



Chilidescu v. Gheorghiu: Exercising Jurisdiction over Foreign Defendants in the context of Applications for Interim Orders by including Local Defendants to facilitate Forum Shopping

As Cyprus has emerged as an international business centre, Cyprus companies and Cypriot residents often act within the context of international corporate structures and participate in international business transactions. As a result, one of the main questions in international commercial litigation in Cyprus is whether the Cyprus Courts have jurisdiction over foreign defendants in multi-defendant cases also involving Cypriot defendants. The recent interim order judgment of *Chilidescu v. Gheorghiu a.o. No.Action 3300/2019 DC Nicosia, 31/03/2020*, handled by our firm for three of the respondents, involved multiple foreign defendants and the Court decided that the Courts of Cyprus lacked jurisdiction to hear and decide the case despite the presence of two Cypriot defendants. Consequently, the application for the issue of Interim Orders was rejected and the ex parte issued Interim Orders were annulled.

The aim of this article is to present that jurisdiction of Cyprus Courts cannot be established and Interim Orders cannot be issued against foreign defendants when the basis of the claim is not really connected with Cyprus and there isn't a sufficient jurisdictional ground in relation to the Cypriot defendants. In doing so, it outlines, briefly, the gateways for exercising jurisdiction over foreign defendants as prescribed by Order 6 of the Civil Procedure Rules and the provisions of the Regulation (EU) 1215/2012 on jurisdiction in civil and commercial matters (Recast Brussels Regulation). It concludes with an analysis of the above-mentioned case.

Jurisdiction

Cyprus case law has established that the issue of jurisdiction is fundamental and is considered as an issue of public policy. Furthermore, it is a matter that can be raised and decided at any stage of the proceedings (*IronFx Global Limited v. Christakis Alexandrou & Sons Limited, Civil Appeal. E338/2016*,

dated 23.3.2017, also handled by our firm, when the lack of jurisdiction was raised during the hearing of the appeal) including the interlocutory stage in which the Court decides whether it will issue an interim order or finalize an issued ex parte order. Illustrative, in this context, is the Supreme Court judgment ***Rostovtsev v. Shchukin Appeal no. E415/2016, dated 5/7/2019***. In this case, it was pointed out that the issue of jurisdiction of the Court may be examined and decided in interim proceedings when it arises or is based on indisputable facts. This approach is consistent with the view that the hearing of an application for interim orders presupposes jurisdiction to hear the action. In fact, according to Cyprus law there are two jurisdictional regimes in parallel.

Recast Brussels Regulation

As Cyprus is a Member State of the European Union, Recast Brussels Regulation has direct effect and is applicable when the defendant is domiciled in a Member State. Firstly, as a general rule of jurisdiction, the Courts of the Member State in which the defendants are domiciled have general jurisdiction (Article 4). Thus, Cyprus Courts have general jurisdiction in cases in which the defendant is a resident of Cyprus or a Cyprus company.

Despite the abovementioned general rule of jurisdiction, Article 5 prescribes that persons domiciled in a Member State may be sued in the courts of another Member State by virtue of the rules set out in Sections 2 to 7 of Chapter 2.

Particularly, other courts may have alternative, specific jurisdiction in parallel with the general jurisdiction when there is an appropriate connection between the claim and the State of the forum. These rules are contained in Article 7 and 8 and contracts and torts constitute notable examples. In matters relating to a contract, a person may be sued in the courts for the place of performance of the obligation in question and in matters relating to tort, delict or quasi-delict, a person may be sued in the courts for the place where the harmful event occurred or may occur. In addition, Article 8 (1) is about multiple defendants and states that where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

In matters relating to contracts with 'a specially protected party', jurisdiction shall be determined by special rules and depends on who sues. More precisely, there are provisions for insurance contracts (Article 10ff.), consumer contracts (Article 17ff.) and individual contracts of employment (Article 20ff.).

Furthermore, one of the important aspects of the Brussels Recast Regulation is that the Courts of a Member State have exclusive jurisdiction, regardless of the domicile of the parties, in certain proceedings as laid down in Article 24. For instance, in proceedings that have as their object rights in rem in immovable property or tenancies of immovable property, in proceedings that have as their object the validity of the constitution, the nullity or the dissolution of companies or the validity of the decisions of their bodies and in proceedings which have as their object the validity of entries in public registers. Apart from the exclusive jurisdiction, Article 25 provides the prorogation of jurisdiction in the case of a choice of court agreement conferring jurisdiction on a court of a Member State and Article 26 determines that a court of a Member State, before which a defendant enters an appearance without objection, shall have jurisdiction.

