INTERNATIONAL AND DOMESTIC COMMERCIAL ARBITRATION IN CYPRUS

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Introduction

The purpose of this article, being is to provide the reader with an overview of the international and domestic arbitration framework of Cyprus.

The Legal System of Cyprus

Cyprus was a colony of the British Empire, as it then was, from 1878 to 1960. The influence of the Common Law system of the British Empire and indeed of the law of Equity on the evolution of the legal system of Cyprus has been profound and it continues to be highly relevant. The Common Law doctrine of stare decisis / binding precedent exists in Cyprus as it does throughout the Common Law world. Hence, where there is no direct precedent of the Courts of Cyprus, practitioners and the Courts look to the Common Law and primarily English and Commonwealth cases for guidance as persuasive precedents.

The international arbitration framework of Cyprus which is governed by the **Cyprus International Commercial Arbitration Law (Law 101/1987)** will be of greater interest to most readers of this article as this is the sphere in which they are most likely to be involved.

The growing number of foreign investors in Cyprus may, however, find themselves involved in a dispute that is governed by the provisions of the domestic arbitration law, the Arbitration Law Chapter 4 of the Laws of Cyprus enacted in 1944. This is an outdated and highly problematic law, for reasons that are explained below and best avoided if this can be done.

It is therefore important for international investors in Cyprus and indeed litigants and their advisers to have knowledge of the main operative provisions of both the Cyprus International Commercial Arbitration Law and the domestic Arbitration law, the differences and, more importantly how to avoid becoming entrapped in the domestic arbitration regime.

International Commercial Arbitration in Cyprus - The Historical Context

Despite its obvious advantages such as geographical location, excellent communications, highly educated population, prevalence of the use of English and a strong Common Law based system of law, in terms of International Commercial Arbitration Cyprus before the 1980s Cyprus was effectively a wasteland. Unlike established international arbitration venues such as New York, London and Stockholm Cyprus, despite its strategic geographical location, did not have a history of International Commercial Arbitration in any commercial activity.

Arbitration was only really existed in domestic arbitrations and almost exclusively in construction disputes.

From the mid-seventies Cyprus transitioned from an economy that was based on a combination of tourism, such as it was then, agriculture and small-scale manufacturing units to a “services” centered economy. The primary services being tourism and “off-shore” commercial business and services on the back of favourable tax concessions offered to foreign businesses and individuals establishing corporate vehicles in Cyprus.

This development placed Cyprus on firmly on the business landscape where it punched way above its weight.

Additionally in the period immediately following the break-up of the USSR, Cyprus emerged as the prime destination for corporate registrations usually in the form of holding companies and consequently litigation from the former USSR states and emerging “New European” states most notably the then Yugoslavia and Poland. There were a number of reasons for this. Cyprus traditionally close ties to Russia through relative proximity, the

shared Orthodox religion, and Cyprus geographical location being at the cross roads of Europe, Asia and the Middle East.

It also has to be stated that undoubtably Cyprus' lax attitude towards the importation of funds more often than not as cash deposits from foreign jurisdictions, that would later, unfairly or otherwise, tarnish the reputation of Cyprus as Russia's money laundering jurisdiction of choice was a further attraction for the fledgling entrepreneurs of the Russian Federation.

The above factors combined to make companies from Cyprus (owned by former USSR / East European citizens) the top investors in the former USSR / Russian Federation.

This resulted in an unprecedented rise of commercial legal activity in Cyprus and along with it litigation and arbitration cases rose to hitherto unknown levels of value and complexity.

EU Membership

A further boost to the Commercial profile of Cyprus came in 2004 when Cyprus joined the EU giving Cyprus registered companies and businesses access to the European market and imposing upon Cyprus, particularly its banking sector, much needed reforms in accordance EU with anti-money laundering / proceeds of crime directives.

The above economic and commercial developments lead to the gradual evolution of Cyprus legal landscape in terms of international commercial arbitration.

International Commercial Arbitration in Cyprus - Chronology of Key Legislative Provisions

Adoption of The New York Convention

Cyprus became a member of the **New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958** on 29th December 1980 with an effective entry into force of 28th March 1981. This was achieved through the ratifying

Law 84/1979, entitled **"The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Ratification) Law"**.

As result of Law 84/1979, an award made in Cyprus by an international arbitration tribunal could be enforced on the basis of the New York convention in the countries which have also ratified it within the framework of the Convention and conversely Cyprus became a venue in which Convention awards could be enforced in accordance with the Convention.

In accordance with the Cyprus Constitution and specifically Article 169(3) of the Cyprus Constitution international treaties and conventions such as the New York Convention, once ratified and incorporated into the laws of Cyprus, enjoy elevated force within the Cyprus legal system, meaning that they override any conflicting domestic legislation.

The Cyprus courts paid heed to the above principle from the very first cases that came before them within the context of the New York Convention and to a large extent have maintained a robust and positive attitude towards the recognition and enforcement of international arbitral awards.

For sake of completeness it should be noted, however, that until the passing of the **Cyprus International Commercial Arbitration Law of 1987 (Law 101/1987)** (see below) Cyprus did not have a legal system that was tailored to the unique requirements of international commercial arbitration.

Those wishing to enforce international arbitral awards resorted to a combination of provisions of the New York Convention and Common Law rules combined with the domestic **Arbitration Law – Chapter (Cap) 4 of the Laws of Cyprus** a law that is of general application to arbitrations and arbitral proceedings in Cyprus. This law was enacted by the British colonial authorities in 1944 and reflecting arbitration law and the paternal attitude that the English courts had towards arbitration and the arbitral process. It is, indeed, unfortunate that as at the time of writing this article this is still the law that applies to domestic arbitration in Cyprus and as we shall see below domestic arbitration is still blighted by this piece of outdated and out of place legislation.

