

Legal Aspects of doing Business in Sri Lanka

by
Kandiah Neelakandan
Precedent Partner
Murngesu & Neelakandan
Attorneys-at-Law
Colombo, Sri Lanka
(Website : www.mnlaw.lk)

INTRODUCTION

'Sri Lanka' means the resplendent or beautiful land. It is the name by which the country has been known to its inhabitants for centuries, though the early foreign visitors and the foreign powers that ruled it from time to time gave it different names. It has been known as 'Ceylon' for over one and half centuries until the Island became a Republic for the first time in 1972 and adopted its indigenous name Sri Lanka. After the adoption of the second Republican Constitution in 1978, its official name has been the 'Democratic Socialist Republic of Sri Lanka'.

It is an Island of perpetual summer, located in the Indian Ocean (hence the name 'Pearl of the Indian Ocean') situated between 79°42' and 81°52' east longitude and 5°55' to 9°50' north latitude 650 km north of the Equator. It is separated from the South of India by the twenty or so mile wide Palk Strait. The island is 65,610 square kilometers in area (with land area of 62705 sq. km), 430 kilometers in length (North to South) and 225 kilometers in width (East to West).

The former administrative capital, Colombo, which remains Commercial Capital is a port city located in the Western coast of the country and is still its commercial centre. Sri Jayawardenapura which was a suburban town and where the new Parliament has now been built is the new Administrative Capital of the Country.

Though the country may be small in size, it accommodates a multi-ethnic, multi-religious and multi-lingual population of more than 20 million people. The majority community consists of the Sinhala people who compose 73.8 per cent. They are the descendants of the Aryans who migrated to the island from North India some twenty-five or more centuries ago. The 18.5 per cent Tamils are Dravidians who came in at various times from South India. The 7.2 per cent Moors are the descendants of the Arabs who settled down in the past, while the ancestors of the small percentage of Malays were brought by the British rulers from the South East Asia, mainly to run the Police and Military forces. The balance 0.8 per cent are burghers and others. The main religious distribution is 69.3 per cent Buddhists, 15.5 per cent Hindus, 7.5 per cent Muslims and 7.6 per cent Christians. Others constitute 0.1 per cent. While most Buddhists are Sinhalese nearly all Hindus are Tamils, Muslims consists of Moors and Malays, and the Christians come from the Sinhala and Tamil Communities and are usually concentrated in the coastal areas of the West and East.

Sri Lanka boasts of a recorded history of over twenty-five centuries. Before the advent of the Westerners, the country was ruled by the Sinhala Kings and at times by the Tamil Kings who came in from South India.

In 1505 AD, the Portuguese arrived and, taking advantage of the civil strife and internal dissensions among the locals, entrenched themselves in the maritime areas. Christianity was introduced during their rule. They named the island 'Ceilao'.

In 1658, the Dutch expelled the Portuguese with the assistance of local chieftains and renamed it 'Ceilan'. They built churches, canals, fortresses, courts and introduced their system of Roman Dutch Law, which still forms an integral part of the Laws of the Country. In 1796, by the Treaty of Amiens, the Dutch ceded all their possessions in the maritime areas of the country to the British, who renamed the country 'Ceylon'. By the Kandyan Convention of 2 March 1815, the entire country came under the British rule and the last King of Sri Lanka was captured and expelled by the British.

Due to the political agitation that followed and intensified later, the country was granted independence by the British on 4 February 1948. Since then and particularly during the past decade, there emerged an era of intense development in the fields of agriculture, irrigation, housing, power and trade. Massive multipurpose projects such as the Victoria, Kommerell, Randenigala and Maduru-Oya were undertaken alongside a campaign to complete the construction of a million houses for the homeless. These development projects have been successfully carried out, despite the strife situation in the North and the East and the deep South.

Sri Lanka's history of trade goes back to over a thousand years. When much of the world was still building their nations and establishing their territorial boundaries, Sri Lanka was a gaining reputation as a leading trading country. Exotic spices and brilliant gems were the mainstay of her trade. Since then, trading in Sri Lanka has undergone changes to meet the demand of the times. The past century was dominated by the three major crops, tea, rubber and coconut. Since of late, there has been emphasis on diversification of the sources of foreign-exchange earnings like non-traditional exports (such as packeted tea, gems, fashion garments, sea-food, coir and fibre products, fruits, vegetables, cut-flowers, foliage, boats, jackets, computer software etc.) and services. There is increased commercial activity which has brought in foreign collaboration for a number of commercial and industrial enterprises, a dozen or more multi-national Banking institutions.

The Country has a plural legal system, consisting of the Roman Dutch Law, the English Law and Indigenous Laws such as the Muslim Law, the Thesavalamai Law and the Kandyan Law.

The Indigenous Laws and the Roman Dutch Law govern principally the Laws of Persons and of property, while the commercial Laws are derived from the English Law and the Statutory Laws.

Like the Anglo-American systems, Sri Lanka is a Common Law jurisdiction and practices an adversarial system of justice.

The present Constitution, adopted in 1978, provides for an Executive Presidency with a Parliamentary system of government. Among the fundamental rights which are guaranteed and made justiciable by it is the freedom to engage in lawful occupation, profession, trade, business or enterprise, either alone or in association with others. Under the Constitution, the State is pledged to establish a democratic socialist society, the objectives of which include the:

... establishment of a just social order in which the means of production, distribution and exchange are not concentrated and centralized in the State, State agencies or in the hands of a privileged few, but are dispersed among, and owned by, all the People of Sri Lanka. [Article 27(2)(f)]

International treaties and agreements on the provision and protection of investments are guaranteed by Article 157 of the Constitution in the following terms:

Where Parliament by resolution passed by not less than two-thirds of the whole number of Members of Parliament (including those not present) voting in its favour, approves as being essential for the development of the national economy, any Treaty or Agreement between the Government of Sri Lanka and the Government of any foreign State for the promotion and protection of the investments in Sri Lanka of such foreign State, its nationals, or of corporations, companies and other associations incorporated or constituted under its laws, such Treaty or Agreement shall have the force of law in Sri Lanka, and otherwise than in the interests of national security no written law shall be enacted or made, and no executive or administrative action shall be taken, in contravention of the provisions of such Treaty or Agreement.

FORMS OF BUSINESS UNDERTAKINGS

Three types of business undertakings exist in Sri Lanka and they are:

- Proprietorships;
- Partnerships; and
- Companies.

PROPRIETORSHIPS AND PARTNERSHIPS

A single individual can carry on business under his personal name or under a business name registered in terms of the provisions of the Business Names Ordinance (Chapter 180 of the Legislative Enactments of Sri Lanka — Revised 1980). Although the Legislature enacted in 1988 has a new statute titled the Business Names Act No. 58 of 1988 to replace the said Ordinance, the same had not yet been brought into operation. However with the establishment of Provincial Councils all businesses in the provinces (except Northern and Eastern Provinces for which the Provincial Councils did not function for a long time and the Provincial Council has now started functioning in the Eastern Province) should be registered with the respective Provincial Registrars of Companies. The Provincial Councils functioning for those provinces have enacted suitable statutes to give effect thereto, almost adopting the Business Names Ordinance.

Two or more persons can carry on business in partnership under a business name registered in terms of the provisions of the said Business Names Ordinance/statute.

If a sole proprietor or partners carry on business under a business name without registering the business name or without furnishing the particulars required by the said Ordinance, he or they will not be able to enforce any contract entered into in the name of that business unless the appropriate court of law grants them leave on application made therefor after satisfying the Court the reasons for the default.

The Law of Partnership in Sri Lanka is the English Law, subject to certain provisions contained in the Partnership Ordinance (Chapter 179 of the Legislative Enactments of Sri Lanka — Revised 1980).

In terms of the Prevention of Frauds Ordinance (Chapter 84 of the Legislative Enactments of Sri Lanka — Revised 1980), any agreement for establishing a partnership should be in writing if the capital of the partnership exceeds Rs 1,000.

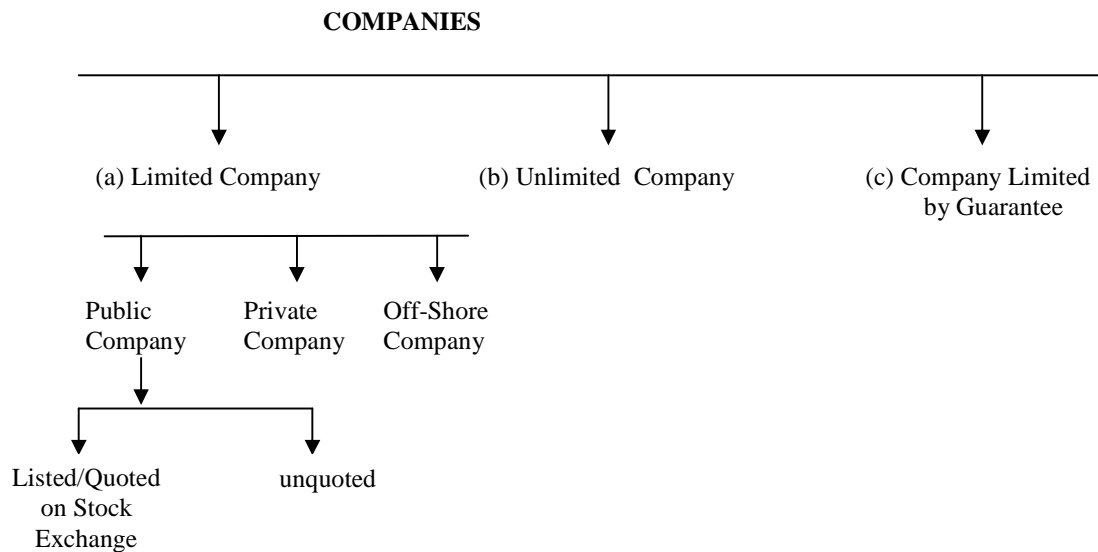
In any action to be instituted in a court of law, each and every partner should file action in his personal name and should be personally sued. The institution of action in the name of the business was permitted under the procedure set out in the Administration of Justice Law which was in operation from 1975 to 1978 but the same is not permissible under the Civil Procedure Code which has taken its place and is now in operation.

COMPANIES ACT

The new **Companies Act No. 7 of 2007** was enacted by the Parliament on 20th October, 2006 and was certified by the Speaker on 20th March 2007. The provisions of the Act have been brought into operation on **3rd May 2007** by an Order made by the Minister of Trade, Marketing Development, Co-operative and Consumer Affairs, and published in the Gazette Extraordinary No. **1493/20 dated 20th April 2007**.

TYPES OF COMPANIES

The following types of Companies can be established under the provisions of the Companies Act No.7 of 2007:-



ABOLITION OF DOCTRINE OF ULTRA VIRES

The doctrine of 'ultra vires' is **no more** a rule of our Company Law as the New Act does not recognise it. A Company is now **not** required to have a **memorandum**. However it has the option of including **the objects** as a part of the Articles of Association more particularly, if the rules of the Exchange Commission or Stock Exchange or a Board of Investment agreement requires the objects to be included. However the new Law contains limitations in respect of **major transactions**

CONTRACTS ON BEHALF OF THE COMPANY

One of the important deviations made by the new Act is **dispensing with the mandatory requirements of the common seal**. A contract or other enforceable obligation may be entered into by a company by its authorised persons as provided for in Sections 19 and 20 of the Act. However, the new Act recognizes that a company may have a common seal.

