of charging the higher value lot with such sum as is necessary to ensure that each partner receives overall a property plus or minus a sum of money which equates to his proportionate share. He gives the simple example of two partners with two properties valued in total at £20,000 to be distributed between them but one being valued at £12,000 and the other at £8,000: each is entitled to receive an equal share, so the one who takes the property valued at £12,000 takes it subject to a charge in the sum of £2,000 in favour of the one who takes the property worth £8,000. The partner whose lot is so charged is under an obligation to pay the sum charged.
- (f) As an alternative to drawing for the lots, the parties may choose to auction them as between themselves ('licitation'), the price paid by the successful bidder being divided between all the partners in accordance with their respective entitlements. The consent of all the parties is required except where the nature and number of the assets are such that there is no practicable possibility of a draw.
- (g) The debts due to the partnership are divided between the partners by operation of law. However, because it is impracticable to expect each partner to collect his own share of a debt from each creditor, it is customary for the good debts to be lotted and drawn in the same way as other assets. However, bad or doubtful debts are not treated that way but the responsibility for collecting them is delegated to one of the partners who must account to the others for whatever he succeeds in collecting.
- (h) The expenses of effecting distribution are properly to be charged to the partnership and deducted from any monies held before distribution. Otherwise they should be borne by the former partners in the same proportions as their respective shares in the common stock.

18.4 We have not seen any case law which indicates whether or not Jersey law historically followed this somewhat arcane procedure for distribution.

However, as noted earlier, in Cooley the Royal Court adopted the approach set out in the English 1890 Act as described in *Halsbury's Laws of England*<sup>38</sup> – i.e.:

*“In settling accounts between the partners after a dissolution of partnership, the firm’s assets, including any sums contributed by the partners to make up losses or deficiencies of capital, are applicable in the following manner and order: (1) in payment of the firm’s debts and liabilities to persons who are not partners; (2) in repaying to each partner rateably what is due from the firm to him for advances as distinct from capital; (3) in repaying to each partner rateably what is due from the firm to him in respect of capital; and (4) in dividing any residue among the partners in the proportion in which profits are divisible. In the absence of contrary agreement, the amount payable by the other partners in respect of the share of a deceased or outgoing partner is a debt from the other partners accruing at the date of death or dissolution, as the case may be.”*

- 18.5 There is no indication in the judgment that the advocates for either party had contended for any different approach, still less for that set out by Pothier. In the absence of any subsequent decision to the contrary, we assume that, whatever may have been the position before 1993, this is currently the position in Jersey law – although, as previously noted, Cooley was not in fact a partnership case as such.

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<sup>38</sup>4<sup>th</sup> edn, para.200 at p.114.

**E. ISSUES ARISING IN VIEW OF THE AGE OF THE SOURCE MATERIAL OF JERSEY LAW OF PARTNERSHIP**

- 19 It is inescapable that lawyers advising clients in the field of partnership law are, absent judicial decisions, presently almost wholly reliant for guidance on what that law is likely to be, on the writings of authors living in the 17<sup>th</sup> and 18<sup>th</sup> centuries.
- 19.1 Jersey holds itself out as a high quality, modern international commercial centre. In doing so it must compete in a global market with other centres advancing the same message. The reputation of the Island in this regard is not assisted by, and may even be damaged by the fact that in this important commercial field, the sources of reference are such aged and largely inaccessible texts.
- 19.2 Domat and Pothier, whilst undoubtedly learned authors of their time, cannot hope to have considered partnership issues in the context of the modern world and the problems that arise in the environment in which we now operate. The court in Cannon v Nicol recognised the potential difficulty of reliance on ancient writings and held itself perfectly entitled to choose not to adopt the writings of such authors as representing Jersey law, where it did not consider they suited the needs of the Island in the 21<sup>st</sup> century. There will also inevitably be silences, and absences of the detail necessary to permit lawyers to grapple with modern day problems and structures.
- 19.3 It is therefore considered important to identify an appropriate more modern source to which regard should be had both in the absence of local authority and to clarify and lend flesh to the bones of such writings as do exist and constitute local authority.
- 19.4 If it is considered preferable to present Jersey's partnership law in a modern statutory framework, again it would be extremely useful to identify an appropriate 'source statute' to use as a foundation. It is to be noted that Guernsey, Jersey's closest 'offshore' neighbour has had a partnership statute since 1995. There is little doubt, that in this area of law, Jersey lags behind its competitors in providing a clear and accessible statement of the law.
- 19.5 The candidate jurisdictions are firstly England, Scotland and the Commonwealth jurisdictions which derive their law from England, and secondly, France. The limited case law demonstrates that the Jersey Court has previously considered it appropriate to draw upon English law. However, this has not been tested, and so it is necessary to examine the source of English partnership law and to contrast its content with the writings of Pothier to which historically primary recourse is had in this field in Jersey, in order to confirm or otherwise whether reference to English law was in fact sensible and appropriate. It is relevant to note that the Guernsey partnership law, which in its pre-statute,

customary law state will have been very similar to Jersey law, is modelled very closely on the 1890 English Partnership Act. This is perhaps a preliminary indication that the English law and the writings of Pothier are not dissimilar. The other candidate, France, is included because Pothier's writings in the field of contract law were heavily drawn upon in the production of the Code Civil. It is possible therefore that it is to modern French law that Jersey law should turn for assistance.

- 19.6 We now consider the origin of English partnership law, its comparison with the law of partnership as stated by Pothier, and then undertake a similar exercise in respect of modern French law.

## F. ORIGINS OF ENGLISH PARTNERSHIP LAW

- 20 It has proved surprisingly difficult to find any convenient, detailed history of the development of English partnership law before the 19<sup>th</sup> Century.<sup>39</sup> There is no doubt that English partnership law does have common roots with other European jurisdictions in the Roman civil law. However, in England, universal or general partnerships appear to have died out relatively early while commercial partnerships survived and developed with the expansion of trade and commerce.
- 20.1 In the Middle Ages commercial partnerships existed in Europe in two principal forms: the *commenda*, and the *societas*. The *commenda* was founded on a contract which enabled a merchant ('the *commendator*') to lend capital to a partner ('the *commendatarius*') to employ in trade without contravening the laws against usury. The *commendatarius* was entitled to his expenses of carrying on the trade and a fixed share of the profits after deduction of such expenses. In the event of the trade failing and the capital being lost without fault on the part of the *commendatarius*, the loss would be borne by the *commendator*. This form of partnership contract was common throughout mediaeval Europe, and was known in England.<sup>40</sup> Initially such partnerships involved only the *commendator* providing the capital for a single venture, but later cases involved capital being provided by both *commendator* and *commendatarius*, and for a series of ventures or for a specified period or even for an indefinite time. This type of partnership was particularly common in the Italian city states. In France it became the *société en commandite* discussed above. However, it did not thrive in England.
- 20.2 The principal reasons for this appear to have been as follows:
- (a) At first, the law merchant in England developed in much the same way as elsewhere in Europe. Mercantile customs relevant to a particular case were raised by the merchants and competing claims were decided by juries of merchants. However, as the importance of England as a trading and commercial power increased, there was considered to be a need for the law to be more clearly defined. This led to the English courts holding that the rules of the law merchant were questions of law to be decided by the judges rather than matters of custom to be determined by

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<sup>39</sup>The summary which follows is a distillation from various sources, the principal ones being:

(1) *An Introduction to English Legal History*, Sir John Baker, 4<sup>th</sup> edn, 2002;

(2) *A History of English Law*, Sir William Holdsworth, 7<sup>th</sup> edn rev. & ed. A.L. Goodhart & H.G. Hanbury, mainly volumes V & VIII;

(3) *Selected Essays in Anglo-American Legal History*, 1907-09, ed. F.W. Maitland.

<sup>40</sup>See, e.g., *Select Cases on the Law Merchant (S.S.)*, vol.i, 77-8, which mentions a case of 1300 in the Fair Court of St Ives; and Thomas's Calendar of early Mayor's Court Rolls, 104-5 and 132, which mentions cases in 1300 and 1302.

juries.<sup>41</sup> Thus from the late 16<sup>th</sup> and early 17<sup>th</sup> centuries, English commercial law appears to have developed in a somewhat insular way, detached from that of mainland Europe.

- (b) Further, England's trade, although expanding in and from the Middle Ages, did not begin to develop rapidly until the later part of the 16<sup>th</sup> century, by which time the joint stock company had begun to emerge as an alternative and apparently more attractive means of raising capital for commercial ventures.
- (c) Additionally, in the early 18<sup>th</sup> century there was considerable political opposition in England to the idea of limited liability, which was of course an essential feature of the *commenda*.

20.3 The consequence of all this was that, so far as concerns partnership, English law became focussed solely on that type of partnership which was equivalent to the French *société en nom collectif*. In the latter half of the 19<sup>th</sup> century economists and lawyers, including some judges, began to campaign for some form of limited liability partnership, as had already been developed in the United States of America. It seems there was still considerable establishment opposition to the idea, and this persisted until the passing of the Limited Liability Partnership Act 1907.

20.4 This position is reflected by comments made by Lord Lindley in chapter 1 of the 3<sup>rd</sup> edition of Lindley on Partnerships.<sup>42</sup> He quoted a number of definitions of partnership, including those of Pothier, Domat, the French Code Civil and a number of other European and Roman jurists, and commented that, with one exception, all these

*“are, with reference to the law of England, too wide; for they include not only partnership in the proper sense of the word, but also many corporations and companies which differ from partnerships in several important respects.”*

The exception was a definition by one Dixon:<sup>43</sup>

*“A partnership is a voluntary unincorporated association of individuals standing to one another in the relation of principals for carrying out a joint operation or undertaking for the purpose of a joint profit.”*

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<sup>41</sup>See, e.g., *Pollans v van Mierop* (1765) 97 Eng Rep 1035 per Lord Mansfield.