Adoption of the UNCITRAL Model Law

Undoubtably the thinking behind the ratification of the New York Convention by Cyprus was Cyprus growing international business presence and reputation of Cyprus.

The ratification of the New York Convention was followed some seven years later by the enactment of the **Cyprus International Commercial Arbitration Law of 1987 (Law 101/1987)**. The key feature of this law is the adoption of the UNCITRAL Model Law as the framework for the conduct of international commercial arbitration and the recognition and enforcement of international commercial arbitral awards in Cyprus, providing not only certainty but also a legal system that is universally recognised as having a transnational relevance and application.

Under the Cyprus International Commercial Arbitration Law, a dispute falling under the ambit of the law is one that is both “international” and “commercial” in nature. These terms are defined as follows:

The Cyprus International Commercial Arbitration Law defines “international” section 2(2) as follows:

An arbitration is considered “international if at least one of the following conditions is met:

(a) The parties to the arbitration agreement have their places of business in different states at the time the agreement is concluded.

(b) The seat or place of arbitration (if determined in the agreement) is outside the state in which the parties have their places of business.

(c) The place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject matter of the dispute is most closely connected, is situated outside the state in which the parties have their places of business.

(d) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

The above elements closely mirror Article 1(3) of the UNCITRAL Model Law. 101/1987.

The Cyprus International Commercial Arbitration Law defines the term “commercial” in section 2(4) which states that the term “commercial” should be interpreted broadly to cover matters arising from all relationships of a commercial nature, whether contractual or not.

The law provides examples, including:

- any trade transaction for the supply or exchange of goods or services
- distribution agreements
- commercial representation or agency
- factoring
- leasing
- construction of works
- consulting
- engineering
- licensing
- investment
- financing
- banking
- insurance
- exploitation agreements or concessions
- joint ventures
- other forms of industrial or business cooperation
- carriage of goods or passengers by air, sea, rail, or road

Essentially, if the relationship is business-related and not personal or purely private, it is considered “commercial” under the law.

Alignment with the UNCITRAL Model Law 2006 Revision

The Cyprus International Commercial Arbitration Law was amended in 2024 by Law 11(I)/2024. The primary purpose of the amendment was to bring the Cyprus International Commercial Arbitration Law into line with the 2006 amendment of the UNCITRAL Model law.

Accordingly, the amendments that have been introduced have significantly enhanced and streamlined the effectiveness of the Cyprus International Commercial Arbitration Law and indeed the process of international arbitration in Cyprus in the following areas:

(a) Enhanced Powers to Award a Wider Range of Interim Protective Measures.
Section 17 (Part IV(A-I)) of the Cyprus International Commercial Arbitration Law has been amended in order to incorporate a better defined and more comprehensive range of measures that may be applied for and awarded on an interim basis,

In summary these are set out in section 17 (2) of the Cyprus International Commercial Arbitration Law and may comprise of interim measures to:

(i) Preserve the status quo
(ii) Avert or prohibit acts that may cause direct or potential damage or may obstruct the arbitral process
(iii) Secure the preservation of assets out of which an arbitral award may be satisfied
(iv) Preserve evidence that may be relevant and essential for the determination of the dispute

Additionally, section 17(3) states that the provisions of part IV of the Cyprus International Commercial Arbitration Law apply by analogy where the arbitral procedure agreed upon by the parties provides for the appointment of a temporary or interim arbitrator for the determination of urgent matters.

Section 17H of the Cyprus International Commercial Arbitration Law provides for the recognition and enforcement of interim measures awarded by an arbitral tribunal in line with t**he Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Ratification) Law (Law 84/1979)** (above).

Article 17I of the Cyprus International Commercial Arbitration Law also reserves the pre-existing right of the Court (District Court) to grant interim measures in support of arbitral proceedings but extends this right to cases irrespective of whether or not any of the parties have their seat within the jurisdiction of the Court in the same manner as applies for proceedings before the Court and having in mind the specific characteristics of International Arbitration.

(b) The process of recognition and enforcement of arbitral awards has also been brought up to date and simplified in the amended Article 35 of the Cyprus International Commercial Arbitration Law by the elimination the requirement to produced a signed and authenticated original of the award. Certified copies of the Award are also permitted. This was often problematical, especially where limited authentic versions of awards were available.

The Decisions of Foreign Courts (Recognition, Registration and Enforcement) Law - (Law 121(I)/2000)

The purpose and scope of the Decisions of Foreign Courts (Recognition, Registration and Enforcement) Law is to provide for the recognition, registration and execution of the judgments of foreign Courts and of arbitral awards issued in foreign arbitral proceedings.

The Decisions of Foreign Courts (Recognition, Registration and Enforcement) Law applies to any foreign court judgment, or arbitral award that originates from a country with which Cyprus has a bilateral or multilateral treaty for mutual recognition and enforcement of judgments. This includes both judicial and arbitral decisions.

By section 3 of the Decisions of Foreign Courts (Recognition, Registration and Enforcement) Law a *"judgment of a foreign court"* is defined as including decisions from

"a court, arbitral tribunal, or similar foreign body", provided *that "the decision is enforceable in the country where it was issued"*.

A party seeking to enforce a judgment or award to which the Decisions of Foreign Courts (Recognition, Registration and Enforcement) Law applies must file an application by summons, supported by an affidavit, before the competent District Court.

In terms of a foreign judgment there is a jurisdictional requirement that for the Cyprus Court to assume jurisdiction under this Law at least one party must reside or have a seat in Cyprus, or the respondent to the application must have assets in Cyprus.

A foreign judgment or arbitral award, once recognised and registered is treated as equivalent to a domestic Court judgment, enabling enforcement through the same mechanisms, such as seizures, sequestration, attachment, or insolvency proceedings.

