

Court examines whether *res judicata* principle applies to arbitral award

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Introduction

In a recent district court case (*Cruz City 1 Mauritius Holdings v Arsanovia Limited*), the applicants applied to register and enforce an arbitral award issued in their favour by the London Court of International Arbitration on July 6 2012. The respondents objected to the registration and enforcement of the award, arguing that the principle of *res judicata* (ie, claim preclusion) was applicable, as the award had not been recognised and enforced in an earlier case before the Cypriot courts. Therefore, the court in *Cruz* examined whether the *res judicata* principle had been engaged, estopping the applicants from registering and enforcing the award.

Facts

The court began by re-stating the legal framework through which an arbitral award may be enforced in Cyprus, namely:

- the International Commercial Arbitration Law 101/1987; and
- Law 84/1979, which incorporates into Cypriot law the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (ie, the New York Convention 1958).

In earlier court proceedings in Cyprus, the court had disallowed the registration of the arbitral award on the grounds that the applicants had failed to comply with Article IV of the New York Convention – namely, that the application must contain:

- a duly authenticated original or certified copy of the arbitral award; and
- a duly certified original or certified copy of the arbitration agreement.

The respondents argued that since the court in this type of proceeding limits itself to examining whether the imperative and substantial requirements of Article IV have been met, this was the only substantial matter in dispute. Therefore, the earlier Cypriot court judgment where registration was denied had undoubtedly engaged the *res judicata* principle.

The court also examined the conditions that render the *res judicata* principle applicable, focusing on the last requirement (ie, the finality of the decision). The court referenced *Georghiou v Voniati* ((1978) 2 JSC239), which incorporates the English case *Carl-Zeiss-Stiftung v Rayner* ((1969) 3 All ER 897) that provides the following definition of 'finality':

"Finality for this purpose means that the decision: (a) is one which does not ex facie, as in the case of an order for an account or enquiry, leave something to be judicially determined or ascertained before the decision can become effective or enforceable; and (b) is not subject to subsequent discharge, rescission, modification or any other form of revision by

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the Court or tribunal making the decision."

The court subsequently referred to *Halsbury's Laws of England's* definition of 'finality of judgments':

"In general a judgment or order which determines the principal matter in question is termed 'final'... Final judgments are such as at once put an end to the action declaring that the plaintiff has either entitled himself, or has not, to recover the remedies he sues for [Fourth Ed, Vol 26, para 505]."

In light of this definition and the case law analysis, the court restated that an earlier judgment must be a decision on the merits of the case in order for the principle of *res judicata* to be invoked.

The court also drew guidance from and examined the commentary in Wolff, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and *Redfern & Hunter on International Arbitration* (Fifth Edition, p 638, par 11.54 and 11.55), whereby a distinction is drawn between the requirements of Article IV and Article V of the New York Convention, which are referred to as "formalities for obtaining recognition and enforcement of awards to which the New York Convention applies" and "grounds for refusal of recognition and enforcement of an arbitration award that are set out in the New York Convention". However, the court did recognise that each country has its own mechanism of applying the requirements set out in the New York Convention.

Decision

The court agreed with the analysis provided in the English case *Rainstorm Pictures Inc v Lombard-Knight* ((CA) (2014) Bus LR 1196), which concluded that the requirements of Article IV of the New York Convention are of a procedural nature and have no bearing on the merits of a case. The judge in *Cruz* stated that: "there is no doubt in my mind that the requirements of Article IV are of a procedural nature and that Cyprus has adopted this approach as is evident in the case *Bristol Business Corporation v Besuno Limited* (2011) 1(B) A AΔ 934".

Comment

Having established that the requirements of Article IV are of procedural nature and having applied the Cypriot case of *Κατσελλή v Κυπριακής Δημοκρατίας* (2007) 3 ΑΑΔ 585 – which determined that a judgment for non-compliance with procedural requirements is not a judgment on the merits of the case that renders the judgment final – the court in *Cruz* concluded that despite the earlier Cypriot judgment regarding the same arbitral award, the *res judicata* principle did not apply.

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