

THE  
COMPLEX  
COMMERCIAL  
LITIGATION LAW  
REVIEW

THIRD EDITION

Editor  
Steven M Bierman

THE LAWREVIEWS

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COMMERCIAL  
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This article was first published in December 2020  
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Published in the United Kingdom  
by Law Business Research Ltd, London  
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK  
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ISBN 978-1-83862-440-8

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADVOCATES SMITH TAUBITZ UNSWORTH LTD

ALLEN & GLEDHILL LLP

BAKER & MCKENZIE PARTNERSCHAFT VON RECHTSANWÄLTEN UND  
STEUERBERATERN MBB

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SIDLEY AUSTIN LLP

THOUVENIN RECHTSANWÄLTE KLG

URÍA MENÉNDEZ

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# PREFACE

I am privileged, once again, to be the editor of *The Complex Commercial Litigation Law Review*, now in its third edition. This expanded volume is published at a time when the world grows ever smaller and commercial relationships are the common currency that links countries and cultures across the globe. And, with apologies to the poet Robert Burns, because the best laid plans of commercial counterparties go oft awry, businesses and their legal counsel in every jurisdiction must be familiar not only with the law governing commerce but also must be keenly aware of the legal issues that most frequently arise in commercial disputes. This reality has only come into sharper focus in a year when the global covid-19 pandemic not only has ravaged public health and private lives but also has profoundly unsettled a vast array of commercial relationships, with as yet uncertain ultimate consequences.

I have had the good fortune to practise law for many years as a litigation partner of a global law firm, Sidley Austin LLP, in New York City, one of the world's great commercial and financial centres, and a crossroads where many significant and complex disputes are litigated and tried, whether in our US federal or state courts or arbitrated under the auspices of pre-eminent ADR providers. I also have had the pleasure of working alongside, or opposite, some of the most accomplished disputes practitioners anywhere, whether down the street or halfway around the world, in matters both domestic and cross-border in nature. In serving our respective clients, I would like to think that we have learned from each other, and have become better and more effective for the education. I know I have.

It is with that spirit and intention that we have assembled a truly distinguished roster of leading practitioners to contribute to this third edition, which expands once again the range of jurisdictions from those covered in earlier editions. The authors of this publication are from among the most widely respected law firms in their jurisdictions. Their practices run the gamut of complex commercial litigation experience, and the home jurisdictions about which they write span the world's geography. We hope you will find their experience invaluable and enlightening when dealing with issues arising in commercial litigation in your own experience or practice.

These authors practise in disparate legal systems under dissimilar procedural regimes. One of the great strengths and, we hope, utility, of this volume is that, notwithstanding these differences, we have asked the authors to report on core principles and recent developments in the law of their country concerning the same set of fundamentally important legal issues likely to feature in complex commercial disputes, wherever they may arise. These issues include contract formation and modification; contract interpretation; breach of contract; defences to enforcement; fraud, misrepresentation, and other claims impacting contracts; dispute resolution; and remedies. The emphasis is on the law and practice of each jurisdiction, but discussion of emerging or unsettled issues is included where appropriate.

Whether you are a corporate counsel, a business executive, a private practitioner or a government official, and whether you are facing litigation or arbitration of a commercial dispute, negotiating a contract with an eye toward minimising litigation risk, contemplating how best to prevent, manage, or resolve disputes, or simply interested in learning more about this important area of law as related by seasoned and savvy practitioners, we hope you will find this volume informative, instructive and enjoyable.

**Steven M Bierman**

Sidley Austin LLP

New York

November 2020

# CYPRUS

*Stavros Pavlou, Katerina Philippidou, Andria Antoniou and Athina Patsalidou*<sup>1</sup>

## I OVERVIEW

Cyprus is a common law jurisdiction country and its justice system is based on the adversarial model. Most of Cypriot law has been modelled after the English Common Law and Equity, the basic principles of which are directly applied by Cyprus courts, under Section 29 of the Courts of Justice Law.

The general contract law of Cyprus is codified by the Contract Law, Cap. 149 (Cap. 149), which is identical in some respects to the Indian Contract Act 1872. The Cyprus courts may therefore also seek guidance from decisions of the English Courts as well as the principles of Indian case law in relation to contract law as well as recognised academic textbooks thereon.

The courts are bound by the doctrine of precedent, according to which the superior courts' (second instance) decisions bind subordinate courts. The Supreme Court has unlimited subject matter jurisdiction and its decisions when operating as an appeal court are final, unless overturned by the European Court of Human Rights or the European Court of Justice. In Cyprus, the courts follow and apply the procedural rules adopted for each type of court. The Civil Procedure Rules (CPR) apply to all district court civil procedures and in civil procedures before other Courts, in some instances *mutatis mutandis*.