Amendments to the Courts of Justice Law 1960 (Law 14/60)

The Courts of Justice Law was amended in 2023 by Law 114(I)/2023. This amendment formed part of the reform of the Cyprus justice and courts system imposed by the EU in order to bring the Cyprus justice system up to speed with the rest of Europe through the elimination of the endemic delays in all Courts. The delays were such that they not only amounted to a justice but they were also a major factor in against international commercial arbitrations being conducted in Cyprus. It was common for an interim application to take up to three years to be decided at first instance, with a further three to four years on appeal. Such delays would effectively scupper any arbitral process.

The amendments to the Courts of Justice Law that have impacted the area of international commercial arbitration are the following:

Section 32 (Interlocutory / Interim relief)

The civil Courts were granted significantly extended powers to grant interlocutory (interim) relief as follows:

(a) Courts may now hear applications for interim relief at any time — including before a substantive claim is filed and after judgment has been given.

(b) The scope of the law has been extended so as to expressly cover interim relief related to court proceedings and to arbitrations that are "existing, pending or anticipated" either inside or outside Cyprus.

(c) The types of relief the court can grant were clarified/expanded as being prohibitory, mandatory, or administrative in nature for example the appointment of an interim receiver or the placement of a company into receivership in circumstances where the court considers *it "just and convenient"* to do so.

Section 21 (Jurisdiction of District Courts / Civil Jurisdiction)

The amendment of Section 21 of the Courts of Justice Law has broadened the jurisdiction of the Cyprus Courts to hear cases of an international / multijurisdictional character by extending the circumstances in which Cyprus Courts may assume jurisdiction in civil matters.

The key effects of the amendments are that the previous restrictive rules for the assumption of jurisdiction by a Cyprus court have been significantly relaxed.

The combined effect of the amendments to Sections 21 and 22 of the Courts of Justice Law is that the discretion of the Court has effectively been widened in order to encompass not only the assumption of jurisdiction per se but also applications for interim provisional / protective relief. It is now sufficient to for the applicant to establish a link to Cyprus, such as the existence of assets within the jurisdiction, a corporate seat in Cyprus or some other benefit for litigants seeking the court's protection and assistance.

Additionally and in order to eradicate all doubts as to jurisdiction the Cyprus District Courts are now expressly designated as competent courts in all cases where none of the parties is resident in Cyprus, or where the jurisdiction of the Cypriot courts arises under EU, international or private international law or any legislation in force in the Republic of Cyprus, including pursuant to the provisions of the newly introduced Civil Procedure

Rules of 2023 or the Common Law. Where none of the district courts has territorial jurisdiction in the traditional sense, the District Court of Nicosia has been designated as the court that can handle any relevant matter. This extension of the jurisdiction of the Cyprus courts has paved the way for an increase in applications for "stand alone" and interim injunctions. These procedures which had previously faced sometimes insurmountable jurisdictional issues are now more readily examined and granted by the Cyprus courts.

2023 Civil Procedure Rules

With the enactment of the Civil Procedure Rules of 2023, the Cyprus Courts were expressly empowered to issue interim or protective measures in cases where there is no substantive claim before the Cyprus Courts exists at the time of the filing of the application for the issuance of the interim orders. Although this power did exist under common law, particularly where an applicant applied for injunctive relief *"in contemplation or in aid of foreign proceedings"* such injunctions could be said to have been the exception rather than the rule.

More specifically Rule 25.4 of the Civil Procedure Rules of 2023 provides that *"measures of interim relief may be requested in relation to judicial proceedings that are or will be taking place outside the jurisdiction, or arbitration proceedings which are or will be held in Cyprus or abroad".*

These combined effect of the above amendments to the Cyprus Courts of Justice Law and the new 2023 Cyprus Civil Procedure Rules have had the effect of significantly increasing the attractiveness of Cyprus as a viable and effective forum jurisdiction in which interim remedies such as "stand alone" protective interim measures may sought in in aid of foreign judicial and arbitral proceedings. This is of particular value in multi-jurisdictional or cross-border disputes and other instances where a claimant requires the immediate protection of the Court.

The European Dimension

Upon Cyprus accession to the EU in 2004 the legal system of Cyprus adopted EU regulations and directives that directly impact the legal process. As a member of the EU, Cyprus provides access to EU regulations and directives which concern, inter alia, service of documents, choice of law, jurisdiction, and recognition and enforcement of judgments across EU Member States. The obligation of Cyprus to implement in its legal system all European regulations and directives offers not only uniformity but also speed when it comes to the adoption of measures on the basis of specific and defined procedures to which the Member States can resort. A noteworthy example of this increased speed and efficiency is the fact that service of judicial and extrajudicial documents in Cyprus can be effected by private process servers, as Cyprus has not objected to such method of service in key international conventions or treaties. Hence, service of legal process to litigants in Cyprus can be affected within days, effectively "circumventing" the Central Authorities, which take considerable time to effect service.

It should also be noted that where the Respondent is located within the EU the Civil Procedure Rules of 2023 operate in conjunction with EU Regulation No. 1393/2007 (on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters) and EU Regulation No. 1215/2012 (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). The effect of this is that no permission or leave of the court is required for service out of jurisdiction in EU Member States (see Rule 6.7 of the Civil Procedure Rules of 2023).

Conversely, for service in non-EU countries to be lawfully affected, the prior leave/order of the court is required.

The Approach of the Cyprus Courts to International Commercial Arbitration

Both the Courts of Cyprus and Cyprus legal practitioners have amassed considerable experience in the field of international commercial arbitration since the ratification of the New York Convention and the adoption of the UNCITRAL Model law as the framework governing the international commercial arbitration in Cyprus.

It can be stated that the Cyprus courts are showing an increasing appetite for the recognition and enforcement international commercial arbitral awards. The above-mentioned legislative changes will undoubtably assist in this respect.

