THE PROCEEDINGS BEFORE THE ARBITRATION TRIBUNAL OF ICSID BETWEEN

MARFIN INVESTMENT GROUP HOLDINGS S.A. AND OTHERS

v.

THE REPUBLIC OF CYPRUS

Introduction

During my term of office as the Attorney General of the Republic between the years 2013 – 2020, the Republic of Cyprus was engaged in many important legal battles either as a claimant – plaintiff, or as a defendant. Cyprus thus took part in various judicial or, quasi judicial proceedings instituted by or against her, both in Cyprus and abroad. Some of these proceedings for one reason or another, had, or could have had, enormous impact and consequences on the economy, or on important issues of human rights.

Amongst those cases, I stress outmost importance on the following proceedings:

1. The arbitral proceedings before the ICSID in Paris by which a number of investors in the Cyprus Popular Bank, were claiming as against the Republic of Cyprus a vast amount of damages exceeding the total sum of 1 billion Euros for loss allegedly caused by the measures taken by Cyprus in order to save the banking sector and the economy in general.

2. The appeal proceedings before the Supreme Court of Cyprus, regarding the constitutionality and legality of the measure taken by the Republic, to impose an

obligatory cut in the wages of all civil servants in order to reduce public spending and cope with the economic crisis which had hit Cyprus between 2012 – 2013.

3. The proceedings regarding the implementation and execution of the judgment of the ECHR in the 4TH Interstate Recourse of Cyprus v. Turkey.

4. The proceedings before the International Court of Justice in the Hague for an advisory opinion regarding the legal consequences of the separation of Chagos Archipelago from Mauritius by the United Kingdom in 1965.

The apparent importance of the first two of the aforementioned proceedings lies on the catastrophic consequences which inevitably would be caused on the economy of Cyprus if an award or judgment was to be issued against the Republic as a result of which the government would be called upon to pay billions of euros as damages to the successful litigants and possibly to many others. And this, at a time when the Republic had almost reached the stage of bankruptcy, following the crisis in its banking system and at a time when Cyprus was under strenuous effort to be able to stand on her own feet again.

The other two proceedings owe their importance to the fact that they involved extremely important issues of human rights and fundamental liberties.

Reverting to the first of the aforementioned cases, with which I propose to deal in this lecture, we should be reminded that between 2012 – 2013 the Republic of Cyprus experienced the horrifying situation of the collapse of almost the whole of its banking system which, in its turn was the cause of an unprecedented general economic crisis as a result of the inability of the state to support this vital sector of the economy. The decisions taken by the government during those critical days

included inter alia, the imposition of the so called bail - in to the two systemic banks i.e. the Cyprus Popular Bank (Laiki) and the Bank of Cyprus. A Memorandum was signed between the Cyprus government and European institutions, by means of which financial support was granted to the Republic, payable by installments provided strict conditions and undertakings, were met.

It was indeed in those depressing and unprecedented circumstances that the criminal investigations had started with the instructions of the Attorney General, regarding the possible commission of any criminal offences which related to the degrading state into which the economy had fallen. The investigations, as in all cases, were carried out by a specially formed team of the police, aided by experts under the supervision of the Law Office of the Republic whenever needed.

Amongst the organizations and the legal and physical persons who were under the microscope of the investigators from the very beginning, was the Cyprus Popular Bank, its major shareholders and its boards of directors. As it has been repeatedly clarified on many occasions, the aim of the investigations was not to detect possible wrong or incorrect acts or decisions of persons involved in the facts, but only acts, decisions or omissions which could constitute criminal offences, provable in court.