## II CONTRACT FORMATION

Section 10 of Cap. 149 provides that a contract is an agreement which is concluded with the free consent of parties competent to contract for a lawful consideration and with a lawful object, and which is not expressly declared by the law to be void, and may, subject to the provisions of this Law, be made in writing, orally or partly in writing and partly orally or may be implied by the parties' conduct.

In a few words, a contract under Cyprus law is an agreement between two or more people regarding a certain matter, which creates specific obligations and rights and which is legally valid and enforceable. A contract need not necessarily be in writing, except where specifically provided so by law.

The fundamentals for the existence of a valid and enforceable contract are outlined in the following sections.

---

<sup>1</sup> Stavros Pavlou is the senior and managing partner, Katerina Philippidou and Andria Antoniou are senior associates and Athina Patsalidou is an associate at Patrikios Pavlou & Associates LLC.

### **i Offer and acceptance**

It is a basic rule of contract law that for a contract to be valid and enforceable there must have been an offer by one of the parties which was accepted by the other one.

An offer exists when one person signifies to another his or her willingness to do or to abstain from doing something, with a view to obtaining the assent of that other person to such act or abstinence.<sup>2</sup>

When the person to whom the proposal is made signifies his or her assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.

An offer should be distinguished from an invitation to treat or an invitation to negotiate because the latter cannot be accepted as such and leads to promise. The answer to such an invitation is in essence an offer.<sup>3</sup> For instance, a price list constitutes an invitation to treat or an invitation to negotiate and an order is an offer which must be accepted so as to create a binding contract.

Acceptance is an absolute and unqualified approval of the terms of an offer with any terms that may be attached.

It must be communicated to the offeror and can be in a variety of forms as follows: (1) in writing; (2) orally; (3) may be inferred by the conduct of the parties; or (4) a stipulated method of acceptance followed.

It has to be noted that silence cannot be considered as acceptance with exception of the case in which the parties have agreed to be so.

### **ii Consideration**

Valuable consideration is necessary to make a contract enforceable; consideration need not be adequate, but must be of some value and sufficient.<sup>4</sup> However, there are some exceptions,<sup>5</sup> including the cases where a party provides a gratuitous assurance by a deed, or gives a gratuitous promise. Past consideration is also considered to be valid consideration. Lastly, the contract is void when the consideration is illegal.

### **iii Intention to create legal relations**

Mutual intention of the parties to create legal relations constitutes a significant factor in considering the validity and enforceability of a contract. Such intention is presumed to exist for commercial contracts, which is generally not the case for family, social and friendly settlements.

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2 Section 2(2)(a) of Cap. 149.

3 *Irene Georgiou v. Cyprus Airways* (1998) 1 (C) C.L.R. 1994, *Christodoulou v. Cyprus Airways* (1999) 1 (B) C.L.R. 1295, *Georgiou v. Cyprus Airways* (2008) 1 (B) C.L.R. 1159 *Mary Kontou v Cyprus Airways*, Civil Appeal 301/07 date 9/11/10.

4 *Panayiotou v. Solomou* 1CLR 779 (1979), *Iosifakis & others v. Chani* 1CLR 190 (1967).

5 Section 25 of Cap. 149.

**iv Capacity to contract**

As a general rule, every person is deemed capable of entering into an agreement, except persons of unsound mind and those disqualified from contracting by any law. For parties who have not attained the age of 18 years at the time of formation of a contract, the law in force in England at the time is applicable.<sup>6</sup>

**v Law formalities**

An agreement can be made in writing or orally or partly in writing and partly orally or may be implied by the conduct of the parties.<sup>7</sup> Nevertheless, there are specific provisions stipulated that certain formalities must be met. For example, in the case of leasing an immovable property for a period exceeding one year, the contract must be in writing and signed at the end thereof by each contracting party, in the presence of at least two witnesses who are competent to contract.<sup>8</sup>

**vi Certainty of terms**

Section 29 of Cap. 149 provides that ‘agreements, the meaning of which is not certain, or capable of being made certain, are void’. The courts should try to consider a contract as valid when the uncertainty of a term does not affect the general clarity of the rest of the contract or the conditions of the contract are clear.<sup>9</sup>

**vii Third-party beneficiaries**

Applying the contractual doctrine of ‘privity of contract’ to contracts to benefit third parties, a ‘legal laguna’ is created. More precisely, the third party who has suffered loss from the breach of contract has no claim and thus is not allowed to seek remedy. A specific legislative instrument has not been adopted in the Cypriot legal system. Despite this fact, a third party is entitled to have the right to enforce a contract to which he or she is not a party in some circumstances, such as in a contract concluded by his or her agent, in cases of assignment or in cases of insurance claims.

