THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN CYPRUS

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THE HISTORICAL CONTEXT OF THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

Cyprus started to lay the foundations for becoming an international business centre immediately after the Turkish invasion of 1974.

Within ten years the combined efforts of the private and public sector, allied to a friendly tax regime had started to make their impact and the number of what were then termed "offshore companies" started to increase.

As we know today Cyprus is a fully fledged international business centre that punches far above its weight in the international business market. Cyprus present status has been significantly enhanced with the raising of the iron curtain in the late 1980's.

It is well known that Cyprus is a major, if not the major investor in the former CIS countries with the result that many CIS businesses are owned by Cyprus holding companies which resolve their disputes in the courts of Cyprus or in arbitrations abroad and seek to enforce or avoid the enforcement of an award (as the case may be) in Cyprus.

It is clear that Cyprus' growth as an international business centre in the commercial sense had to be supplemented by an internationalization in the legal sense.

Although Cyprus had laws and procedures dating back to its colonial era relating to the Reciprocal Enforcement of Foreign Judgments (Cap. 10), the "internationalization" of Cyprus in a legal sense could be said to have commenced with the ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated 10th June 1958 through Law 84/1979.

Law 84/1978 was supplemented in the context of international arbitrations by the Cyprus International Commercial Arbitration Law, Law 101/1987 which is modeled on the UNCITRAL model international arbitration law.

JURISPRUDENCE RELATING TO THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

With the passing of these laws, which had as their objective the establishment of Cyprus as an international arbitration centre the number of applications for the recognition and enforcement of international arbitral awards has steadily increased and a body of jurisprudence has emerged relating to the enforcement of foreign arbitral awards.

One of the first major cases in the field which pre-determined the subsequent approach of the Cyprus courts to the question of enforcement international arbitral awards was the case of:

THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA FOR AND ON BEHALF OF THE REPUBLIC OF KENYA v BFAUW BANK OF AUSTRIA (1999) 1 CLR p. 585.

This case concerned an appeal from the Attorney General of Kenya against a decision of the District Court of Larnaca in respect of an arbitration between the Republic of Kenya and an Austrian bank which for reasons of neutrality of venue, was ordered by the ICC to be heard in Cyprus.

In the above case the Cypriot Supreme Court affirmed the basic law which is that foreign arbitral awards governed by the New York Convention should be enforced in accordance with the rules of the Convention, subject at all times to what Dicey describes as ***"the inherent jurisdiction, re-inforced by statute, to stay or strike out an action or to restrain by injunction the institution or continuance of proceedings in a foreign court or the enforcement of foreign judgments, whenever it is necessary to prevent injustice"***.

The case resulted in a dismissal of the appeal by the Attorney General of Kenya and a reaffirmation of the decisive role played by Article V. 1 (a) to (e) of the New York Convention which the court said are the only reasons under which an application for the recognition and enforcement of an award may be refused.

It is, however, clear in looking through the relevant case law which in essence commences in the mid nineties that even though the Cyprus courts were relatively new to the concept of enforcing international arbitral awards, they were, however, from the outset very clear on one issue, namely that **the court will not look to the merits of the arbitral award but will limit itself to a procedural examination of the process leading up to an award**.

In essence the court will only enquire as to whether the correct procedure has been followed whilst at the same time ensuring that the pre-requisites to enforcement set out in the Convention have been complied with. (see: **PREROGATIVE WRIT APPLICATION (CERTIORARI AND/OR PROHIBITION) No. 74/1995 RE BEOGRADSKA BANKA D.D. (1995) 1 CLR p. 737 at p.756**:

"Judicial examination of the arbitral award which is made in accordance with articles IV and V of the Convention is in my view supervisory, it has a procedural character and it does not encroach upon the decision of the arbitrators. Some departure may be said to exist in respect of the provisions of para 2(b) of article V of

the Convention which relates to matters of public order, which is examined ex proprio motu by the court. But again this is procedural and although the court examines the content of the decision of the arbitrators it limits itself only to the the issue of determining whether the arbitral award is contrary to public policy and it does not embark upon a diagnosis of the substance of the award.....”

And at p. 758:

“..... the court does not enter into the substance of the case or the wisdom of the arbitral award. The court does not determine the rights of the parties and no rights of action arise out of the recognition and enforcement.”