DUTIES OF DIRECTORS

The new Act imposes statutory duties on directors of a company :-

- (a) to act in **good faith and in the best interests of the Company**.
- (b) to **comply with the Act and the Company's articles of association**.
- (c) **not to act in a manner** which is **reckless or grossly negligent** but to **exercise the degree of skill and care** that may reasonably be expected of a person of his knowledge and experience.

- (d) **to rely on and use information and advice** received from others **only if he knows** that such **reliance is not unwarranted** and if he is not put on notice after making adequate inquiries.
- (e) **to make disclosure of interests.**
- (f) **not to use company information.**
- (g) **to disclose share dealings.**
- (h) **to approve remuneration and other benefits for directors only as provided** for the Act.
- (i) **not to give loan or provide guarantee or security to a director** unless permitted under the Act.
- (j) to act as provided for in Section 219 in the event of a situation of **insolvency**.
- (k) to call an extra-ordinary general meeting as provided for in Section 220 if it appears that there will be **serious loss of capital**.

INTERESTS REGISTER

Every company should maintain an Interests Register. However, in the case of a private company, such register can be dispensed with.

A director of a company should disclose his interests and have the same entered in the Interests Register. Furthermore, remuneration and other benefits to directors should also be entered in the Interests Register

INDEMNITY AND INSURANCE

A company can indemnify or directly or indirectly effect insurance for a director or employee of the company or of a related company only in the manner set out in section 218.

SHARES AND SHAREHOLDERS

A company need not have authorised capital or par value for shares under the new Act. Stated Capital concept has been introduced by the new Act. Provisions are included in the Act to protect minority shareholders.

Minority Buy-Out Rights are also recognized in the new Law.

OVERSEAS COMPANY

A company incorporated outside Sri Lanka can establish a place of business in Sri Lanka and register its branch in Sri Lanka under the provisions of Part XVIII of the Act. Although the Companies (Special Provisions) Law No. 19 of 1974 and the Foreign Companies (Special Provisions) Law No. 9 of 1975 have been repealed by Section 533(2) of the Act, Section 489(7) of the Act provides that a company incorporated outside Sri Lanka should not establish a place of business within Sri Lanka or be registered as an overseas company, where the business being carried on by that company does not conform to the stipulations made by or under the Exchange Control Act.

For further details on important provisions of the New Companies Act in a nutshell, please see my firm's website : www.mnlaw.lk.

FOREIGN INVESTMENT AND ITS PROTECTION

Foreign investment in the local equity market is open to approved Country Funds and Regional Funds, (approval is given by the Ministry of Finance, which is a formality) and Citizens of Foreign States (whether resident in Sri Lanka or outside Sri Lanka) and Sri Lankans resident outside Sri Lanka. Foreign investors may invest in up to 100 per cent of the issued capital of a limited company [subject to certain exclusions, limitations and conditions which are referred to hereinafter]. The investment in an unlisted company requires prior approval from the relevant authorities. Foreign investment is permitted in all sectors of the economy except in the following activities which are reserved for citizens of Sri Lanka :-

- (a) Money Lending;

- (b) Pawn Broking;
- (c) Retail Trade with a capital investment of less than US\$ 1 Million;
- (d) Coastal fishing;
- (e) Provision of security services including security management, assessment and consulting to individuals or private organisations

The BOI now permits 100% foreign ownership in a number of areas of investments. Foreigners are permitted to acquire shares up to 100% in public quoted companies subject to the limitations set out in the notification of the Controller of Exchange in the Government Gazette Nos.721/4 of the 29th June 1992, 1122/12 of 7th March, 2000 1232/14 of 19th April 2002, 1248/19 of 8th August 2002 and 1685/2 of 21st December 2010. The monies for such investment should be received through a SIA (Securities Investment Account). Prior to 1992 the Finance Act No.11 of 1963 imposed a transfer tax of 100% on the transfer of shares in Companies to non-citizens of Sri Lanka but that tax was abolished in 1992.

SECURITIES INVESTMENT ACCOUNT (SIA)

Foreign investors are permitted to invest in shares of (a) Companies listed at the Colombo Stock Exchange and (b) unlisted companies in which foreign investment has been approved by the Board of Investment of Sri Lanka or the Government of Sri Lanka or by any legal or administrative authority set up for approval of any such investment. To facilitate investment by foreign investors, authorized dealers are permitted to open and maintain Securities Investment Account (SIA) for (a) Country Funds and Regional Funds as may be approved from time to time by the Minister of Finance Corporate Bodies incorporated outside Sri Lanka; and (b) Citizens of Foreign States, and Citizen of Sri Lanka Resident outside Sri Lanka.

SIA shall only credited with inward remittances or transfer form a non-resident foreign currency account or from and off shore unit of a bank and converted into Sri Lanka Rupees at the prevailing rate of exchange, The credits to this account will comprise inward remittances, sale proceeds of shares, dividends and commissions to such transactions. Funds in this account may be utilized for all payments related to share transactions such as brokers fees, bank charges, etc., expenses in Sri Lanka of the Account holder subject to certain limits . For remittance of dividends abroad, tax clearance has to be obtained, confirming that withholding tax has been paid. Sale proceeds of shares of listed companies may be remitted without delay. Such remittances are made by banks without the need for prior exchange control approval. Although remittances are subject to the production of a tax clearances certificate, the procedure for the issuance of this Certificate has been streamlined.

PROTECTION

Foreign investment is guaranteed protection by the Article 157 of Constitution of the Republic of Sri Lanka (as pointed out earlier).

Sri Lanka has entered into a number of Investment Protection Agreements with several countries including Belgium, China, Denmark, Egypt, France, Finland, Germany, Italy, Indonesia, India, Iran, Japan, Korea, Luxembourg, Malaysia, The Netherlands, Norway, Romania, Singapore, Sweden, Switzerland, Thailand, U.K. and U.S.A. Bi-Lateral agreements are valid for 10 years. They are extended automatically unless terminated by either party. If the agreements, are terminated, investments already made are protected for another 10 years. The said Article 157 of the Constitution ensures the sanctity of these agreements which generally provide for :-

- (a) Protection against nationalisation;
- (b) Prompt and adequate compensation if required;

- (c) Free remittance of earnings, capital and business fees;
- (d) Settlement of disputes under the ICSID

Sri Lanka is also a founder-member of the Multilateral Investment Guarantee Agency (MIGA) of the World Bank which provides guarantees against non-commercial risks, such as those arising out of political changes or political instability and insecurity. MIGA issues guarantees including co-insurance and re-insurance of investments, against non-commercial risks such as losses resulting from expropriation, breach of contract, war and civil disturbances.

BOARD OF INVESTMENT

The Board of Investment (BOI) has its origins in the Greater Colombo Economic Commission (GCEC) established in 1978. In 1992 the Commission was reconstituted as the Board of Investment of Sri Lanka.

The BOI is structured to function as a Central Facilitating point for investors. It operates as an autonomous statutory body that is directly responsible to the President of Sri Lanka. Board of Directors of BOI drawn from the Private Sectors, Public Sectors and several departments that are geared to facilitating the investment process. Salient features in the BOI Agreement are that the specific incentive granted to the eligible company as tax holidays or preferential tax rates, exemption from custom duty and foreign exchange controls remain valid for the life of the enterprise. The provisions and the spirit of the agreement which may include cannot be changed by successive government.

The GCEC was initially established with the objective of encouraging Foreign Direct Investment in export-oriented activities. In pursuance of this objective, the Export Processing Zones were developed as industrial estates with the necessary infrastructure and other needs of GCEC enterprises. These Export Processing Zones (EPZs) come under the sole authority of the GCEC. The first to be established in 1978 was the Katunayake EPZ. It is located in close proximity to the International Airport. This was developed in three phases and covers an area of approximately 200 hectares. The second EPZ at Biyagama is situated between the Colombo Port and the Katunayake International Airport, 24 kilometers from Colombo, and covers an area of 180 hectares. A third zone, the Koggala EPZ, covering an area of 80 hectares, was opened in mid-1991, close to the southern seaport at Galle, which is 115 kilometers south of Colombo.

Further Industrial Parks have been set up at Sithawake, Awissawella, Malwatte, Wathupitiwala and Mirigama within the Gampaha District and Polgahawela and Mawathagama in Kurunagala District.

APPLICABLE LAW

The main Law governing foreign investment is found in the Law No.4 of 1978 as amended in 1980, 1983, 1992, 2002 and 2009 and regulations made under the Act.

The Board of Investment Law was amended by :-

- (a) Greater Colombo Economic Commission (Amendment) Act No. 43 of 1980;
- (b) Greater Colombo Economic Commission (Amendment) Act No. 21 of 1983; and
- (c) Greater Colombo Economic Commission (Amendment) Act No. 49 of 1992 whereby the title of the Law was also changed to the Board of Investment of Sri Lanka Law.
- (d) Board of Investment of Sri Lanka (Amended) Act 10th of 2002.

RESERVED AND REGULATED ACTIVITIES

As stated earlier the areas totally reserved for Sri Lankans are:

- (a) Money Lending;
- (b) Pawn Brokering;
- (c) Retail Trade with a capital investment of less than US\$ 1 Million;
- (d) Coastal fishing;
- (e) Provision of Security Services including Security Management assessment and consultancy to individuals or private organizations.

Foreign Investment in the regulated areas listed below will be allowed on a case by case basis by the relevant authorities. The BOI will direct potential foreign investors to the appropriate authorities who regulate these activities and evaluate foreign investment proposals

- (a) Air Transportation;
- (b) Coastal Shipping;
- (c) Industrial undertaking in the second schedule of the Industrial Promotion Act No. 46 of 1990 namely – any industry manufacturing arms, ammunitions, explosives, military vehicles and equipment aircraft and other military hardware, any industry manufacturing poisons, narcotics, alcohols, dangerous drugs and toxic, hazardous, or carcinogenic materials, any industry producing currency, coins or security documents,
- (d) Large scale mechanised mining of gems and
- (e) Lotteries and

APPROVAL FOR INVESTMENT

The approval of the BOI for foreign investment is automatic in most instances unless the same is in respect of foreign investment of more than 40% in an activity in the non-automatic list or if that involves provision of fiscal and financial incentives.

The **non-automatic list** given by the BOI is as follows :-

- (a) Production of goods where Sri Lanka's exports are subject to internationally determined quota restrictions
- (b) Growing and primary processing of tea rubber coconut rice cocoa sugar and spices;
- (c) Mining and primary processing of non-renewable natural resources;
- (d) Timber-based industries using local timber;
- (e) Fishing; (deep sea Fishing)
- (f) Mass Communications;

- (g) Education;
- (h) Freight forwarding;
- (i) Travel Agencies ;
- (j) Shipping Agencies.

INCENTIVE PACKAGES

As an impetus to the development effort, the BOI provides a wide range of incentives and concessions. These incentives and concessions depend on the type of project proposed. The incentives offered belong to two classes or "regimes", and the enterprise may become eligible for incentives offered by either of these two regimes. Reproduced below are the investment incentives as announced by the BOI.

The two regimes are :

BOI Incentives under Section 17 of the BOI Law

Special incentives, outside identified laws of the country, are available to enterprises approved by the BOI, under Section 17 of the BOI Law, if they meet certain criteria.