These are not necessarily exhaustive but should be restricted to similar subjects that raise threshold questions about whether an agreement has been formed, in a commercial context. Readers should be given an idea of the common features of commercial contracts under your jurisdiction’s law. Where a formal contract has not been formed, authors may wish to refer to an alternative framework that may establish commercial rights and obligations, for example, implied in law or implied in fact contract, quasi-contract, promissory estoppel and *quantum meruit*.

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6 Section 11 of Cap. 149.

7 Section 10 of Cap. 149.

8 Section 77 of Cap. 149.

9 See *Saab & Another v. Holy Monastery Ay. Neophytos* (1982) 1CLR 499.

### III CONTRACT INTERPRETATION

#### i Choice of law principles

The parties to a contract are free to choose the law to govern the whole or part of their contract, even where the chosen law has no connection, or no apparent connection, with the transaction in issue. Where the parties to a contract choose the governing law of the contract, then the Cyprus courts will almost invariably respect such a provision, provided that that was clearly the intention of the parties.

This principle is also specifically embodied in the 1980 Rome Convention on the law applicable to contractual obligations, which provides that the choice of law must be either expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. However, Article 3(3) of the Rome Convention provides that in cases where all other elements relevant to the situation at the time of the choice are connected with one country only, then a choice of a foreign law shall not prejudice the application of rules of the law at the country which cannot be derogated by contract (i.e., the ‘mandatory rules’).

Additionally, the Cyprus courts can restrict the application of a foreign law if it is incompatible with public policy. A foreign law must be pleaded and proved as a fact. Therefore, the parties bear the burden to prove the applicable foreign law. If they fail to do so, the foreign law is presumed to be similar to Cyprus law and the courts will apply domestic law.<sup>10</sup>

#### ii Rules of construction

There are two approaches regarding contractual interpretation, namely literal and purposive. According to the first one, the interpretation process focuses firstly on the wording of the contract and only if there is a kind of ambiguity resorts to the context of the contract in order to interpret it based on the intention of the parties. In contrast, the second one promotes a commercially sensible construction based on the commercial reality.

The Supreme’s Court judgment in the case of *Theologou a.o. v. Ktimatikis Etaireias Nemesis Ltd* (1998) 1 C.L.R 407 explains the approach Cyprus courts follow:

*We should note that, there is a continuous tendency to harmonise the principles of interpretation of contract with the reality of everyday life. The criterion is the meaning which the text of the contract would convey to the average reasonable person. To this end, the knowledge may be enriched by revealing the background of the agreement, with the exception of negotiations, as well as unilateral declarations and subjective intentions of the parties. Evidence referring to subjective factors can only be admitted in actions for rectification. (See ICS v. West Bromwich BS [1998] 1 All ER 98 (HL)). The object of interpretation, of course, remains to be the meaning of the terms of the agreement according to the average reasonable person. The meaning, which is conveyed to him, for the agreed.*

<sup>10</sup> *Royal Bank of Scotland v Geodrill Co Ltd* K.A. (1993) 1 A.A.D. 753 and *Sat Vision Ltd v Interamerican Property and Casualty Ins. Co.* (1999) 1(C) A.A.D. 1811.

Moreover, another significant interpretation rule is the *contra proferentem* rule, which provides that in a case of ambiguity of a term, this term must be interpreted against the party who has proposed or drafted it.<sup>11</sup>

### iii Exclusion and limitation clauses

Although specific exclusion and limitation clauses are accepted, they are strictly interpreted. With regard to consumer contracts where terms, which were not individually negotiated, create a significant imbalance to the rights and obligation of the parties against the consumer, they may be considered unfair, taking into account the principle of good faith. A test of reasonableness or unfairness is applicable to all contracts apart from consumer contracts and where a clause is unreasonable as such or in the facts of the case, it can be voided.