<sup>42</sup>(1873), the earliest edition which we have been able to find to date.

<sup>43</sup>The author of an early 19<sup>th</sup> century book on partnership law of which we have not yet been able to find a copy.

Lord Lindley said that in English common law every association of individuals formed for the purpose of sharing profits is either a partnership or a corporation and, “a company which is neither a corporation nor a partnership is a thing unknown to the common law of England.”

- 20.5 Lord Lindley went on to distinguish between partnerships, corporations and unincorporated companies. He said that the distinguishing feature of a corporation is that it is a “fictitious person created by special authority” and enabled by that authority to acquire rights and incur obligations as a means of attaining the object for which the corporation is created; the rights and obligations of individual members are not those of the corporation, nor are the rights and obligations of the corporation exercisable by or enforceable against the individual members. By contrast, in English law a partnership has no distinct legal personality from its members and therefore has no rights and obligations distinct from those of its members. Lord Lindley commented that a partnership consists of a few individuals known to each other, bound together by ties of friendship and mutual confidence, and who, therefore, are not at liberty without the consent of all to retire from the firm and substitute other persons in their place. By contrast, a company consists of a larger number of individuals, not necessarily acquainted, and who join and leave at will. He suggested that the law of unincorporated companies “is composed of little else than the law of partnership modified and adapted by statute to the wants of a large and fluctuating number of members”.
- 20.6 It remains an essential feature of English partnership law that a partnership has no legal personality distinct from its members. A firm cannot in its own right acquire rights or obligations; the rights and liabilities of a partnership are the collective rights and liabilities of each of its members. The firm cannot hold an interest in property; any property introduced or acquired for the partnership must be held by some of the partners as trustees for the benefit of themselves and their co-partners. The firm name is merely a convenient shorthand for the names of all its members; it is not a legal entity.
- 20.7 The other significant difference between English law and mainland European law was the refusal of the English courts to recognise as a partnership any community in property or profits which does not arise from the carrying on of a business for profit (including for that purpose a professional practice). This reflected the disappearance of general and non-trading particular partnerships from English law. This probably was largely due to differences in property and inheritance law in England and mainland Europe.
- 20.8 In 1865 the first legislation concerning partnership law in the United Kingdom other than Ireland (see below) was passed. This was Bovill’s Act (An Act to amend the Law of Partnership).<sup>44</sup> From the 18<sup>th</sup> century the courts had accepted that a person who shared in the profits of a business was liable as a partner for

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<sup>44</sup>28 & 29 Vict c.86.

the losses of that business. However, it had come to be considered unjust that someone who had merely lent money to a firm at a rate of return fluctuating with and payable out of the profits of a firm should be treated as a partner. In *Cox v Hickman*<sup>45</sup> the House of Lords held that the sharing of the profits of a partnership was determinative of the existence of a partnership but was merely *prima facie* evidence of a partnership which could be rebutted. Bovill's Act expanded the effect of this decision by removing any presumption of partnership or liability as a partner in four situations in which a person receives a share of the profits of a business: where the receipt of a share of the profit is consideration for the sale of a business, is repayment of a loan, is remuneration for services, or is an annuity to the widow or family of a deceased partner. No equivalent statute was enacted in Jersey.

- 20.9 Nonetheless, there are, it is considered, relatively few differences between the pre-1890 English law of partnership and what appears to be Jersey customary law in relation to *sociétés en nom collectif* as set out above.

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<sup>45</sup>(1860) 8 HL Cas 268.

**G. THE CURRENT ENGLISH LAW OF PARTNERSHIP AND THE WRITINGS OF POTHIER COMPARED**

21 The Partnership Act 1890 (the “1890 Act”) forms the basis of partnership law in the United Kingdom.<sup>46</sup> It is a convenient shorthand in this report, to refer to UK partnership law generally as ‘the English law of partnership’ unless the context requires otherwise.

21.1 The 1890 Act was expressed to “declare and amend the law of partnership” and provides that the pre-existing common rules of equity and common law relating to partnership remain in force except in so far as they are inconsistent with the express provisions of the Act.<sup>47</sup> In the 6<sup>th</sup> (1893) edition of his book on Partnership (the first revision of the work after the 1890 Act came into force), Lord Lindley commented,

*“With one exception the Partnership Act 1890 introduces no great change in the law. It amends the law in some small particulars, and it removes doubt on one or two controverted points; but, speaking generally, the Act makes no important change in the law save in respect of the mode of making a partner’s share of the partnership assets available for the payment of his separate judgment debts.”*

A revised version of this comment survives at paragraph 1-06 of the current (18<sup>th</sup>) edition of Lindley & Banks on Partnership, and the current editor notes in a footnote that the one important change referred to, making a partner’s share of partnership assets available to pay his judgment debts (section 23), is now little used. No reported case or other accepted textbook on the law of partnership has been found which has identified any other significant change in the pre-existing law which was effected by the 1890 Act.

21.2 Nonetheless, it is important to note that, although the 1890 Act is seen as a code, it is not a complete code and, by section 46, expressly saves the pre-existing rules of equity and of common law applicable to partnership in so far as they are not inconsistent with the express provisions of the Act.

21.3 Partnership has been called a branch of the law of contract. In the 6<sup>th</sup> edition of Lindley on Partnership Lord Lindley suggested partnership might more properly be called a relationship resulting from a contract. However, this distinction was largely ignored by the English courts until the judgment of Lord Millett in *Hurst v Bryk*.<sup>48</sup> Lord Millett’s proposition in that case (which, although not the ratio of the majority, has since been followed in a number of cases at first instance) is that the contract brings into existence the distinct equitable relationship of

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<sup>46</sup>The Act applies generally to England & Wales, Scotland and Northern Ireland, although certain of its provisions do not apply to all of these jurisdictions.

<sup>47</sup>Section 46.

<sup>48</sup>[2000] 1 WLR 740.

partnership. The consequence in that case was that a repudiatory breach of the contract did not, of itself, automatically dissolve the partnership; the partnership was a creation of equity under control of the court.

- 21.4 It is not necessary to set out here the detailed provisions of the 1890 Act. A convenient summary of the essential features of English partnership law is set out in Part II of the Joint Report on Partnership Law issued by the (English) Law Commission and the Scottish Law Commission,<sup>49</sup> and that section of their paper is included as an appendix to this report.
- 21.5 The first point of difference between the 1890 Act and existing Jersey law as it is believed to be lies in the definition of partnership. Section 1(1) of the 1890 Act defines it as “the relationship which subsists between persons carrying on a business in common with a view to profit”. The definition (based on Pothier’s) adopted by the Royal Court in Bennett included holding “something in common” as an alternative to the carrying on business, although both limbs were subject to the requirement of an intention to make a profit. The omission from section 1(1) of words to the effect that the business and the profit had to be lawful or (per Pothier) honest, does not create a difference, since the requirement of lawfulness is necessarily presumed.
- 21.6 A further potential difference arises from the respective definitions in that Pothier’s definition expressly requires a contribution to constitute a person a partner whereas there is no such express requirement in the 1890 Act – although the need for a contribution is plainly implicit. By section 14(1) of the 1890 Act any person who holds himself out, or knowingly allows himself to be held out, as a partner is liable to third parties dealing with the partnership, even if he has made no contribution to the partnership and is not entitled to any share in its profits. It is not clear from Pothier’s or Domat’s writings on partnership law what the position in Jersey customary law would be in this regard.
- 21.7 The requirements of French law for partnership contracts to be reduced into writing and registered have been commented upon already on (paragraph 10.2 above), queried whether this was or is the position in Jersey law, at least in regard to partnerships *en nom collectif*, and found there to be no evidence to support such a finding - paragraph 10.3 above. English law does not require partnership deeds to be in writing, nor does it require any subsequent variation to be in writing even if the original was in writing (absent any express provision to the contrary). Because there presently is no requirement for registration of a partnership deed or of an extract containing any special stipulations, while any such stipulations will be binding as between partners, they will not bind third parties dealing with the partnership in the absence of actual notice of them (section 8 of the 1890 Act). The same would appear true in Jersey law if it is correct to suppose that Jersey law does not require writing and registration.

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<sup>49</sup>(English) Law Commission Paper 283, Scottish Law Commission Paper no. 192

- 21.8 Section 9 of the 1890 Act expressly provides that every partner in a firm is jointly liable with his co-partners for all the debts and obligations of the firm incurred while he is a partner. It seems that the Royal Court in Golder adopted the principle contained in this provision. However, it should be noted that Pothier says that joint and several liability in commercial partnerships was an exception to French common law and ought not to apply to non-trading partnerships because a partner in a non-trading partnership would often have no power to bind his co-partners in circumstances where a partner in a trading partnership would. Presumably this could be the case under Jersey law in relation to the non-trading partnerships, which are allowed under the Royal Court's definition of partnership.
- 21.9 Section 24(8) of the 1890 Act provides that in the absence of any agreement to the contrary, "any difference arising as to ordinary matters connected with the partnership business" may be decided by a majority of the partners, although no change in the nature of the partnership business may be made without the agreement of all partners. It is not clear if this also is the case in Jersey law but it is known that it is commonly adhered to in Jersey professional partnerships.
- 21.10 In English law there is no qualification on the right of a partner to dissolve a partnership at will by giving notice to the effect that the notice should not be given "at an unseasonable time".<sup>50</sup> As stated above (paragraphs 3.5, 3.6) this is a condition stated in Pothier, but whilst the Court in Cannon was not called upon to actually decide the matter, it is clear from the comments made in the judgment that the Court did not consider this additional requirement of Pothier should be adopted as part of Jersey law.
- 21.11 The complicated procedure for distribution described by Pothier does not apply under English law, which is governed by section 44 of the 1890 Act. The principal effect is that the whole of the partnership property, moveable or immovable, should be sold so that, after satisfying the claims of all creditors of the firm, each partner can receive his share of the balance of the proceeds of sale. However, as noted above, it seems likely that current Jersey law has adopted English law in this regard.
- 21.12 It seems that there is no other significant difference between the two jurisdictions. Viewed as a whole, in fact the law of partnership of the two jurisdictions essentially the same in the majority of its content. This is of course not surprising since Roman law provided the spring board from which partnership law in both jurisdictions developed and which was the source to which both Pothier and Domat referred.

