District court reaffirms narrow scope of public policy argument against recognition of arbitral awards

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Facts

In a recent Limassol District Court case (*Great Station Properties SA κα v UMS Holding Limited κα* (2/2018, 18 July 2018)), the applicants applied for the recognition and enforcement of a London Court of International Arbitration award dated 9 May 2016. The dispute concerned the breach of a joint venture and put option agreements.

The respondents argued that:

- the award's recognition contravened Cypriot public policy pursuant to Article V(2)(b) of the New York Convention; and
- the arbitral award dealt with a difference not contemplated by and which did not fall within the terms of submission to arbitration under Article V(1)(c) of the New York Convention.

Decision

In examining the first argument, the district court adopted the Supreme Court's analysis in *Attorney General of the Republic of Kenya v Bank Fur Arbeit Und Wirtschaft AG* ((1999) 1(A) AAD 58), in which it was explained that:

> *the term "public policy" comprises of the fundamental values that a society, at a given point in time, recognises as governing transactions and the various manifestations of the life of its members, which are infused in its legal system.*

The district court further cited a passage from *International Commercial Disputes: Commercial Conflict of Law in English Courts (*Hill and Chong, Volume 4, p475), which states that:

> *the public policy defence ought to operate only in exceptional cases... The Court of Justice has confirmed that the public policy defence must be narrowly construed. In* Krombach v. Bamberski *case C-7/98 (2000) ECR1-1935 the Court of Justice considered that recourse to the public policy defence can be envisaged only when recognition or enforcement of the foreign judgment would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought inasmuch as it infringes a fundamental principle.*

Finally, the district court referred to an extract from *The New York Convention: A Commentary* (Wolf) and concluded that public policy is not infringed if a dispute would have been resolved differently pursuant to the substantive law of the state in which recognition and enforcement of the award are sought.

Also, in its examination of the first argument, the district court recognised that it was well established in English law that company shareholders have no right to bring a claim in their personal capacity for damages suffered by their company. Such loss is simply a reflection of the loss suffered by the company and not the shareholder in their personal capacity.

This principle has also been recognised and adopted in Cypriot jurisprudence – the district court referred to the recent Supreme Court ruling in *Trafalgar Developments Ltd ao v Uralchem Holding Plc ao* (Civil Appeal 331/2017, 24 April 2018).

The district court subsequently stated that a thorough analysis of the arbitral award under review had revealed that the damages had resulted from a breach of a joint venture and put option agreements and had not been based on the principle of reflective loss.

Notwithstanding this conclusion, the district court proceeded to state that even if damages had been awarded on the principle of reflective loss, it would nevertheless permit the recognition of the award. The court reasoned that according to the abovementioned case law, the respondents had failed to establish that the Cypriot courts' rejection of the principle of reflective loss constituted a fundamental principle of Cypriot public policy.

The court proceeded to consider the second ground of objection – namely, whether:

- a third party which did not participate in the arbitration proceedings had a cause of action deriving from the agreements in question; and
- the damages could be awarded based on the principle of unjust enrichment.

The court observed that the respondents had unjustifiably overlooked the fact that the arbitral tribunal had made the specific findings regarding the third party's cause of action only after the issue had been raised by the respondents themselves. Consequently, the respondents could not reasonably complain about any remarks made in passing by the arbitral tribunal.

The court also reasoned that any statements from the arbitral tribunal to the effect that damages could be awarded on the basis of unjust enrichment were *obiter* and, in any event, the damages had been awarded following the application of breach of contract principles.

Comment

This case demonstrates the approach of the Cypriot courts when asked to deny recognition of an arbitral award on public policy grounds. The Cypriot courts have shown their willingness to recognise an arbitral award which may be contrary to a principle of Cypriot law as long as that principle has not been recognised as representing a fundamental public policy principle.

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