

Techniques used to conceal the Source of Illicit Funds

Are offshore locations vulnerable?

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Methods of concealing assets vary significantly and so are the personalities of the individuals involved.

- The volume and types of fraud cases in the region.
- Recent fraud cases.
- Why Cyprus is favoured jurisdiction for placing assets.
- Interim remedies including “super injunctions”.
- Discovery and Norwich Pharmacal Orders, recent trends by the Cypriot Courts.
- The impact of the EAPO in Cyprus.

The Main Action - the most appropriate jurisdiction

As to the main proceedings (the substantive proceedings):

- In general, the presence of a defendant within Cyprus (the anchor defendant) or the occurrence of the cause of action within Cyprus will give Cyprus courts jurisdiction to try a matter. When there is a dispute over jurisdiction as between EU and EEA Member States, EC Regulation 44/2001 and the New Lugano Convention, which provide common rules on jurisdictional issues as well as on recognition and enforcement of judgements, apply.
- As between Cyprus and a non EU country, the *forum non conveniens* doctrine applies and the courts will determine whether Cyprus is the appropriate or the most appropriate forum to try the action based upon examination of a series of factors.
- Contractually agreed jurisdiction/arbitration clauses: courts in Cyprus will *prima facie* respect a jurisdiction/arbitration clause agreed by the parties. In the case of *George Petrou v Zim Navigation* where the plaintiff, contrary to what was contractually agreed, purported to file an action in Cyprus, it was held that the plaintiff failed to show good and strong reason to overcome the *prima facie* rule that the parties must keep their agreement. This burden becomes heavier if none of the defendants are in Cyprus.

Remedies available in the Main Action (in Cyprus)

- **Damages** are awarded to compensate for losses suffered.
- **Restitution** is a common law principle which provides remedies in respect of unjust enrichment and money had and received.
- **Specific performance** is a discretionary remedy which may be granted where damages would not be an adequate remedy.
- **Constructive trust:** In addition to the remedies described above, by operation of the law of equity an asset may be deemed to be held on constructive trust for the victim of fraud where it would be unjust for the (fraudster) holder of the asset to retain it for his own benefit due to it having been obtained by means of a fraudulent or otherwise unacceptable abuse of the law.
- **Injunctive relief (provisional measures incl. Mareva injunctions)** is a discretionary remedy which is extremely useful for the freezing, tracing and recovery of assets. It may be granted "*in all cases in which it appears to the court just or convenient so to do*" provided the following conditions are satisfied:-
 - (a) *a serious question arises to be tried at the main trial;*
 - (b) *there appears to be a probability that the plaintiff is entitled to relief and, lastly,*
 - (c) *it shall be difficult or impossible to do complete justice at a later stage without granting an interlocutory injunction."*

It is possible to apply to the court for interim measures without notice to the respondent by an *ex-parte* application. The applicant is under a duty to make full and frank disclosure to the court of all material facts. The court will approve an *ex-parte* application provided it is satisfied that there is an element of extreme urgency.

Provisional measures - the most appropriate jurisdiction

As to provisional measures (interim orders):

[15] Where a defendant and his assets are located outside the jurisdiction of the court seised of the substantive proceedings, it is in my opinion most appropriate that protective measures should be granted by those courts best able to make their orders effective.

In relation to orders taking direct effect against the assets, this means the courts of the state where the assets are located; and in relation to orders in personam, including orders for disclosure, this means the courts of the state where the person enjoined resides. (see *Credit Suisse Fides Trust SA v Sergio Cuoghi* [1998] I.L.Pr.41)

Interim orders in aid of domestic court or arbitration proceedings

The Courts of Justice Law of 1960 is the main legal basis upon which Cyprus courts may issue provisional measures in the context of a domestic action or in aid of local arbitration proceedings.

Interim orders in aid of international arbitration proceedings

- Section 9 of the International Commercial Arbitration Law, (Law 101 of 1987) forms the legal basis upon which courts may grant interim orders in aid of international commercial arbitration.
- Section 9 of the International Commercial Arbitration Law is identical in effect to Article 9 of the UNCITRAL Model Law, which provides as follows:

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

Interim orders in aid of court actions and arbitration proceedings in EU Member States

Article 31 of EC Regulation 44/2001 states:

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

Interim orders in aid of court actions and arbitration proceedings in EEA countries

- Article 31 of New Lugano Convention states:
“Application may be made to the courts of a State bound by this Convention for such provisional, including protective measures, as may be available under the law of that State, even if, under this Convention, the Courts of another State bound by this Convention have jurisdiction as to the substance of the matter”

