

Article

**SCOPE AND APPLICATION OF CYPRUS
ARBITRATION LAWS**

Authors: Thomas Keane & Christina Vgenopoulou

© KVLaw October, 2021

Introduction

In a recent arbitration case, the issue of the meaning of “Cyprus Arbitration Laws” as well as their scope and application has been considered. The case related to a multi-party arbitration in connection with a shareholder dispute under a shareholders agreement regulating the parties relationship as shareholders in a Cyprus project. The dispute resolution clause, which was poorly drafted, referred to arbitration in accordance with the “Arbitration Laws of the Republic of Cyprus”. The Claimants commenced the arbitration under the Arbitration Law, cap. 4 (“**Arbitration Law**”) but the Respondents objected and contended that the arbitration should be conducted under the International Commercial Arbitration Law, Law 101/1987 (“**ICAL**”). The matter was placed before the Arbitral Tribunal for decision.

Cyprus Arbitration Laws

As a matter of Cyprus statute there are in place two pieces of legislation that fall under the nomenclature of “Cyprus Arbitration Laws”, which are:

- (i) the Arbitration Law (cap.4); and
- (ii) ICAL (Law 101/87).¹

It is clear, almost by default, that the Arbitration Law applies to arbitrations that are wholly domestic, i.e., do not have any “international” component or element. The ICAL thus applies to arbitrations that are international commercial arbitrations. The interpretation of “commercial” is without doubt, however the interpretation and meaning of “international” is not so clear-cut. In fact if the draftsman of the shareholders agreement had been a little more precise in his/her drafting and selected clearly the applicable statute, the issue would never have arisen.

The case turned on what is for the purposes of the ICAL "international", which is defined in section 2(2) as meaning:

- (a) The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- (b) one of the following places is situated outside the State in which the parties have their places of business:
 - i. the place of arbitration if determined in, or pursuant to, the arbitration agreement;

¹ Which adopted and transposed into Cyprus law the UNCITRAL Model Law on International Commercial Arbitration 1985 (which Model Law has subsequently been amended in 2006) ("Uncitral Model Law").

- ii. any 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; or
- (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

It is clear that the Uncitral Model Law was adopted to contribute to development of harmonious international trade and to provide a "unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations".² It is clear that the legislative intent was that the Uncitral Model Law would apply in the context of the conduct of trade on a cross-border basis and not to resolve disputes arising out of a local or domestic transaction. The dispute at hand related to a dispute under a shareholders agreement pertaining to the implementation and operation of a Cyprus based project.

The definition of "International" is very broad and flexible. It has been stated that:

"The Model Law creates a flexible and effective system for the determination of the international character of arbitration. Its approach consists of alternative criteria and also includes a conflict of laws rule..... Article 1(3)(c) has been criticised as too broad as it allows parties to a dispute to internationalise it without apparent reason or any foreign link."³

Article 1(3)(c) of the Uncitral Model Law and section 2(2)(c) of the ICAL assumes that to be "international" the subject matter of the arbitration agreement relates to more than one country. The subject matter of the Shareholders Agreement and the instant dispute was all positioned in one country.

It should further be noted that Section 2(3) of the ICAL states:

"If a party has more than one place of business, the place of business for the purpose of subsection (2) is that which has the closest relationship to the arbitration agreement";

Thus, in construing section 2(2) of ICAL, the place of business of the parties to be considered is the place of business with the closest relationship to the arbitration agreement, which in the instant case was Cyprus as that is where the project was located.

Neither the ICAL nor any other statute provides a clear definition of the term "place of business". We can look to certain decided cases in company law where the concept of "place of business" is used in the context of an overseas company registering a branch. Where an overseas company "establishes a place of business" in Cyprus it is compelled under the

² see Resolution 40/72 dated 11 December 1985 and Resolution 61/33 of the General Assembly of the United Nations.

³ Comparative International Commercial Arbitration by Julian D. Lew, Loukas A. Mistelis and Stefan M. Kröll (2003 Kluwer Law International), at para. 4-37.

Companies Law, cap. 113 (as amended) to register with the Registrar of Companies within 1 month of establishing a place of business.⁴ The jurisprudence under the Companies Law has determined that in order for a place of business to be established, it must be shown that the company had a permanent and specific location associated with it from which the business was habitually and regularly conducted. There must be some degree of permanence or recognisability as being a location of the company's business.⁵ Some guidance can also be taken from decisions of the EU courts on right of establishment, where it is considered that establishment and place of business are similar concepts. In case *C-55/94 Gebhard*⁶ the European Court of Justice (ECJ as it then was) stated that:

“It follows that a person may be established, within the meaning of the Treaty, in more than one Member State-in particular, in the case of companies, through the setting-up of agencies, branches or subsidiaries...”

In case *C-411/03 SEVIC Systems* the ECJ stated:

“.....the right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the persons concerned to participate in the economic life of the country....”⁷

The right of establishment under EU law or having a place of business (as establishment is exercised through, *inter alia*, the establishment of a branch which under Part VIII of the Companies Law, cap.113 requires having a place of business) involves the participation in the economic activity of another state other than the state of incorporation. For the purposes of the definition of “International” in this context, the jurisdiction of closest relationship of **all** Respondents was Cyprus.

Decision of the Arbitral Tribunal

The Arbitral Tribunal rejected the arguments of the Claimants, basing their decision that at the time that the Shareholders Agreement was concluded certain of the Respondents had their “registered office”, and thus no connection to the agreement, in a jurisdiction other than Cyprus.

⁴ Section 347. Companies Law, cap.113

⁵ See *Re Oriel Ltd* [1985] 3 All ER 216, and *South India Shipping Corp. Ltd v Export-Import Bank of Korea* [1985] 2 ALL ER 219.

⁶ [1995] ECR I-4165, at para. 24

⁷ [2005] ECR I-10805 at para. 18

Conclusion

The true conclusion from this case is that dispute resolution clauses need to be drafted in a clear and complete manner, not leaving anything to doubt or interpretation.

The foregoing should not be read or construed or relied upon as legal advice in any specific or individual circumstance.

In the event of any query or need for clarification please contact the undersigned.

Keane Vgenopoulou & Associates LLC

For further information, please contact:

Thomas Keane

Partner

Tel: +357 25 25 7900

Email: tkeane@kvlaw.eu

Christina Vgenopoulou

Partner

Tel: +357 25 25 7900

Email: cvgenopoulou@kvlaw.eu