Whilst it may have been true to say that the recognition and enforcement of international arbitral awards, particularly at District court level could sometimes have been somewhat of a minefield – a number of pedantic refusals to register international commercial arbitral awards were noted in the recent past, this attitude is changing and it is true to say that the majority of decisions in the fields of recognition and enforcement are positive.

Recognition and Enforcement of An Arbitral Award

The recognition and enforcement provisions outlined in the Cyprus International Commercial Arbitration Law broadly align with those of the UNCITRAL Model Law and the New York Convention.

The above outlined legislative provisions, most notably section 36 of the Cyprus International Commercial Arbitration Law have made the recognition and enforcement of arbitral awards more straightforward, so that the pedantic rejections for the recognition and enforcement of an international commercial arbitral award such as the absence of an official Greek translation and will hopefully become a thing of the past.

The requirement for the recognition and enforcement of an international commercial arbitral award now essentially boils down to the filing of an application before a District Court attaching the original duly authenticated award or a certified copy thereof. The court may also request a translation if the award is not in an official language of the Republic of Cyprus (either Greek or Turkish) but it is very rare for this to be requested as most judges have sufficient knowledge of English (the language in which awards are predominantly written) in order to discern whether or not the formal requirements for an award have been complied with or not. The Court will not look into the merits or the reasoning of an award.

The grounds for the refusal of recognition of an award are exhaustedly listed in section 36 of the Cyprus International Commercial Arbitration Law.

These are the following:

- The parties lacked contractual capacity or the arbitration agreement is invalid under the applicable law.
- The opposing party was not properly notified of the arbitration process or unable to present their case.
- The award addresses matters outside the scope of the arbitration agreement or differs from the terms of the submission to arbitration. In the context of this ground it should be noted that a part of an award that does comply with the scope of the arbitration agreement or the terms of the submission to arbitration may be recognised. An excess of jurisdiction does create a bar to recognition per se.
- The arbitration process did not follow the parties' agreement or the law of the seat of the arbitration.
- The award is not yet binding, or has been annulled or suspended by a competent authority.
- The dispute cannot be arbitrated under Cypriot law.
- Enforcing the award would contravene public policy of Cyprus.

The above grounds are of course a close reflection of the grounds for refusal of recognition set out in the New York Convention.

The application for recognition and enforcement is made by summons and the respondent to the application is given time to appear and lodge an objection which must be based upon the above stated grounds.

The above provisions are well and widely drafted and clear in content. There is usually no great discussion as to whether one of the grounds applies.

If an award has been suspended or is the subject of a challenge at the seat of the arbitration the Cyprus court will invariably exercise its discretion in favour of postponing the recognition of the award the suspension is lifted or the challenge is finally decided.

As with most other jurisdictions the Courts of Cyprus give precedence to proceedings at the seat of the Arbitration.

Moreover, awards annulled abroad can still be recognized and enforced in Cyprus under EU regulations (Regulation (EU) 44/2001, 1215/2012) or the Lugano Convention, or under bilateral treaties or common law provisions.

Sovereign Immunity

As a precursor to the discussion on state or sovereign immunity it should be noted that Cyprus has implemented the doctrine of state or sovereign Immunity into its legal system through a series of treaties and conventions which regulate the applicability of the doctrine. Immediately after its establishment the Republic of Cyprus acceded to the **Vienna Convention on Diplomatic Relations 1961** and transposed it into national legislation by the **Law on the Convention of Vienna of 1961 on Diplomatic Relations Law (Law 40/1968)**. This law regulates the immunity of diplomatic missions and agents. In 1976 the Republic of Cyprus acceded to the **European Convention on State Immunity 1972 and its Additional Protocol (ETS no.074A) ("European Convention on State Immunity")** which the Republic of Cyprus transposed into national legislation by the **Law on the European Convention on State Immunity and its Additional Protocol of 1976 (Law 6/1976)**.

The Courts of Cyprus have applied the doctrine of state or sovereign immunity as established by the above legislative provisions which depart from the concept of absolute immunity.

In the case of the **General Attorney of the Republic (No.1) (1997) 1 SCJ 802** the Supreme Court of Cyprus noted the distinction that exists in public international law between absolute and restrictive state immunity and in furtherance of the application of

the doctrine of State or Sovereign immunity as it exists in Cyprus it noted that Cyprus does not recognise the immunity as being absolute.

Cyprus recognises and applies a clear distinction between state acts that constitute the exercise of a governmental function or authority and acts undertaken by a state in the commercial sphere.

The Court stated that state immunity applies where governmental acts are taken in the exercise of sovereign capacity and thus characterised as *"acta jure imperii"* but it does not apply when actions are "private" or "commercial" and thus *"acta jure gestionis".*

The same distinction was also enunciated in the case of **Slovenia v Beogradska Banka D.D. interlocutory appeal judgment (1999) 1 SCJ 225** in which the Supreme Court examined whether Cypriot Courts have jurisdiction over a dispute between Slovenia and a bank controlled by the then Republic of Yugoslavia relating to the ownership of money of the former Republic of Yugoslavia that were allegedly deposited with the state controlled Beogradksa Banka to which the state of Slovenia laid claim. Slovenia argued that the assets were being held on trust by the state-controlled Beogradksa Banka on behalf of the government and that accordingly this gave rise to a "private" or "commercial" act rather than a state act. The Court rejected this argument stating that Beogradksa Bank in holding the funds on behalf of the government of the Republic of Yugoslavia was effectively acting in a governmental capacity and whilst acting as such was entitled to rely on the privilege afforded by state immunity. Thus, despite the fact that the said bank was undoubtably a commercial entity and carried out commercial operations through branches, including a retail branch in Cyprus, it was held in the particular instance to be acting as an organ of state of the Republic of Yugoslavia.