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<sup>50</sup>See s.32 of the 1890 Act and Peacock v Peacock 15 Ves. 56 per Lord Eldon.

## **H. PARTNERSHIP LAW OF OTHER JURISDICTIONS**

### **22 Scottish Partnership Law**

- 22.1 The 1890 Act applies to both England and Wales and Scotland,<sup>51</sup> although some sections are expressed to apply only to one of these jurisdictions. As with England and Wales, there is a general consensus that the 1890 Act as it applies to Scotland is for the most part a codification of the pre-existing Scottish law.<sup>52</sup>
- 22.2 The most authoritative work on Scottish partnership law before the 1890 Act is *F.W. Clark's 'The Law of Partnership and Joint Stock Companies According to the Law of Scotland' (1886)*. Clark commented that the differences between English and Scottish partnership law generally arose from differences in the other branches of law which affected the law of partnership rather than from partnership law as such. He considered it acceptable to refer to English authority on matters of principle.
- 22.3 One major point of divergence between English and Scottish partnership law which Clark did identify was in regard to the separate legal personality of a partnership. In Scotland a partnership was not a corporation but nevertheless had a distinct legal personality from its members. This had a number of important practical consequences which distinguished English and Scottish partnership law:
- (a) The funds and other assets of the partnership belonged to the firm itself as sole owner, not to the partners as joint owners.
  - (b) The firm is the proper or primary debtor in debts owed by the partnership so that the personal liability of the individual members was accessory, or secondary, to that of the firm and they could be called upon to meet those debts only if the firm had failed to do so.
  - (c) The firm could sue and be sued in its own name.
  - (d) The firm could itself be a debtor or creditor to any of its members and could sue or be sued by them.
  - (e) Two firms having one or more members in common could sue one another.
  - (f) A firm could be sequestrated without the members individually being sequestrated.

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<sup>51</sup>[It also applied in Ireland and, with some amendments, continues to apply in both the Republic and Northern Ireland.]

<sup>52</sup>See, e.g., *Miller, The Law of Partnership in Scotland (1973)* pp 1-2, and the introduction to the section of partnership in the *Stair Memorial Encyclopaedia of Scottish Law* (the Scottish equivalent of *Halsbury's Laws of England*).

- (g) Creditors of a member of the firm could attach that member's share or interest in the firm.

These distinctions were preserved by section 4(2) of the 1890 Act.

- 22.4 Early drafts of the bill which eventually resulted in the 1890 Act did seek to introduce the concept of distinct legal personality for partnerships into English partnership law, but that was rejected. The joint Report of the English and Scottish Law Commissions on partnership law and the draft bill produced in connection with it sought to do the same. The view of the (English) Law Commission is that it would be a reasonable development of English partnership law and would accord with the reality of modern commercial attitudes. Those changes have been put on hold for the time being by the British Government, due it appears to differing opinions on the economic benefit of such reforms, though it will take forward changes to the Limited Partnerships Act 1907 (See Appendix 2).
- 22.5 It is relevant to note that Scottish law has its origins in Roman law developed with reference to Dutch and pre-Napoleonic Code French commentaries. Although, Scottish law has been heavily influenced by English authority since the Act of Union, its distinctive character remains strong. This point is mentioned because the fact that the 1890 Act is seen by commentators on both sides of the border as essentially a codification of both the pre-existing law in both England and Scotland adds force to the proposition that the law of partnership as set out in that Act derives essentially from the same roots as pre-Code French law and does not differ in any significant respect from what appears to be the customary law of Jersey.
- 22.6 The other respects in which Scottish partnerships are expressly treated differently from English partnerships under the 1890 Act are as follows:
  - (a) In both jurisdictions each member of a partnership is jointly liable with the others for the debts of the partnership, but by section 9 each member of a Scottish partnership is also severally liable.
  - (b) In both jurisdictions, on the death of a partner his estate is also severally liable for such debts and obligations as were incurred while he was a partner, but in England (and Ireland), although not in Scotland, this is subject to the prior payment of his separate debts.
  - (c) Section 20 deals with partnership property. It has different provisions for England and Scotland, but these arise solely from the differences between English and Scottish land law.
  - (d) Section 23, which deals with proceedings against a partner's share in partnership property to satisfy that partner's personal judgment debts does not apply in Scotland.

- (e) Section 47 makes reference to the Scottish law of bankruptcy, which differ from English bankruptcy law..

None of these differences are fundamental.

## 23 Irish Partnership Law

- 23.1 The Irish law of partnership prior to the separation of the Republic of Ireland from the United Kingdom appears (unsurprisingly) to have followed English law. Interestingly, the first partnership law enacted in Ireland (and which did not apply to the other UK jurisdictions) was in 1741: An Act for the better Regulation of Partnerships to encourage Trade and Manufacturing in Ireland,<sup>53</sup> which was amended in 1771.<sup>54</sup> However, these were repealed and the 1890 Act has been held by the Irish Court of Appeal still to apply in the Republic after independence.<sup>55</sup> The same case confirmed the relevance of pre-1890 decisions of the Irish courts in accordance with section 46 of the 1890 Act unless inconsistent with the Act. The status of the pre-1922 decisions of the courts of the United Kingdom is the subject of judicial conflict. On one view they became part of Irish law on independence save to the extent they are inconsistent with the Republic's constitution.<sup>56</sup> On another view, only pre-1922 statute law, not case law, was carried over into Irish law on independence.<sup>57</sup> However, post-1922 UK decisions on partnership law, although clearly not binding on the Irish courts, are regarded as persuasive,<sup>58</sup> as are the decisions of those former colonies which have implemented the 1890 Act in whole or in part into their respective partnership legislation.

## 24 Guernsey Partnership law

- 24.1 As referred to above, in 1995 the States of Guernsey enacted The Partnership (Guernsey) Law 1995. In almost all respects this mirrors the 1890 Act (save for some changes in order and layout). The only significant differences between it and the 1890 Act as applied in England are:
- (a) Section 9 makes partners jointly and severally liable for all debts of the firm incurred while they were partners (i.e., applies section 9 of the 1890 Act as for Scottish partnerships).

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<sup>53</sup>15 Geo II c.7.

<sup>54</sup>11 & 12 Geo III c.25.

<sup>55</sup>Murphy v Power [1923] 1 IR 68.

<sup>56</sup>This is the view of Michael Twomey in his (Irish) *Partnership Law* (2000) supported by the Irish cases of Yone Securities Ltd v Cooke [1975] IR 59, McKinley v Minister for Defence [1992] 2 IR 333, and Irish Shell Ltd v Elm Motors Ltd [1984] ILRM 595. .

<sup>57</sup>This was the majority view of the Irish Court of Appeal in Gaffney v Gaffney [1975] IR 59.

<sup>58</sup>See, e.g., Irish Shell Ltd v Elm Motors Ltd (above) and more recently per Costello J in McM v J McC[1994] 1 IR 293 at 303.

- (b) Section 12 of the 1890 Act, which makes every partner jointly and severally liable for the liabilities of the firm in respect of wrongful acts and omissions of any partner acting in the ordinary course of the firm's business (section 10) and any misapplication of money received for or in the custody of the firm (section 11), is omitted.
- (c) Section 22 introduces an express requirement of utmost good faith as between partners.
- (d) Section 36 of the 1890 Act (rights of persons dealing with firm against apparent members of firm) is omitted.
- (e) Section 43 introduces specific provisions as to the power of the Royal Court to make orders in relation to dissolution.

24.2 It is presumed that Guernsey partnership law prior to the enactment of this Law would have developed from common roots with and would have been broadly similar to Jersey partnership law. The Jersey Royal Court will look to Guernsey law as part of the exercise in ascertaining what is Jersey law in the absence of established Jersey authority on a particular topic<sup>59</sup>. It is clearly of some relevance to the Commission that Guernsey has felt able very substantially to adopt the 1890 Act when codifying its own partnership law so recently.

## 25 **Isle of Man Partnership Law**<sup>60</sup>

25.1 The general law of partnership in the Isle of Man mirrors that of England and Wales. The principal statute, which governs both ordinary and limited partnerships, is the Partnership Act 1909. This is based on the 1890 Act and the UK Limited Partnership Act 1907. There is no practical difference between English and Manx law so far as concerns ordinary partnerships. The rules applicable to ordinary partnerships were modified for limited partnerships in much the same way as in English law. However, a number of significant changes to the law concerning limited partnerships were introduced subsequently by the International Business Act 1994.

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<sup>59</sup> Enquiries were made of the Guernsey Law Officers' Department and the Financial Services Department (which, it is understood had the primary responsibility for introducing the 1995 Law) as to what investigation there may have been as to the existing Guernsey law of partnership before the 1995 Law was introduced. No response has yet been received.

