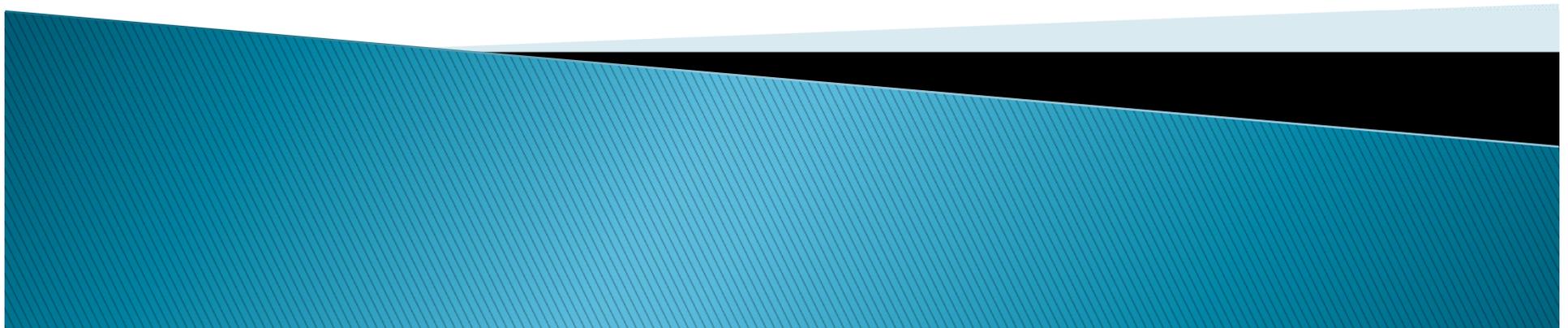


# Arbitration and National Courts

New Trends in ICC Arbitration and Mediation  
Nicosia, 29 April 2014

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# Introduction

- ▶ The relationship between national courts and arbitration

- ▶ *“swings between forced co-habitation and true partnership”*

A. Redfern et al., *The Law and Practice of International Commercial Arbitration* (Thomson, Sweet & Maxwell, 4<sup>th</sup> Ed. 2004) p. 328

- ▶ *“the great paradox of arbitration is that it seeks the co-operation of the very public authorities from which it wants to free itself”*

J. Paulsson “Arbitration in Three Dimensions” (LSE Legal Studies Working Paper No. 1 2.2010 <<http://ssrn.com/abstract=1536093>>) at 2

# Introduction *cont'd*

- ▶ United Nations Convention on International Trade Model Law on International Commercial Arbitration (UNCITRAL Model Law)
- ▶ Cypriot International Arbitration in Commercial Matters Law (L. 101 /87)
- ▶ 2012 Rules of Arbitration of the International Chamber of Commerce (ICC Rules)



# General Remark

- ▶ Article 5 of the UNCITRAL Model Law:

*[i]n matters governed by this Law, no court shall intervene except where so provided in this Law”*

- ▶ Section 6 of L. 101 /87
- ▶ However, national court involvement is contemplated:
  - At the beginning of the arbitration
  - During the arbitration
  - After the arbitration

# At the beginning of the arbitration

## ▶ Establishing the arbitral tribunal:

- Article 12 of the ICC Rules
- Article 11(3)(a) of the UNCITRAL Model Law:

*if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court*

- Section 10 of L. 101/87



# At the beginning of the arbitration

*cont'd*

## ▶ Challenge of the arbitrators:

- Articles 14 and 15 of the ICC Rules
- Article 13(3) of the UNCITRAL Model Law:

*If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court... to decide on the challenge, which decision shall be subject to no appeal.*

- Section 13(3) of L. 101/87

# At the beginning of the arbitration

*cont'd*

- ▶ Enforcement of the arbitration agreement:

- Article 8 of the UNCITRAL Model Law:

*(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*

*(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.*

- Section 8 of L. 101 / 87



# At the beginning of the arbitration

*cont'd*

## ▶ Challenges to the jurisdiction of the arbitral tribunal:

- Article 16(3) of the UNCITRAL Model Law:

*If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court ... to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.*

- Section 16(3) of L. 101 / 87



# During the arbitration

## ▶ Interim Measures:

- Power of the arbitral tribunal:
  - Article 28(1) of the ICC Rules
  - Article 17(1) of the UNCITRAL Model Law
  - Article 17 of L. 101 /87
  
- Enforcement of interim measures ordered by the arbitral tribunal, by the national courts, subject to limited circumstances:
  - Articles 17H and 17 I of the UNCITRAL Model Law
  
- Power of the national courts:
  - Article 28(2) of the ICC Rules
  - Articles 9 and 17 J of the UNCITRAL Model Law
  - Section 9 of L. 101 /87

# During the arbitration *cont'd*

- ▶ Court-ordered interim measures of protection in arbitration:
  - Prior to the constitution of the arbitral tribunal
  - Third parties
  - Lack of power of the arbitral tribunal

# After the arbitration

- ▶ Challenge of the award: annulment or set aside proceedings:
- ▶ Article 34(2) of the UNCITRAL Model Law:
  - Grounds which one party has to prove:
    - lack of capacity of the parties to conclude an arbitration agreement or lack of a valid arbitration agreement;
    - lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case;
    - the award deals with matters not covered by the submission to arbitration; or
    - the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, to the Model Law.
  - Grounds that a court may consider on its own initiative:
    - non-arbitrability of the subject-matter of the dispute; or
    - violation of public policy.
- ▶ Section 34(2) of L. 101/87

# After the arbitration *cont'd*

- ▶ Challenge of the award: annulment or set aside proceedings (*cont'd*):
  - Problematic?
    - Appeal on questions of fact
    - Appeal on questions of law

# After the arbitration *cont'd*

- ▶ Recognition and enforcement of the arbitral award:
  - New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958 (New York Convention)
  - Articles 35 and 36 of the UNCITRAL Model Law
  - Sections 35 and 36 and Appendix 2 of L. 101/87

# After the arbitration *cont'd*

- ▶ Recognition and enforcement of the arbitral award (*cont'd*):
  - Grounds for refusing the recognition and enforcement of the arbitral award: Article V of the New York Convention
    - Similar to Article 34 of the UNCITRAL Model Law and Section 34 of L. 101/87. Almost identical to Article 36 of the UNCITRAL Model Law and Section 36 of L. 101/87.
    - Exhaustive
    - Invoked by party or by court, ex officio
    - No review of the merits

# After the arbitration *cont'd*

## ▶ Recognition and enforcement of the arbitral award (*cont'd*):

- Grounds for refusing the recognition and enforcement of the arbitral award: Article V of the New York Convention (*cont'd*)
  - “*may be refused*”
  - Pro-enforcement bias

judicial control of the arbitral award which takes place according to articles IV and V of the [New York] Convention, is [ ] supervisory, has a procedural character and does not go into the substance of the judgment of the arbitrators” or into “the wisdom of the arbitral award.

*Re Beogradska Banka (1995)* 1 C.L.R. 737, 756–758

# Conclusion

- ▶ Arbitration is a system which depends on the agreement of the parties
- ▶ However, arbitration is also a system built on law, and it relies on such law to make it effective both nationally and internationally
- ▶ Rule v. Exception
- ▶ Problematic relationship v. Healthy relationship?
- ▶ It depends

# Thank you!

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