It was in this gloomy environment that on the 27th September 2013, a recourse was filed at the International Centre for Settling Investment Disputes (ICSID) for the resolving of an investment dispute through arbitration, against the Republic of Cyprus by certain legal and physical persons who were shareholders in the Cyprus Popular Bank. Some of them were already under the microscope of the police investigators regarding the possible commission of criminal offences

connected with the state of the banking sector and the economy. Amongst those, Andreas Vgenopoulos the strong man of the bank and his company Marfin Investment Group (MIG) and 18 other Greek shareholders of the Bank. These claimants were claiming as against the Republic the payment of 1,2 billion euros for the alleged expropriation of their investment as shareholders of the Popular Bank, as well as for other alleged misdoings of Cyprus, which, had caused the value of their investment to have diminished. Of those investors, MIG was claiming damages of approximately 800 million euros whereas other 400 million were being claimed by the other investors.

The International Centre for Settling Investment Disputes (ICSID) and its jurisdiction.

The full name of the arbitration center to which the claimants had resorted is *The International Centre for Settling Investment Disputes (ICSID)*. This institution was set up by virtue of the *International Convention on the Settlement of Investment Disputes between States and Nationals of other States*, which is known as the *Washington Convention of 1965*, a convention which had been ratified years earlier by both Greece and Cyprus.

According to Article 1(2) of this Convention, the scopes of the Centre are to provide a procedure for the amicable solution and arbitration of investment disputes between the contracting states to the Convention and citizens of other contracting states. For all the disputes which are referred to the Centre pursuant to the Convention, there is provision for a preliminary procedure aiming at reaching an amicable solution, failing of which, the arbitration procedure begins with the setting up of an Arbitral Tribunal.

According to the provisions of Article 37.2 (b) of the Convention, in the case where there is no other agreement between the parties involved in the arbitration, then the Arbitral Tribunal consists of 3 members. Two of these are chosen by the parties involved, one from each side, whereas the third, who acts as the President, is appointed following an agreement by the parties, if possible.

The final decision of the tribunal (the Award) is binding on the parties and it is also final. In this regard, there exists no right of appeal and the only available means which is provided for in the Convention, is the right of an aggrieved party to apply for the annulment of the award on one of very limited and specified grounds such as on the ground of corruption by a member of the tribunal. Another remedy which is also available to an aggrieved party, is the application for review of the award for only one single reason: That a piece of evidence of a decisive importance came to light, which was not known to the tribunal or to the party applying for review, before the issuing of the award.

The international arbitration against the Republic of Cyprus by the aforesaid claimants.

This international arbitration which was of a critical importance to Cyprus and its economy, had as a legal basis the bilateral agreement signed between the government of the Greek Republic and the government of the Cyprus Republic on the 30th of March 1992 and came into effect on the 26th of February 1993 which provided for the bilateral promotion and protection of investments between the two countries.

According to the major provisions of the said bilateral agreement, a contracting party undertakes to promote and protect within its territory, any investments

effected by investors of the other contracting party. Furthermore, as provided by Article 9 of the Agreement, every dispute raised between such an investor and a contracting party relating to an investment, expropriation or nationalization of investment, shall be settled amicably and failing that, the investor has the right to submit the dispute for the decision of either a competent court of law of the contracting party, or for the decision of the "*International Centre for the Settling of Investment Disputes which was set up by virtue of the Convention dated 18th March 1965*". The contracting parties to the agreement were further agreeing and undertaking that they approved this arbitration procedure, the award in which would be binding upon them and could not be subjected to any reviewing measures, other than those envisaged in the 1965 Convention.

As mentioned earlier on, the recourse of the Greek investors against the Republic of Cyprus was submitted on the 27th September 2013. As expected, the time limit provided in the ICSID Convention for exploring the possibility of an amicable settlement, expired without any effort having been undertaken towards this aim. As a result of this, the mechanism for the start up of the arbitration proceedings was set into motion by submitting the relevant application to the General Secretary of the Centre.

As far as the composition of the Tribunal is concerned, the provisions of both the Bilateral Agreement and of the Convention were followed. In this respect, the Claimants put forward the name of Mr. Daniel Price from the United States for appointment as one of the arbitrators, whereas the respondent Cyprus Republic put forward the name of Sir David Edward QC from the United Kingdom. In view of the non agreement of the parties to the arbitration regarding the person to be

appointed as the president of the tribunal, the Chairman of the Administrative Council of ICSID applying the Convention rules, proceeded and appointed Mr. Bernard Hanotiau from Belgium as the President of the Tribunal.