### iv Implied terms

Terms in a contract may be either express or implied and can be established by custom, statute or the courts.<sup>12</sup> Construction contracts constitute a prime example of contracts encompassing implied terms. The following are examples of terms that may be implied in construction contracts (even though it is not specifically expressed therein): that the work will be done in a good and workmanlike manner; that he will supply good and proper materials; and that the house will be reasonably fit for human habitation when built or completed.<sup>13</sup>

### v Extrinsic evidence rule

As a general rule, extrinsic evidence cannot be taken into consideration for interpretation of a contract in way that they 'contradict, modify, remove or add to the content of the terms of the document'. However, it has been established that extrinsic evidence may be accepted to prove the validity of a contract (*Mavrou v. Theodorou* (1984) 1 CLR 635) the true nature of the contract (*Kypio (I.T.H.) Company v. Kassapi* [1980] 2 J.S.C. 259) and the ambiguous capacity of the parties (*Loizidou v. Georgiou* [1973] 9 J.S.C. 1219).<sup>14</sup>

## IV DISPUTE RESOLUTION

A party to a commercial contract having any monetary or specific performance claim against another party, may initiate legal proceedings in order to recover any money due thereunder or obtain an order for specific performance, as there are no threshold requirements as to the amount claimed in order to be able to do so. A party may even sue solely for the purpose of obtaining a declaratory judgment on the rights of the respective parties.

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11 *Takis Xenopoulos v. Thomas Nelson* (1982) 1 CLR 674.

12 *Agisilaou Tsiali v. Doras K. X Andreou* (Tsiali) mentally ill, dated 17/7/00 Civil Appeal 10174.

13 *Chitty on Contracts*, Volume I, 30th edition, par. 1015.

14 *Marketrends Finance Ltd v. Perdikou a.o.* (2006) 1B C.L.R. 1042.

## **i Jurisdiction**

In Cyprus the most common method of resolving large commercial disputes is by way of litigation, most often in the highest level of the district (first instance) courts where the judges (court presidents) have jurisdiction to try claims above €500,000. Apart from the presidents, a district court also offers senior district court judges with jurisdiction to try claims between €100,000 and €500,000, and district judges with jurisdiction to try claims below €100,000.

Up to now there is no separate commercial court, however on 6 May 2019 the Council of Ministers approved a draft bill providing for its establishment. The Commercial Court will solely be handling high-value commercial disputes and adopt fast track procedures.

Moreover, Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation) applies in contracts as well.

## **ii Alternative dispute resolution methods**

### ***Arbitration***

Arbitration has long been used as a means of dispute resolution, among others for construction or building contract disputes or disputes relating to cooperative institutions. Arbitration clauses have increasingly been used in all forms of contracts as the means of resolving disputes arising out of such contracts. A dispute submitted to arbitration may be resolved quicker and more cost-effectively than one submitted to litigation.

Arbitration is a private and out of court dispute resolution method based on the agreement of the parties. The dispute is resolved by an impartial arbitrator or arbitral tribunal and the decision is final and binding.

Domestic arbitration is governed by the Arbitration Law 1944 (Cap. 4), which is based on the older version of the English Arbitration Act 1950. Moreover, the International Arbitration in Commercial Matters Law (Law 101/1987) applies exclusively to international commercial disputes and is almost identical to the UNCITRAL Model Law of 1985. The amendments of UNCITRAL Model Law in 2006 have not been adopted by the Cypriot legislator. Cyprus is also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (ratified in Cyprus by the Ratification Law (84/1979)).

### ***Mediation***

Mediation is an alternative, out of court and voluntary dispute resolution mechanism. Mediation in Cyprus is not a compulsory step prior to resorting to court. It is a non-binding, private, confidential and low-cost procedure via which the parties attempt with the help of a mediator to reach an agreement by which to settle their dispute in a binding manner.

It is a rather new concept in Cyprus and, according to the Cyprus Mediation Association, 'there is strong opposition from legal circles, who loathe mediation because it bypasses legal proceedings'. This is one of the least preferred methods of ADR, since the parties may feel somewhat insecure about resorting to it as its outcome depends on the parties' personal and business interests, and common sense rather than the relevant law.

On the other hand, it may be argued that parties have little to lose by choosing mediation since, even if a settlement is not reached, the process facilitates the designation of the facts and issues of the dispute, thus preparing the ground for any potential court proceedings.

## V BREACH OF CONTRACT CLAIMS

Where a contracting party breaches terms of the contract, the burden for proving such a breach lies on the plaintiff on the balance of probabilities.

### i Termination

The innocent party in some cases has the right to either insist on the performance of the contract that has been breached or accept the breach and affirm the termination of the contract. It should be noted that if the innocent party fails to terminate the contract within a reasonable time, it may be considered as having waived its right to terminate, especially if it continues to perform its obligations according to the contract or act in a manner incompatible with an intention to terminate thereof.