<sup>60</sup> *Isle of Man Partnership Law*, Mark Solly (1996).

## I. PARTNERSHIP LAW OF OTHER COMMONWEALTH AND FORMER COMMONWEALTH JURISDICTIONS

26 It must be appreciated that sources for partnership law in these jurisdictions has been limited principally to the libraries of the Inns of Court and the internet. Not all these jurisdictions yet have websites that contain or give access to the necessary information, and some of the printed sources in the libraries are not terribly recent. This section must be read in light of that qualification.

27 **Australia**<sup>61</sup>

27.1 The 1890 Act was substantially adopted by all the then Australian State Parliaments except Western Australia within a year or so of that Act being enacted by the United Kingdom Parliament.

- (a) New South Wales<sup>62</sup> and South Australia<sup>63</sup> passed Acts identical to the 1890 Act, but excluding references to Scotland and the Stannaries but including references to the law of ‘cautionary obligations’, a peculiarly Scottish concept of law.<sup>64</sup>
- (b) Queensland,<sup>65</sup> Victoria<sup>66</sup> and Tasmania<sup>67</sup> showed their independence from the mother country by adopting a different numbering of the sections but otherwise adopting in substance the Act as applied to England.
- (c) Western Australia appears to have taken time to consider Sir Frederick Pollock’s original proposals for allowing a form of limited partnership and did not pass its Partnership Act until 1895, when in fact it passed an Act substantially in accordance with the 1890 Act but with some minor additions.<sup>68</sup> In particular, section 22 deals with representations by a partner as to the extent of his authority; section 27 sets out the acts that may usually be performed by a partner in a trading firm; section 33 defines the nature of a partner’s interest in the firm’s assets; section 44 gives partners the option to dissolve where one of them has assigned his share; section 52 provides for the use of the firm name after dissolution; and section 51 provides for the sale of goodwill on dissolution.

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<sup>61</sup>See generally *The Law of Partnership in Australia and New Zealand*, Higgins & Fletcher (2001) 8<sup>th</sup> edn

<sup>62</sup>*Partnership Act NSW 1892*.

<sup>63</sup>*Partnership Act SA 1891*.

<sup>64</sup>Section 18 of the Act in each case. For cautionary obligations, see Wallace v Gibson [1895] AC 354 (HL Scotland).

<sup>65</sup>*Partnership Act Qld 1891*.

<sup>66</sup>*Partnership Act Vic 1891*, now *Partnership Act 1958*.

<sup>67</sup>*Partnership Act Tas 1891*.

<sup>68</sup>*Partnership Act WA 1895*.

- (d) In all cases except Western Australia, the State Acts were expressed to “declare and amend” the pre-existing partnership law. The Western Australian Act was expressed to “consolidate and amend” the existing law – probably a distinction without any difference in practice. The existing law was essentially the English case law referred to in Section II of this report and such changes to that as were contained in the Acts were the same as in England.
- 27.2 When the Australian Capital Territory came into existence, the Seat of Government Acceptance Act 1909 provided that all laws in force in the territory immediately before the ‘proclaimed day’ (1<sup>st</sup> January 1911) were, so far as applicable, to continue in force unless and until otherwise provided. No provisions with regard to the general law of partnership have yet been enacted to alter that situation.
- 27.3 Post-1890 UK decisions on partnership law and those of the Commonwealth or former Commonwealth jurisdictions that adopted the 1890 Act are accepted as persuasive authority.
- 28 **New Zealand**<sup>69</sup>
- 28.1 New Zealand adopted the substance of the 1890 Act, although using a different numbering of the sections, and that<sup>70</sup> remains in force today. As in Australia, decisions of the UK courts and those of other Commonwealth and former Commonwealth countries that adopted the 1890 Act are of persuasive authority.
- 29 **Republic of South Africa**
- 29.1 South Africa does not have a statutory equivalent to the 1890 Act. However, the English law of partnership is apparently regarded by the South African courts as consistent with the Roman-Dutch law on ordinary partnerships in most respects.<sup>71</sup> It is noteworthy that in one of the digests of South African law in the Inner Temple library, Pothier’s *Treatise on the Contract of Partnership* is specifically referred to as a source “for the whole subject” of partnership.<sup>72</sup>
- 30 **Nigeria**
- 30.1 Partnership law in Nigeria is adapted from the 1890 Act. So far as it has been possible to ascertain,<sup>73</sup> there is no material difference between the two jurisdictions as regards ordinary partnerships.
- 31 **Hong Kong**

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<sup>69</sup>See generally Higgins & Fletcher, as above.

<sup>70</sup>*Partnership Act 1908*.

<sup>71</sup>See *LAWSA* vol.19 §363.

<sup>72</sup>*Wille’s Principles of South African Law* (1991) 8<sup>th</sup> edn.

<sup>73</sup>

‘NigeriaExchange’: [www.ngex.com/business/biz/legal/partnershiplaw.htm](http://www.ngex.com/business/biz/legal/partnershiplaw.htm).

31.1 CAP 38 Partnership Ordinance (30/06/1997) is the current statute regulating partnerships in Hong Kong.<sup>74</sup> It comprises 47 sections which replicate the 1890 Act, and section 47 is in identical terms to section 46 (saving for rules of equity and common law) of the 1890 Act. So far as it has been possible to ascertain, judicial decisions have followed those of the UK and other Commonwealth jurisdictions which have adopted the 1890 Act.

## 32 **Singapore**

32.1 English Acts, CAP 391, Partnership Act,<sup>75</sup> was made applicable by the Application of English Law Act 1993 and again appears to mirror the 1890 Act. UK and other Commonwealth authorities, especially Australia and New Zealand, are regarded as persuasive.

## 33 **India**

33.1 The Indian Partnership Act 1932<sup>76</sup> was enacted to define and amend the Indian law relating to partnership. Partnership had previously been regulated by Chapter IX (sections 239 to 266) of the Indian Contract Act 1872, and this appears to have been based on the English pre-1890 common law relating to partnership. Save that the 1938 Act includes detailed provisions concerning registration of partnerships (sections 56 to 72), there appears to be no practical difference between the provisions of this and the 1890 Act. The Indian courts regard decisions of the UK and other Commonwealth jurisdictions on partnership law as persuasive authority.

## 34 **Pakistan**

34.1 Pakistan also has a Partnership Act 1932 and, again save for the addition of provisions concerning registration, appears to follow the 1890 Act. UK and other Commonwealth authorities are persuasive authority.

## 35 **The Cayman Islands, Bermuda and the BVI**

35.1 The Cayman Islands has The Partnership Law (1995 Revision). It is based on the 1890 Act as regards ordinary partnerships (Parts I to V) but includes provisions regulating limited partnerships (Part VI). The British Virgin Isles have the Partnership Act 1996. Parts I to V regulate ordinary partnerships and again follow the 1890 Act. Bermuda has the Partnership Act 1902 (1989 Revision), which is almost identical to the 1890 Act. In all three jurisdictions UK and other Commonwealth decisions are accepted as persuasive authorities.

## 36 **Canada**

36.1 With the exception of Quebec, the provincial and territorial Partnership Acts in Canada are essentially an adoption of the 1890 Act – see, e.g, British Columbia's current Partnership Act [RSBC 1996] (Parts 1 and 2 of which mirror the 1890 Act, while Part 4 deals with limited partnerships and Part 4

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<sup>74</sup><http://www.legislation.gov.hk/blis>.

<sup>75</sup><http://www.statutes.agc.gov.sg>.

<sup>76</sup><http://www.vakilno1.com/bareacts/partnershipact>.

with registration). Canadian partnership law (outside Quebec) is therefore very similar to English partnership law.<sup>77</sup> In August this year the Uniform Law Conference of Canada published a paper on the reform of partnership law and, in particular, the possibility of granting partnerships separate legal entity and limited liability.<sup>78</sup> This seems to have been prompted in part by the joint report of the (English) Law Commission and the Scottish Law Commission and in part by the adoption in the United States of America of the Revised Uniform Partnership Act (1994) in place of the 1914 Uniform Partnership Act (see below). It seems this possibility is under consideration by the Canadian Law Commission.

### 37 **The United States of America**

37.1 All states apart from Louisiana had adopted the Uniform Partnership Act 1914 ('UPA'). As noted above, this has been superseded by the Revised Uniform Partnership Act 1994 ('RUPA') which was itself amended in 1997, mainly by the incorporations of provisions concerning limited liability partnerships ('RUPLA'). As of this year, RUPA has been adopted by only 3 states and RUPLA by 29. With the exception of Louisiana, the partnership law of the remaining states is presumably still governed by the UPA.

37.2 Although UPA Act was largely modelled on the 1890 Act, there were some significant differences, and these have been maintained in subsequent legislation. These are usefully set out as part of an article by Deborah Dermott in the US Journal of Corporation Law.<sup>79</sup> The major difference relates to the position in regard to the ability of a partner to withdraw from the partnership by serving notice on his co-partners where the partnership is not a partnership at will but is for a fixed term that has not yet expired or where the partnership was formed for a specific purpose that has not yet been completed. Under the 1890 Act a partner's unilateral notice of intention to dissolve is ineffective in these cases.<sup>80</sup> In consequence, notices given to third parties by the partner wishing to dissolve are ineffective to absolve him from future liabilities of the partnership. Under section 31(2) of UPA, an individual partner's notice dissolve will be effective even though inconsistent with the express provisions of the partnership agreement as to time or purpose. Under the equivalent provision of RUPA (section 61) a distinction is made between "disengagement" or "dissociation" – i.e., the departure of one partner from the partnership – and "dissolution" – which follows only when the business of the partnership is wound up. A partner can dissociate at any time by notice of intention to do so, even when unilateral dissolution would be in breach of the provisions of the partnership agreement. He may thereby terminate the authority of his co-partners to bind him and his liability to the partnership in respect of transactions entered into after the date his dissociation. He may also terminate his future liability to third parties by giving them notice of the

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<sup>77</sup>See generally *A Practical Guide to Canadian Partnership Law* by Alison Manzer.