Being on this point, I should add that the choice of a person to act as one of the arbitrators by one side involved in the dispute is not an easy task. On the contrary, before such a decision is taken, a lot of attention and careful investigation is required. In the case under consideration, our research was focused to persons of recognized reputation, satisfactory academic qualifications and with sufficient experience in arbitrations. We had to inquire into the issues with which the proposed persons had dealt in the past, inquire as to whether in any previous proceeding in which they had been involved they had expressed any opinion or taken a position which were incompatible with our main positions to be exposed in the arbitration, any possible books or articles published by them etc.

Furthermore, the Law Office of the Republic engaged the legal services of the internationally renowned law office of Skadden, Arps, Slate, Meagher and Flom (UK) LLP with which we kept a close and flawless cooperation during the whole period of the pendency of the arbitration.

It is useful at this point to refer to the main remedies the Claimants were praying as against the Cyprus Republic which were the following:

(a) A declaration that Cyprus had violated the terms of the aforesaid Bilateral Agreement between Greece and Cyprus.

(b) An order against Cyprus to pay compensation to the Claimants for alleged violations of the Bilateral Agreement, in the sum of 1,041 billion euro plus interest on this sum as from the 26th October 2011 until final repayment.

(c) An order against Cyprus to pay compensation to MIG in the sum of 50 million euro and to Mr. Vgenopoulos in the sum of 10 million for damage to their reputation which was allegedly caused as a result of the violation of the Bilateral Agreement's provisions by Cyprus.

(d) An order against Cyprus to pay all the legal costs and expenses incurred by MIG and by Mr. Vgenopoulos in defending or facing proceedings and investigations which had started or were about to start by Cyprus.

(e) An order against Cyprus to proceed with a formal and unreserved apology to Mr. Vgenopoulos , to MIG and to its staff for the alleged unwarranted, frivolous and oppressive proceedings, including decisions, orders and other actions of the Cypriot courts and of administrative authorities.

(f) An order against Cyprus to pay all the costs of the ICSID arbitration, the costs of expert witnesses and all legal costs for the representation of the Claimants.

In its turn, the Respondent Republic of Cyprus opposed the claims and counter claimed the following remedies to be granted by the Tribunal:

(a) A declaration that the tribunal had no jurisdiction to entertain any of the claims of the Claimants.

(b) In the alternative, the tribunal to dismiss all the claims of the Claimants in their substance.

(c) Further in the alternative, a declaration that the Claimants failed to prove any loss or damage caused to them and that therefore they are not entitled to any compensation.

(d) The payment by the Claimants jointly or severally of all the costs of the arbitration proceedings.

Regarding the main objections of Cyprus as to the jurisdiction of the tribunal in entertaining the claims, it should be noted that these were not examined by any preliminary inquiry, but they were dealt with by the Tribunal during the hearing of the issues of substance in the case.

On the 28th April 2014, the arbitration tribunal issued its first Procedural Order concerning procedural matters such as setting out the various stages of the proceedings, the time limits for written pleadings, the selection of the center in which the hearing was going to take place which was Paris, etc.

Before we start elaborating in depth in the core issues which were raised by the Claimants and formed the subject matter of the main hearing of the case, it is important to pause here for a while and examine another serious aspect of the proceedings, which was the intermediary, or interlocutory measures and steps taken by the Claimants against the Republic within the framework of the arbitral proceedings which had started.

The application of the Claimants for the taking of preventing measures by the Tribunal against Cyprus pending the determination of the arbitral proceedings.