INCENTIVES UNDER SEC. 17

Section 17(l) of the Board of Investment of Sri Lanka Law ('BOI Law') reads as follows:

"The Board shall have the power to enter into agreements with any enterprise in or outside the Area of Authority and to grant exemptions from any law referred to in Schedule B hereto, or to modify or vary the application of any such laws, **to such enterprises** in accordance with such regulations as may be made by the Minister." (Emphasis *is ours*)

The laws referred to in the Schedule B of the BOI Law are the following -

- * The Inland Revenue Act No.4 of 1963;
- * The Inland Revenue Act (No. 28 of 1979).
- * The Inland Revenue Act (No. 38 of 2000)
- * The Customs Ordinance.
- * The Exchange Control Act.
- * The Companies Act.
- * The Merchant Shipping Act.
- * The Finance Act No.65 of 1961, Parts I, 11, V, VI, VII & VIII.
- * The Finance Act No. 11 of 1963 Part XII
- * The Air Navigation Act.

* The Inland Revenue Act No. 10 of 2006

"Enterprise" has been defined by section 35 of the BOI Law and it means and includes only the enterprise, which is established with BOI approval for the purpose of carrying on the envisaged business.

Section 17(2) reads as follows :-

"Every such agreement shall be reduced to writing and shall upon registration with the Board, constitute a valid and, binding contract **between the Board and the enterprise.**"

Enterprises which satisfy specific eligibility criteria qualify for incentives under Section 17 of the BOI Law. The incentives offered by the BOI were expanded in November 1995. The new incentives represent a two pronged strategy: diversification of exports towards advanced technology and value addition, and investments in large scale projects including infrastructure. The incentives offered by the BOI were further expanded in November 2006. The new incentives covered Information Technology / IT enable services, BPO Industries, Textile / Fabric manufacturing, printing, dyeing washing and finishing projects. Setting up export trading houses in rural sector. Procure agricultural products, handy craft items, handloom and other locally manufactured products any other products with collecting centers outside Colombo and Gampaha District. **(Please see the website www.boi.lk for the BOI incentives which are now stated to be under review)**

For the purpose of granting the new incentives, "advanced technology" has been defined as follows by the Ministry of Finance.

- i. Technology which introduces a new design, formula or process for the manufacture of an article or in the provision of a service, resulting in one or more of the following :-
 - a. Higher productivity resulting in lower cost of production
 - b. Quality improvement of product/ service
 - c. Better Utilization of raw materials
 - d. Upgrading of technical skills
 - e. Minimizing/ controlling environmental pollution and/or wastage
- ii. Manufacture of products using a technology hitherto not applied in Sri Lanka (excluding technology involving only simple processing)
- iii. Technology for the local processing of raw materials, which are currently imported in processed form, excluding simple types of processing.
- iv. Technology hitherto unutilized in Sri Lanka that would make use of local resources to provide public utilities and infrastructure services.

Investments in Non-Traditional Export-Oriented Manufacturing, Advanced Technology Electronics Sector Information Technology, IT enabled and Services, Regional Operating Headquarters and Direct and Indirect Exporters are the main types of investment that qualify for incentives under Section 17 of the BOI Law, with applicable conditions.

General Incentives Under the Normal Laws of the Country - Permission under Sec. 16 of the BOI Law

The incentives offered under this regime are also available to both local and foreign investors. Firms that do not qualify for concessions under Section 17 of the BOI Law may seek incentives available under the normal laws of the country such as Inland Revenue Act, Turnover Tax Act, Excise (Special Provisions) Act and Customs Ordinance. Foreign investment entry to operate under the normal laws is conferred under section 16 of the BOI Law which entitles the enterprise to repatriate profits and dividends attributable to foreign shareholders.

Resident Visas

The Foreign investors who make substantial investments in Sri Lanka are eligible for Resident Visas.

BOO, BOT AND BOOT PROJECTS

The Government of Sri Lanka has sought the collaboration of the private sector, local and foreign, on mutually beneficial terms in the development of the infrastructure. These projects typically take the form of privately owned and managed ventures or public-private partnerships whereby the resources, risk and profits connected with the venture are shared. Projects are usually structured on the basis of Build-Own-Operate (BOO), Build-Own-Transfer (BOT) or Build-Own-Operate-Transfer (BOOT).

In determining the terms of the BOO/BOT/BOOT projects the Government will negotiate with the objective of providing satisfactory services to the public at reasonable costs, while providing the private sector owner/operator with a risk-adjusted return. In the case of projects initiated by the Government, a tendering process will be conducted to secure such services at reasonable cost to the consumer by encouraging competition among potential private sector participants, while ensuring that their return on investment is reasonable but not excessive.

The Sri Lankan government now encourages local and foreign private investment in the country's infrastructure. Private investors are already active in telecommunications services such as cellular services, wireless local loop systems and pay phone networks. Investments into the power sector, ranging from mini-hydro systems to large-scale generation plants, and the port sector are now being implemented. Other opportunities in infrastructure investments are wide ranging highways, public transport and environment are a few examples. Foreign ownership up to 100% is allowed in these ventures.

In 1996, the Government issued new guidelines on the Government Tender Procedure. Part 11 of these guidelines deals with private sector finance projects. These guidelines require a Government agency which decides that certain infrastructure projects are to be implemented by or with the participation of the private sector to follow the procedure laid down in those guidelines. According to those guidelines, the Bureau of Infrastructure Investment is the coordinating agency of all activities in relation to such projects.

The focal point of the BOO/BOT/BOOT program is the Bureau of Infrastructure Investment (BII) established as a separate unit of the BOI. BII is responsible for all aspects of project development in collaboration with key policy and implementing Ministries and is promoting coordinating and facilitating foreign investment into the Infrastructure sector.

In terms of the guidelines set down by the Government, the procurement process relating to Infrastructure projects commences with the issue of a request for proposals. The proposals will be evaluated by a Project Committee which functions under a Cabinet Appointed Negotiating Committee.

In the alternative, in terms of the guidelines it is also possible for an investor to submit an unsolicited proposal. Where such a proposal is submitted, the relevant Government Agency will examine the need for such an Infrastructure project and if the need for such a project is recognised, the Government Agency will thereafter submit the unsolicited proposal to a competitive process. By this method the Government expects to obtain the best terms even from such an unsolicited proposal.

STRATEGIC DEVELOPMENTS PROJECTS ACT NO. 14 OF 2008

This new law was enacted to promote Strategic Development Projects and to provide a tax free period in relation to identified strategic development projects.

Strategic Development Project means a project which is in the national interest and which is likely to bring economic and social benefit to Sri Lanka and which is likely to change its landscape, primarily through –

- (a) the strategic importance attached to the proposed provision of goods and services, which will be of benefit to the public;
- (b) the substantial inflow of foreign exchange to the country;
- (c) the substantial employment which will be generated and the enhancement of the income earning opportunities; and
- (d) the envisaged transformation in terms of technology.

EXCHANGE CONTROL

Issue and Transfer of Shares to Non-residents in Companies -

In terms of the Exchange Control Act, no shares can be issued or transferred to a non-resident without the permission of the Controller of Exchange. General permission has now been granted by the Controller of Exchange for the issue or transfer of shares in a Company up to 100% of the issued capital of such company to non-residents, subject to certain exclusions and limitations. The payment for shares in any issue or transaction so permitted should be made out of or into a Securities Investment Account (SIA) opened in a Commercial Bank in accordance with the directions given by the Controller of Exchange. All transfers, remittances of dividends and sale proceeds of securities should be through the SIA accounts and could be permitted by an Authorised Dealer subject to the production of the following -

- (I) A certificate of balance in the SIA account at the date of application.
- (II) Contract notes in proof of sale price and number of shares sold.
- (III) Income tax clearance covering the amount to be repatriated.

The general permission so given -

- (a) does not apply to shares in Companies carrying on or proposing to carry on,
 - (I) Money lending,
 - (II) Pawn brokering,
 - (III) Retail trade with a capital of less than U.S. \$ 1 million,
 - (iv) coastal fishing.
 - (v) Provision of Security Services including
- (b) applies only up to 40% of the issued capital or up to such higher percentage of foreign investment as approved by the BOI of a Company carrying on or proposing to carry on,
 - (i) Production of goods where Sri Lanka's exports are subject to internationally determined quota restrictions;

- (ii) Growing and primary processing of Tea, Rubber, Coconut, Cocoa, Rice, Sugar and Spices,
 - (iii) Mining and primary processing of non-renewable national resources,
 - (iv) Timber based industries using local timber,
 - (v) Fishing (deep sea fishing),
 - (vi) Mass communication
 - (vii) Education
 - (viii) Freight forwarding,
 - (ix) Travel agencies and
 - (x) Shipping agencies
- (c) applies only up to such percentage of the issued capital as approved by the Government or other lawful authority of a company carrying on or proposing to carry on -
- (i) Air transportation,
 - (ii) coastal shipping,
 - (iii) Industrial undertaking in the second schedule of the Industrial Promotion Act No. 46 of 1990 namely - any industry manufacturing arms, ammunitions, explosives, military vehicles and equipment aircraft and other military hardware, any industry manufacturing poisons, narcotics, alcohols, dangerous drugs and toxic, hazardous, or carcinogenic materials, any industry producing currency, coins or security documents,
 - (iv) Large Scale mechanized mining of gems,
 - (v) Lotteries.

For the purpose of the Exchange Control Act the following are considered non-residents: -

- (i) All persons whose permanent place of abode is outside Sri Lanka including citizens of Sri Lanka who have made their permanent abode outside Sri Lanka.
- (ii) Citizens of Sri Lanka who have emigrated from Sri Lanka or who have proceeded outside Sri Lanka for taking up employment or setting up in business or profession.
- (iii)
 - (a) The Diplomatic Representative, Consul or Trade Commissioner in Sri Lanka (by whatever name or title designated) of the Government of any foreign country.
 - (b) Any member of the staff of any person referred to in sub-paragraph (a) who is a citizen of the Country represented by such Diplomatic Representative, Consul or Trade Commissioner, and is not a person who carries on or exercises in Sri Lanka any other employment, trade, business, profession or vocation.
 - (c) Any expert, adviser, technician or official whose salary or principal emolument is not payable by the Government of Sri Lanka and who is brought to Sri Lanka through any specialised Agency of the United Nations Organisation or any Organisation approved by the Minister.
 - (d) Any official of the United Nations Organisation, I.M.F., World Bank, I.B.R.D., A.D.B., or other similar Organisation, who is in Sri Lanka, excluding citizens of Sri Lanka who have been recruited locally.

- (e) Any member of the family of any person treated as being resident outside Sri Lanka under sub-paragraphs (a), (b), (c) or (d) of paragraph.
- (f) Any trainee from abroad who is sent to Sri Lanka under any of the Technical Co-operation Programmes of the United Nations Organisation and its Specialised Agencies or of the Colombo Plan Organisation or of any other Organisation approved by the Minister.
- (g) Personal Representatives, including Attorneys, Administrators, when acting solely in that capacity for a deceased person, who at the date of death was resident, for Exchange Control purposes, in a country outside Sri Lanka.
- (h) Sri Lanka Trustees of will trusts or inter-vivos settlements when acting solely in that capacity where the deceased at the time of death, or the settlor at the time the settlement was made, was resident, for Exchange Control purposes, outside Sri Lanka.