The approach in this case is distinguishable from the approach taken in the case of **Tlais Enterprises Ltd v Her Majesty's Revenue & Customs (Ex Her Majesty's Customs and Excise), Civil Appeal number 109/2009 dated 18/3/2015)** where the Court stated (obiter) that the doctrine of state immunity can apply in circumstances where the state is acting purely as a state and could not claim state immunity in circumstances where it

entered into an agreement regulating the policing of cigarette importation into the UK with a commercial enterprise and the levying and execution of penalties.

Public Policy

The public policy defence to the recognition of an international commercial arbitral award is of universal application. It is found in the New York Convention, the UICITRAL Model Law and indeed in the Cyprus International Commercial Arbitration Law.

The concept of what constitutes public policy may differ from state the state. Cyprus, being a Common Law jurisdiction has not codified what constitutes public policy into by way of a law.

Public policy is significant in terms of the recognition of an international commercial arbitral award as an award procured by fraud is in many jurisdictions liable to be annulled or incapable of recognition on grounds of public policy.

In the Cyprus Supreme Court case of **Attorney General of the Republic of Kenya v Bank fur Arbeit Uno Wirtschaft AG (1999) 1 A CLR 585** in the absence of a statutory definition of what constitutes public policy in Cyprus, the Court sought to interpret and establish an acceptable understanding of what constitutes public policy in the field of the enforcement of international commercial arbitral awards stating that the notion of public policy includes *"the fundamental values which a society recognises in a specific time period, as those values which govern the transactions and other perspectives of its members, with which the established legal order is imbued".* In the task of interpreting and explaining the concept of public policy guidance was sought from the Common Law, specially from Canada. This is one of the earliest cases in which the Courts of Cyprus were called to determine the issue of recognition and enforcement of an international commercial arbitral award.

Further explanations of what constitutes public policy in Cyprus can be found in subsequent cases such as **Charalampides v Westacre Investments Inc (2008) 1 (B) JSC 1217**. In this case the Court stated that the term public *policy "is recognised to*

include the fundamental governing principles which society in general recognises at the specific time and which permeate the established legal order".

Domestic Arbitration in Cyprus – The Arbitration Law Cap. 4

Despite the fact that arbitration, especially in certain spheres such as construction disputes, is the most prevalent dispute resolution mechanism in Cyprus, as far as domestic arbitrations are concerned, the operative statute is Cyprus Arbitration Law, Cap. 4, a statute enacted during colonial times in 1944. Since then, there have been no amendments to this statute.

In order to understand the machinery and key aspects of the domestic Arbitration Law, Cap. 4, we have set out the main provisions and legal authorities relating to the operation of these provisions, namely sections 8, 20 and 21.

Section 8 gives power to the Court to stay proceedings in an action brought before it on the grounds that the matter in issue should have been referred to Arbitration.

Section 20 gives power to the Court to remove an arbitrator for "misconduct".

Section 21 gives power to the Court power to set aside or refuse registration of an Arbitral award.

Stay of Legal Proceedings

Section 8 of the Arbitration Law, Cap. 4 reads as follows: *"If any party to an arbitration, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the 2 arbitration agreement or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do*

all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Before exploring the case law relating to section 8 of the Arbitration Law Cap. 4 it is important to note that the Constitution of the Republic of Cyprus safeguards access to Courts. The Courts do not have power to stay court proceedings either ex proprio motu or merely upon the ground that there is an arbitration clause binding on the parties before it, unless the defendant or one of the defendants applies for stay.

In order for the Court to deprive the Plaintiff of the constitutionally protected right of access to the Court it has be satisfied that the court proceedings do indeed constitute a breach of the arbitration clause.

There are a plethora of Supreme Court judgments dealing with the judicial power to stay proceedings and the criteria that are applied by the Court when considering whether or not to stay legal proceedings. In the case of **Bienvenido Steamship Co Ltd v. Georgios Chr. Georghiou and Another, 18 CLR 215**, decided before the establishment of the Republic of Cyprus, but adopted by the Supreme Court of Cyprus in subsequent cases (**see e.g. Viola Sausalito v. Christoforos Pelecanos (1976) 1C.L.R 251 at page 258**) the Court, in construing section 8, adopted the following principles:

(a) That the dispute in question is a dispute within the arbitration clause.

(b) The power of the Court to stay the proceedings is discretionary.

(c) It requires some substantial reason to induce the Court to deny giving due effect to the agreement of the parties to submit the whole dispute, whether of fact or law or both fact and law to arbitration.

In **Bienvenido** the arbitration clause provided that *"all disputes which may arise under this agreement"* shall be referred to arbitration. The District Court decided that the cause action fell within the ambit of the arbitration clause but refused to stay the action because

it was not satisfied that the ship-owners were willing to go to the arbitration at the commencement of the action by the charterers. On appeal and having in mind that neither party contested the finding that the dispute in the action fell within the arbitration clause, the decision of the court of first instance was reversed and a stay of the action was granted. From the following extract from the decision of the Supreme Court, (see pages 219-220 of the report), the Common Law influence on the jurisprudence of Cyprus and the highly persuasive authority that the decisions of English courts represent, which persists to this day, is apparent: *"It is well established by English authorities dealing with the corresponding provisions of the English Arbitration Act, 1889*, section 4, that when a Court is asked to stay legal proceedings in order that a dispute may be referred to arbitration in accordance with an agreement between the parties, the power of the Court to stay the proceedings is discretionary. In considering this appeal we have therefore tried to bear constantly in mind the principles upon which a superior Court should act in an appeal from the exercise of a discretion given to a lower Court: (See the case of* ***Odenton v. Johnston, (1941) 2 All E.R.245****). Those principles have a special application when the exercise of the discretion given to the lower Court rests partly on the Court's view on a question of fact. Nevertheless, we feel compelled to examine the grounds upon which the District Court came to the conclusion that they were not satisfied that the ship-owners were willing to go to the arbitration at the commencement of the action by the charterers"*.