As mentioned earlier on and as it had been announced publicly on many occasions in 2013 – 2014, the authorities in Cyprus had started intensive police

investigations exploring the possibility of the commission of any criminal offences by any physical or legal persons involved in the banking crisis. Many persons with a leading role in the pending arbitration and others closely related to them were already under scrutiny by the investigators. Criminal charges had already been brought against a number of them and both national as well as European arrest warrants had been issued, or were in the process of being issued against others, who had refused or neglected to appear before the court despite the fact that they were properly summoned.

It should be noted that the ICSID Tribunal on the basis of Rule 39 of the ICSID Arbitration Rules, possesses the power which is exercisable at any stage during the pendency of the proceedings and on the application of any party to the dispute, to recommend the taking of any provisional measures which it deems proper in order to safeguard its rights and the integrity of the proceedings which are pending before it and these measures will remain in force until the final determination of the case. The Arbitration Tribunal, according to the same Regulation is further obliged to give priority to the examination of any such application for provisional measures and in addition, it can recommend the taking of measures other than those applied for but are aiming towards the same target.

The Claimants, taking full advantage of the aforesaid provisions of the ICSID Convention, applied through their legal representatives to the Arbitration Tribunal for the taking of very drastic and rather exceptional measures which were clearly aiming at defeating or at least suspending the criminal proceedings which were pending in Cyprus against a number of them.

More specifically, on the 10th May 2016 whilst the procedure of filing the written pleadings of the parties was in process, the Claimants legal representatives submitted to the Tribunal an application for provisional measures against the Respondent Republic, by which they were praying for the following remedies:

"(a) ORDER Cyprus and all persons and entities for whose actions and omissions Cyprus bears international responsibility, including the Special Administrator of Laiki, the Central Bank of Cyprus and the Cypriot Securities and Exchange Commission, to desist from any and all measures that aggravate, exacerbate, or extend the existing dispute, including the issuance of investigations and fines or penalties of any nature;

(b) ORDER Cyprus to immediately take all measures necessary to suspend forthwith all proceedings related to the ICSID arbitration during the pendency of this arbitration, whether pending or forthcoming, against any of the Claimants and associated persons including but not limited to MIG and Messrs. Vgenopoulos, Bouloutas, Foros, Kounnis and Mageiras. In relation to the pending proceedings, the Claimants respectfully request that the Tribunal ORDER:
(i) the suspension of the Nicosia Proceedings;
(ii) the suspension of proceedings in England, Greece and anywhere else to enforce the WWFO;
(iii) the suspension of all pending CySEC proceedings;
(iv) the suspension of the civil proceeding to enforce the CySEC fines;
(v) the suspension of the Criminal Investigation;
(vi) the suspension of the 2015 Criminal Prosecution;
(vii) the cancellation or suspension of the enforcement of the European Arrest Warrants against Messrs. Foros and Bouloutas; and
(viii) the cancellation or suspension of the enforcement of the bail set on Mr Kounnis.

(c) ORDER, in the alternative to (b), and at a minimum, that Cyprus allow Messrs. Foros, Bouloutas and Kounnis to travel freely, conduct their business and consult counsel in the ICSID arbitration, by
(i) suspending the enforcement of the European Arrest Warrants against against Messrs. Foros and Bouloutas; and
(ii) allowing Messrs. Foros and Bouloutas to defend themselves in the 2015 Prosecution through counsel rather than by appearing in person.

(d) ORDER Cyprus to take all measures to suspend any order or fine, including but not limited to the WWFO;

(e) ORDER, as a preliminary matter, that Cyprus refrain from undertaking any of the actions covered by the foregoing requests pending the Tribunal's decision on the present Application."

Looking at the remedies prayed for by the Claimants, it became more than obvious that if only some of them were approved by the Tribunal, this development would be sufficient to undermine, defeat or at least suspend the furtherance of the criminal cases and investigations which were pending following onerous and time consuming work done by so many people in an effort to bring to justice persons who could be regarded as responsible for acts or omissions related to the banking crisis.