ISSUE AND TRANSFER OF DEBENTURES OF SPECIFIED BUSINESS ENTERPRISES TO FOREIGN INVESTORS

The Controller of Exchange has granted a general permission for issue of debentures in Sri Lankan Rupees in a Company classified as a specified business enterprise in terms of the Sri Lanka Accounting and Auditing Standards Act No. 15 of 1995 to foreign investors subject to terms and conditions set out in Gazette No. 1681/11 dated 22nd November 2010.

NRFC and RFC Accounts

1. NRFC may be opened for –
 - (a) a citizen of Sri Lanka who is or has been employed outside Sri Lanka;
 - (b) a national of a foreign country who prior to the acquisition of such nationality was a citizen of Sri Lanka;
 - (c) with the prior written approval of the Controller of Exchange, a foreign employment agency licensed by the Sri Lanka Bureau of Foreign Employment.
2. A NRFC may be opened for a person referred to in clauses (a) and (b) of paragraph 1 while such person is resident outside Sri Lanka or within ninety days after the return of such person to Sri Lanka.
3. Funds in a NRFC may be utilized for –
 - (a) making any payment in foreign currency to or for the credit of a person resident outside Sri Lanka;
 - (b) transfer of funds from one NRFC to another NRFC;
 - (c) making any payment in Sri Lankan rupees converted at the prevailing rate of exchange;
 - (d) issue of travelers cheques and, subject to subparagraph 3.1, of foreign currency notes for travel outside Sri Lanka to –
 - (i) the account holder where such holder is a person referred to in clauses (a) and (b) of paragraph 1 above.

- (ii) A proprietor, partner or a director of the account holder where such holder is a foreign employment agency, on production of an unutilized travel ticket.
 - (e) an investment in a BOI Enterprise;
 - (f) subject to such restrictions as may be imposed under the Banking Act No.30 of 1988, as security for the grant of rupee loan facilities for third parties.
- 3.1. Except with the approval of the Controller of Exchange, foreign currency notes issued for travel under clause (d) of subparagraph (1) shall not exceed five hundred United States Dollars as per instructions given to authorized dealers and the total amount released under subparagraph (1)(d) shall be endorsed on the passport of the traveller as foreign exchange issued against funds held in that account.
4. A RFC may be opened for
- (a) an individual resident in Sri Lanka, whether a citizen of Sri Lanka or not, who could satisfy the authorized dealer that the individual owns or holds foreign exchange of an amount not less than five hundred United States Dollars or its equivalent in other foreign currency on inward remittances in favour of the individual or brought to Sri Lanka on arrival therein by the individual;
 - (b) A citizen of Sri Lanka resident in Sri Lanka who owns or holds foreign exchange of an amount not less than five hundred United States Dollars or its equivalent in other foreign currency.
5. Funds in a RFC may be utilized for –
- (a) making any payment in foreign currency to or for the credit of a person resident outside Sri Lanka;
 - (b) transfer of funds from one RFC to another RFC;
 - (c) making any payment in Sri Lanka in Sri Lankan rupees converted at the prevailing rate of exchange
- and any documents for making any of the above payments shall be endorsed as being issued in Sri Lanka against the funds in the RFC.
6. “1. The following shall be treated as “resident in Sri Lanka”:-
- (i) Citizens of Sri Lanka or citizens of foreign countries married to citizens of Sri Lanka, if the permanent place of abode of such person is Sri Lanka.
 - (ii) Citizens of Sri Lanka referred to in paragraph 1(i) above, who have proceeded outside Sri Lanka temporarily on holiday, business or medical treatment, or for any other similar reason.
 - (iii)(a) The Diplomatic Representative, Consul or Trade Commissioner of the Government of Sri Lanka resident outside Sri Lanka (by whatever name or title designated);
 - (b) Any person who is a citizen of Sri Lanka, if he is a member of the staff of any person referred to in sub-paragraph (a) above, or a member of the staff of a Government Corporation, Institution or a Statutory Board incorporated in Sri Lanka, serving abroad, except those recruited abroad;
 - (c) Any member of the family of any person treated as being resident in Sri Lanka under sub-paragraph (a) or (b) of paragraph 1(iii)

- (iv) Citizens of foreign countries who are in Sri Lanka, except passengers in transit to other countries or visitors touring the country for pleasure or business;
- (v) Offices and Branches in Sri Lanka of Companies, Firms, Banks or any other Organisations whether owned by citizens of Sri Lanka or foreigners.

Buying and Selling of Gold in Sri Lanka

Subject to paragraph (a) and (b) below general permission has been granted in terms of a notification published in the Extraordinary Gazette No. 1263/10 of November 22, 2002 for the purpose of -

- (i) Buying gold in Sri Lanka;
- (ii) Selling gold in Sri Lanka by any person who is resident in Sri Lanka.
- (iii) Importing into Sri Lanka or exporting from Sri Lanka of gold by any person subject to the conditions specified in the paragraphs (2) and 3 thereto.

However gold shall not be imported into Sri Lanka on consignment account basis by any person other than -

- (a) a licensed commercial bank; or
- (b) a limited liability company approved by the Controller of Exchange;
 - (i) which is primarily engaged in trading of gold or manufacturing gold jewellery or other gold products for exports;
 - (ii) which has a paid up capital of not less than Rs.10 million;
 - (iii) which has a good financial track record for not less than three years; and
 - (iv) which has experience in gold trading for not less than three years.

Please see the said gazette notification for details.

Others

The Exchange Control Act has certain restrictions in respect of dealings in gold, foreign currency and other properties which dealings are allowed only with the required permission of the Controller of Exchange. No person in or resident in Sri Lanka can open bank accounts abroad or acquire any foreign assets. Likewise no payments in or outside Sri Lanka to a person outside Sri Lanka or to his credit can be made without the permission of the Controller of Exchange. The Exchange Control Act contains provisions in respect of securities, import and export, duty to collect debts, tourist services, Shipping agencies, airline agencies, other agencies, blocked accounts etc. Needless to say that when transactions, payments and receipts involving non-residents and foreign currencies take place one should satisfy oneself that there is compliance with the Exchange Control Act. NRFC and RFC Accounts can also be opened and operated as permitted by the regulations of the Controller of Exchange. Although Exchange Control is expected to be completely lifted in the near future, the laws in respect of Exchange Control as at date need strict compliance.

BANKING SYSTEM

Exchange Rate Regime and Exchange Rate Movements

Sri Lanka continues to follow an independently floating exchange rate regime, the Sri Lankan rupee no longer depreciates at a steady pace against major currencies, but responds to market forces of supply and demand in determining the exchange rate with limited intervention by the Central Bank to mitigate excessive volatility in the market.

Currency

The fixed parity of the Sri Lanka Rupee (SLR) with the Pound Sterling was ended on 24 May 1976. Thereafter, exchange rates were established daily by the Central Bank on the basis of a currency cut with Sri Lanka's main trading partners and their parities with US Dollars (pounds, FF, DM, Yen, Indian Rupees). Since 10 November 1982, however, the US Dollars is the unique lead currency for the SLR. Foreign trade transactions with the commercial banks are done in Dollars, except for transactions within the Asian Clearing Union (Bangladesh, Burma, India, Iran, Nepal and Pakistan). Commercial banks may apply their own business and selling rates within margins laid down by the Central Bank.

Law

The law relating to banking in the country is the English law subject, however, to any contrary provision in the statutes of Sri Lanka. It may in this connection be noted that the law applicable to mortgage of an immovable property to a bank and guarantees is still the Roman-Dutch Law which is the common Law of the Country.

New Banking Legislation

The country's Legislature has passed the Banking Act Number 30 of 1988 to provide for the introduction and operation of a procedure for the licensing of persons carrying on banking business and for the regulation and control relating to the business of banking.

Nevertheless, the substantive law relating to banking continues to be the English Law.

Banking Structure

Banking structure in the country comprises indigenous and foreign commercial banks, development banks, savings banks and rural banks. At the apex of the banking structure stands the Central Bank of Sri Lanka which is responsible for the smooth functioning of the banking system. It regulates and controls the Banks in order to ensure monetary stability and solvency of the banking system.

Indigenous Commercial Banks

There are six indigenous commercial banks of which two, the Bank of Ceylon and the People's Bank, are State owned while the balance, The Commercial Bank of Ceylon PLC, the Hatton National Bank PLC, the Sampath Bank Limited, the Seylan Bank PLC, DFCC Vardhana bank Limited, National Development Bank PLC, Nations Trust Bank PLC, Union Bank of Colombo Limited and Pan Asia Banking Corporation PLC, are privately owned.

These banks raise deposits from surplus units and channel those deposits to deficit units. They provide short-term loans to meet working capital requirements of businesses and medium and long-term loans to develop new projects. They also provide a host of ancillary services, foremost among them being foreign exchange operations, facilitating international trade, undertaking management consultancy services, corporate and syndicate financing.

Foreign Commercial Banks

A good number of leading foreign banks operate branches in Colombo. They include Citibank NA, Habib Bank Limited, Hongkong & Shanghai Banking Corporation, Indian Bank, Indian Overseas Bank, Standard Chartered Bank, ICICI Bank Limited, MCB Bank Limited, Public Bank Berhad, Standard Chartered Bank (Pakistan) Limited and State Bank of India. The volume of transactions go apace, and the Government is taking a major interest in the development of Sri Lanka as an international finance centre with off-shore facilities.

Most banks participate in off-shore business through their foreign currency banking units system and are thus authorized to hold such accounts from non-residents. The proceeds are tax-free. Accounts are currently held in US

Dollar, French Franks, Deutsche Mark, Swedish Kronar, and Swiss Francs. Loans and advances from these accounts are available to non-residents. The firms established in the BOI Investment Promotion Zones are considered as non-residents for this purpose. Under certain circumstances, local firms may also enjoy loan facilities from this scheme. However costs of fixed capital in foreign investments cannot be financed by recourse to the domestic banking system.

Development Banks

The institutions which fall within this category, namely the Development Finance Corporation of Ceylon (DFCC) and the State Mortgage and Investment Bank (SMIB) have been set up with specific purposes.

The DFCC

The DFCC, established in 1955, provides long-term capital investment requirements to the private sector. It raises funds for this purpose both from domestic (by issuing debentures) and foreign (by raising loans from international financial institutions) sources. In providing its services, the DFCC offers financial assistance to private enterprises in the form of equity participation, loans convertible debentures and guarantees. It also provides consultancy services in the formulation, establishment and management of development projects.

The SMIB

The SMIB provides medium and long-term credit for the development of agricultural and industrial sectors and housing. For this purpose it is authorized to raise funds through the issue of debentures, shares, stocks, and securities and acceptance of term deposits above certain minimum amounts. Unlike the DFCC the SMIB can lend to both private and public enterprises.

Savings Bank

The National Savings Bank (NSB), formed by the amalgamation of Post Office Savings Bank, the Ceylon Savings Bank and the National Savings Movement, provides a rational institutional framework for promoting and mobilizing domestic savings, so necessary for capital formation. The funds mobilized by the Bank are largely lent to the Government. Its credit operation with the public is for housing. It also operates a pilot rural credit project in one of the Districts of the country, with a view to gaining necessary experience to extend the scheme to other Districts.