LEGISLATIVE PROVISIONS GOVERNING THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN CYPRUS

As stated above, there are two laws in Cyprus that govern the recognition and enforcement of foreign arbitral awards in Cyprus.

These are the following:

Law 84/1979 which is the law ratifying the New York Convention, which thereby made the Convention an integral part of the law of Cyprus.

and

Law 101/1987, the Cyprus International Commercial Arbitration Law.

Dealing firstly with **Law 84/1979** we see that the law follows the Convention in so far as it incorporates into the law in full the English text of the Convention (part 1 of the annex to the law) and states that the English translation takes precedence over the Greek translation of the Convention which is set out in part 2 of the annex to the law.

The relevant Articles of the Convention in so far as enforcement is concerned are the following:

Article II – which in paragraph 1 sets out the Convention rules regarding the enforceability of the agreement to arbitrate and clearly states that ***"each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them.....concerning a subject matter capable of settlement by arbitration"*.**

The same Article in paragraph 3 imposes an obligation upon the state to enforce an agreement ***"refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."***

Article III imposes an obligation on each Contracting State to ***"recognize arbitral awards as binding and [to] enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles (IV and V)"*.**

The same article adds: ***"There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this convention applies than are imposed on the recognition or enforcement of domestic arbitral awards"*.**

Articles IV and V are the key articles and I set them out in full below:

Article IV

"1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The Original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent."

Article V

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

The recognition or enforcement of the award would be contrary to the public policy of that country."

Law 84/1979 is supplemented by **Law 101/1987, the Cyprus International Commercial Arbitration Law.**

This law, as mentioned above is modeled on the UNCITRAL International Commercial Arbitration Model Law and contains two sections which aid the enforcement of international arbitral awards in Cyprus.

Section 6 which is restrictive in nature and states:

"In matters governed by this Law, no Court shall intervene except where so provided in this Law."

Section 34 sets out in detail the specific instances in which a national court may intervene and to refuse the recognition of an international arbitral award as follows:

"(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside in accordance with the following provisions of this section.

(2) An arbitral award may be set aside by the Court only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in section 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the Republic of Cyprus; or

(ii) the party making the application was not given proper notice of the appointment of an arbitration or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law, or, failing such agreement, was not in accordance with this Law; or

(b) the Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of Cyprus; or

(ii) the award is in conflict with provisions relating to public order of the Republic of Cyprus.

(3) An application for setting aside may not be made after three months have elapsed form the date on which the party making that application had received the award or if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."

Section 35

"(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding. Upon application in writing by either party, the Court, shall issue an order of enforcement of the arbitral award, subject to the provisions of this or the following section.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in section 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of the Republic of Cyprus the Court may request the party to supply a duly certified translation thereof into such language."

Section 36

"(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes proof that:

(i) a party to the arbitration agreement referred to in section 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it to or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a Court of the Country in which, or under the law of which, that award was made; or

(b) if the Court finds that:

(i) the subject-matter of the dispute is not capable of arbitration under the law of the Republic of Cyprus; or

(ii) the recognition or enforcement of the award would be contrary to provisions relating to public order of the Republic of Cyprus.

(2) If an application for setting aside or suspension of an award has been made to a Court referred to in sub-section (1)(a)(v) of this section, the Court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security."

From the above legislative provisions it is clear that in Cyprus legislation exists that both recognizes the standing of a valid international arbitral award and also aids its enforcement.

The local law (Law 101/1987) is subservient to the Convention, in accordance with both the Cypriot Constitution Article 169 which gives precedence to international convention and treaty obligations over local law and in accordance with Section 3 (1) of Law 101/1987 itself.

THE PROCEDURE FOR THE RECOGNITION AND ENFORCEMENT OF A FOREIGN ARBITRAL AWARD

It is clear that the major advantage of arbitration in the field of international disputes is the fact that through the New York Convention it is possible to apply to the court of the district or country in which the losing party is located in order to have the award recognized and enforced.

When one considers that the New York Convention has over 145 signatory states is clear to see that the enforcement of an international arbitral award under the rules set out in the Convention represents far less of a challenge to a successful plaintiff than enforcement through the courts.