Civil Procedure Rules

The Civil Procedure Rules of Cyprus apply with respect to defendants domiciled in a country which is not a member of the European Union or a party to the Lugano Convention. The provisions of Order 6 Rule 1 of the Civil Procedure Rules constitute not only procedural rules regarding the service but also jurisdictional rules pursuant to which the Cyprus Courts can obtain jurisdiction over foreign defendants. This approach has been affirmed in the case ***ANS Secretaries v. Orianda Management FZ LLC a.o. Appeal no. 362/09, dated 3/7/2014***. Basically, the Applicant has to demonstrate that his case falls within one of the jurisdictional gateways contained in Order 6 Rule 1, which include the following:

- (a) *the whole subject matter of the action is immovable property of any kind situated in Cyprus; or*
- (b) *any act, deed, will, contract, obligation, or liability affecting immovable property of any kind situated in Cyprus, is sought to be construed, rectified, set aside, or enforced in the action; or*
- (c) *any relief is sought against any person domiciled or ordinarily resident in Cyprus; or*
- (d) *the action is for the administration of the movable property of any deceased person who at the time of his death was domiciled in Cyprus, or for the execution (as to property situated in Cyprus) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of Cyprus; or*
- (e) *the action is one brought to enforce, rescind, dissolve, annul, or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract-*
 - (i) *made in Cyprus, or*
 - (ii) *made by or through an agent trading or residing in Cyprus on behalf of a principal trading or residing out of Cyprus,**or is one brought in respect of a breach committed in Cyprus of a contract wherever made, even though such breach was preceded or accompanied by a breach out of Cyprus which rendered*

impossible the performance of the part of the contract which ought to have been performed in Cyprus; or

- (f) the action is founded on a civil wrong committed in Cyprus; or*
- (g) any injunction is sought as to anything to be done in Cyprus, or any nuisance in Cyprus is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or*
- (h) any person out of Cyprus is a necessary or proper party to an action properly brought against some other person duly served in Cyprus.*

In addition, when there are foreign defendants who are not domiciled in a Member State, the plea of forum non conveniens is still available. The Court has a broad discretion and can take into consideration the special circumstances of each case from legal and practical perspective so that decide whether Cyprus Courts are the proper forum.

The Interim Judgment in *Chilidescu v. Gheorghiu a.o. No.Action 3300/2019*

In the case of ***Chilidescu v. Gheorghiu a.o. No.Action 3300/2019***, before the District Court of Nicosia, the question of jurisdiction over foreign defendants arose in the context of an application for interim orders and the Court held that the dispute did not fall within its sphere of jurisdiction.

The dispute related to the ultimate ownership of the proceeds from the sale of a yacht and the ownership of a Spanish property. The facts of the case are as follows: Mrs. Chilidescu (Applicant), who was a resident of the United States of America, sued Respondents 1 and 2, who were Romanians citizens and residents of Dubai. She claimed that they were involved in a conspiracy with the intentional or innocent involvement of Respondents 3 to 8 in order to fraudulently deprive her of her assets, primarily the yacht and the Spanish Property. Respondent 5 was a company registered in Spain and the Spanish Property was registered in its name. Respondent 3 was a company registered in Cyprus, Respondent 4 was a Cypriot resident, Respondent 6 was a company registered in Hong Kong and Respondent 7 was a company registered in Seychelles. The following corporate structure or shareholder pyramid was an admissible fact: Respondent 5 was wholly owned by Respondent 3, Respondent 3 was wholly owned by Respondent 6, Respondent 6 was wholly owned by Respondent 7 and Respondent 4 held the shares in Respondent 3 as a nominee shareholder and on behalf of Respondent 6 based on a Declaration of Trust. Our law firm represented Respondents 6, 7 and 8.

The Court issued an order prohibiting Respondents 1-8 from the alienation of assets which were registered in the name of Respondent 5 including the Spanish Property, freezing orders against

Respondents 1 and 2 and notification injunctions against Respondents 3, 5, 6 and 7 at the ex parte stage. The remaining requested disclosure orders were not issued ex parte. The matter in these proceedings was the finalization or the annulment of the issued orders, as well as the issuing or dismissing of the remaining requested orders. Before the Court examined the issues that arose in relation to the interim orders, it referred to the legal remedies sought by the action. According to the Generally Endorsed Writ, the Plaintiff requested the following declaratory judgments: the Plaintiff is the ultimate beneficial owner of all the shares of the capital of the Defendants 3, 5, 6 and 7 and the assets of these Defendants and Defendants 1 and 2 have conspired with each other or with other persons in Cyprus and elsewhere for the purpose to cause financial damage to the Plaintiff. In addition, general and specific damages were sought against the Defendants 1 and 2. Alternatively, the Plaintiff sought against all Defendants and each of them separately under the principle of Quia Timet judgment prohibiting each of them from alienating any property registered in their name or entitled to registration as ultimate beneficial owner of such property and which belongs to the Plaintiff in her capacity as the ultimate beneficial owner of the shares in capital of the Defendants 3, 5, 6 and 7.

With respect to the question of jurisdiction, Judge Demetriadou firstly noted that the basis of the claim and the substance of the Action was the claim of ownership over the Spanish Property registered in the name of a Spanish company, itself ultimately owned by a Seychelles company the ownership of whose shares were the real substance of the claim. The Court finally concluded that the Cyprus Courts have no jurisdiction to hear the Action based on the following reasoning.