Ceylinco Savings Bank Limited is owned by the Private Sector and the Sri Lanka Savings Bank Limited is established with the participation of the State Sector.

Housing Development Finance Corporation Bank of Sri Lanka.

HDFC Bank is established under the Act No. 7 of 1997 for providing finance facilities for housing purposes and for redemption of residential properties.

Rural Banks

The Regional Rural Development Banks (RRDB) operate on a District basis to mobilize savings and to use such funds to finance small scale agricultural industrial and other productive enterprises in rural areas. Cooperative Rural Banks established by various Multi-purpose Co-operative Societies too raise deposits in rural areas and grant short-term agricultural and other loans to members.

INSURANCE

The insurance companies were all nationalized in 1963. Since then, insurance business in the country were handled exclusively by the National Insurance Corporation and the Insurance Corporation of Sri Lanka.

However, in 1988 the Government permitted the Private Companies to carry on the insurance business pursuant to which the Ceylinco Insurance Company Limited, Eagle Insurance Company Limited, Janasakthi Insurance Company

Limited, ABC Insurance Company Limited, Alliance Insurance Company Lanka Limited, Asian Alliance Insurance Company Limited, HNB Assurance Limited, Celinco Takaful Insurance Co-operative Insurance Company Limited and Union Assurance Limited commenced business. All kinds of insurance business available in the European markets are represented in Sri Lanka. In the fields of property insurance, the range includes fire insurance as well as insurance against burglary and theft, storm, floods, loss of profits and all other risks.

It is possible to resort to insurance businesses which are not established in the country since the import liberalization of recent years also includes the services sector.

The Sri Lanka Export Credit Insurance Corporation (SLECIC) is considered one of the main instruments of public export promotion and offers the entire range of risks coverage like its European counterparts such as COFACE or HERMES. It does not discriminate among resident firms along national lines, and mainly covers commercial risks such as insolvency of the buyer or his refusal to accept goods after shipment, political risks and those not covered by general insurance. However, disputes about quality or terms of contracts as well as exchange rate fluctuations are not covered. Several guarantee schemes enable the exporter to finance, through the commercial banks, export orders, to discount export bills in order to obtain new working capital, to participate in tender bids abroad or to postpone import duties for re-exportable goods. The inventiveness of this no-profit no-loss organization goes as far as offering a telex service to small clients. SLECIC co-operates with the World Political Forecast (WPRF) Organization and has an Economic Intelligence Service; its credit intelligence reports are free of charge for the client.

The Law of Insurance in Sri Lanka is also the English Law.

LAWS OF PROPERTY AND CONTRACTS

Roman-Dutch Law is the foundation of the law of property, but it has been much amended by legislation and local custom.

The general law of contract is the Roman Dutch Law except in Commercial matters. The Commercial Law of Sri Lanka is the English Law or Statutes based on the English Statutes. Capacity to contract of persons governed by special laws such as the Kandyan Law, Thesavalamai and the Muslim Law is governed by the special system applicable to the parties to the Contract.

As a leading jurist of Sri Lanka once said, there are many pitfalls in defining a contract. However, it may be defined as a promise which will be enforced or recognized in a Court of law. A contract must be distinguished from other obligations such as those arising out of delicts quasi-contracts and trusts. To constitute a valid contract the following elements should be present:

- There should be two parties — the promisor and the promisee;
- Agreement between the parties;
- Actual or presumed intention to create a legal obligation;
- Due observance of the prescribed forms or modes of agreement, if any;
- Consideration or cause as the case may be;
- Capacity of parties to contract; and
- Reality of consent (viz the agreement should not be impeachable on the ground of fraud fear misrepresentation undue influence or such other reason).

In view of the provisions of section 2 of the Prevention of Frauds Ordinance (Chapter 84 of the Legislative Enactments of Sri Lanka — Revised 1980), the following classes of contracts are of no force or avail in law unless in writing and signed in Sri Lanka in the presence of a licensed notary public and two or more witnesses and attested:

- Any sale purchase transfer assignment or mortgage of land or other immovable property;

- Any promise bargain contract or agreement for effecting any such object and for establishing any security interest or encumbrance affecting the land or other immovable property, and
- Any contract or agreement for the future sale or purchase of land or other immovable property.

If a foreigner wants to purchase a property he will have to pay a 100 per cent tax and the purpose of this tax is obviously to discourage the foreigners acquiring the properties in Sri Lanka. However there are certain qualifications to this rule.

APARTMENT OWNERSHIP LAW

The Condominium Property Act No. 12 of 1970 was the first legislation enacted in Sri Lanka for Condominium Properties. This was repealed and replaced by the Apartment Ownership Law No. 11 of 1973 (as amended by the Acts Nos. 45 of 1982, 4 of 1999, 27 of 2002 and 39 of 2003) and the same embodies the current law for registration of multi-storeyed properties capable of being divided into separate units.

Although in terms of the Roman Dutch Law which applies to immovable properties in this country, the owner of a building is the owner of the land upon which the building is constructed (the building is in law a fixture on the land). This concept was changed by the enactment of the said Condominium Law which for the first time in Sri Lanka legally recognized horizontal layers of a building (when registered under that law) as a class of property on its own entitling separate ownership.

The owner of a Condominium Parcel enjoys freehold title of his unit whilst he shares in common with the other condominium dwellers of the sub-divided building the ownership of common elements such as land, car park, corridors and lifts.

The amendment No. 39 of 2003 paved the way for registration of provisional Condominium Plan and Semi-Condominium plan too.

Once a Condominium Plan with the corresponding Condominium Declaration is registered at the Land Registry the owner of a Condominium Parcel becomes the absolute owner of that parcel and also of the common elements based on the respective share value subject to any encumbrances registered on that property.

TRANSFER OF PROPERTY TAX

Property Tax was introduced by Part VI of the Finance Act No. 11 of 1963, as amended by the Acts, Nos.14 of 1982 and 22 of 1992. The said Part VI of the Finance Act No. 11 of 1963, was repealed by Part IV of the Finance Act No. 11 of 2002. Thereafter the said Part IV of the Act No. 11 of 2002 was repealed by Section 2 of the Finance (Amendment) Act No. 8 of 2004. The said Act No. 8 of 2004 re-enacted the said Part VI of the Finance Act No. 11 of 1963 (as amended from time to time). Accordingly, the provisions of the said Part VI of the Finance Act No. 11 of 1963, and also the orders notifications and rules or regulations made thereunder (as amended from time to time) have come back into operation again on the 5th October 2004 when the Act No. 8 of 2004 was certified.

The said Part VI of the Finance Act No. 11 of 1963 has been published as Cap. 354 under the caption “Transfer of Property Tax” in the unofficial revised edition 1980 of the Legislative Enactments of Sri Lanka (Vol. 13).

Section 58 of the said Act No. 11 of 1963 which has been reproduced as section 2 in the said Cap. 354 has been further amended by Act No 8 of 2004, by the addition of new sub-clauses 1A and 3A and by repealing the original paragraph (g) of sub-section 4 and substituting therefor a new paragraph (g).

Accordingly the present legal position as set out in the said provisions of Section 58 (as amended) is as follows:-

- “(1) Subject to the provisions of sub-section where there is a transfer of ownership of any property in Sri Lanka to a person who is not a citizen of Sri Lanka there shall be charged from the **transferee** of such property a **tax** of such amount as is **equivalent** to the **value** of that property.

- “(2) Where there is a transfer of ownership of any property within Sri Lanka to a Company there shall be charged from the **transferee** of the property a **tax** of such an amount that is **equivalent** to the **value** of that property **if more than twenty-five percentum of the issued shares of such company are owned by persons who are not citizens of Sri Lanka.**” (emphasis is ours)

However, the said liability to pay 100% tax does not arise in the following instances:-

- (a) for transfer of land to any commercial bank or body of persons carrying out the business of insurance which is not a citizen of Sri Lanka arising out of the sale of such land to such bank or body of persons in execution of a **decree of court** to enforce the mortgage of such land as security for a loan or advance given by such bank or body of persons.
- (b) The sale of any land to any person who is not a citizen of Sri Lanka if it is proved to the satisfaction of the Registrar of Lands that the negotiations for such sale had commenced before the date of operation of the Finance **Act No 11 of 1963** and the instrument for the transfer of ownership of such land was effected in consequence of such negotiations.
- (c) Transfer of property of any such class or description as is specified in any Order made by the Minister and published in the Gazette.

The Minister of Finance and Planning has published an order under Section 58(4)(g) in the Gazette Extraordinary No. 1386/18 dated 30th March 2005 declaring that the provisions of sub-sections (1), (2) and 3(A) of Section 58 do not apply to any transfer of property to the following classes or descriptions as specified in the Schedule to that Notice :-

1. Any property, the ownership of which is transferred to a **licensed bank** within the meaning of the Banking Act No., 30 of 1988, at an auction conducted by such bank in the discharge of a mortgage of such property.
2. Any property, the ownership of which is transferred to a **finance leasing institution** licensed under the Finance Leasing Act, No. 56 of 2000, upon a **purchase** made by such institution, where such property has been mortgaged to such institution as security for a lease.
3. Any property, the ownership of which is transferred to a finance leasing institution licensed under the Finance Leasing Act, No. 56 of 2000, in order to **execute a lease** and an agreement to sell or a loan and an agreement to sell.
4. Any property, the ownership for which is transferred to a licensed bank within meaning of the Banking Act No. 30 of 1988 or to a finance leasing institution licensed under the Finance Leasing Act, No. 56 of 2000, pursuant to **an order of court** in an action for recovery of a debt.
5. Any property, the ownership of which is transferred to a licensed bank within the meaning of the Banking Act No. 30 of 1988 or to a finance leasing institution licensed under the Finance Leasing Act, No. 56 of 2000 to **carry on therein its business of banking or finance leasing**, as the case may be.
6. Any land, the ownership of which is transferred to an enterprise to which **the Board of Investment of Sri Lanka has granted authorisation** in writing to set up on such land –
 - (a) a project for the construction of not less than hundred residential housing units, each constructed on land not exceeding ten perches, inclusive of appurtenant land, or a condominium property within the meaning of the Apartment Ownership Law, No. 11 of 1973 comprising not less than hundred units for residential or non-residential accommodation, provided that the total value of the land is met by inward remittances of foreign currency;

- (b) a project for the construction and operation of a hospital or a hotel, provided that the total value of the said land is met by inward remittance of foreign currency and that the investment on the project be not less than ten million US Dollars or its equivalent in Sri Lanka Rupees;
 - (c) a project relating to infrastructure development or any other development determined by the Minister as being essential for the economic progress of Sri Lanka, provided that the value of the said land is met by inward remittances of foreign currency and the investment on the project be not less than fifty million US Dollars or its equivalent in Sri Lanka Rupees;
 - (d) a project solely for the manufacture of non-traditional goods for export, for the establishment of its manufacturing plant, office, storage facilities, dormitories for workers, provided that the value of the said land is met by inward remittances of foreign currency and the investment on the project be not less than one million US Dollars or its equivalent in Sri Lanka Rupees;
7. Any **condominium unit** of a condominium property situated on or above the fourth floor of such condominium property, the ownership of which is transferred to a person who is not a citizen of Sri Lanka, provided that the value of such unit is met by inward remittances of foreign currency. In computing the number of floors in a condominium property, a floor which accommodates any common element or common elements within the meaning of the Apartment Ownership Law, No. 11 of 1973 in excess of one half of the floor area of such floor, shall not be taken into account.
8. Any property which had been acquired **prior to October 5, 2004** by a company (hereinafter referred to as the “the transferor company”) the ownership of which is transferred to another Company (hereinafter referred to as the “the transferee Company”) on the **dissolution** of the transferor company and the **appropriation** of the said property by the transferee company consequent on merger of the transferee company with the transferor company.