Inevitably, those strong and radical provisional measures applied for by the Claimants, had raised very serious concern to us and provided food for thought regarding an issue of international law of a vital importance, i.e. whether it is possible or even thinkable for an arbitration tribunal which is seized with a case of an investment dispute, to interfere with the rights and duties of a sovereign state and its organs to engage in criminal investigations into serious charges, to issue and to execute arrest warrants against persons suspected of having committed offences, to interfere with pending court trials, to suspend administrative processes and to perform any other lawful duties?

In relation to this legal discussion, it should be pointed out from the beginning that the aforementioned Rule 39, gives the power to the Tribunal at any stage of the arbitral proceedings on the application of a party to recommend to one of the parties the taking of any provisional measures which it deems fit and proper in order to preserve its rights and to protect the integrity of the proceedings before it. The exact words used in *Rule 39(1)* are as follows:

« *a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal»*.

It is therefore obvious that the actual words used in the text of Rule 39 do not refer to an *order* of the tribunal but to a *recommendation*. According to legal authorities on the matter, the Convention establishing ICSID, did not grant a binding legal effect to the provisional measures issued by the tribunal, but considered them as recommendations and therefore any tribunals which deal with such provisional measures as if they were orders, undermine the sovereignty of states.

On the other hand however and despite the fact that there exists no set procedure for the enforcement and execution of the measures provided for in recommendations of this kind, there is no doubt that the states engaged in the arbitral proceedings are bound by their accession to the Convention and by signing the same, to adhere to its provisions and to the relevant rules. Therefore, the non compliance with the directions and recommendations of the Arbitration Tribunal is considered as a violation of the obligations arising out of the Convention. Furthermore, the Tribunal which ascertains non compliance with measures which the same had imposed in the form of recommendations, may well extract negative impressions regarding the non cooperative behavior of a party and in the end it is not remote the possibility of the tribunal imposing aggravated damages against that party if, as a result of his non compliance, the position of the successful party had deteriorated.

It was thus obvious that the Republic of Cyprus was entering into a serious legal adventure from the beginning of the arbitral proceedings. Following written

pleadings and affidavits, the Tribunal fixed the application for Provisional Measures for oral hearing before it in Paris on the 4th and 5th August 2016.

The number of witnesses which were called upon to give oral evidence before the Tribunal was fixed at two, one for each side. On behalf of the claimants Mr. A. Vgenopoulos and on behalf of the Respondent Cyprus Republic the Attorney General gave evidence before the Tribunal. Present for the Claimants were 11 in total well selected lawyers from around the world. Their target became obvious from the very beginning: that was no other than to avoid all criminal and other proceedings against some of them and in order to succeed in this, they were taking full advantage of the provisions of the Rules under the pretext of protecting their rights and the integrity of the Tribunal.

The hearing proceeded with the examination and cross examination of the respective witnesses and following the oral addresses of the parties, the interim decision of the Tribunal was reserved.

On the 13th September 2016, the Arbitration Tribunal issued its reserved decision regarding the Claimants demands for interim measures against Cyprus.

In its well reasoned decision which consisted of 81 pages, the Tribunal dismissed all other remedies prayed for by the Claimants, and decided to deal only with the issue of the two criminal cases which had already been filed in Cyprus and were pending before the courts. In this respect, the Tribunal rejected any claim for suspending the proceedings in those or in any other court cases, mentioning that Cyprus, as all other states, retains the sovereign right to investigate and to prosecute any persons for having committed criminal offences and stressed the fact that some of the pending cases against some of the Claimants and other persons were not initiated for the purpose of causing fear or harassment, or for