<sup>78</sup>*Reform of General Partnership Law: The Aggregate versus Entity Debate* by Heather Heavin, 2006.

<sup>79</sup>*Transatlantic Perspectives on Partnership Law: Risk and Instability*, Journal of Corporation Law, vol.26 no.4, parts II and III.

<sup>80</sup>See s.32 of the 1890 Act.

revocation of his authority to his co-partners. It has not been feasible to investigate how this has worked in practice. However, this is a substantial departure from the emphasis on contractual obligations that is at the core of the 1890 Act and English partnership law.

## J. MODERN FRENCH PARTNERSHIP LAW

38 As stated above, at paragraph 19.5, the other main candidate jurisdiction to which it might be appropriate for Jersey to have recourse either in the absence of local authority on a point, to clarify and lend flesh to the old writings, or as a source statute to use as a foundation for a Jersey partnership law is French law.

38.1 The origins of French partnership law have already been addressed in paragraphs 3.9, 3.10, 4, 5 and 8.6 above. As with the English law, French partnership law is also Roman in its origin. The work undertaken by Pothier is of significance not only in Jersey but was also of significance in relation to the creation of modern French law since much of his work was incorporated almost verbatim into the Napoleonic civil law code established in 1804. The Napoleonic civil law code remains the foundation of modern French civil law and some of the code remains, virtually unchanged, in force in France today.

38.2 Upon the creation of the Napoleonic civil law code in 1804, those responsible for its compilation included the following provision as Article 1832 :

*“la société est un contrat par lequel deux ou plusieurs personnes conviennent de mettre quelque chose en commun, dans la vue de partager le bénéfice qui pourra en résulter”*

our translation of which is:

a partnership is a contract by which two or more persons agree to put something in common, with a view to sharing the profit which will result from it.

38.3 It is easy to see from the 1804 version of article 1832 that a “*société*” was then used to describe a relationship in the nature of a partnership or other common venture. The influence of Pothier as source material for the text is also evident.

38.4 The legislator has from time to time intervened to “modernize” the exercise of certain forms of joint activity, but this has been done in a somewhat piecemeal manner, with, perhaps inevitably, the legislator simply seeking to amend the Civil Code as it stood and in large part to perpetuate the categorization already established, rather than seek to modernize the law by a root and branch modification of the entire French Code.

38.5 Thus, leaving aside the formal creation in French law of limited liability companies which are by their very nature commercial, even when not carrying out a commercial activity (in 1867 for the category of limited liability companies which are, today, known as “*sociétés anonymes*” and in 1925 for those which are known as “*sociétés à responsabilité limitée*”, neither of which are the topic of the present work of the Commission), and the creation in the second half of the 20<sup>th</sup> century of a whole range of specific “*sociétés civiles*”

to which (in addition to the general rules set out in the Code Civil) certain special rules apply, only a very marginally amended version of the relevant provisions of the 1804 Code continued to be applicable to all “*sociétés civiles*” until 1978.

38.6 However, in 1978 a reform of the provisions contained in the Civil Code relating to “*sociétés*” introduced a major modification of the underlying content of the text as a whole, notwithstanding that certain parts of the text were only subject to cosmetic, or insubstantial, modification.

38.7 Thus, notwithstanding that :

- (a) some degree of departure from the “*contrats de société*” as known to Pothier had been caused by the introduction by the legislator from time to time of specific regulations applicable to specific categories of “*sociétés civiles*” (some prior to the 1978 reform and others following that reform), and;
- (b) some parts of the Code as applicable to “*sociétés civiles*” remain, even today, perfectly recognizable by reference to the text of the original Code (and thus in many instances by reference to the writings of Pothier),

it was the general reform of the relevant part of the Civil Code in 1978 which most directly consummated the rupture of any direct line of legal theory between the “*contrats de société*” as known to Pothier and the vast majority of “*sociétés civiles*” as known to modern (post-1978) French law.

38.8 The major change, insofar as the present study is concerned, was brought about by the new article 1842, which provides :

*“Les sociétés autres que les sociétés en participation visées au chapitre III jouissent de la personnalité morale à compter de leur immatriculation. Jusqu’à l’immatriculation, les rapports entre les associés sont régis par le contrat de société et par les principes généraux du droit applicable aux contrats et obligations”*

our translation of which is:

*société*” other than “*sociétés en participation*” referred to in chapter III benefit from juridical personality from the moment of their registration.

Until registration, the relationship between participants are governed by the contract of common adventure and by the principles of the law relating to contracts and obligations.

38.9 This article, by introducing (i) the principle of registration of “*société civiles*”, and (ii) the consequential attribution of juridical personality of the “*société*” by reference to its constituent members, was intended to remedy, at a stroke, two perceived difficulties with “*société civiles*” as they had existed until then :

- (a) the somewhat clandestine nature of “*sociétés civiles*” (where it was not always possible for third parties dealing with the “*société*” to know with whom it was dealing, one or more of the participants being, in effect, a sleeping or anonymous participant), and;
- (b) the issue of juridical personality for “*sociétés*”, which had never been expressly recognized in the Code until this point. Whilst case law had recognized, with effect from 1891, the principle of juridical personality, the courts had failed to draw all of the conclusions from this principle, since they continued to admit the principle of the personal obligations by the participants in “*sociétés civiles*”, such that a creditor could pursue, at his choice, either the company or the participants.

38.10 Thus, the reform of French law was, from this point onwards, to view “*sociétés civiles*” in much the same way as “companies”, requiring all joint venture vehicles (with certain specific exceptions) to be registered and henceforth to have a corporate or separate juridical personality.

38.11 This major reform also dealt in consequence with many of the consequential effects of this modification, including the imposition of a corporate style of organization and management, the attribution to the participants of an individualized “share” of the value of the “*société*” and an individualized right to a certain “value” in the “*société*”, comprising the value of his “share” of the “*société*”, and thus being rather more closely assimilated to a shareholding in the capital of a company. The modifications also defined in greater detail the obligations of each participant both towards the structure of the “*société*” itself and also towards third parties. Further, much of the language, and virtually all of the rights, have been very heavily influenced by the language and nature of corporate rights.

38.12 From this point on, accordingly, it is very much more difficult to identify any direct and specific link between the “*contrats de société*” as known to Pothier (recognizable still in the unincorporated structures of joint venture or partnership, as known to Anglo-Saxon systems of law) with the forms of “*société*” as they are today integrated and recognized in mainstream French law.

38.13 Although, technically, it seems that one or two minor forms of “*société*” were left untouched by the 1978 reforms and continue to be governed in large measure by the principles known to Pothier, these are exceptions, have specific application and/or are not generally designed or intended as a suitable alternative to the new corporate style of “*société*” to permit two or more people to carry on business together with the object of making a profit. It is understood that were one to ask a French lawyer whether the law of partnership exists in modern French law, the vast majority would respond that no such structure exists in French law, and that its existence is a peculiarity of Anglo-Saxon systems of law.

**K. APPROPRIATE JURISDICTION TO WHICH TO HAVE RECOURSE  
IN THE ABSENCE OF LOCAL AUTHORITY**

- 39 In the earlier section (Section E) on issues arising in view of the age of the primary source material on what may be the Jersey law of partnership, there was recognition of the potentially harmful effect on a modern commercial centre of its law in this important field being reliant on ancient writings of learned authors.
- 39.1 It is not difficult to believe that an organisation wishing to establish a partnership structure for a commercial venture would choose a jurisdiction with a partnership statute and underlying case law readily available, rather than a jurisdiction with texts on the general principles, in French and Latin written several centuries ago, with little or no case law to elaborate upon particular issues.
- 39.2 The clear rupture imposed by the French legislature between *contrats de societe* as known to Norman customary law and to Pothier, and modern French law, with its essentially corporate legal structure and organisation for partnerships, make it apparent that modern French law is now materially different from the current statement of Jersey law in the area of partnership and is therefore not a suitable jurisdiction to use as a modern source.
- 39.3 The Commission therefore recommends that recourse should be had to the law of England in the absence of local authority, and that English cases should be able to be referred to as persuasive in the Royal Court. The differences between the law of the two jurisdictions is not great, and is identifiable, and thus appropriate caveats and exceptions can be identified when making such references.
- 39.4 The law of the two jurisdictions clearly developed from the same Roman law root. The law of Guernsey, Scotland and Commonwealth jurisdictions derive their law of partnership from the English 1890 Act with some local changes/additions, the majority of which are not material. It has been suggested that, at least in some fields, it is to the law of Scotland that Jersey should have regard in the absence of local authority rather than to England as the root of the law is potentially closer. As seen above, the 1890 Act also applied to Scotland with various exceptions and qualifications and with reference to English authorities being considered appropriate. The key difference, namely separate legal personality of a partnership is not currently part of Jersey law.