Not every breach of a contract entitles the innocent party to terminate a contract. If a party breaches a condition, i.e., a term of significance and essential importance going to the root of the agreement of the parties, the innocent party may terminate the contract and seek damages. But in cases where a party breaches a warranty (i.e., a term of lesser importance and collateral to the basic scope of the contract), the innocent party cannot terminate the contract, but can only seek compensation. In the case of innominate terms, the non-breaching party is entitled to terminate the contract when the effect of the breach is sufficiently serious; in fact, its right to terminate depends on the consequences of the breach.<sup>15</sup>

The filing of an action itself can be considered as a termination of a contract.<sup>16</sup>

### ii Anticipatory breach

Where a party reveals with his or her behaviour or statements that it will not fulfil its obligations arising from the contract, the innocent party can consider itself as discharged and terminate the contract before performance is due or insist on performance thereof and sue for specific performance.<sup>17</sup>

The Supreme Court in *Neophytou Neophytos a.o. v. Elma Holdings Ltd (previously named Portfolio Investment Company Hra Limited)* (2013) 1 A.A.D. 1807 held that it was not necessary for the respondent to prove her readiness and willingness to fulfil her obligation due to a prior breach conducted by the appellants.

## VI DEFENCES TO ENFORCEMENT

### i Void and voidable contracts

The parties to a contract may avoid enforcement thereof, if the prerequisites for the formation of a valid contract are not met, and more specifically if the parties do not enter into the agreement by their free consent. Cap. 149 exhaustively provides the cases where the consent of the parties entering into a contract is not given under their free will.<sup>18</sup> Specifically, the parties do not enter into a contract under their free will if their consent is given due to the following reasons.

15 *Hong Kong Fir Shipping Ltd v. Kisen Kaisha Ltd* (1962) EWCA Civ 7.

16 See *Company J.K. Vavrites (Hotels & Leisures) Ltd v. Administration Comission of the Governmental Customer Welfare Fund*, Civil Appeal No. 31/2013, 30/1/2019.

17 *Hochster v. De La Tour* (1853) 2 E & B 678.

18 Sections 14–22 of Cap. 149.

### ***Coercion***

If someone, with the intention to force another to enter into a contract, commits or threatens to commit any act forbidden by the Penal Code or unlawfully detains or threatens to unlawfully detain any property, to the prejudice of any person.<sup>19</sup>

### ***Undue influence***

A contract is deemed to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. A person is deemed to be in a position to dominate the will of another where he holds a real or apparent authority over the other or he stands in a fiduciary relation to the other or he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress. The burden for proving that a contract was not entered into with undue influence lies upon the party who is in a position to dominate the will of the other.<sup>20</sup>

### ***Fraud***

Any of the following acts committed by a party to a contract or by his or her agent, with the intent to deceive another party thereto or his or her agent or to induce him or her to enter into the contract:

- a* the suggestion, as to a fact, which is not true by one who does not believe it to be true;
- b* the active concealment of a fact by one having knowledge or belief of that fact;
- c* a promise made without any intention of performing it;
- d* any other act fitted to deceive; and
- e* any such act or omission as the law specifically declares to be fraudulent.

However, mere silence as to facts which are likely to affect the willingness of a person to enter into the contract is not fraud, unless the person keeping silence has a duty to speak or unless his or her silence is equivalent to making a representation.<sup>21</sup>

### ***Misrepresentation***

Misrepresentation includes the following:

- a* the positive assertion, in a manner not warranted by the information of the person making it, which is not true, though he believes it to be true;
- b* any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him or her, by misleading another to his or her prejudice or to the prejudice of anyone claiming under him or her; and
- c* causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject to the agreement.<sup>22</sup>

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19 Section 15 of Cap. 149.

20 Section 20 of the Law on Contracts, Cap. 149.

21 Section 17 of Cap. 149.

22 Section 18 of Cap. 149.

Where a person entered into a contract under the above circumstances, the said contract is voidable at the option of the party whose consent was so induced.<sup>23</sup> The said party may insist that the contract must be performed and that he shall be put in the position in which he would have been if the representations made had been true.<sup>24</sup>

### ***Mistake***

Mistake refers to cases where both parties entered into the agreement under a mistake as to a matter of fact essential to the agreement. In that case, the agreement is void.<sup>25</sup>

### ***The parties are not competent to contract***

A person is considered competent to contract if he or she is not disqualified from contracting by any law and is of sound mind, namely if at the time of making the contract he or she is capable of understanding it and of forming a rational judgment as to its effect upon his or her interests.<sup>26</sup> It is irrelevant if he or she is occasionally of unsound mind, as long as he or she was of sound mind at the time he or she made the contract.