obtaining an advantage in the arbitral proceedings, thus dismissing the relevant arguments of the Claimants. With regard to the warrants of arrest which had already been issued against messrs Bouloutas and Foros of the Cyprus Popular Bank, the Tribunal was of the opinion that the issuing of those warrants was not an act disproportionate to the circumstances, neither an abusive act, given the fact that according to the Cypriot legislation the physical presence of the two accused persons in court is obligatory. Still on this issue, the Tribunal rejected the claim of the Claimants according to which these two accused persons should be entitled to be represented in the Cyprus court through their lawyers and not to be physically present. Despite the above, the Tribunal decided that the involvement and participation of Mr. Bouloutas and Mr. Foros in the arbitration proceedings before it, would be seriously hindered in view of the possibility that these persons might be held in custody as a result of the execution of the warrants of arrest which had been issued against them, since their availability and contribution to the arbitration proceedings was considered as substantive. Having balanced the sovereign right of the Cyprus Republic to proceed with the criminal cases filed in 2015 on the one hand and the need for the unhindered availability and presence of these two accused persons before the Tribunal on the other hand, the Tribunal decided in this respect to recommend to the Republic of Cyprus the following:

i. To suspend the enforcement of the arrest warrants against Messrs. Bouloutas and Foros until the Tribunal has closed these proceedings;

ii. To refrain from seeking arrest warrants against Messrs. Vgenopoulos and Mageiras in connection with matters that form the basis of the Claimants' claims in these proceedings, including the Christodoulou prosecution, until the Tribunal

has closed these proceedings; It should be mentioned here that the Christodoulou prosecution was one of the most serious criminal cases against the former Governor of the Central Bank of Cyprus relating to charges of corruption through bribery from companies on the instructions of A. Vgenopoulos.

iii. To refrain from taking any steps that would hinder the freedom of movement of Messrs. Bouloutas, Foros, Vgenopoulos and Mageiras, their access to counsel and their appearance for examination and cross-examination at the hearing until the Tribunal has closed these proceedings.

It should be noted that during the furtherance of the criminal cases against the aforementioned persons, both of them were repeatedly neglecting to appear before the court which was seized with the case against them. In view of the Procedural Order referred to above which recommended the non issue or the non execution of any arrest warrants against them and the stalemate which resulted there from, Cyprus referred back to the Tribunal praying for the reexamination of its previous Order. At the same time, the Claimants prayed for the taking of measures against the Republic for what they alleged to be a non compliance with the provisions of the Order.

The Tribunal dealt with our petition as well as with the new petition of the Claimants and having considered the statements submitted by both sides, issued a new decision on the 7th November 2016. In this new decision the Tribunal accepted in effect all our arguments and confirmed that in spite of all the limitations the Tribunal had included in its previous recommendations, all accused persons were and still are under an obligation to appear before the Cypriot courts

and called upon them to appear in the criminal cases against them which had been adjourned for the 17th November and 1st December 2016 respectively. The Tribunal stressed that if they in fact appear on the dates fixed by the court, then they should not be held in custody but they should be left free on bail conditions to be imposed by the court in order to secure their further attendance in court, as it is the practice with all other accused persons. In the event, however, that they fail to appear in court on the dates fixed, the Tribunal was then going to take appropriate measures having been moved by Cyprus. In its new decision the Tribunal in order to clear up any misinterpretation of its previous decision, clarified that at the time when it was recommending Cyprus to suspend the execution of pending arrest warrants and to avoid the issuing of new arrest warrants, this fact was in no way obstructing the Republic from exercising its sovereign rights as to the furtherance of the criminal cases. The Tribunal had only adopted the minimum possible measures targeting at the safeguarding the integrity of the proceedings before it and at the same time protecting the rights of Cyprus.

In view of those new developments, the way to execute the arrest warrants against the two former high officials of the Cyprus Popular Bank was re-opened, in the event of their defaulting to appear before the criminal court. The green light for issuing an arrest warrant against A. Vgenopoulos was also given but unfortunately the light had become permanently red only 2 days before the Tribunal's decision, due to his sudden death.

Following the above, the stage of the interlocutory proceedings was concluded and the case proceeded to the hearing of all the matters of substance and jurisdiction issues which had been raised by the parties.

The hearing of the issues of substance and jurisdiction at the ICSID premises in Paris.

Following the submission of all written statements by the parties, the discovery of documents and the completion of all other procedural matters, the case was eventually fixed for oral hearing in Paris on the 6th – 9th March 2017.