**L. A PARTNERSHIP LAW FOR JERSEY?**

- 40 Reference to English law in the absence of local authority is in the opinion of the Commission only a partial or interim solution to the need for a modern statement of the Jersey law of partnership. There are differences which have been identified in this paper between the law of partnership as stated by Pothier, which has traditionally been regarded as the primary source for the content of the customary law of Jersey on the subject, and the modern law of England. Consequently, in relation to any question where there is a yet no judicial decision in Jersey, analysis will still be required to present the Court with the potential sources from which it may wish to draw, which will invariably involve reference to the ancient authors, as well as to the English law.
- 40.1 There is also always a tension in referring to English cases based on English statutes, even though the 1890 Act was in the main a statement of the pre-existing common law. Further, it remains incongruous that in Jersey there exist two specialist partnership statutes but no statutory statement of the underlying law itself, and finally that a modern commercial centre would not have its own clear and up to date statement of such an important aspect of law.
- 40.2 For all of the above reasons, it is the recommendation of the Commission that Jersey would benefit from a modern statutory expression of the Jersey law of partnership. The 1890 Act clearly forms an appropriate basis and therefore the work involved in drafting would be greatly reduced. Clearly those areas in which the law as stated by Pothier and English law differ would need to be addressed, and a decision made, pursuant to the sentiment expressed in Cannon v Nicol, as to which were the more suitable for Jersey, but this has not proved problematic for the many other jurisdictions, including Guernsey and Scotland, which have previously chosen to go down this route. The main differences identified between the writings of Pothier and English law have been highlighted in section G above. Careful reference to the changes made to 1890 Act prior to its (in effect) adoption into Guernsey law, and understanding the reasons for those changes would also no doubt be a valuable exercise.
- 40.3 The introduction of a Partnership (Jersey) Law 200\* , would also afford an opportunity to introduce improvements to the 1890 Act. An analysis of what those improvements might be will be considered by the Commission in a further consultation paper, so as not to further increase the length of an already lengthy paper. However, as was noted in paragraph 22.4, the English and Scottish Law Commission have issued a joint report proposing changes to the 1890 Act. Even though those changes have been put on hold for the time being by the British Government, (though it will take forward changes to the Limited Partnerships Act 1907) there is no reason however why when drafting a Jersey Law of Partnership that those suggestions should not be reviewed and where considered meritorious, incorporated. This would give Jersey a more certain and commercially attractive partnership law.

**M. ACKNOWLEDGMENTS**

- 41 The Commission would like to express its grateful and sincere thanks to Michael Heywood and Marcus Flavin, both of Radcliffe Chambers, Lincoln's Inn, and to Timothy Clemens-Jones of the Paris office of Holman Fenwick & Willan for their careful research and detailed reports upon which the Commission has drawn heavily in producing this paper.

## APPENDIX I

### EXTRACT OF JOINT REPORT ON PARTNERSHIP LAW ISSUED BY THE ENGLISH AND SCOTTISH LAW COMMISSIONS WHICH SUMMARISES THE ESSENTIAL FEATURES OF THE EXISTING LAW IN THOSE JURISDICTIONS

#### A SUMMARY OF THE CURRENT LAW

##### A. INTRODUCTION

42 This Part seeks to set out the basic structure of partnership law, which we discuss in more detail in this report. The Partnership Act 1890 forms the basis of partnership law in the United Kingdom. But the 1890 Act is a basic code and the rules of common law and equity relating to partnerships continue to play an important role in the law of partnership.

##### B. A CONTRACTUAL RELATIONSHIP

43 A partnership depends upon an existing relationship which results from a contract. The contract is, as Jessel MR explained in *Pooley v Driver*.<sup>81</sup>

A contract for the purpose of carrying on a commercial business - that is, a business bringing profit, and dividing the profit in some shape or another between the partners.

43.1 A partnership relationship can arise only by mutual consent, which may be express or inferred from parties' conduct. The personal nature of partnership means that a partner has agreed to associate with his co-partners and no-one else: no new partner can be introduced without the consent of all the partners.

43.2 Notwithstanding the contractual origin of a partnership, it appears that once in being a partnership is not governed solely by the rules of contract law. In *Hurst v Bryk*,<sup>82</sup> Lord Millett has suggested that, in English law, a partnership is more than a simple contract; it is a continuing personal as well as commercial relationship. He has argued that the Court of Chancery controls this relationship and that the Court has a discretionary power under section 35 of the 1890 Act to dissolve a partnership. As a result he suggests that repudiatory breach of contract by a partner is not a ground for the automatic dissolution of a partnership. Since then, Neuberger J has adopted Lord Millett's reasoning in reaching judgment in *Mullins v Laughton*.<sup>83</sup>

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<sup>81</sup> (1877) 5 Ch D 458, 472.

<sup>82</sup> [2002] 1 AC 185.

<sup>83</sup> [2003] Ch 250.

## C. PARTNERSHIP AND LEGAL PERSONALITY

- 44 In English law a partnership is not an entity separate and distinct from the partners who at any time may compose it. The firm cannot acquire rights nor can it incur obligations. A firm cannot hold property. The rights and liabilities of a partnership are the collection of the individual rights and liabilities of each of the partners. The firm name is a mere expression, not a legal entity.<sup>84</sup> We call this the "aggregate" approach to partnership.<sup>85</sup>
- 45 Any change in the membership of a firm, whether the withdrawal of a partner or the admission of a new partner, "destroys the identity of the firm".<sup>86</sup> The "old" firm is dissolved. If the surviving partners continue in partnership (with or without additional partners) a "new" firm is created. The new firm can take over the assets of the old one and assume its obligations. This involves a contractual arrangement between members of the old firm and the new firm, to continue the old firm's business. In addition, the transfer of an obligation will normally require the consent of the creditor. Continuing a partnership's business in this way does not continue the partnership itself. Even an agreement in advance that partners will continue to practise in partnership on the retirement of one of their number does not prevent the partnership which practises the day after the retirement from being a different partnership from that in business on the previous day.<sup>87</sup>
- 46 In Scots law, "a firm is a legal person distinct from the partners of whom it is composed".<sup>88</sup> A partnership is able to own property,<sup>89</sup> hold rights and assume obligations. It can sue and be sued.<sup>90</sup> It can be a partner in another partnership. It can have a partner in common with another partnership while remaining separate from that firm, and can also be its debtor or creditor. A partnership can enter into contracts with its partners, who can thus be creditors or debtors of the firm.
- 47 There is serious doubt as to whether the legal personality of a Scottish partnership can continue on a change in the composition of the partnership. On one view, in contrast with English law, partners can agree that a partnership will continue on a change of membership and thus the legal

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<sup>84</sup> *Sadler v Whiteman* [1910] 1 KB 868, 889, per Farwell LJ.

<sup>85</sup> There has been an academic debate in the United States of America on the conceptual approach to partnership: see Gary S. Roslin, "The Entity-Aggregate Dispute: Conceptualism and Functionalism in Partnership Law" (1989) 42 *Arkansas Law Review* 395 - 466. The move in the United States from the aggregate theory of partnership to the entity theory in section 201(a) of the Revised Uniform Partnership Act (RUPA) has enjoyed broad support while other aspects of RUPA have been controversial. See Alan W. Vestal " " ...Drawing Near the Fastness?" - the failed United States experiment in unincorporated business entity reform", (2001) *The Journal of Corporation Law* Vol 26, No 4, 1019 - 1030. See Part V below.

<sup>86</sup> Lord Lindley quoted in *Lindley & Banks on Partnership* (18<sup>th</sup> ed 2002) para 3-04; and see *Green v Herzog* [1954] 1 WLR 1309.

<sup>87</sup> *Hadlee v Commissioners of Inland Revenue* [1989] 2 NZLR 447, 455 per Eichelbaum CJ.

<sup>88</sup> 1890 Act, s 4(2).

<sup>89</sup> Historically, a Scottish partnership has not been entitled to hold title to immovable property held on feudal tenure but this restriction will disappear when s 70 of the Abolition of Feudal Tenure etc (Scotland) Act 2000 is brought into force.

<sup>90</sup>

personality of the firm continues. On the other view, even where partners agree that the partnership is not to be dissolved on a change of membership, any alteration in the composition of the partnership gives rise to a new legal personality. On the latter approach the law in both jurisdictions does not allow continuity of partnership, making partnership a less stable business relationship than it might be.

- 48 English law has maintained the "aggregate" approach to partnership: the name of the firm is, subject to certain exceptions which we discuss below,<sup>91</sup> no more than convenient shorthand for referring to a group of persons who conduct a business together. Scots law, subject to certain limitations, has adopted the "entity" approach to partnership. In summarising the basic features of partnership law we draw attention to some of the effects of these different approaches.

#### **D. AGENCY**

- 49 In England and Wales a partner cannot be an agent of the partnership as an entity because it lacks legal personality. Whenever a partner makes a contract, it is on behalf of that partner and the other partners.<sup>92</sup> If they breach the contract they will be liable for any consequential loss without limit of liability.
- 50 In Scots law the partners are agents of the partnership which is the principal.<sup>93</sup> The partnership has primary liability for all debts and obligations which it incurs through the agency of its partners. The liability of the partners is subsidiary in nature.<sup>94</sup> In effect the partners are guarantors of the partnership. Because they have subsidiary liability for the firm's debts and obligations, anything which they do (as the firm's agents) to bind the partnership binds the partners indirectly. Partners of a Scottish partnership are jointly and severally liable for the obligations of the firm.<sup>95</sup> As in English law, their liability is unlimited.
- 51 The 1890 Act contains several statutory rules which set out the agency of a partner.<sup>96</sup> In both jurisdictions, the partners are jointly and severally liable for loss and injury caused to a third party by a partner who commits a wrong while acting within the limits of his actual or apparent authority.<sup>97</sup> Partners are also jointly and severally liable for the misapplication of money or property which a partner receives in the course of carrying on the partnership business or which is in the custody of the firm.<sup>98</sup> The Act also provides that admissions and

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<sup>91</sup> See Part V below.