In the case of **Belfast v. Third World Steel Company Ltd (1993) 1 Α.Α.Δ Γ148** the Plaintiffs claimed $515,099.20 as freight due under a Charterparty, which provided that any dispute between the ship-owners and the charterers will be referred to arbitration. The defendants applied for stay of proceedings. The plaintiffs opposed the application on three grounds: First, the non-payment of freight is not a "dispute", second, the Arbitration Law, Cap. 4 is not applicable in admiralty matters, and third, that the defendants had not taken any steps to refer the dispute to arbitration. The defendant replied that the refusal to pay the freight was due to the fact that they had a counterclaim exceeding in value the amount of their debt. In dismissing the application for a stay, the Supreme Court held:

(*section 4 of the English Arbitration Act 1889 is an exact copy of section 8 of the Cyprus Arbitration Act).

(a) First, the Arbitration Law, Cap. 4 was prima facie not applicable to the dispute. However, as by virtue of the Courts of Justice Law (Law 14/1960) in admiralty cases English Law, as it existed immediately before the 16th of August, 1960, is applicable, and because section 4 of the English Arbitration Act 1950 is identical to section 8 of the Cyprus Arbitration Law Cap. 4, the application can be disposed of under section 4 of the English Arbitration Act 1950.

(b) Second, the payment of freight is not a dispute that can be referred to arbitration.

(c) Third, it is settled that a cross-claim for unliquidated damages cannot be set off against a claim for freight or in any way operate as a defence to it. Therefore, and by reason of the above, the Plaintiffs were entitled to proceed with the legal action.

(d) Fourth, the fact that the defendants applied for stay is an indication of readiness to proceed with arbitration, even if they had not taken any other step before filing the application for stay.

In the case of **Viola A.Skaliotou v. Christoforos Pelecanos (1976) 1C.L.R251** the Court of first instance dismissed the defendant's application for stay. The claim concerned monies allegedly due under a building contract. The building contractor (plaintiff), when finally, the building operations were executed and completed, informed the defendant that an amount of £12,404.250 mils was still owing to him out of the agreed amount including extras, and called upon the latter to pay it. When there was no payment, the plaintiff brought an action against the defendant on February 14, 1973, claiming that amount. Although the statement of claim was filed on April 14, no defence had been filed by the defendant disputing in any way the amount claimed by the plaintiff, but after a period of nearly 5 months, i.e. on September 7, 1973, the defendant filed an application for the stay of the action of the plaintiff relying on the provisions of section 8 of the Arbitration Law, Cap. 4. The question posed for determination was that once the claim was made and not rebutted or denied, whether a dispute would arise between the employer and the contractor; and whether such dispute fell within the terms of the arbitration clause which

had been made part of the Building contact. The Supreme Court, in dismissing the appeal, held that:

(a) Where proceedings are instituted by one of the parties to a contract, containing an arbitration clause and the other party, relying on the clause, applies for a stay, the first thing to be ascertained is the precise nature of the dispute which has arisen; and the next question is whether the dispute is one which falls within the terms of the arbitration clause; and once the nature of the dispute as been ascertained, it given that the Court had held that it fell within the terms of the arbitration clause, there remained for the Court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration.

(b) In the instant case the only allegation of counsel for the defendant was that the defendant's refusal to pay when the plaintiff sent to her the final account could be treated as a dispute or disagreement.

(c) The first instance trial Judge was correct in holding that that refusal by itself, without disclosing reasons, cannot be conclusively understood as amounting to an existing dispute or difference, because such refusal might be due to various reasons, as for example, due to lack of money or an intention for an indefinite postponement of the payment, or indeed due to a caprice not to pay etc., and not due to the existence of any dispute or difference.

(d) A mere reference to arbitration is not sufficient, and it was up to the party applying for a stay to point out clearly what was actually the dispute in more specific language, because once the plaintiff had instituted proceedings, and the defendant was relying on the arbitration clause, it was up to the defendant to clearly point out and persuade the trial Judge with precision the nature of the dispute which has arisen between the parties in order to obtain a stay of proceedings.

(e) The effect of there being no dispute between the parties within the terms of an arbitration agreement is, of course, that the Court has no power to stay an action (See **Monro v. Bongor U.D.C. [1915] 3 K.B. 167 at p. 171**.)

(f) In any event, the power to stay proceedings under section 8 of Cap. 4 is a matter of discretion of the Court. Even though the dispute is clearly within the arbitration clause, the Judge may still refuse to stay the action, if, on the whole, that appears to be the better course. The Court must, however, be satisfied on good grounds that it ought not to stay the legal proceedings.

Thus, the onus of satisfying the Court is on the person opposing the stay to show sufficient reason why the matter should not be referred to arbitration.

It should be noted that item (f) above represents a reversal of the traditional burden of proof.

From the above it can be seen that the way the Courts exercise the statutory power given to them by section 8 of the Arbitration Law Cap. 4, does not reveal any enmity whatsoever towards arbitration proceedings. In fact the contrary is true. The Cyprus courts are supportive of arbitration and the arbitral process.

The setback that befalls the parties in applications based upon section 8 is that in a significant number of cases cases, especially when a Court of first instance wrongly refuses to stay proceedings instituted in breach of the arbitration clause, and leading to a successful appeal the victory is invariably a pyrrhic one as one of the main advantages of arbitration over litigation, namely speedy determination of the dispute in question, completely vanishes, resulting in the effective frustration of the will of the parties when they agreed to insert in their contract a valid arbitration clause.

There is no real remedy to such a situation other than giving priority to all cases before the Courts in an application of stay of proceedings pursuant to section 8 of Cap. 4 or other similar enactment is made.