The New Lugano Convention is similar to EC Regulation 44/2001. [Norway ratified on 1/1/2010. Ratification by Switzerland and Iceland is pending]

Interim orders in aid of legal proceedings in non-EU / EEA countries

There are no specific legal bases similar to article 9 of the International Commercial Arbitration Law 101/97 or Article 31 of EC Regulation 44/2001 or the New Lugano Convention upon which interim orders in aid of legal actions in countries outside the European Union and the EEA may be requested. However, this should not be interpreted as meaning that Cyprus courts cannot issue interim orders in such instances should they consider it appropriate under the circumstances. Section 31 of the Cyprus Courts of Justice Law provides that the Courts have power to provide any remedy they consider appropriate for the purpose of conclusively resolving any dispute before them that is founded on a particular law or in equity.

Reference may further be made to the English case of *Credit Suisse Fides Trust SA v Sergio Cuoghi* [1998] I.L.Pr.41:

[17] In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention. International fraud requires a similar response. It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.



Forms of injunctive relief most commonly encountered

The armoury of the Cyprus courts includes the discretionary power to issue the following types of provisional measures:

- freezing orders (*Mareva* injunctions) to prevent further alienation of assets;
- Norwich Pharmacal* disclosure orders to identify wrongdoers and current location of alienated assets, if unknown;
- gagging orders to prohibit the “tipping-off” of so-far unidentified wrongdoers and co-conspirators, hence limiting the risks of further alienation of assets; and
- search orders (*Anton Pillar* orders) to prevent the destruction of evidence.

Necessary conditions for interim orders

Cyprus courts have the discretionary power to issue interim orders where it is considered just to do so provided that all three of the following conditions are satisfied:

- a serious question arises to be determined at the main trial of the action;
- there appears to be a probability that the plaintiff is entitled to relief; and,
- it will be difficult or impossible to award complete justice at a later stage without granting the requested interlocutory injunction.

Necessary conditions for interim orders

- The **first condition**, namely the **existence of a serious question to be determined at the main trial** of the action, has been interpreted "*as not including anything further than demonstrating an arguable case based on the pleadings that were submitted*".
- Turning to the **second condition** (which to an extent overlaps with the first), namely, that **there appears to be "a probability" that the plaintiff is entitled to relief in the main trial**, "*...it has been explained as referring to the existence of something more than a simple possibility of success but something less than the "balance of probabilities" which is the measure and degree of proof that is required in civil cases*".
- The **third condition**, namely that **it would be difficult or impossible to award justice at a later stage without the issuance of the requested order** or orders, should be examined in the light of the answer to the question whether, on the basis of the facts of the case, the award of damages at the end of the trial would be sufficient remedy.

Additional requirements for issuance or maintenance of provisional measures

- Assuming the three preconditions are satisfied, the court must go on to consider whether on the **balance of convenience** it is fair and just to issue or maintain the interlocutory injunction.
- It is possible to apply to the court for interim measures without notice to the respondent by an *ex-parte* application. The applicant is under a **duty to make full and frank disclosure to the court of all material facts**. The court will approve an *ex-parte* application provided it is satisfied that there is **an element of extreme urgency**.

Third parties

The Supreme Court of Cyprus has confirmed the power of courts in Cyprus to issue provisional measures against co-defendants against whom no direct cause of action lies, provided that the claim for the relevant order is ancillary and incidental to the claimant's cause of action against that primary co-defendant.

The rationale behind the availability of disclosure orders against third parties derives from the leading English decision of *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133:

"[The authorities] seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration. I am the more inclined to reach this result because it is clear that if the person mixed up in the affair has to any extent incurred any liability to the person wronged, he must make full disclosure even though the person wronged has no intention of proceeding against him. It would I think be quite illogical to make his obligation to disclose the identity of the real offenders depend on whether or not he has himself incurred some minor liability..."



Worldwide reach of provisional measures

- The Supreme Court of Cyprus has confirmed the power of Cyprus courts to issue asset freezing orders with worldwide effect.
- Furthermore, Regulation 44/2001 and New Lugano Convention have introduced legal bases under which Cyprus courts may issue provisional measures in support of court and arbitration proceedings in another European/EEA Member State and *vice-versa*.

Recognition and enforcement of foreign judgments

Recognition of foreign decisions may be accomplished under EU Regulations such as Regulation 44/2001, under statutes, relevant bilateral or multilateral agreements where applicable, or by common law actions.

Article 32 of Regulation 44/2001 defines a judgment as: ‘any judgment given by a court or tribunal of an EU Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.’