<sup>92</sup> 1890 Act, s 5.

<sup>93</sup> 1890 Act, s 5.

<sup>94</sup> See *Mair v Wood* 1948 SC 83, 86 *per* the Lord President (Cooper).

<sup>95</sup> 1890 Act, s 9.

<sup>96</sup> Sections 5 and 6 set out the express, implied and apparent authority of the partner. Specific rules restricting the liability of the firm where a partner uses the credit of the partnership for private purposes and where notice has been given of a restriction on a partner's authority are contained in ss 7 and 8.

<sup>97</sup> 1890 Act, ss 10 and 12

<sup>98</sup> 1890 Act, ss 11 and 12.

representations made by a partner concerning partnership affairs and in the ordinary course of business are evidence against the firm.<sup>99</sup> There is also a provision, which has caused some concern in particular to the accountancy profession, which appears to impute to a partnership knowledge relating to partnership affairs acquired by a partner in the course of partnership business.<sup>100</sup>

- 52 The liability of a partner (in English law as principal and in Scots law as quasi-guarantor) lasts for as long as other partners (as agents) have authority to bind that partner. The partner is not liable for obligations incurred before this agency relationship is created,<sup>101</sup> and he is not liable for obligations incurred by his former partners after the agency relationship has ended.<sup>102</sup>

## **E. FIDUCIARY DUTIES**

- 53 Partners place mutual trust and confidence in each other. They stand in a fiduciary relationship. A partner must display the utmost good faith towards his fellow partners in all partnership dealings. A partner owes his co-partners a duty to be honest in his dealings with third parties, even if the transactions are not of a partnership nature.<sup>103</sup>

- 54 The 1890 Act contains statements on some aspects of the partners' fiduciary relationship. A partner must give any of his partners true accounts and full information of all things affecting the partnership.<sup>104</sup> A partner must account to his partners for any profit which he obtains without their consent from any transaction concerning the partnership or from his use of partnership property.<sup>105</sup> Similarly, a partner who carries on a competing business of the same nature as the partnership's business without his partners' consent must account for any profits made by him in that business.<sup>106</sup>

- 55 Other fiduciary duties are left to the general law. A partner should not make a secret profit in the course of the sale to or purchase from his firm and must account for such profit.<sup>107</sup> To avoid this duty to account a partner must make full disclosure of his interest to his fellow partners. A partner will be liable to account if he secures a personal benefit which should, as a consequence of his duties to his fellow partners, be obtained for the benefit of the firm.<sup>108</sup> A partner's use of information received in the course of the partnership business to secure a personal benefit will give rise to a similar obligation.<sup>109</sup>

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<sup>99</sup> 1890 Act, s 15.

<sup>100</sup> 1890 Act, s 16. The operation of this rule is considerably more complex than the terse statutory wording suggests and is discussed in paras 6.15 — 6.21 below.

<sup>101</sup> 1890 Act, s 17(1) (in absence of agreement to the contrary).

<sup>102</sup> See paras 6.81 — 6.83 below and the 1890 Act, s 36.

<sup>103</sup> See *Carmichael v Evans* [1904] 1 Ch 486. In this context "honest" means abstaining from fraud.

<sup>104</sup> 1890 Act, s 28.

<sup>105</sup> 1890 Act, s 29.

<sup>106</sup> 1890 Act, s 30.

<sup>107</sup> *Gordon v Holland* (1913) 108 LT 385.

<sup>108</sup> *Powell and Thomas v Evan Jones & Co* [1905] 1 KB 11.

<sup>109</sup> *Boardman v Phipps* [1967] 2 AC 46.

- 56 In English law a partner's fiduciary duties are owed to his fellow partners. It appears that in Scots law certain duties are owed to the partnership as an entity: sections 29 and 30 refer to the obligation to account "to the firm". In both jurisdictions the duty to render true accounts and full information of all things affecting the partnership is a duty owed to co-partners rather than to the partnership.<sup>110</sup>

## **F. MANAGEMENT AND FINANCIAL RIGHTS**

- 57 Section 24 of the 1890 Act sets out partners' management and financial rights which apply in the absence of contrary agreement. These are default rules. Section 19 of the 1890 Act provides:

The mutual rights and duties of the partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.

- 58 The default rules set out in section 24 include, for example, that partners are entitled to share equally in the capital and profits of the firm,<sup>111</sup> are entitled to take part in the management of the business<sup>112</sup> and can agree ordinary matters connected with the partnership business by a majority<sup>113</sup> so long as all partners are able to express a view.<sup>114</sup> As we have already mentioned,<sup>115</sup> unanimity is required for the introduction of a new partner.<sup>116</sup>

## **G. PARTNERSHIP PROPERTY**

- 59 It is necessary in English law, which adopts the "aggregate" approach to partnership, to distinguish between property held for the partnership and the property of its individual members. This is done in the 1890 Act by the concept of partnership property.<sup>117</sup> It is of fundamental importance in distinguishing between the assets available to meet the claims of the creditors of individual partners and the creditors of the partnership and in attributing the benefit of any increase in the value of the property.

- 60 It is not always easy to determine whether an asset is partnership property. Property can be used for the purposes of the partnership and yet not be part of the partnership's property.<sup>118</sup> Its status depends on the agreement, express or implied, between the partners. If there is no express agreement sections 20 and 21 of the 1890 Act set out the factors which will

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<sup>110</sup> 1890 Act, s 28.

<sup>111</sup> 1890 Act, s 24(1).

<sup>112</sup> 1890 Act, s 24(5).

<sup>113</sup> 1890 Act, s 24(8).

<sup>114</sup> *Const v Harris* (1824) Turn & R 496, 525; 37 ER 1191, 1202; *Lindley & Banks* para 15-08; *Miller*, p 185.

<sup>115</sup> See para 2.3 above.

<sup>116</sup> 1890 Act, s 24(7).

<sup>117</sup> 1890 Act, s 20(1).

<sup>118</sup> See, for example, *Miles v Clarke* [1953] 1 All ER 779.

generally be relevant.<sup>119</sup> The circumstances behind and the purpose of the acquisition of the asset, the source from which it is financed and how it is subsequently dealt with, will normally determine the status of the property.

- 61 In English law a legal estate in land can only be held by a maximum of four partners.<sup>120</sup> For larger firms four partners will hold the legal estate on trust for themselves and their co-partners according to their beneficial interests. Other options are for a partnership to vest land in a company controlled by the partnership or in a nominee which holds the land in bare trust for the firm. This avoids the need to transfer the estate on the death or retirement of one of the trustees.
- 62 In Scots law, a partnership can hold moveable property such as vehicles, computers and intellectual property. It can also hold title to a lease of heritable property. But it is common practice to take title to leases in the name of trustees for the firm. The prohibition against the partnership holding title to feudal property has resulted in the partners taking title to heritable property as trustees for the firm.<sup>121</sup> The options of vesting land in a company or in a nominee are available as in England and Wales.
- 63 The trust by which a partner or partners hold property in trust for the firm is often implied rather than express and similar issues arise as to the status of the property as in England and Wales. The agreement of the partners, express or implied, determines the status of the property.<sup>122</sup> Again sections 20 and 21 of the 1890 Act illustrate factors which are relevant to establishing such agreement.
- 64 The separate personality of the Scottish partnership prevents partners having title to sue for damage to partnership property or having an insurable interest in partnership property.<sup>123</sup>

## H. DURATION OF PARTNERSHIP

- 65 A partnership falls into one of two categories namely a partnership at will or a partnership for a fixed term. The default rule is the partnership at will: it exists where the partnership agreement is silent as to the duration of the partnership.<sup>124</sup> A partner in a partnership at will can dissolve the partnership immediately by notice.<sup>125</sup> In absence of agreement between the partners to the contrary, the partnership must then be wound up.

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<sup>119</sup> The partnership accounts are often a good guide as to whether an asset is partnership property. If every partner has agreed to the inclusion of an asset in the balance sheet, this will normally be sufficient agreement.

<sup>120</sup> Trustee Act 1925, s 34(2); Law of Property Act 1925, s 34(2).

<sup>121</sup> See para 2.7 and footnote 9 above.

<sup>122</sup> Bell, *Comm*, II, 501-502. The title of a bona fide third party may however prevail over a latent trust: see *Redfearn v Somervail* (1813) 1 Dow 50; 3 ER 618.

<sup>123</sup> See *MacLennan v Scottish Gas Board*, First Division, 16 December 1983 (unreported on this point); *Arif v Excess Insurance Group Ltd* 1987 SLT 473; *Mitchell v Scottish Eagle Insurance Ltd* 1997 SLT 793.

<sup>124</sup> *Moss v Elphick* [1910] 1 KB 465 and 484; *Walters v Bingham* [1988] 1 FTLR 260; *Abbott v Abbott* [1936] 3 All ER 823.

<sup>125</sup> 1890 Act, ss 26 and 32.