It must be borne in mind that any “transfer of ownership of any property” arising from –

- (a) intestacy;
- (b) by gift or testamentary disposition by any individual to his spouse, child, parent, brother or sister and the issue of such child, brother or sister, who is not a citizen of Sri Lanka; or
- (c) upon the succession of any person as trustee to a person appointed as trustee under a will or any instrument of trust or of any provident fund or any investment;

is excluded from the liability to pay 100% tax.

TAX SYSTEM

The annually voted Inland Tax Revenue Act constitutes the basis for the stipulation of tax rates. The fiscal year runs from 1 April of one year to 31 March of the succeeding year.

There are different types of income which are liable to tax:

- Profits from trade, business, profession, or vocation;
- Profits from employment;
- Net annual value of land and improvements thereon, - owner’s / occupier’s income;
- Dividends, interest, or discounts;
- Charges or annuities;
- Rents, royalties or premiums;
- Winnings from a lottery, betting or gambling

- Grants, donations or contributions received by a non-governmental organization.
- Income from any other sources whatsoever, not including profits of a casual and non-recurring nature.

Income tax is payable subject to the provisions of the Inland Revenue Act at appropriate rates specified for every year of assessment in respect of the profits and income of every person –

- wherever arising in the case of a person who is resident in Sri Lanka;
- arising in or derived from Sri Lanka in the case of a person non-resident in Sri Lanka.

If an individual is physically present in Sri Lanka for 183 days or more during any year of assessment, he is deemed to be resident in Sri Lanka throughout that year of assessment. However an individual who has been deemed to be resident for two or more consecutive years of assessment shall be deemed to be resident until such time he is absent from Sri Lanka for a continuous period of 365 days. When he is so absent for such period of 365 days he will be deemed to be non resident from the year of assessment in which such absence commences. For calculation of the period of absence for 365 days, his presence in Sri Lanka for a period not exceeding 30 days in the aggregate during the relevant period of 365 days is disregarded. In the case of a company, if it has its registered or principal office in Sri Lanka, it is deemed to be a company resident in Sri Lanka. A foreign-registered company is normally regarded as a non-resident company. However, if a foreign registered company exercises its control and management in Sri Lanka, such company is deemed to be resident in Sri Lanka.

TAXATION

The Companies are divided into two categories for taxation. Taxable income of less than Rs. 5 Million taxed at 15%. Taxable income Rs. 5 million or above to be taxed at 35%. Venture Capital Companies are liable to income tax of 20%.

New quoted public companies are liable to pay only 33 1/3% tax for first five years.

PERSONAL INCOME TAX

Maximum Rate of Tax – 35%
Tax Free Allowance – Rs. 300,000.00

CAPITAL GAINS

Taxation of capital gains is abolished.

VALUE ADDED TAX

Value added tax is introduced from 1st August 2002. In place of GST and NSL which was abolished from 30th June 2002. Vat system will consist of lower rate of 10% and stranded rate of 20%.

Zero rate suppliers will be same as in the GST law except for addition to the list of the following:

WEALTH TAX

It has been completely abolished from the year of assessment 1992/93

ESTATE DUTY

No estate duty is payable in respect of the estate of a person dying on or after 13 November 1985 (vide Estate Duty (Abolition) Act No.53 of 1985). However, administration of the estate is compulsory if the value of the estate is compulsory if the value of the estate is Rs.500,000.00 or more or he has left a last will.

TURNOVER TAX

Turnover tax is payable on business which is defined to include professions and services as well. With the devolution of powers to the Provincial Councils (under the 13th Amendment to the Constitution) the Provincial Councils in all the provinces except the North East Province have enacted Financial Statutes imposing a tax on turnover on sale by wholesale or retail of any article or commodity other than the sale by a manufacturer. There is no exemption limit under these statutes. All businesses engaged in the wholesale or retail sale of articles and commodities irrespective of their turnover are liable to turnover tax. The manufacturers and the others are liable to continue to pay the turnover tax to the Central Government.

STAMP DUTY

There is a duty of 0.5 per cent on the issue of shares. Receipts for payments of Rs 25,000.00 and over carry a stamp duty .

Wealth Tax

Tax is payable on the property of residents, at home or abroad, or on the property of non-residents in Sri Lanka. Exclusions and deductions are specified in the tax legislation.

The value of one house is exempted, if occupied by the tax payer himself. The property of husband and wife will not be aggregated but that of minor children will be added to that of the father.

Business Turnover Tax

The multi-stage tax is based on the turnover of business carried on in Sri Lanka. The rates depend on the kind of business and are subject to change from time to time.

Tax Incentives

Resident companies are at present liable to income tax at the rate of 50 per cent on their taxable income. A concessionary rate of 40 per cent is levied on public companies whose shares are quoted and who make available a minimum percentage of shares to be purchased by the general public.

Dividends, Interest and Royalties

Dividends, interest and royalties arising in Sri Lanka and received by a non-resident are liable to Sri Lanka income tax. The rate of tax on such income will be that applicable to non-resident individuals and non-resident companies. However, concessionary rates varying from 10 to 15 per cent have been extended to residents from countries with which Sri Lanka has entered into Double Tax Relief Conventions.

Tax Holidays

Tax holidays are available to various types of enterprises given outside the free trade zone provided respective statutory requirements are satisfied. Such tax holidays are available in respect of tourist hotel, urban development, housing, mahaweli development and agricultural projects.

LABOUR LAWS

Principal Laws - which regulate the various aspects of employer-employee relationship include:

1. Shop and Office Employees (Regulation of Employment and Remuneration) Act.

2. Wages Boards Ordinance.
3. The Employees' Provident Fund Act (EPF).
4. The Employees' Trust Fund Act (EPF)
5. Payment of Gratuity Act.
6. Workmen's Compensation Ordinance.
7. Factories Ordinance.
8. Industrial Disputes Act.
9. Termination of Employment of Workmen (Special Provisions) Act.
10. Minimum Wages (Indian Labour) Act.
11. Maternity Benefits Ordinance

Salient Features of some of these Principal Labour Laws are:

1. AGE LIMIT

2. WORKING HOURS

On any one day - not to exceed 9 hours (including one hour for meals and rest).

In any week - not to exceed 45 hours.

Note:

1. If working time includes the period between 11 a.m. and 2 p.m. the rest and lunch interval should be one hour. If it includes the time 7 p.m. and 10 p. m. the rest and dinner interval too should be one hour duration. Any work period, which includes 4 p. m. and 6 p. m., and at any time after a duration of four hours such rest and meal interval could be for 30 minutes.
2. The provision regarding nine hour day and forty five hour week applicable to all persons employed in shops and offices does not apply with the same vigour to public corporation managerial executives. Administratively, the application of overtime rules are relaxed In the case of other persons holding similar posts in the private sector. Travelling inspectors, travelling agents, travelling salesmen, canvassers, and those in similar positions do not get coverage for the limitation of working hours. Similarly, reporters and press photographers of publishing houses and editorial establishments of newspapers also fall into this category.
3. Working beyond nine hours (with a break for rest and meals and overtime) each day is restricted to all females and to males below 18 years' of age. This prohibition is relaxed in the case of residential hotels, clubs, theatres, and air-line shops or offices. Females above the 18th year of age could be employed before 6 a. m. and after 6 p. m. in offices maintained by airlines, and those who work as ground hostesses, as receptionists In residential hotels, as ladies cloak-room attendants, as ladies linen-room attendants, or as ladies lavatory attendants.
4. A person who has not attained the age of fourteen years cannot be employed in or about the business of a shop or an office. A male between fourteen and eighteen years of age may not be employed in a shop or an office before 6 a. m. or after 6 p. m. on any day; any male between fourteen and sixteen years may however be employed in a hotel, restaurant or place of entertainment during the period between 6 p. m. and 10 p.m. Females below fourteen years are forbidden from employment before 6 a.m. and after 6 p. m. There are however relaxations extended to females who are eighteen years of age employed in hotels etc.

3. OVERTIME

Rate of payment – 1½ times the ordinary remuneration (including C. 0. L allowances)

Period of overtime - not to exceed 12 hours in any week

Note:

1. An employee becomes entitled to overtime payments if he works for more than 8 hours a day or for more than 45 hours in a week. However, in some establishments the daily, and therefore, the weekly, hours are less than what the law allows. For instance, in some establishments the daily working hours are 7 or 7½ hours. In such cases an employee should nevertheless be paid at overtime rates for work beyond his normal working hours even though such normal working hours are less than 8 hours permitted by the Act.
2. The necessity of paying overtime rates for working in excess of 45 hours a week, as distinct from work in excess of 8 hours a day, would arise only in a situation where an employee does not receive his weekly holidays in a particular week but only in the succeeding week and, thereby, exceeds the weekly hours of work. For example, in a particular establishment the working hours are 8 hours on week days and 5 hours on Saturday, making a total of 45 hours in the week. If he works overtime during the period Monday to Friday he will receive overtime payments for work in excess of his normal working hours during the week, and not on the basis that he has exceeded the 45 hours in the week. If, in the same example, an employee worked 8 hours each day between Monday and Friday, works the whole of the Saturday and Sunday and receives his weekly holidays only in the next week then, by working on the Saturday afternoon and on Sunday he has exceeded the weekly hours of work and will receive overtime for that reason.
3. The period of any leave or holidays during the week will be deemed to be time worked for the purpose of ascertaining the number of hours he has worked in that week.
4. As the Act does not prescribe particular days in the week as the weekly holidays, the question of any special rates of overtime for 'work on' weekly holidays does not arise. As stated earlier, if an employee does not enjoy his weekly holidays in a particular week then he receives overtime payment for having exceeded his normal weekly hours.
5. For any overtime work an employee is entitled to be paid at 1½ times the normal hourly rate.
6. For the purpose of computing overtime remuneration, the hourly rate of remuneration is worked out as follows:
 - (a) where remuneration is payable at a daily rate, be 1/8th of the daily rate;
 - (b) where the remuneration is payable on a monthly rate, be 1/8th of the monthly rate divided by 30;
 - (c) where remuneration is payable at a fortnightly rate, be 1/8th of the fortnightly rate divided by 14;
 - (d) where remuneration is payable at a weekly rate, be 1/8th of the weekly rate divided by 7.
7. Where an employee is employed on a statutory holiday he is entitled to one extra day's salary or to a paid holiday in lieu before 31st December of that year.
8. The Commissioner of Labour may at his discretion permit a worker to be employed on such holiday.
9. All Full Moon Poya days operate as 'dies non' for employees in shops and offices. Unlike in the case of Public Holidays, employment on Poya Holidays, does not require the sanction of the Commissioner of Labour; remuneration for work on Poya Holidays is one and a half times the normal pay for such day. Monthly remunerated workers would receive only one half day's pay.