The Court's Power to Supervise the Conduct of the Arbitrator and the Proceedings Pursuant to Sections 20 and 21 of the Cyprus Arbitration Law – Misconduct by the Arbitrator of Himself or of the Proceedings

Sections 20 and 21 of the Arbitration Law, Cap. 4 read as follows:

> "20(1). *Where an arbitrator or umpire has misconducted himself or the proceedings, the Court may remove him. (2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside. 21. An award or an arbitration agreement may, by leave of the Court be enforced in the same manner as a judgment or order to the same effect and in such case judgment may be entered in terms of the award."*

The Cyprus courts have interpreted what amounts to misconduct by the arbitrator of himself and the proceedings. The cases most cited are set out below. The conclusion derived from an examination of these cases is that the Courts of Cyprus are reluctant to find misconduct and to either remove an arbitrator or set aside an award on grounds of misconduct unless:

(a) There has been a breach of the rules of natural justice.

(b) The arbitrator has acted unfairly towards one party.

(c) Wrongful admission of evidence will amount to legal misconduct. Where, however the arbitrator has a particular skill or experience he is permitted to rely on his own skill, knowledge and experience to decide issues.

(d) The misconduct, if in the form of an issued award, is not one that can be remedied by a remission of the award for further consideration by the arbitrator.

(e) An error of law on the part of the Arbitrator is only misconduct of the error is *"apparent on the face of the award".*

What Constitutes Misconduct

In the leading case **Paniccos Harakis Limited v. The Official Receiver (1978) 1C.L.R15** the first instance Court dismissed the appellants-defendants' application for the setting aside of the award of the arbitrator.

On appeal by the defendants the following issues arose for determination:

(a) Whether the arbitrator, by requesting the plaintiff contractor to dig a trench so that the arbitrator could verify plaintiff's allegation regarding the hardness of the soil – a request which was not complied with by the plaintiff – has misconducted himself.

(b) Whether the whole award should be set aside because the arbitrator left two issues undetermined (in this connection the trial Court held that the better course was to remit the case to the arbitrator, for determination of the above mentioned omitted issues, under section 19 of the Arbitration Law, Cap. 4.).

(c) Whether the arbitrator had wrongly received and admitted in evidence two documentary exhibits. The alleged misconduct, which was relied on by the appellants, was that the arbitrator – as he had openly stated in his award – requested the plaintiff in the action (whose trustee in bankruptcy was the respondent in the proceedings) to dig a trench so that the arbitrator could verify an allegation of the plaintiff regarding hardness of the soil.

(d) The arbitrator repeatedly reminded the plaintiff of his said request, but the plaintiff omitted to comply with it and the arbitrator referred to the aforementioned omission to accede to the arbitrator's above-mentioned request by way of complaint, in his award.

The Supreme Court held:

What constitutes misconduct has been defined, on many occasions; and quoted the following passage from the judgment of Josephides J. in the case of **Charalambos Galatis v. Sofronios Savvides and another (1966) 1 C.L.R. 87 (at pp. 96, 97)**:

"The first principle in arbitration is that the arbitrator must act fairly to both parties, and that he must observe in this the ordinary well-understood rules for the administration of justice. The arbitrator must not hear one party or his witnesses in the absence of the other party or his representative except in few cases, where exceptions are unavoidable, both sides must be heard and each in the presence of the other: see ***Harvey v. Shelton [1844]****……*

The principles of universal justice require that the person who is to be prejudiced by the evidence ought to be present to hear it taken, to suggest cross-examination or himself to cross-examine, and to be able to find evidence, if he can, that shall meet and answer it; in short, to deal with it as in the ordinary course of legal proceedings: ***Drew v. Drew [1855] 2 Marq. 1, at page 3, per Lord Cranworth, L.C.***

*There would seem to be an established practice for the umpire in commercial "quality arbitrations" to depart form this rule: An arbitrator experienced in cloth was held justified in deciding a dispute as to quality upon inspection of samples only (****Wright v. Howson [1888] 4 T.L.R. 386****).*

*Similarly, an umpire expert in the timber trade properly decided a dispute as to quality on his own inspection (****Jordeson & Co. v. Stora etc. Aktiebolag [1931] 41 L1. L. Rep. 201, at page 204****).*

In the light of the true notion of misconduct, we fail to see how the arbitrator has, in the present case, misconducted himself in any way; we hold that, quite rightly, the trial Judge found that such a ground for the setting aside of the award was unfounded."
As to the two issues that were left undetermined, that is (i) whether or not there existed hardness of the soil, as alleged by the plaintiff; and (ii) whether the appellants were entitled to an amount of C£ 114 for having purchased an extra quantity of iron bars in order to complete work which was left unexecuted by the plaintiff, the Court found that trial Judge rightly held that the better course was to remit the case to the arbitrator, for determination of the above issues, under section 19 of Cap. 4. As stated in Russell,

supra, p. 355, unless there is misconduct which makes it impossible for the parties, or for the Court, to trust an arbitrator, the Court, in exercising its discretion, should remit the award rather than set it aside.

It is correct that wrongful admission of evidence may amount to legal misconduct by an arbitrator (see Russell, supra, at p. 235); and it is, also, well established that it is not possible to admit extrinsic evidence in order to construe a written contract (see, inter alia, ***Prenn v. Simmonds, [1971] 3 All E.R. 237, Wickman Machine Tool Sales Ltd. v. L. Schuler A. G., [1972] 2 All E.R. 1173, and on appeal to the House of Lords [1973] 2 All E.R. 39****, as well as the case-law which was referred to, recently, by this (the Cyprus) Court in* ***Kyriakides v. Kyriakides, C.A. 4799 Reported in (1969) 1 C.L.R 373****.*

But, what has taken place in the present case is not wrongful admission of extrinsic evidence in order to interpret the contract between the parties; as it has been correctly found by the trial Court what has, actually, happened is that the arbitrator, being himself an expert in the matter, checked the quantities and prices contained in the aforementioned two documents and, having found them to be correct, he then used them for the purpose of assessing, in the light of the evidence before him, the value of the work which has been left unexecuted by the plaintiff ".