### ***The consideration and the purpose or object are not lawful***

An agreement with unlawful consideration or object is void and cannot be enforced by Cyprus courts. Sections 23 and 24 of Cap. 149 provide that the consideration or object of an agreement is deemed be unlawful where:

- a* it is forbidden by law;
- b* it is of such a nature that if permitted it would defeat the provisions of any law;
- c* it is fraudulent;
- d* it involves or implies injury to the person or property of another; and
- e* the court regards it immoral, or opposed to the public policy.

As a general rule, an agreement without consideration is void, unless it is:

- a* expressed in writing and signed by the party to be charged therewith and is made on account of natural love and affection between parties standing in near relation to each other;
- b* a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do; or
- c* a promise made in writing and signed by the party to be charged therewith, to pay wholly or in part a debt of which the creditor might have enforced payment but for any law for the time being in force relating to prescription or the limitation of actions.<sup>27</sup>

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23 Sections 16 and 19 of Cap. 149.

24 Section 19(2) of Cap. 149.

25 Section 21(1) of Cap. 149.

26 Sections 11 and 12 of Cap. 149

27 Section 25 of Cap. 149.

### ***Limitation periods***

The parties to a contract may also argue that the claim is statute-barred, namely that the time within which the parties could have initiated legal proceedings in relation to the breach of contract has elapsed. Since 1964<sup>28</sup> and until 1 January 2016,<sup>29</sup> the limitation periods in Cyprus were suspended, therefore no limitation periods applied.

The law that currently regulates the matter of limitation periods is the Limitation of Actions Law 66(I)/2012, which came into force on 1 July 2012, with a transition period of one year.

Pursuant to the provisions of Law 66(I)/2012 the limitation period begins to run from the creation of the claim or cause of action. However, the limitation period for causes of action that arose prior to 1 January 2016 begins to run therefrom.

The general limitation period provided is 10 years from the date the cause of action was perfected.<sup>30</sup> The limitation period is different depending on the nature of the cause of action. Common contract claims are statute-barred six years from the creation of the cause of action, namely from the breach of contract, while claims brought in relation to contracts or quasi-contracts for an agreed or reasonable fee for the services rendered by a lawyer, doctor, dentist, architect, civil engineer, contractor or any other independent professional are statute-barred after three years from the creation of the cause of action. Also, claims in respect of a mortgage or pledge are statute-barred after 12 years from the breach of obligation contained in the mortgage or pledge, while claims in relation to loan agreements are statute-barred after six years from the perfection of the cause of action.<sup>31</sup>

### **ii Frustration of contract**

Further to the above, the parties to a contract may invoke the doctrine of frustration so as to resist the enforcement thereof. This doctrine is applied by the Cyprus courts when a contract after its conclusion becomes, without the fault of either party, impossible or unlawful to perform due to circumstances that are beyond the control of the contracting parties or due to a change of circumstances which makes the performance of the contract impossible or unlawful.<sup>32</sup> A defendant cannot avail himself or herself of the doctrine of frustration when the non-performance of the contract is clearly attributable to his or her own default. When frustration of a contract occurs, the contract is automatically terminated and the parties do not have an option as to whether the contract will be performed.<sup>33</sup>

The element of what the parties had foreseen at the time of the contract plays a key role in whether the doctrine of frustration will be applied. Specifically, if the parties, at the time of concluding the contract, have foreseen the event that could have led the contract to be frustrated, but they did not include any relevant provision to the contract as to that event, the doctrine of frustration cannot be invoked. On the other hand, the doctrine of frustration may be invoked and applied if the event could have been foreseen by the parties (but was not actually foreseen) at the time the contract was concluded.

28 Law on Suspension of Limitation of Actions, No. 57/1964.

29 Law on Limitation of Actions No. 66(I)/2012.

30 Section 4 of Law on Limitation of Actions No.66(I)/2012

31 Sections 5 and 7 of the Law on Limitation of Actions No.66(I)/2012.

32 Section 56(2) of Cap. 149 and *KIER (Cyprus) Ltd v. Trencos Construction* (1981) 1 CLR 30.

33 See *A.N. Stasis Estates Co. Ltd v. Waldner a.o.* (1998) 1 A.A.D. 250.

### iii Force majeure

*Force majeure* occurs when a random event occurs that could not have been foreseen and which is beyond the control of the parties (for example, war, strike, hurricanes, earthquakes, government or legislative action etc). The occurrence of these events cannot be prevented by the parties, even if they exercise reasonable diligence and therefore the parties can invoke *force majeure* circumstances to avoid enforcement of the contract.

Even though Cap. 149 does not explicitly provide for these instances, contracting parties may choose to include in their contract a clause providing for *force majeure* instances which may lead to the non-performance of a contract. Even if they do not include this in the contract it will be implied by operation of law, under the principles of common law and equity.

