



# Arbitration and Dispute Resolution Bulletin

## Challenging the arbitral award under the laws of Cyprus - a brief outline

### Introduction

The International Commercial Arbitration Law of 1987, (101/87) was passed in 1987, in essence, adopting the United Nations Commission on International Trade Law (UNCITRAL) Model law on International Commercial Arbitration of 21/6/1985.

(The old law still remains in force, basically for local arbitration).

The dispute has to be international. Definitions of "commercial" and "international" are to be found in the Law itself.

### Challenging the arbitral award

The award is not subject to appeal. It can only be challenged by means of a recourse for annulment (active remedy) to the Court (section 34(1)), under instances which are restrictively enumerated by section 34(2) of the Law. The enumeration is exhaustive and not indicative - The Attorney-General of the Republic of Kenya v Bank für Arbeit und Wirtschaft AG (1999) 1 CLR 585.

These instances, in note form, are:

- a. If the applicant (to set aside the award) proves:
  - (i) Incapacity to contract or invalidity of the agreement either under the applicable (by the agreement) law or under Cyprus Law; or
  - (ii) no proper notice of the appointment of the Arbitrator or of the Arbitral proceedings or deprivation of the opportunity to appear and present his case; or
  - (iii) that the award does not fall within the terms of the submission to Arbitration or is beyond the scope of the submission to Arbitration; or
  - (iv) that the composition of the Tribunal or the procedure it followed suffers.
- b. If the Court finds that:
  - (i) The subject of the Arbitration was not arbitrable under the Law of Cyprus, or
  - (ii) the Award is in conflict with the public policy of Cyprus.

Any recourse for annulment should be filed within 3 months from the communication of the Award.

In accordance with section 36 of the Law, enforcement of the award may be refused (passive remedy) only:

- a. If the party opposing enforcement proves:
  - (i) Incapacity to contract or invalidity of the agreement either under the applicable (by the agreement) Law or under the law of the country where the award was made; or
  - (ii) no proper notice of the appointment of the arbitrator or of the arbitral proceedings or deprivation to present his case; or
  - (iii) that the award does not fall within the terms of the submission to arbitration; or is beyond the scope of the submission to arbitration; or
  - (iv) the composition of the arbitral tribunal or the arbitral procedure suffers; or
  - (v) that the award has not yet become binding on the parties or has been set aside or suspended by a Court of the country in which, or under the law of which, that award was made.
- b. If the Court finds that:
  - (i) The subject matter of the dispute is not capable of settlement by arbitration under the law of Cyprus; or
  - (ii) the recognition or enforcement of the award would be contrary to the public order of Cyprus.

Even where the Courts do have jurisdiction to intervene, as above, the Courts' (District Courts') decision is final.

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## Challenging an arbitral award under the laws of The Netherlands - a brief outline

### Introduction

The Dutch Arbitration Act came into force on December 1st, 1986. The Arbitration Act can be found in the fourth Book of the Code of Civil Procedures (CCP) articles 1020-1076.

### Challenging an arbitral award

If an award of an arbitral tribunal has been given and the arbitration agreement does not allow an arbitral appeal or if an award in arbitral appeal has been given the award can be challenged on certain limited grounds. The challenge takes place before the District Court of the district with whose Registry the arbitral award must be deposited 1064(2) CCP.

Article 1065(1) CCP defines the grounds on which the challenging of an arbitral award can be based. Those ground, exhaustively set out in Article 1065(1) CCP are subject to a number of formal restrictions that are mentioned in Article 1065 (2) ff CCP.

The award can be challenged:

- a. If a valid arbitration agreement is lacking; If the party applying for challenging had appeared in arbitral proceedings and has failed to raise a plea pointing out that the arbitral tribunal lacks jurisdiction, on the ground that there is no valid arbitration agreement before submitting a substantive defence, then challenging on this ground is not possible (article 1065(2) jo. 1052(2)) CCP.
- b. If the arbitral tribunal was constituted in violation of the rules applicable thereto; If the party applying for challenging had appeared in arbitral proceedings and has failed to raise a plea to this effect before submitting a substantive defence, then challenging on this ground is not possible (articles 1065(3) jo. 1052(3) CCP). If the arbitral tribunal has given an award in excess of or different from the claim installed (partial) challenging is possible 1065(7) CCP).

If the arbitral tribunal has failed to decide on one or more matters submitted to it, the party applying for setting aside must first have gone unsuccessfully through the procedure for an additional award, before challenging of the award on that ground (article 1065(6) CCP).

- c. If the arbitral tribunal has not complied with its mandate; If the party applying for challenging has failed to invoke this ground and knew about the non-compliance of the court with the mandate, challenging on this ground is not possible (article 1064(4) CCP).
- d. If the arbitral award was not signed by all the arbitrators in accordance with article 1057 CCP or does not contain the reasons for the award.
- e. If the award, or the manner in which it was made, violates public policy or good morals. Violation of fundamental principles of procedural law are seen as such as is the failure to apply European Non-Competition Directives.

The writ of summons for challenging must be issued within three months after the date of the deposit of the arbitral award or within three months after an arbitral award and the court order for the enforcement thereof have been served on the opposite party (article 1064(3) CCP).

The consequence of setting aside is that the jurisdiction of the court revives as soon as the decision of the court has become final, unless the arbitration agreement stipulates otherwise (article 1067 CCP).

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## Basketball Arbitration Court

A case study for sports arbitration in Portugal

Sports arbitration in Portugal is on the verge of a decisive development: the creation of a Portuguese Sports Arbitration Court. The first draft of the statutes is already under discussion within the Portuguese Olympic Committee. This, however, is just a preliminary document with general rules on the composition and general objectives of the Arbitration Court to be created in due course.