4. LEAVE AND OTHER BENEFITS

ANNUAL LEAVE

For those

- (a) who join between 1st January and 31st March 14 days in the year succeeding
- (b) who join between 1st April and 30th June 10 days in the year succeeding
- (c) who join between 1st July and 30th September 7 days in the year succeeding
- (d) who join on or after 1st October 4 days in the year succeeding

Note: On cessation of employment an employee is entitled to leave earned in the previous year and also in the current year of cessation. If an employee is unable to avail himself of his leave entitlement before the cessation he should be remunerated in respect of his unavailed leave on the basis of one day for each complete month if the final period of employment is less than ten months; for 14 days if the period is over ten months.

CASUAL LEAVE

Leave on account of private business, ill-health or other reasonable cause could be obtained upto a maximum of 7 days each year. New employees can obtain such casual leave on a pro-rata basis of one day for each complete period of two months.

MATERNITY BENEFITS

Women in shop and office are entitled to 84 working days leave in respect of their first two live births.

Female employees are entitled to -

- (a) 14 days leave prior to confinement and to 70 days leave subsequent to such confinement (upto a maximum of two confinements)
- (b) 42 days (of which 14 days leave prior to confinement and the balance 28 days) subsequent to such confinement (for the third and subsequent confinements)

Maternity leave 84 working days will be in addition to the any holidays falling within this period together with the weekly holidays.

The Maternity Benefits Ordinance, but not Shop and Office Employees Act requires an employer of a female employee who is nursing a child under one year of age to allow a two nursing intervals within the normal working day at such time as she may require.

WAGES BOARDS have been established for a number of trades. These boards have the power to determine minimum rates of wages and overtime and fix working hours, days of leave and holidays etc.

EPF: All employees (other than government servants, local Govt. service employees, domestic servants, employees in charitable institutions or any institutions maintained solely for the purpose of religious worship or social service and employees in industrial undertakings which are carried mainly for the purpose of giving industrial training to juvenile offenders, orphans or to persons who are destitute dumb or blind) are covered by the EPF Act. Now even employment in the service of any charitable Institution or Institution maintained for the purpose of religious worship or social service employing 10 or more employees is also a covered employment.

Contributions: Employer - 12% of the employee's earnings

Employees - 8% of the employee's earnings

Employees electing to pay higher contribution can do so but the decision, once taken, is irrevocable.

Contributions:

ETF : Employers have to contribute 3% of the employees earnings. This contribution brings for members a life insurance cover and certain medical benefits.

GRATUITY

The Payment of Gratuity Act was promulgated to achieve two main objectives:

- (a) To make a payment of gratuity for the periods of service to the Indigenous workers of the estates, which were acquired by or vested in the L.R.C., on or after May, 1971
- (b) To provide appropriate legal provisions for payment of gratuity to employees by employers.

Part I of the Act came into force with retrospective effect i.e. on 26.08.1972. All employees, except Indian repatriate workers, who had completed a period of over 05 years uninterrupted service, on an estate or an agricultural land, at the time of vesting or acquisition, under the land Reform Act or the Land Acquisition Act, are covered by this Part and calculation of gratuity to those workers is set out in the Part I of the Act.

Part II of the Act came into operation with effect from 31.03.83. All employees attached to private sector establishments and state sector Corporations which employ 15 or more workmen are covered by this Part.

The Following employees are excluded from the coverage of this Part :-

- (a) Employees, employed in establishments which have less than 15 workmen.
- (b) Employees who do not count 05 years continued service.
- (c) Employees attached to Government Owned Business Undertakings, Co-operative Societies and Local Bodies.
- (d) Personal chauffeurs and domestic Servants.
- (e) Employees who are entitled to any non-contributory pension scheme.
- (f) Employees who are entitled to a more favourable gratuity under any Collective Agreement.

Computation of gratuity to workers covered by Part II of the Act is made as follows :-

Monthly Paid Employee - Half of the monthly terminal salary for each year of service, completed by the worker.

Daily Paid Employee - 14 days salary for each year of completed service. The daily rate is deemed to be the terminal daily rate received by the worker.

Piece Rated Employee - 14 days salary earned at piece rate, for each completed year of service. The average daily earnings during the preceding 3 months before the cessation of employment of the worker, has to be considered here.

Factories Ordinance - provides for safety health and welfare of all workers in Factories. Special provisions have been made regarding the health safety and welfare of women and young persons who work in the Factories.

Industrial Disputes Act – The Industrial Dispute (Amendment) Act No. 56 of 1999 prohibits certain unfair labour practices by employers. This law contains provisions for prevention, investigation and settlement of industrial disputes and matters connected therewith. Salient features of The Industrial Dispute Act are those providing for arbitration, establishments of Industrial Courts Labour Tribunals and Collective Agreements etc.

An applicant seeking relief from a Labour Tribunal should make the application within 3 months of the date of termination.

TERMINATION OF EMPLOYMENT OF WORKMEN (Special Provisions) Act No.45 of 1971 (as amended by the Law No.44 of 1976 and the Act No.51 of 1988)

Any employer employing 15 or more workmen on an average in a scheduled employment shall not terminate (for any reason whatsoever other than by reason of a punishment imposed by way of disciplinary action) the services of a workman who has one year or more service under the employer without the workman's prior written consent or the prior written approval of the Commissioner of Labour. Termination effected in contravention of this Act is illegal and null and void. Any complaint to the Commissioner of Labour in respect of a termination in violation of this Act should be lodged within 6 months of such termination.

INTELLECTUAL PROPERTY LAWS

Intellectual property law in Sri Lanka recently took a step forward with the promulgation of the *Intellectual Property Act No. 36 of 2003* (new Act). This new Act, which came into effect on November 12 2003, repealed the *Code of Intellectual Property Act No. 52 of 1979* (old Act) and all amendments made there under.

While incorporating many of the provisions of the old Act, the new Act also includes a number of new provisions designed to bring Sri Lanka's IP law into compliance with the TRIPs Agreement.

In particular, the new Act includes substantial revisions in the areas of copyright, patents and designs. The provisions relating to unfair competition have also been expanded.

Before the new Act was passed by parliament, its constitutionality was challenged in the Supreme Court by a group of health activists, namely, the Centre for Policy Alternatives, Dr Kamalika Abeyratne, chairperson of the AIDS Coalition in Sri Lanka, and Mr Nihal Fernando.

In delivering its judgement, the Supreme Court observed that several clauses in the Bill that dealt with patents were inconsistent with Article 12(1) of the Constitution, which addresses equality before the law. The Supreme Court took the view that the clauses were inconsistent with Article 12(1) of the Constitution, as the relevant provisions of the TRIPs Agreement do not apply equally to developed and developing countries without the inclusion of safeguards, as provided for in the TRIPs Agreement, with respect to the national laws of developing countries. It was the petitioner's case that mitigating features and the safeguards which were available in the TRIPs Agreement were not included in the Bill.

In particular, Articles 30 and 31 of the TRIPs Agreement permit states to make provision for the use of a patent in the domestic market without the prior authorization of the patent holder in situations of national emergency. Further, the Doha Declaration made provision for the compulsory licensing and parallel importing of any pharmaceutical drugs needed to meet national health emergencies. In the course of its judgement, the Supreme Court observed "equal protection means the right to equal treatment when similar circumstances are prevailing allowing no discrimination against two persons who are similarly circumstanced". The court observed that "producers of patented products and processes and their agents in developed nations and consumers of such products in developing countries such as Sri Lanka could not be taken as parties that are similarly circumstanced. There is ample justification to treat them differently as they cannot be put in equal footing and if they are to be treated equally such decisions should be justified by relevant criteria." The court therefore found that Clauses 62, 83, 84, 87, 90, 91, 92 and 93 of the Bill were inconsistent with Article 12(1) of the Constitution of Sri Lanka. Therefore the government amended the relevant provisions to comply with the directions of the Supreme Court and the Bill has since been passed and is now an Act.

Copyright

The new Act provides protection for literary, artistic and scientific work. The scope of scientific work includes, *inter alia*, computer programs. There is also provision made for economic rights and moral rights. Economic and moral rights are protected during the lifetime of the author and for 70 years thereafter. The provisions relating to fair use have been expanded. There is provision that any library or archives whose activities do not serve direct or indirect commercial gain may without the authorization of the author or other owner of copyright make a single copy of the work by reprographic reproduction where, *inter alia*:

- the work reproduced is a published article or other short work or short extract of work and where the purpose of the reproduction is to satisfy the request of a physical person and the library or archive is satisfied that the copy will be used solely for the purpose of such scholarship or private research; and
- the act of reproduction is an isolated case occurring, if repeated, on separate and unrelated occasions.
- Provision is also made for the rights of performers, producers of sound recordings and broadcasting organizations to be protected. A performer shall have the exclusive right to carry out or authorize any of the following acts:
 - ❖ the broadcasting or other communication to the public of his performance or substantial part thereof except where the broadcasting or other communication:
 - ❖ is made from a fixation of the performance;
 - ❖ is a re-broadcasting, made or authorized by an organization, of initial broadcasting of the performance or substantial part thereof;
 - ❖ the fixation of his unfixed performance or substantial part thereof; or
 - ❖ reproduction of a fixation of his performance of substantial part thereof.

Performers also have the exclusive right to carry out the following acts:

- broadcasting or other communication to the public of his performance or substantial part thereof;
- fixation of his unfixed performance or substantial part thereof; and
- reproduction of a fixation of his performance or substantial part thereof.

A producer of sound recording shall have the exclusive right to carry out, *inter alia*, the following:

- a direct or indirect reproduction of the sound recording or substantial part thereof;
- importation of copies of the sound recording or the substantial part thereof, including in cases in which such imported copies were made with the authorization of the producer;
- adaptation or other transformation of the sound recording or a substantial part thereof;
- rental of a copy of the sound recording or a substantial part thereof; and
- offering to the public of the original or copies of sound or a substantial part thereof.

A new provision has been made for the Director General of Intellectual Property (Director) to settle disputes without the necessity of resorting to litigation. The new Act provides that upon an application made in the prescribed form and manner by a person aggrieved by any of his copyrights being infringed or in any other manner affected, the Director may after such inquiry as he thinks fit decide any question that may be necessary or expedient to decide in connection with such parties until the matters are finally decided by a court.

Copy right owner/Performer/Producer have the right to receive a payment for authorizing to carryout any acts under the Act. (sections 9, 17, 18 and 20. Regulation No.01 of 2005)

In order to protect the rights of local performers, provision has been made for the establishment of a Performance Rights Society.

The Act also protects the copyright in computer programs and protects folklore.

Industrial Designs

The new Act provides for more detailed examination of design applications. When the Director considers that an industrial design is not registerable, he should give his grounds for refusal. Any dissatisfied person can make representations to the Director within a period of one month of this decision and the Director could thereafter fix the matter for hearing. If after a hearing, the application is again refused, the applicant can ask for the reasons for such refusal and thereafter an appeal to the courts is available. There is also provision for opposition proceedings for designs and where a person considers that an industrial design is not registerable, he may, within two months from the date of publication, file a notice of opposition with the prescribed fee and the matter will become the subject of an inquiry.

Patents

A patent is valid for a period of 20 years from the date of application. Where an international-type search report has not been tendered by the applicant, the Director could refer the application to a local examiner and, prior to the grant of the patent, will publish a notice informing the public that such a patent will be granted at the expiration of three months from the date of publication.