Omitting the reference to EU Member States, this is a reasonable approximation of the definition used throughout Cyprus law.

**Article 23 - Judgments which shall be
Recognized and Enforced in the territory of
the other Contracting Party on the conditions
provided by this Treaty.**

Judgments mean the following:-

- Judgments rendered in civil matters and amicable settlements approved by the Court.
- Judgments for the payment of legal costs.
- Judgments in criminal matters concerning the payment of damages and other civil law claims.

Articles 24 & 25- Conditions for Recognition and Enforcement of Judgments

- A judgment shall be recognized and enforced provided that:-
- It is final and enforceable under the law of the Contracting Party in whose territory it was given.
- The party who failed to appear and take part in the proceedings and against whom the judgment was given was duly notified and in sufficient time, under the law of the Contracting Party in whose territory the judgment was given.
- The case does not fall within the exclusive competence of an authority of the Contracting Party in whose territory the judgment is to be recognized and enforced.
- No judgment, which became final, has been earlier rendered in the same subject-matter between the same parties in the territory of the Contracting Party where the judgment is to be recognized or enforced.
- Proceeding between the same parties on the same subject-matter are not pending before a judicial authority of the requested Contracting Party and those proceedings were the first to be instituted.
- Judgments shall be recognized and enforced if given subsequent to the entry into force of this Treaty. Decrees of divorce may be recognized even if prior to the entry into force of this Treaty.

Article 26

Procedure for Recognition and Enforcement of Judgments

- For the purpose of enforcing the judgments the courts of the Contracting Party in whose territory the judgment is to be enforced shall render a decision authorizing the enforcement. The requesting authority shall be advised of the decision rendered.
- In granting an authorization of enforcement the court shall confine itself to ascertaining whether the conditions provided in Articles 24 and 25 (see previous slide) and the provisions of Article 28 (see next slide) have been complied with.
- The procedure for obtaining an authorization for enforcement as well as the procedure for enforcements shall be regulated by the law of the Contracting Party in whose territory the judgment is to be enforced.

Articles 27 & 28: Application for Enforcement

- An application for the enforcement of a judgment shall be submitted to a judicial authority at the place where the judgment was given. This authority shall transmit the application to the competent court of the other Contracting Party. If a person applying for enforcement has his permanent or temporary residence in the territory of the Contracting Party where the judgment is to be enforced, the application may also be submitted directly to the competent court of this Contracting Party.

The application MUST be accompanied by:-

- The original or a certified copy of the judgment together with a certificate to the effect that it is final and enforceable unless this is evident from the judgment itself.
- A document certifying that the party against whom the judgment was given had been duly notified and in sufficient time
- A certified translation of the application and the documents.

Objections of Respondent- Debtor

- A judgment debtor may object to the enforcement of a judgment before the competent court of the Contracting Party in whose territory the judgment is sought to be enforced upon grounds which are admissible under the law of the Contracting Party whose authority rendered the judgment.

Grounds on which recognition at common law may be challenged

- public policy;
- the foreign judgment was obtained by fraud;
- incompatibility with natural justice and due process;
- the foreign judgment is not final and conclusive;
- lack of jurisdiction of the issuing court; and
- inconsistency of the foreign judgment with a prior judgment.

Arbitration awards

Cyprus is a party to the relevant New York Convention of 1958.

A judgment creditor seeking to enforce a foreign arbitral award in Cyprus may request the relevant district court to recognize and enforce the award. To do this the creditor will file an application by summons.

The application must be served on the judgment debtor and supported by an affidavit together with the documents required under article IV of the New York Convention, namely:

- the authenticated original award or a duly certified copy of it;
- the original agreement or a duly certified copy of it; and
- duly certified translations of these documents in Greek.

Execution measures

Once a foreign judgment has been duly registered it immediately takes effect as a judgment of a domestic court, and all the methods of executing domestic court judgments are available, including:

- writ of execution for the sale of movables;
- registration of charging order over the immovable property or chattels of the judgment debtor;
- writ of delivery of goods ordered to be delivered to the judgment creditor;
- writ of possession of land ordered to be delivered to the judgement creditor;
- committal for breach of an order or undertaking;
- writ of sequestration;
- bankruptcy or liquidation proceedings against the judgement debtor.

Company winding up (liquidation)

An application for the winding up of a Cyprus company may be filed if the company is unable to pay its debts.

Under the Cyprus Companies Law, a company is deemed to be unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding €854 has served on the company a demand in writing for the payment of the outstanding amount and the company has failed to pay the sum within three weeks.

Questions?

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