## VII FRAUD, MISREPRESENTATION AND OTHER CLAIMS

### i Fraud and deceit

A plaintiff alleging the commission of fraud should generally prove that the defendant has acted with dishonesty or provided false statements or false representations. Due to the serious nature of the offence of fraud, and the fact that it contains criminal characteristics, the evidence to be provided must be precise and clear and general allegations will not suffice.<sup>34</sup>

The following are the essential elements of the civil wrong of fraud:

- a a representation of fact, either orally or by conduct; an expression of opinion or intention does not constitute a representation, unless such opinion or intention were never held;
- b the person making the representation must be aware that the representation is false;
- c the person making the representation intends the plaintiff to rely at the said representation and to suffer damage due to the said reliance;
- d the plaintiff actually relied on and acted in accordance to the said false representation; and
- e the plaintiff actually suffered loss, because he or she acted in accordance to the said false representation.

On the other hand, a person commits the fraud of deceit if he or she presents a false fact as true, knowing that it is false and it includes any other action which intends to deceive another person. If the other person relies upon the said representation and due to the said reliance suffers damage or loss, then the defendant is liable for the said damage or loss.

The burden for proving that the tort of fraud or deceit were committed lies on the plaintiff, who must provide and prove the details of the fraud and deceit respectively.

### ii Procuring breach of contract

The following are essential elements for proving that the civil wrong of procurement of breach of contract has been committed:

- a the defendant caused the breach of contract between two other parties. The plaintiff must show a causal link between the conduct of the defendant and the breach of the contract;

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<sup>34</sup> *Jonesco v. Beard* (1930) A.C. 298.

- b* the plaintiff must prove he suffered damage because of the procured breach of contract; and
- c* the defendant had an intention when procuring or inducing the said breach, namely the defendant must have known the existence of the contract and without any reasonable justification he procured the parties to breach the said contract.<sup>35</sup>

It should be noted that in order for the said civil wrong to be committed, the contract must be legally binding, as it is a violation of legal right to interfere with contractual relations recognised by law if there is no sufficient justification for the said interference. A defendant who was reckless or shut his or her eyes to facts may be held liable for procuring breach of the contract.<sup>36</sup>

### **iii Unlawful means conspiracy**

The tort of unlawful means conspiracy is not expressly provided for in the law but it forms a common law tort, recognised by the Cyprus courts.<sup>37</sup> The essential elements of the aforementioned tort are the following:

- a* the existence of an agreement between two or more parties; and
- b* either, where the means are lawful, an agreement the real and predominant purpose of which is to injure the claimant or, where the means are unlawful, an agreement, the purpose of which is to injure the claimant; and
- c* acts done in execution of that agreement resulted in damage to the claimant.

## **VIII REMEDIES**

Breach of contract gives the right to the innocent party to claim a number of remedies against the party who breached the contract. The innocent party may seek most of the remedies usually available under common law and the principles of equity, while the Cyprus courts have discretion in awarding such remedies to the successful claimant. The remedies may be either monetary or non-monetary. The following are the most typical remedies awarded by the Cyprus courts, within the context of claims for breach of contract.

### **i Compensatory damages**

The primary remedy awarded by Cyprus courts within the context of claims for breach of contract are compensatory damages, namely special and general damages. The damages awarded in these cases aim to compensate the innocent party for the loss it suffered and put him or her in the position he or she would have been, had the breach not occurred or had the contract been performed. These damages are calculated in accordance to the extent and type of loss suffered by the injured party. The party who rightly rescinds a contract is also entitled to compensation for any damage he or she has sustained because of the non-fulfilment of the

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35 Section 34 of the Law on Civil Wrongs, Cap.148

36 *British Industrial Plastics Ltd v. Ferguson* (1940) 1 All E.R. 479, pp.482–483.

37 see *Christoforou v. Barclays Bank PLC* (2009) 1 A.A.D. 25.

contract.<sup>38</sup> However, the innocent party should not be placed, through the award of damages, in a better position than the position he or she would have been placed had the contract not been breached.

Prior to awarding this type of damages, Cyprus courts take into consideration the following factors.