Firstly, the question of jurisdiction over foreign defendants was examined in relation to the existence of one of the gateways for exercising jurisdiction over a person resident abroad as provided by Order 6 Rule 1 of the Civil Procedure Rules and more precisely Rule 1(c), (g) and (h) referred to by the Applicant in her application as founding jurisdiction. The Judge affirmed our position that Order 6 Rule 1 (c) did not apply as the said provision does not cover the case where Cypriot Defendants are included in the action to which foreign Defendants are added as explicitly covered by the provisions of Order 6 Rule 1 (h). With regards to the Order 6 Rule 1 (g), the Court ruled that it was not applicable to the facts of the case. There was no allegation or evidence that the Cypriot Defendants were in any way involved in any illegal acts or conspiracy against the Plaintiff. They simply acted within the context of a corporate scheme. The fact that Quia Timet injunctions were being sought in relation to the risk that the Cypriot Defendants would assist, innocently or not, the alienation of the Spanish property was not sufficient to provide a jurisdictional basis. To obtain such an injunction, the applicant must show that, unless the court grants the injunction, there is a real risk that an actionable wrong will be committed.

The Court pointed out that due to the nature of the injunction, a clear and strong testimony is required, establishing that the threatened risk is imminent and visible and the harm is inevitable, serious and may not be compensated monetarily. Thus, the Court adopted our position that the issuing of a Quia Timet type order presupposed that the main dispute regarding the ownership had already been decided. Also, our submission that the inclusion of the Defendants 3 and 4 in the Action was an attempt to found jurisdiction in the Cypriot Courts was adopted as well.

Subsequently, pursuant to Order 6 Rule 1 (h), the Court ruled that the action had not properly been raised against the Cypriot Defendants and therefore, foreign defendants could not be joined as necessary parties to the action. Firstly, the Judge stated again that merely seeking Quia Timet Injunctions against them in case they (innocently or not) acted in a way that would lead to alienation of the Spanish Property is not a sufficient jurisdictional ground. Nor would the mere fact that Norwich Pharmacal orders were sought against the Cypriot defendants be sufficient to found jurisdiction against the other defendants.

The judge then examined whether she had jurisdiction under the Recast Brussels Regulation. She applied the provisions of the Regulation to the circumstances of the case stressing in particular that the dispute was about the ownership of the shares in Respondent 7, which is a Seychelles company. After she mentioned the general rule of jurisdiction as described by Article 4(1) and 63 of the Brussels Regulation, she referred to the case of ***Andrew Owusu v. Jackson and others of the European Court of Justice (Case C-281/02)*** in which the European Court of Justice held that a Court of a Member State cannot refuse to exercise its jurisdiction because another court is more competent (*forum non conveniens*) to address the dispute. Nevertheless, the Judge analysed that according to Article 24 (3), the Courts of a Member State in the country in which a public register (e.g. commercial register) is kept have exclusive jurisdiction to decide disputes regarding the validity of their entries. In addition, Article 6 extends the enforcement of Article 24 and in cases where the Defendant is not domiciled in a Member State. Interestingly, the Court of Justice of the European Union has not decided whether the Courts of a non-EU Member State would have exclusive jurisdiction in such cases as those under Article 24. It was clear from the provisions of Article 24 (3) that if Respondent 7 was a company registered in a Member State of the European Union, the Courts of that Member State would have exclusive jurisdiction. Proportionally applying Article 24 (3), the Judge accepted our submission that, the Court that has exclusive jurisdiction on a dispute concerning company members, is the Court where the company has its registered office, i.e. the court of the Seychelles in relation to the

Defendant 7. Obviously, the Courts of Cyprus lacked jurisdiction to decide to whom the shares of a Seychelles company belong.

For the sake of completion and in the event that her judgment on jurisdiction is disputed in appeal she then went on and examined whether the requirements of Section 32 of Law no. 14/1960 to grant interim injunctions were satisfied. She immediately stated that the Application would again fail because of failure to show that the Applicant had a visible chance of success. After listing the relevant principles of the law regarding the application of the maxim *ex turpi causa non oritur actio* (from an illegal or immoral act there cannot be any legal rights), she accepted our submission that even if the story of the Applicant was correct she was admitting that she had knowingly embarked upon a course of action that was clearly in breach of international law and which also constitutes, inter alia, breaches of the Anti-Money Laundering legislation. In addition to the corrosion of her cause of action by the illegality the Applicant plainly could not claim that granting her the injunctions was just and equitable. She had not “come to equity with clean hands”.

Conclusion

In conclusion, It can be seen that you cannot found jurisdiction in the Cyprus Courts by the mere inclusion of innocent Cypriot defendants in an action when the dispute is not connected in substance with Cyprus, even if only for the purposes of obtaining Interim or Quia Timet injunctions.

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