This is something completely new for Portugal, where sports arbitration has never been seriously considered as an effective alternative to the civil courts. Bearing in mind the enormous success and prestige of the Court of Arbitration for Sport, with its head office in Lausanne, Switzerland, our national sports entities have decided that the best solution for sports justice is through creation of a Sports Arbitration Court. This will represent a huge step towards equitable sports oriented justice in Portugal.

Until now, there have only been two arbitral structures as regards sports:

The "Basketball Arbitration Court", which was created in 2000, and the "Paritary Arbitration Commission" of the Portuguese Football League, which is of completely different origin (it was created in a collective employment regulation entered into by the Portuguese Professional Football League and the Players Union) and with a very limited objective – it only has jurisdiction for labour disputes arising from sports employment contracts.

The Basketball Arbitration Court (BAC) is, the only de facto regular and inclusive arbitration body in the Portuguese sports system. We shall, therefore, look deeper into this example, which may well prove to be inspirational for the nascent Sports Arbitration Court.

This court, composed by five arbitrators, with degrees in Law, has the competence to:

- a. Solve disputes arising from contracts entered into by clubs and/or sports corporations, coaches and players
- b. Resolve issues arising in the ambit of protocols between the above mentioned entities, further to requests filed by such entities
- c. Interpret the rules of protocols entered into by such entities
- d. Resolve all issues set forth in such protocols.

The decisions, which are by majority of the

arbitrators, are resolved in accordance with the applicable laws and, in the absence of such laws, in accordance with equity.

Parties to the arbitral proceeding must be represented by a lawyer and the proceedings follow the specific rules of the BAC Regulation and, in general, the Civil Procedure rules and the Voluntary Arbitration Act.

With a special focus on the essential expedited nature of the Court, exemplified in the procedural rules, the BAC resolutions are not subject to appeal. The parties waive the right of appeal with the arbitration agreement. Under Portuguese Arbitration Law, the decision of arbitration courts may, however, be disputed in some limited circumstances, regardless of the above mentioned waiver, within 1 month of the notification of the arbitral decision.

Finally, the enforcement of arbitral decisions must be made by a first instance civil court.

Although this is an innovative or pioneering regime in Portugal, since it is the first regulation (and, so far, the only regulation) for an arbitral court, the BAC gathers its inspiration from different sources notably previous international experience. It has enabled the creation of a practical, available and trustworthy arbitration body, setting an example for other national sports organisations.

We look forward to seeing the result of the commission for the creation of the Portuguese Sports Arbitration Court, hoping that the solutions implemented are as effective as those in the BAC.

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## A new alternative dispute resolution system: The Collaborative Approach

Collaborative Law is steadfastly emerging as the new way to go about solving conflicts. Its success lies in the core aspect it strives to focus on: settlement, not trial. The following is a brief outline of collaborative practice.

Designed to bring both parties to a mutually satisfactory agreement, collaborative practice is a step ahead of mediation. Both parties and their lawyers must agree in writing beforehand to negotiate until settlement is reached. Also, a key aspect of collaborative law is that there is no neutral third party involved. Most importantly, neither party can threaten to go to court or sue during the process, and if no agreement is reached and the parties decide to use traditional methods of adjudication, both lawyers representing the parties during the collaborative approach must withdraw. It is also specific to collaborative law that the negotiations are held with all involved parties, with their lawyer present, or also between lawyers only. These golden rules of the collaborative approach ensure a smooth and efficient negotiation process as well as encourage parties to think twice about the costs involved in hiring new lawyers.

Parties sitting at the negotiation table are required to:

- Exchange complete information necessary for the other party to make well-informed decisions
- Maintain absolute confidentiality during the process
- Reach written agreement on all issues and concerns (except contested court proceedings)
- Authorize the attorneys to use the written agreement to obtain a final court decree.

Collaboration is an excellent option for people who want or need to pursue relationships after the dispute such as business partners, people with family ties, employers and employees. More and more it is used in family law, and it also works well for health care cases, school law and probate matters.

Lawsuits are extremely costly for businesses, in terms of counsel fees, but also time, human resources and reputation and relationships.

The business community would benefit greatly from the collaborative approach. Indeed, it places great value on personal responsibility of the parties and a respectful working relationship. This is vital to businesses because of the importance of their long-term relationships with commercial partners and clients, built over many years.

Also, parties gain support while staying in control. Most often, the agreement they come to is more detailed and complete than a judgment, having been able to negotiate a better settlement, tailored to their needs which are, in

business, quite specific and unique.

An additional advantage of collaborative law is that it allows the parties to work with their attorneys as well as other professionals such as financial advisers who can intervene at any moment in the process to help the parties come to the best mutual and individually acceptable agreement. These professionals are bound by the terms of the collaborative contract.

Of course, for a case to be collaborative, the Collaborative Agreement must be signed by the parties. Lawyers play a big role in promoting this means of dispute resolution and should let clients know about this possibility. Although already extensively used in family law matters in Quebec, the Quebec Bar itself encourages individuals and businesses to have recourse to the collaborative approach.

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### TO OUR READERS

This Newsletter is intended to introduce and explain on a regular basis new areas of law relating to arbitration and dispute resolution which is of general interest to all of our clients. It is jointly written and produced by PLG's Litigation Network which includes legal practitioners in several PLG firms and their contacts worldwide. We always welcome comments and questions on any matters raised in PLG Arbitration and Dispute Resolution Bulletin. Further information is available on all topics but nothing in PLG Arbitration and Dispute Resolution Bulletin is to be regarded as a definitive statement of the law or as specific legal advice and reliance should only be placed on particular advice obtained from the relevant practitioners in the light of all relevant facts and circumstances. Readers are requested to direct their enquiries to the author of the relevant article.

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