### ***Causation***

The claimant or innocent party must prove a causal link between the breach of contract and the loss suffered, namely the loss or damage naturally arose in the usual course of things from such breach, or the parties could reasonably contemplate, when they made the contract that such loss was likely to result from the breach thereof.<sup>39</sup>

### ***Remoteness***

Cyprus Courts will not award damages if the loss or damage suffered is too remote to the breach of contract or for any indirect loss or damage caused due to the breach of the contract.<sup>40</sup>

### ***Mitigation***

The plaintiff will not be entitled to compensation for damages he or she suffered due to the breach of the contract to the extent that he could take any reasonable steps for mitigating the said damage or loss.<sup>41</sup>

### ***Amount of damages***

The measure for estimating the amount of damages that will be awarded by the courts for the breach of contract is the amount required to put the innocent party in the position it would have been, had the breach not occurred or had the contract been performed and the time for determining this loss is the time the contract was breached, namely the time the actionable right arose.<sup>42</sup>

It is essential for the plaintiff not only to satisfy the court as to the fact of damage, but also as to its amount. If the plaintiff fails to thus satisfy the court, his or her action will be dismissed, or he will be awarded nominal damages for the right that was infringed.<sup>43</sup>

## **ii Restitutionary damages**

Cyprus courts have the power to award restitutionary damages in favour of the innocent party, so as to prevent unjust enrichment of the party liable for the breach of the contract. Such damages may be awarded when the plaintiff did not suffer any loss or damage because of the breach of contract, but the defendant has gained some type of profit or benefit due to

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38 Section 75 of Cap. 149 and *Metaxas Loizides Syrimis & Co v. L.K. Globalsoft com Ltd*, Civil Appeal No. 250/2005, Supreme Court judgment dated 19 January 2007.

39 Section 73(1) of Cap. 149.

40 Section 73(1) of Cap. 149.

41 *George Charalambous Ltd v. Kalos Kafes Ltd a.o.* (1997) 1 A.A.D. 199.

42 *Evelthon Developments Ltd a.o. v. Ethniki Trapeza tis Ellados Kiprou*, Civil Appeal no. 281/2008, Supreme Court Judgment dated 12 November 2012.

43 *Pontiki v. Constantinidi* (2004) 1 A.A.D. 875.

the said breach. In this case, the Court has power to award restitutionary damages in favour of the plaintiff thereby receiving any profit the party liable for the breach of contract received, because of the said breach.

### iii Punitive or exemplary damages

Cyprus courts do not have any power to award punitive or exemplary damages within the context of claims for breach of contract, punishing the behaviour of the party liable for the breach. Exemplary damages may be awarded mainly within the context of civil wrongs, including cases for procuring breach of contract, but not for the breach of contract itself.<sup>44</sup>

### iv Orders for specific performance

Cyprus courts have discretion to order the party liable for the breach of contract to comply with his or her obligations pursuant to the contract. Only the following contracts are capable of being specifically enforced:

- a if the contract is not void;
- b if the contract is expressed in writing;
- c if the contract is signed at the end thereof by the party to be charged therewith; and
- d the court considers, having regard to all the circumstances, that the enforcement of specific performance of the contract would not be unreasonable or otherwise inequitable or impracticable.<sup>45</sup>

### v Interim orders

Apart from the final orders, Cyprus courts have jurisdiction to issue interim orders within the context of claims filed with the court, according to Section 32 of the Courts of Justice Law, No. 14/1960. Such interim orders aim to preserve the status quo until the final adjudication of the case or to prevent one of the parties to act in a specific way, alienating the object of the claim.

## IX CONCLUSIONS

It is notable that the Cyprus legal system is not particularly complex, in the sense that it does not impose any strict requirements for the initiation of legal proceedings by an aggrieved party for breach of contract, including any minimum amounts in dispute.

One of the most remarkable changes in the sector of commercial litigation that is to be effected soon is the establishment of a separate commercial court that will handle only high-value commercial disputes. Such a court will enhance the faster and more efficient adjudication of these claims brought before the Cyprus courts by a specialised bench.

In complex commercial litigation, it is somewhat usual for the plaintiff to seek from the court interim relief, including freezing injunctions against the defendant's assets, until full and final hearing of his or her case, in order to ensure that in the event he or she succeeds he or she will be able to recover the damages to be awarded in his or her favour. The courts are reluctant to issue such orders on an *ex parte* basis, unless certain requirements set out by the law and case law apply, such as full and frank disclosure of all relevant matters, the existence

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44 *Constantinides v Pitsillou and Another* (1980) J.S.C. 279.

45 Section 76 of Cap. 149 and *ALPAN (Adelfoi Taki) Ltd a.o. v Trifonidou* (1996) 1 A.A.D. 679.

of urgency or of other exceptional circumstances. Even in the case where interim relief is granted on an *ex parte* basis, subsequently a full *inter partes* hearing will take place where the court, after having heard both sides, will decide as to whether it is just and reasonable under the circumstances to render the orders issued absolute or to dismiss them.

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ISBN 978-1-83862-440-8