In Cyprus, as the courts have pointed out there are no direct procedural rules relating to the enforcement and recognition of foreign arbitral awards.
The domestic arbitration law **Cap 4 section 21** states ***"An award on 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 courts have, however, through case law, evolved the following procedural rules:

An application to the court for the registration, recognition and enforcement of an arbitral award should be made by way of a general application by summons under the provisions laid out in the **Civil Procedure Rules Order 48 rule 2** which states:

"(1) Save where other provision is made, every application to the Court shall be in writing stating the nature of the order or direction sought and referring to the specific section of the Law or to the specific Rules of Court upon which it is founded.

(2) Applications made ex parte shall be in Form 45; applications made by summons shall be in Form 46, and set out at the foot thereof the name of every person to be served therewith and the address at which service is to be effected, which in the case of any person who has given an address for service in the action may be such address.

(3) In the case of applications which may under Rules 8 and 9 of this Order be made without affidavit, the facts relied upon (if any) shall be stated in the applications; and in the case of applications supported by affidavit, it shall be sufficient if reference is made thereto for the facts relied upon."

It has however been found not to be fatal for an ex parte application to be made under the provisions of **Order 48 rule 2** and **Section 32 of the Courts of Justice Law, Law 14/1960**, for an order that the arbitral award is registered recognized and stands to be enforced unless the Respondent shall appear to the court within a time fixed by the court to show reason why the award should not be enforced as this gives the Respondent the right to be heard.

The application is a general application and is supported by an affidavit showing that all the requirements of the convention and sections 35 and 36 of Law 101/1987 have been duly complied with by the applicant.

JUDICIAL ASSISTANCE TO THE ARBITRAL PROCESS BY WAY OF PRESERVATION MEASURES

It is clear that arbitration that arbitration cannot function on its own. The harsh realities of the commercial world are such that parties are not content with arbitrating their differences. Today's businessman, when involved in a dispute with millions of dollars on the line, is not content with a fair result in arbitration. He will seek to obtain benefit out of any aspect of the dispute resolution process that he can possibly obtain benefit from. This quest for benefit may take many forms.

It may be obtained by making it difficult or impossible for his opponent to collect upon any award that he may obtain. This, in the hope of exerting pressure for a settlement of the award in a reduced amount or, as is more often than not the case, in the hope of avoiding payment altogether.

It is for this reason that it may become necessary for a party to an arbitration procedure, usually the plaintiff, to take protective measures in order to ensure that he will be in a position to collect upon a future award.

It is for this reason that the courts have shown an inclination to assist the arbitral process by granting interim protective measures, even in circumstances where an arbitration is pending.

Therefore it is relatively common place in Cyprus for Cypriot lawyers to be requested to take out proceedings for the granting of injunctions restraining a company involved in arbitral proceedings from disposing of assets so as to ensure that a successful party will not be frustrated in its attempt to enforce an award in its favour.

The legal basis for an application for such an injunction in the context of an international arbitration is **section 9** of **Law 101/1987** which states: ***"It is not incompatible with an***

arbitration agreement for a party to request, before or during arbitral proceedings, from a Court an interim measure of protection and for a Court to grant such measure".

Additionally **Section 32 of the Courts of Justice law, Law 14/1960** allows for the granting of an injunction as follows:

"(1) In the application of any procedural rule, every court, in the exercise of its civil jurisdiction, may issue a prohibitive order interim, permanent or prohibitive or to appoint a receiver in all cases where the court may deem this to be just or beneficial, even if no damages or other remedy are sought or awarded with the same.

It is provided that an interim prohibitive order shall not be issued unless the court is satisfied

(1) that there is a serious issue to be tried during the hearing process,
(2) that there is a possibility that the applying party is entitled to the remedy,
(3) that unless an interim prohibitive order is issued it shall be difficult or impossible to disseminate full justice at a later stage, and
(4) that in all circumstances the balance of convenience lies in favour of the granting of the injunction.

An application for an injunction is made under **Order 48 rule 2 of the Civil Procedure Rules** and **Section 4 of the Civil Procedure Law** and is supported by affidavit stating the facts of the case and showing that the application satisfies the criteria set out in **Section 32 of Law 14/1960.**

Finally it should be noted that in Cyprus an injunction cannot exist as an independent process. Therefore the application made for an injunction is made as part of the general

application for enforcement or as an interim measure in an application for a dispute to be referred to arbitration, or as an interim measure in an action.

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