In the above context the Court also went on to cite the following passage from the English case **Mediterranean and Eastern Export Co. Ltd v. Fortress Fabrics (Manchester), Ltd., [1948] 2 All E.R. 186 (at pp.188, 189)** which represents a precise encapsulation of the law:

"Whether the buyers contested that statement does not appear, but an experienced arbitrator would know, or have the means of knowing, whether that was so or not and to what extent, and I see no reason why in principle he should be required to have evidence on this point any more than on any other question relating to a particular trade. It must be taken, I think, that, in fixing the amount that he has, he has acted on his own knowledge and experience. The day has

long gone by when the Courts looked with jealousy on the jurisdiction of arbitrators. The modern tendency is, in my opinion, more especially in commercial arbitrations, to endeavour to uphold awards of the skilled persons that the. parties themselves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the Courts should be slow indeed to set aside his award"

From the above it is clear that the Courts of Cyprus are indeed slow interfere where the arbitrator is a specialist arbitrator possessing a particular skill or experience that was clearly a factor in his appointment when such an arbitrator makes findings and renders an award based upon that skill or experience.

The trust that the Courts place in arbitrators is not, however, blind or without limits.

In the Cyprus case of **Bank of Cyprus Ltd v. Dynacon Limited and Another (1990) 1B A.A.Δ 717** the arbitrator, following conclusion of the hearing, discussed the case with one of the parties in the absence of the other. In fact he commented that the proceedings were *"a waste of time"*. The other side thought that that related to the way it had conducted the proceedings.

It was held that such a conduct by the arbitrator was impermissible and amounted to misconduct in the sense of section 20(1) of Cap. 4. The Court stated:

"The term "misconduct" encompasses every kind of behaviour, which tends to destroy the trust that the litigants should have towards an Arbitrator that he will reach a fair decision".

In the Cyprus case of **Re Vasoula Kakouri (2000) 1B A.A.Δ 1372** it was held that in dealing with an application to register an award under section 21 of Cap. 4 the Court has discretion to refuse it; therefore, the process should be served to the other party to the arbitration, so that the latter may have the opportunity to oppose registration.

In the light of the above and having in mind the case law concerning the above matters and drawing from our own experience, we venture to say that as stated the Supreme Court of Cyprus in **Paniccos Harakis Limited**, in Cyprus *"the day has long gone by when the Courts looked with jealousy on the jurisdiction of arbitrators"*.

Misconduct by Way of an Error of Law Apparent on the Face of the Award

A passage from Halsbury's Laws of England, 4th Edition, Vol. 2, Paragraph 623, dealing with an error of law by an arbitrator that is apparent on the face of the award which has been adopted and cited many Cyprus court judgments *"An arbitrator's award may be set aside for error of law appearing on the face of it, though the jurisdiction is not lightly to be exercise. If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award."*

The Case Stated Procedure

The age and outdated nature of the Cyprus Domestic Arbitration Law Cap 4 becomes apparent when one considers that it still contains what is termed as a "case stated procedure".

The "case stated" procedure set out in Section 21 of the Arbitration Law Cap. 4 is a mechanism allowing, on the one hand the arbitrator or umpire to seek the opinion of the District Court on a question of law arising in the course of arbitration and on the other hand it is also a mechanism whereby any party to an arbitration may apply to the court to oblige an arbitrator to refer a matter of law to the court. The arbitrator has a discretion as to whether he will accede to such a request but is obliged to do so if the Court so orders.

The case of **Adamos Neophytou v Demetris Pieris (1982) 1 C.L.R. 595** clarified that the arbitrator's discretion as to whether to state a case or not is broad, but once the court directs, compliance is mandatory.

Section 21 of the Cyprus Arbitration Law mirrors same section of the English Arbitration Act of 1950 and states:

> *"Any arbitrator or umpire may, at any stage of the proceedings, and shall, if so directed by the Court, state a case for the opinion of the Court on any question of law arising in the course of the reference."*

As can be imagined and especially having in mind the delays that plague the Cyprus courts, an application by a party to state the case, which is usually accompanied by an ex parte application and subsequent order obliging the arbitrator to suspend the arbitral process until the application is examined by the Court may well derail an arbitration altogether.

It is clear that the case stated procedure is outdated and incongruous to the modern arbitral process as we know it today. It is significant to note that the case stated procedure was limited by the English Arbitration Act of 1957 to questions of law and only permissible with prior leave of the High Court. Indeed, in England the case stated procedure was abolished altogether by the English Arbitration Act of 1996.

Conclusions

In terms of International Commercial Arbitration the governing law, being based on the UNCITRAL Model law and supported by legislative reforms of the Courts of Justice Law, which have expanded the jurisdiction of the Cyprus courts in cross boarder litigation and arbitration combined with the additional support provided by the 2023 Civil Procedure Rules combine to provide a robust and effective system of law for the conduct, support recognition and enforcement of international commercial arbitration and arbitral awards.
In stark contrast however, the domestic Arbitration Law Cap. 4 which is handed down colonial legislation which has been on the Cyprus statute book since 1944 without

amendment contains numerous provisions that are not conducive to the conduct of an arbitral process to the speed, efficiency and standards demanded by today's users.

Persons investing or entering into contracts in Cyprus should therefore avoid agreeing to arbitration under the domestic Arbitration Law Cap. 4 and should instead insist upon Arbitration under the Cyprus International Commercial Arbitration Law (Law 101/1987).

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