During the above dates, the Tribunal heard the oral evidence of only two witnesses. Mr. Efthymios Bouloutas former high official of the Popular Bank on behalf of the Claimants and Mr. Kikis Kazamias a former Finance Minister during the critical period on behalf of the respondent Republic of Cyprus.

The oral hearing was followed by further written submissions and addresses on various matters including the costs, whereas the Tribunal declared the closure of the proceedings and reserved its award.

Finally, the Award of the Arbitration Tribunal was delivered on the 26th July 2018 and the decision was unanimous.

The Tribunal's Award both on the issue of the existence or not of jurisdiction as well as on all of the substantive issues which had been raised during the proceedings.

(a) The Award with regard to the issues of the Tribunal's jurisdiction.

The respondent Republic of Cyprus had submitted from the very beginning of the proceedings its position according to which the ICSID Arbitration Tribunal before which the Claimants filed their claim, had no jurisdiction to deal and resolve the

specific investment dispute. In spite of the existence of the Bilateral Agreement between Greece and Cyprus which was still in force, it was the position taken by Cyprus that the ICSID Tribunal had no jurisdiction to deal with the dispute for two separate legal reasons:

(i) Due to the fact that the specific investment by the Claimants or at least a part of it is considered as a domestic investment in Greece and not in Cyprus.

(ii) Due to the fact that the Bilateral Agreement between Greece and Cyprus had been superseded by statutes of the European Union which followed.

In its extensive and well reasoned Award, the Tribunal dismissed both objections of the Republic relating to the alleged lack of jurisdiction by the Tribunal to entertain the Claimants claims.

With reference to the first objection, the Tribunal ruled that despite the fact that some of the Bank's investments were indeed made in Greece, what matters for the purpose of enforcing the Bilateral Agreement is the fact that the claims of the Claimants refer to an investment which related to their share holding in the Bank which was an organization based in Cyprus and this fact alone is sufficient, in spite of the fact that the Bank had also invested abroad.

The second objection which had been raised by the Republic, was based upon the fact that following the signing of the Bilateral Agreement between Cyprus and Greece, the Republic of Cyprus had acceded to the European Union as a full member as Greece had done years earlier and that various statutes were approved and are in force in all member states as a result of which the Bilateral Agreement upon which the claim had been based had been superseded and became unenforceable. More specifically, it was the argument put forward by the Republic that the Bilateral Agreement or at least its part which related to the

provision referring disputes to binding arbitration proceedings had been terminated by virtue of Article 59 of the Vienna Convention on the Law of Treaties. According to that article the operation of a treaty is terminated or suspended by the conclusion of a later treaty relating to the same subject but with a different content. In this respect, we indicated to the Tribunal as examples of treaties concluded later than the Bilateral Agreement, the Treaty on the Functioning of the European Union as well as the Treaty of Lisbon which amended it. It must be pointed out at this point that following the conclusion of the hearing before the Tribunal, viz. on the 6th March 2018 the European Court of Justice issued its judgment in the case of *Slovwakische Republik v. Achmea BV Case C-284/16* a judgment which had provided strong support to our jurisdiction objection. More specifically, that judgment confirmed that an investor from one member state is precluded by virtue of Articles 267 and 344 of the TFEU from resorting to an arbitration tribunal against another member state on the basis of a bilateral agreement signed between the two member states which aim at the mutual protection of investments. The main reason for this being that all issues relating to these disputes between citizens and member states of the European Union should be resolved by resorting to the appropriate organs or bodies of the Union and specifically to the ECJ.

In view of the importance of that decision and its possible impact on the Cyprus arbitration, the Tribunal re-opened the case and called upon the parties to submit any additional arguments they might have had on the issue of the Tribunal's jurisdiction, which they did.