The Director will then grant the patent referred to in such notice upon the expiration of three months from the date of publication unless he is restrained from doing so by a court order. In a patent infringement action, the burden of proof of establishing that an alleged infringement is not obtained by the patented process is on the infringer.

Trade marks

The new Act provides for both certification marks and collective marks. Special provisions have been introduced with regard to geographical indications. There is also provision for the protection of well-known marks and the criteria that should be taken into account in determining whether a mark is well known. Among other things, these criteria include:

- the particular facts and circumstances relating to each mark;
- any fact or circumstances from which it may be inferred that the mark is a well-known mark;
- degree of knowledge or recognition of the mark by the relevant sector to the public;
- duration, extension and geographical area of the use of the mark and the value associated with the mark.

In respect of well-known marks, marks shall not be registered if they are identical to or sufficiently similar to constitute a translation or transliteration of: i) marks for identical or similar goods or services of a third party; or ii) marks well-known or registered in Sri Lanka for goods or services which are not identical to or similar to those in respect of which registration has been applied for.

Under the new Act a mark shall not be registered in respect of goods or services the trading of which is prohibited in Sri Lanka.

Unfair competition

The New Act expands the provisions relating to unfair competition. Any act in relation to any goods or marks in the course of industrial or commercial activity which is contrary to honest practice shall constitute unfair competition and these provisions shall apply independently and in addition to the other provisions of the Act.

The provisions also cover acts which could potentially cause confusion or damage or dilute another's goodwill, misleading advertisements or promotions which discredit competitors and disclosure of undisclosed information.

In particular, the following constitute unfair competition:

- confusion (confusion may in particular caused with respect to, inter alia, a mark whether registered or not);
- damaging another's goodwill;
- any act or practice which misleads or is likely to mislead the public in respect of another enterprise or its activities;
- any false or unjustifiable allegation in the course of industrial or commercial activity which discredits or is likely to discredit another's enterprise;
- any act or practice in the course of industrial or commercial activity that results in the disclosure, acquisition or use by others of undisclosed information without the consent of the person lawfully in control of that information; and
- any act or practice in the course of industrial or commercial activity will be considered unfair competition if it consists or results in unfair commercial use of secret test or other data, the collection of which involves considerable effort and which has been submitted to a competent authority for the purpose of obtaining approval in the marketing of pharmaceutical, agricultural or chemical products which utilize new chemical entities, or disclosing of such data, except where necessary to protect the public.

Unfair competition and undisclosed information

The new Act provides for the protection of undisclosed information. In particular, the following provisions are made:

- Any act or practice in the course of industrial or commercial activity, that results in the disclosure, acquisition or use by others of undisclosed information without the consent of the person lawfully in control of that information (referred to here as “the rightful holder”) in a manner contrary to honest commercial practices shall constitute an act of unfair competition.
- Disclosure, acquisition or use of undisclosed information by others without the consent of the rightful holder may, in particular, result from:
 - i) industrial or commercial espionage;
 - ii) breach of contract;
 - iii) breach of confidence;
 - iv) inducement to commit any of the acts referred to in sub-paragraph i) to iii); or
 - v) acquisition of undisclosed information by a third party who knows or was grossly negligent in failing to know that an act referred to in sub-paragraph i) to iv) was involved in the acquisition.
 - i) For the purpose of the Act, information shall be considered “undisclosed information” if:
 - i) it is not, as body or in the precise configuration and assembly of its components, generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information in question;
 - ii) it has actual or potential commercial value because it is secret; and
 - iii) it has been subject to reasonable steps by the rightful holder to keep it a secret.
- The undisclosed information for the purpose of the Act shall include:
 - i) technical information related to the manufacture of goods or the provision of services; or
 - ii) business information which includes the internal information which an enterprise has developed to be used within the enterprise.

Registered agents

Another new feature of the new Act is that provisions have been made regarding the recognition of registered agents.

Trade description

In the case of the sale of any goods to which a trade description applies, the vendor shall be deemed to warrant that the mark is genuine and that the trade description is not false.

Geographical indications

Any interested person shall be entitled to prevent the use of any means which designate, indicate or suggest that the goods in question (including agricultural products, good, wine, or spirit) originate in a geographical area other than

the true place of origin, in a manner which misleads the public as to the geographical origin of the goods or which constitutes unfair competition.

Appeals

Appeals against any order of the Director should be made to a court within a period of six months. The appropriate court would be the high court of a province empowered with civil jurisdiction or, where no such high court is established, the High Court of the Western Province (commonly called the Commercial High Court).

Infringement

In civil proceedings for infringement, the court is entitled to grant both damages and an injunction and the fact that damages could be awarded will not be a bar to the issue of an injunction. The court has the power to order the infringer to pay damages that are adequate to compensate the intellectual property owner for the loss suffered by reason of any infringement in addition to the recovery of any profits, and can order that the infringing goods be distributed outside the channels of commerce to be destroyed without the payment of compensation. The court may also take into account the seriousness of the infringement and order the infringer to inform the intellectual property right holder of the identity of the persons involved in the production and distribution of the infringing goods and the channels of distribution.

Layout designs of integrated circuits

The new Act provides for the protection of layout designs of integrated circuits and the Director now maintains a register of layout designs.

Customs

Provisions have also been made in regard to Customs whereby an intellectual property rights-holder who has valid grounds to believe that importation of counterfeit goods or pirated copies contravene his rights, may make an application to the Director General of Customs for the release of the goods from Customs to be suspended. The rights holder should provide the Director General of Customs with *prima facie* proof of infringement and a sufficiently detailed description of the goods. The Director General could require the applicant to provide security sufficient to protect the defendant and to prevent abuse. When the Director General suspends the release of any goods, he must ensure that the importer is promptly notified. Director General may order the release of the goods after 10 working days from the date on which the alleged infringer has been informed unless proceedings against the alleged infringer have been instituted and provisional relief has been granted by the court.

Offences

Where an offence under the new Act has been committed by a body corporate, every person who at the time of the commission of the offence was a director, general manager, secretary or other similar officer of that body, or was obliged to act in any such capacity, shall be deemed to be guilty of such offence unless he can prove that the offence was committed without his consent or connivance and that he exercised all due diligence to prevent the commission of the offence having regard to the nature of his functions in that capacity and to all the circumstances.

In criminal proceedings, the penalties for IP-related offences have been increased to a fine of SLR500,000/= approximately (US\$5,000/=) and/or imprisonment for up to two years.

LAWS OF PROPERTY AND CONTRACT

Roman - Dutch Law is the foundation of the law of property, but it has been greatly amended by legislation and local custom.

REQUIREMENT OF NOTARIAL ATTESTATION

In view of the provisions of Section 2 of the Prevention of Frauds Ordinance (Chapter 84 of the Legislative Enactments of Sri Lanka – Revised 1980) the following classes of contracts are of no force or avail in law unless in writing and signed in Sri Lanka in the presence of a licensed notary public and two or more witnesses and duly attested.

- (a) Any sale purchase transfer assignment or mortgage of land or other immovable property;
- (b) Any promise bargain contract or agreement for effecting any such object and for establishing any security interest or encumbrance affecting the land or other immovable property;
- (c) Any contract or agreement for the future sale or purchase of land or other immovable property.

CEILING ON OWNERSHIP

The restriction on ownership of agricultural lands brought in by the Land Reform Law still continues. An individual or company can own only 50 acres of an agricultural land of which the paddy lands should not exceed 25 acres in extent.

CONTRACT AND APPLICABLE LAW

The general law of contract is the Roman Dutch Law except in Commercial matters. The Commercial Law of Sri Lanka is the English Law or Statutes based on the English Statutes. Contracts entered into by persons subject to special laws such as the Kandyan Law, Thesavalamai and the Muslim Law, are governed by the special system applicable to the parties to the contract.

As a leading jurist of Sri Lanka once said, there are many pitfalls in defining a contract. However it may be defined as a promise which will be enforced or recognised in a Court of law. A contract must be distinguished from other obligations such as those arising out of delict quasi-contracts and trusts. To constitute a valid contract the following elements should be present:-

- (a) There should be two parties - the promisor and the promisee;
- (b) Agreement between the parties;
- (c) Actual or presumed intention to create a legal obligation;
- (d) Due observance of the prescribed forms or modes of agreement, if any;
- (e) Consideration or causa as the case may be;
- (f) Capacity of parties to contract (this relates to whether they are minors or suffer from disabilities).
- (g) Reality of consent (viz. the agreement should not be impeachable on the ground of fraud, fear, misrepresentation, undue influence or such other reason).

PUBLIC CONTRACTS

All Public contracts (with Government Departments, establishments, Corporations, undertakings or Local Authorities) over Rs.5,000,000/- fall under the General Contracts Act No.3 of 1987. This Act is effective from 2nd

June 1988. All tenderers, agents and sub-agents representatives or nominated persons should register under the provisions of the General Contracts Act. This law is administered by the Registrar of Companies.

UNFAIR CONTRACT TERMS ACT

The Unfair Contract Terms Act 26 of 1997 imposes limits on the extent to which civil liability for breach of Contract or for negligence or other breach of Duty can be avoided by Means of Contract terms and otherwise.

The provisions of Sections 3, 4, 5 and 6 applies only to business liability and the references to Liability in those sections shall be construed accordingly.

The following Contracts are exempted from application of this law

- a) Any contract of Insurance
- b) Any contract so far as it relates to the creation or transfer of an interest in land or to the termination of any such interest.
- c) Any contract so far so it relates to the creation or transfer of a right or interest in any patent, trade mark, industrial design or other intellectual property, or to the termination of any such right or interest.
- d) Any contract so far as it relates –
 - i) to the formation or dissolution of a Company or partnership or
 - ii) to the constitution or the rights or obligations of its partners.
- e) Any contract so far as it relates to the creation or transfers or of any right or interest in securities.

Admiralty Cases

Colombo is a popular venue for admiralty cases also and it may perhaps be due to the fact that the Legal expenses are comparatively low. The Admiralty jurisdiction is exercised by the High Court of Colombo. The law relating to admiralty jurisdiction, legal proceedings in connection with ships, the arrest of ships and other property is contained in the Admiralty jurisdiction Act Number 40 of 1983. Where an action in rem has been instituted under this Act and the Judge is satisfied that the vessel or property to which the action relates will be removed out of the jurisdiction of the Court before the plaintiff's claim is satisfied, the Court is entitled to issue a warrant for the arrest and detention of that vessel or property. The law applicable to admiralty, shipping and marine matters is also the English Law as modified by the local statutory provisions.

Conclusion

We have in the short space available endeavoured to briefly set out the relevant legal aspects of doing business in Sri Lanka. Needless to add, it is only a summary of the legal aspects and any one who wishes to commence business may seek professional guidance. Please also see our website www.mnlaw.lk which we endeavour to update as far as possible. There are services of competent and experienced lawyers and accountants available in the country. Inquiries can be addressed:

In respect of *lawyers to*:

The Bar Association of Sri Lanka
No. 153, Mihindu Mawatha,
Colombo 12
Tel: 2447134, 2387477

In respect of *accountants to*:

The Institute of Chartered Accountants of Sri Lanka
30A Malalasekera Mawatha
Colombo 7
Tel: 2586256, 2500265

Sri Lanka-legal-11.03.2011.doc/office