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JUDICIAL ATTITUDES TO ARBITRATION IN CYPRUS

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There can be no doubt that nowadays arbitration proceedings are an important part of the whole machinery for dispute resolution; and yet, we, in Cyprus, as far as domestic arbitrations are concerned, are still working on the basis of the Cyprus Arbitration Law, Cap. 4, a statute enacted during colonial times in 1944. Since then, there were no amendments to this statute. However, back in 1987 there was enacted a new law, which in fact was more or less a copy of the International Model Law suggested by UNCITRAL (The United Nations Commission for International Trade Law) But such Law applies only in respect of International Commercial Arbitration cases as defined by that law itself.

This lecture deals only with judicial attitudes regarding domestic arbitration.

In order to discern judicial attitudes of the Courts of Cyprus to arbitration proceedings, I thought it both useful and necessary to look for authorities in respect of the following sections of the Arbitration Law, namely sections 8, 20 and 21. Section 8 gives power to the Court to stay proceedings in an action brought before it on the ground 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.

A. 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

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."

There are a lot of Supreme Court judgments dealing with the judicial power and its exercise under the aforesaid section. In the case of ***Bienvenito Steamship Co Ltd v. Georghios Chr. Georhiou and Another, 18 CLR 215***, decided before the establishment of the Republic of Cyprus, but adopted by the Supreme Court of Cyprus (see ***Yiola A.Skaliotou v. Christoforos Pelekanos (1976) 1C.L.R251 at page 258***) the Court, in construing section 8, adopted the following principles:

i. That the dispute in question is a dispute within the arbitration clause.

ii. The power of the Court to stay the proceedings is discretionary.

iii. 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.

In ***Bienvenito*** the arbitration clause provided that "all disputes which may arise under this agreement" shall be referred to arbitration. The District Court decided that the action before it fell within the clause, but went on and refused stay 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, namely that the dispute in the action fell within the arbitration clause, the Court of Appeal reversed the decision and granted stay. I quote a passage from pages 219-220 of the Report.

"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 *Osenton 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 ***Bulfract v. Third World Steel Company Ltd (1993) 1 A.A. Δ148*** 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 stay the Supreme Court held: First, the Arbitration Law, Cap. 4 is not applicable. However, as by virtue of the Courts of Justice Law in admiralty cases English Law, as it were immediately before the 16th of August, 1960, is applicable, and as section 4 of the English Arbitration Act 1950 is identical to section 8 of Cap. 4, the application can be disposed of under section 4 of the English Arbitration Act 1950. Second, the payment of freight is not a dispute that can be referred to arbitration. 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, the Plaintiffs are entitled to proceed with the action. 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 ***Yiola A.Skaliotou v. Christoforos Pelekanos (1976) 1C.L.R251*** the first instance Court dismissed the defendant's application for stay. The claim concerned monies allegedly due under a building contact. 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, yet no defence was 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 s. 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, founding 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 being ascertained, it having been held to fall within the terms of the arbitration clause, there remains for the Court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration.

(b) In this 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 trial Judge was right in holding that that refusal by itself, without disclosing reasons, cannot be understood conclusively 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 affiant to point out clearly what was actually the dispute in more specific language, because once the plaintiff instituted proceedings, and the defendant was relying on the arbitration clause, it was up to him to pinpoint to 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 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. 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 onus of thus satisfying the Court is on the person opposing the stay to show some sufficient reason why the matter should not be referred.

I do not think it necessary to refer to other cases in order to discern the attitude of the Cyprus Courts as regards arbitration proceedings. My conclusions, emanating from my view of the case law and my rather long experience as a practising advocate are as follows:

The Constitution of the Republic of Cyprus safeguards access to Courts. The Courts do not have power to stay proceedings on 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. Such an application presupposes an action in breach of the arbitration clause. The defendant – applicant has the onus of satisfying the Court that the action concerns a dispute within the clause. A mere reference to a dispute is not enough. The precise nature of the dispute should be explained to the satisfaction of the Court. Even if the applicant-defendant satisfies the Court in this respect, the Court still has discretion to refuse stay. But the onus of satisfying the Court that the case in question is a proper one, justifying the exercise of such discretion lies on the plaintiff. Whatever the decision of the first instance Court, it is subject to appeal before the Supreme Court by the party aggrieved. The Supreme Court, in dealing with such an appeal, does not easily interfere with the exercise of the trial Judge's discretion. Finally, the filing of the appeal does not operate as a stay of execution of the judgment appealed from.

Overall, I am happy to assert that the way the Courts exercise the statutory power given to them by Cap. 4, does not reveal any enmity towards arbitration proceedings. The setback is that in some cases, especially when a Court of first instance wrongly refuses to stay proceedings instituted in breach of the arbitration clause, but there is a successful appeal, one of the main advantages of arbitration over litigation, namely speedy determination of the dispute in question, completely vanishes, resulting in virtual 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 this situation other than giving priority to all cases before the Courts in which there arises an issue of stay of proceedings pursuant to section 8 of Cap. 4 or other similar enactment.

B. My next task is to examine the attitude of the Courts when called upon to remove an arbitrator or set aside an award or register an award.

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.”

In ***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 and 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 issues, under section 19 of the Arbitration Law, Cap. 4.)

(c) whether the arbitrator has wrongly received in evidence two documentary exhibits.

The alleged misconduct, which is relied on by the appellants, is that the arbitrator – as he, himself, has openly stated in his award – requested the plaintiff in the action (whose trustee in bankruptcy is the respondent in these proceedings) to dig a trench so that the arbitrator could verify an allegation of the plaintiff regarding hardness of the soil; the arbitrator reminded repeatedly the plaintiff about his said request, but the plaintiff failed to comply with it, and, actually, the arbitrator complains, in his award, about such failure.

The Supreme Court held:

(a) What is misconduct has been defined, on many occasions; we find it pertinent to quote the following passage from the judgment of Josephides J. in *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], *supra*, to which we shall revert later. 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.

(b) 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 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 it is 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.

(c) 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 Court in *Kyriakides v. Kyriakides,* C.A. 4799, not reported yet[1]). 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.

(d) It is useful to quote the following passage from *Mediterranean and Eastern Export Co. Ltd v. Fortress Fabrics (Manchester), Ltd.*, [1948] 2 All E.R. 186 (at pp.188, 189) “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**

[1] Reported in (1969) 1 C.L.R 373.

parties themselves have selected to decide the questions at issue between them[2]. 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.

In ***Bank of Cyprus Ltd v. Dynacon Limited and Another (1990) 1B A.A.Δ717*** 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 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 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 ***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 my own experience, I would venture to say that as the Supreme Court in ***Paniccos Harakis Limited***, supra, said "the day has long gone by when the Courts looked with jealousy on the jurisdiction of arbitrators".

I conclude by citing a passage from **Halsbury's Laws of England, 4th Edition, Vol. 2, Paragraph 623, which has been adopted and cited in a very recent case by the District Court of Nicosia.**

> "*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*

[2] The emphasis is mine.

> *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***[3]*; 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.*"

Obviously, therefore, it is more difficult to set aside an arbitrator's award than it is to reverse by appeal a judgment of a first instance Court.

[3] The emphasis is mine.