In spite of the above development however, in its Award the Tribunal dismissed the objection of Cyprus regarding jurisdiction on this basis as well, with the main

reasoning that the subject matter of the Bilateral Agreement is different from that of European Treaties which have followed and that the Arbitration Tribunal is bound to enforce the Treaty by virtue of which it was established and the Bilateral Agreement which had not in any case been terminated by the contracting parties, as well as the applicable principles of customary international law.

(b) The Award on the points of substance which had been raised in the case.

Despite the dismissal of our objections regarding jurisdiction, the Tribunal examined in depth all the issues of substance which had been raised in the proceedings, and in effect decided all of them against the Claimants and in favour of the Republic. The gist of the decision was that Cyprus had not violated any of its obligations arising out of the Bilateral Agreement. The Tribunal unanimously dismissed all the Claimant's claims against the Republic.

Furthermore, the Tribunal awarded in favour of Cyprus and against all the Claimants jointly or severally the sum of 5 million euros against costs.

The main points of the Award comprising of 363 pages were the following:

As a starting point the Tribunal pointed out that the acts of the Cyprus Popular Bank at the material time could not be attributed to the Republic of Cyprus, thus accepting our position that the Republic bears no responsibility under international law for the acts of the Bank since June 2012 in spite of the fact that the Republic was the majority shareholder of the Bank.

Secondly, even if the aforementioned acts could be attributed to the Republic of Cyprus, they did not constitute violations of the provisions of the Bilateral Investment Agreement between Greece and Cyprus in any event.

Thirdly, the Arbitration Tribunal extracted the following findings:

(i) The resignation of Mr. Vgenopoulos following pressure exerted by the Central Bank of Cyprus as well as the removal of Mr. Bouloutas, had been based on objective criteria and were the result of a long procedure through which the Central Bank as the appropriate regulatory authority, had attempted to persuade the administration of the Popular Bank to proceed and take corrective measures in order to face its critical economic situation.

(ii) The Republic did not aim at nationalizing Cyprus Popular Bank as it was the allegation of the Claimants, neither was its strategy during the Summit Conference of the Eurozone on the 26th October 2011 led by such an intention.

Furthermore, the Tribunal pointed out that an arbitration court is not in a position to judge difficult political decisions of states, unless these refer to the taking of measures which prove to be arbitrary and illogical or lacking the element of impartiality. Regarding the hair cut of the Greek Bonds the Tribunal decided that the failure of the Cyprus Republic to negotiate an exemption or mitigation of the impact on the Cyprus banks was not such a measure.

(iii) The Tribunal decided further that the Republic did indeed examine the various proposals of the Claimants for the recapitalization of the Popular Bank and disagreed with the position of the Claimants that it was aiming at securing the majority shareholding of the Bank.

(iv) Regarding the recapitalization of the Popular Bank, the Tribunal decided that the relevant legislative framework and the Order which was issued pursuant to it constituted a legally permissible exercise of the regulatory powers of the state. The recapitalization of the Bank was necessary in order to secure its survival. Also, the relevant legislation and the Order were enacted having followed a

transparent procedure with full respect of the Claimants' rights and in the absence of discrimination against them.

(v) The Tribunal confirmed its interlocutory ruling according to which the criminal cases which had been filed by the Republic against former executives of the Bank, was the result of applying the penal laws of the Republic and in no way did they constitute an abuse of the process of the law or tactical moves aiming at creating difficulties to the Claimants.

Those were in a nutshell the main points of the landmark decision of the Arbitration Tribunal which was expected with real agony by all involved in the proceedings.

Opening a parenthesis here, I should mention that the sum of 5 million Euros which had been awarded by the Tribunal in favour of Cyprus as against its legal costs was fully paid a few months later by the new CEO of Marfin.

Epilogue

The aforementioned decision of the ICSID Arbitration Tribunal marked the end of a unique legal case against the Republic of Cyprus and a real adventure which, if decided against it, could have caused a real set back in the efforts to reconstruct the economy following the taking of strict austerity measures which were affecting all citizens.

C. Clerides UCLan Cyprus, 1st March 2023