Transactions begun but unfinished may be completed,<sup>126</sup> and the partnership's assets distributed.<sup>127</sup>

- 66 Unless the partners agree otherwise, the death or bankruptcy of a partner means that the partnership is dissolved as regards all partners and that it should be wound up.<sup>128</sup> This is so even if the partnership was entered into for a fixed term which has not expired.<sup>129</sup>
- 67 In a partnership for a fixed term, a partner who wants to retire can only do so with the consent of his fellow partners. Alternatively, he can apply to the court to wind up the firm under section 35 of the 1890 Act.
- 68 If a partnership for a fixed term is continued after the expiry of that term, without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.<sup>130</sup> In English law, where a new partner is admitted to a fixed term partnership, that partnership is determined and a new one is created, which may also be a fixed term partnership or a partnership at will, depending upon the terms of the original agreement.<sup>131</sup>
- 69 All the partners can agree to dissolve the partnership. The partnership agreement may provide that unanimity is not required so that a majority of partners can decide to dissolve the firm.
- 70 A temporary cessation of business may not cause a dissolution.<sup>132</sup> But, as the very existence of a partnership is intrinsically linked to the carrying on of a business, an agreement of the partners permanently to cease all forms of business must be taken as an agreement to dissolve the partnership.
- 71 A partnership is dissolved where an event occurs which makes it unlawful to carry on the business of the firm or for the members to carry it on in partnership.<sup>133</sup> The 1890 Act also provides that a partner may apply to the court to dissolve a partnership on a number of specified grounds, including the general ground that it is just and equitable that the partnership be dissolved.<sup>134</sup>
- 72 Views differ as to whether a partnership is dissolved where a repudiation of the partnership contract is accepted by the partner or

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<sup>126</sup> 1890 Act, s38.

<sup>127</sup> 1890 Act, ss 39 and 44.

<sup>128</sup> 1890 Act, s 33.

<sup>129</sup> *Gillespie v Hamilton* (1818) 3 Madd 251; 56 ER 501; *Downs v Collins* (1848) 6 Hare 418; 67 ER 1228; *Lancaster v Allsup* (1887) 57 LT (NS) 53.

<sup>130</sup> 1890 Act, s 27(1).

<sup>131</sup> *Firth v Amslake* (1964) 108 SJ 198. The position in Scots law is unclear: see para 2.8 above.

<sup>132</sup> *Millar v Strathclyde Regional Council* 1988 SLT (Lands Tribunal) 9.

<sup>133</sup> 1890 Act, s 34.

<sup>134</sup> 1890 Act, s 35.

partners not in breach.<sup>135</sup> There are also differing views on whether the frustration of the partnership contract brings a partnership to an end.<sup>136</sup>

## I. THE EFFECT OF CHANGES IN MEMBERSHIP OF THE FIRM ON THIRD PARTIES

73 In both jurisdictions, the basic contractual position is that a party to a contract cannot transfer his obligations under that contract without the other party's consent.<sup>137</sup>

74 In English law a contract with a partnership is a contract with the members of that firm. It is a matter of construction whether a contract can be performed "vicariously" by another set of persons, for example, a "new" partnership. In general it is more likely that dissolution of the firm on a change in its membership terminates a contract when the firm is small, than where the contract is with a larger firm.<sup>138</sup>

75 In Scots law, similar issues arise, notwithstanding the separate personality of the firm. It is a matter of construction of the contract with the partnership as to whether the contract is with the firm as it is then constituted, or is with the firm (viewed as a continuing entity) as it might be constituted from time to time. The concept of a contract "with the house" which allows third parties to contract with the firm and its successors which carry on the same business is an established device in Scots law<sup>139</sup> but its conceptual basis is unclear.

76 In contracts of suretyship in English law and cautionary obligations in Scots law a change in the person for or to whom a third party stands as surety or cautioner may alter the third party's risk and so relieve him of liability, unless he consents to the change. This rule is preserved in section 18 of the 1890 Act.

77 Changes in the membership of a partnership can also cause difficulty in relation to other contracts. For example, insurance contracts are personal contracts and cannot normally be assigned without consent. This restricts the ability of a firm effectively to assign such contracts to the new firm, resulting from a change of membership.<sup>140</sup>

78 If a partnership maintains a single running account with a bank, on a change of membership of the firm, the well-known rule in *Clayton's Case*<sup>141</sup> will

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<sup>135</sup> See paras 8.83 - 8.84 below.

<sup>136</sup> See para 8.83 below.

<sup>137</sup> *Humble v Hunter* (1848) 12 QB 310, 317; 116 ER 885, 887; *Don King Productions Inc v Warren and Others* [2000] Ch 291, 318-319; Gloag, *Contract* (2<sup>nd</sup> ed 1929) p 416 but cf *Cole v Handasyde & Co* 1910 SC 68.

<sup>138</sup> *Briggs v Oates* [1990] ICR 473, 482. See also *Sheppard & Cooper Ltd v TSB Bank plc* [1997] 2 BCLC 222.

<sup>139</sup> See, eg, *Alexander v Lowson's Trustees* (1890) 17 R 571.

<sup>140</sup> For other complications caused by a change in the partners see *Lindley & Banks* paras 3-08-3-16.

<sup>141</sup> 1816) 1 Mer 572; 35 ER 781.

apply. Withdrawals from the account will operate to reduce or cancel deposits in the order in which they were made - the "first in, first out" rule. Deposits will be applied in reduction of indebtedness in the same order. For partnerships this means that money paid into a current account by the "new" firm will reduce the debts of the "old". Therefore, if deposits of the "new" firm exceed the debts of the "old", a debit balance on the account will be the liability of the "new" firm alone. If the "new" firm becomes insolvent, the creditor has no recourse against the "old" firm whose indebtedness has been discharged. To avoid this, banks will often "freeze" the current account when a partner leaves the firm and thus keep the accounts of the "old" and "new" firms separate.

## **J. PARTNERS' LIABILITY AND A THIRD PARTY'S ACCESS TO INFORMATION**

- 79 A partner's liability for new debts incurred on the firm's behalf lasts for as long as other partners (as agents) have authority to bind that partner.<sup>142</sup> Nonetheless, third parties are entitled to assume that the other partners remain agents until they are notified to the contrary.<sup>143</sup> Partners should therefore notify any future clients by advertising their withdrawal from the partnership in the Gazette.<sup>144</sup> An outgoing partner who wishes to avoid any liability for post-withdrawal partnership debts may require to notify clients who had dealings with the firm before his withdrawal as the Gazette advertisement is notice only to persons who had no such dealings.
- 80 It is often difficult for a third party to ascertain who was a partner at a particular time. The Business Names Act 1985 requires the disclosure of the names of current partners where the firm has a place of business and carries on business in Great Britain under a business name which does not consist exclusively of the surnames of all of the partners (with certain permitted additions). The problem for the third party is that the Act does not require a firm to maintain a record of when a person became a partner or of former partners who have since withdrawn from the firm. The Act does not help the third party establish at a later date who were the partners at the time a liability was incurred. The third party may get access to that information when he initiates litigation against the firm. Rules of Court in England and Wales allow a claimant to require the disclosure of the names and addresses of the relevant partners.<sup>145</sup> In Scotland, the court may grant an order requiring the production of documents disclosing such information.<sup>146</sup>

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<sup>142</sup> In English law the partner is bound as principal; in Scots law he is bound through his subsidiary liability for the firm's debts.

<sup>143</sup> 1890 Act, s 36.

<sup>144</sup> 1890 Act, s 36(2). If the firm is English or Welsh the notice is in the London Gazette; if the firm is Scottish it is in the Edinburgh Gazette.

<sup>145</sup> CPR, Sched 1, RSC 0 81, r 2.

<sup>146</sup> *Mitchell v Grangemouth Coal Co* (1894) 2 SLT 109.

## K. INSOLVENCY

- 81 English law and Scots law have radically different insolvency regimes for partnerships. In English law there has been an attempt to assimilate partnerships into the framework that governs corporate insolvency.<sup>147</sup> This is currently under review and is not within the scope of this report. By contrast partnership insolvency in Scots law is regulated by the Bankruptcy (Scotland) Act 1985, which provides the regime for individual insolvency.<sup>148</sup>

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<sup>147</sup> See the Insolvency Act 1986 as applied by the Insolvent Partnerships Order 1994 (SI 1994/2421). See also Davis, Steiner and Cohen, *Insolvent Partnerships* (1996) and P Totty and G Moss, *Insolvency* (1986).

<sup>148</sup> See McBryde, *Bankruptcy* (2<sup>nd</sup> ed 1995).

## APPENDIX 2

### WRITTEN MINISTERIAL STATEMENT

**IAN MCCARTNEY**  
**MINISTER FOR TRADE INVESTMENT AND FOREIGN AFFAIRS**

**Thursday, 20<sup>th</sup> July 2006**

#### **Partnership Reform**

##### **Government statement following the Law Commissions' Report and related consultation**

The Law Commission and the Scottish Law Commission published a report on partnership law reform in November 2003 (Law Com No 283; Scot Law Com No 192). It included recommendations in respect of general partnership law and limited partnership law, together with a draft Bill designed to replace both the Partnership Act 1890 and the Limited Partnerships Act 1907. I am very grateful for the Law Commissions' detail and thorough work.

The DTI followed this with a consultation document on the economic impact of reform of partnership law. Respondents to the consultation were divided on the economic benefits of the proposed reforms to the business community. A summary of responses is being published on the DTI website at <http://www.dti.gov.uk/bbf/corp-governance/partnership/page25911.html>. Copies are available in the libraries of the House.

The Government has carefully considered the report from the Law Commissions and the consultation responses and intends to bring forward proposals for the reform of limited partnership law based on the Law Commissions' recommendations. The recommendations for limited partnership reform have been widely supported and there is a strong economic case for taking them forward. The reforms are not dependent on the proposed reforms for general partnership law which the Government has decided not to take forward at this time.

The Government aims to take forward the reforms to limited partnership law by means of a Regulatory Reform Order when Parliamentary time allows, and to publish a consultation document containing draft clauses shortly.

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Responses to this Consultation Paper should be made in writing, by 31 October 2008,  
to:

The Jersey Law Commission  
Whiteley Chambers  
Don Street  
St Helier  
Jersey  
JE4 9WG

Fax no. 01534 504444

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