Setting Up the Plea of Lack of Competence under Article 15(3) of the Maltese Arbitration Act

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[1] The Issue:

In a dispute relating to a contract containing a domestic arbitration clause one of the parties decides to seize the ordinary tribunals. What plea, if any, can the respondent raise, and what formalities must he observe in order to plead successfully?

[2] The Validity & Enforceability of Arbitration Clauses in Malta:

An arbitration agreement can be defined as "an agreement made by two or more parties between whom some difference has arisen or may thereafter arise, whereby, they appoint another person to adjudicate upon such difference and agree to be bound by this decision thereon."[1] In a similar fashion, the Maltese Arbitration Act defines an "arbitration agreement" as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."[2]

Maltese jurisprudence has long upheld the validity of arbitration clauses within commercial contracts, even before the enactment of the Maltese Arbitration Act.[3] In ***Edwin Vella vs. Wilfred Mamo Ne. (13.10.1989),*** the Court of Appeal (Commercial) ruled that it lacked competence to hear a dispute regarding "all differences" arising between the parties under an insurance policy due to the presence of an arbitration clause within that same policy.[4] In virtue of the parties' free will to regulate their juridical relations, arbitration clauses are to be deemed binding just like any other term or condition within a contract.[5]

[3] The Formalities for Pleading Lack of Competence before the Ordinary Courts:

Two Articles, found in separate pieces of legislation, currently govern the formalities of setting up the plea of lack of competence of the Civil Courts:

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[1] ***Halsbury's Laws of England****, 1931, Vol. 1, pg 1621, n. 1071.*

[2] *Article 7 of the Model Law*

[3] *Act II of 1996, now Chapter 387 of the Revised Edition of the Laws of Malta*

[4] "*Kif huwa ormai paċifiku fil-ġurisprudenza tagħna, klawsola arbitrali hija valida - u dana in omaġġ għall-volonta' libera tal-partijiet."* Another judgment reaching the same conclusion is that of ***Joseph Laferla Ne. vs. Salvino Mizzi Ne. (22.2.1964) Civil Court***. Similarly, in ***Renato Cefai ne. vs. Valletta Freight Services Limited (30.3.2001)*** the Civil Court held that arbitration clauses are to be respected, even though the ordinary civil courts retain concurrent jurisdiction over arbitral matters.

[5] ***Article 992 Civ. C***.: *"(1) Contracts legally entered into shall have the force of law for the contracting parties. (2) They may only be revoked by mutual consent of the parties, or on grounds allowed by law."*

i. ***Article 742(3) of the Code of Organization and Civil Procedure***[6] *"The jurisdiction of the courts of civil jurisdiction is not excluded by the fact that there exists among the parties any arbitration agreement, whether the arbitration proceedings have commenced or not, in which case the court, saving the provisions of any law governing arbitration, shall stay proceedings without prejudice to the provisions of sub-article (4) and to the right of the court to give any order of direction."*

ii. ***Article 15(3) of the Arbitration Act*** *(emphasis added): "Notwithstanding any provision of the Code of Organization and Civil Procedure if any party to an arbitration agreement…commences any legal proceedings in any court against any other party to the arbitration agreement…in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time before delivering any pleadings or taking other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, unless satisfied that the arbitration agreement has become inoperative or cannot proceed, shall make an order staying the proceedings. An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures."*

The leading case interpreting these Articles is that of ***Cobra Installations Limited vs. Stephen Caruana (8.11.2013) Court of Appeal (Inferior Jurisdiction)***. This involved a claim by plaintiff against the respondent before the Magistrates' Court for payment of amounts due for services rendered. Respondent filed a statement of defence in line with the provisions of the Code of Organization and Civil Procedure, containing the preliminary plea of lack of competence of the ordinary civil courts. The first instance court dismissed the preliminary plea because it was not raised in the proper form. This conclusion was subsequently upheld on appeal:

"It-talba ghall-waqfien tal-proceduri odjerni minhabba l-ezistenza ta' ftehim ta' arbitragg bejnu u is-socjetà attrici...ma gietx imressqa mill-konvenut permezz ta' Rikors izda fil-forma ta' eccezzjoni preliminari fir-Risposta tieghu. Fid-dawl ta' dak kjarament dispost fl-Artikolu 15(3) tal-Kap.387 tal-Ligijiet ta' Malta...il-Qorti hi tal-fehma li t-talba tal-konvenut ghall-waqfien tal-proceduri odjerni minhabba l-ezistenza ta' ftehim ta' arbitragg bejnu u s-socjetà attrici, kif minnu promossa, hija proceduralment inammissibbli u ghaldaqstant ma tistax tigi milqugha."

It reached this conclusion after citing other cases dealing with the interpretation of laws of a procedural nature. For instance, in ***Josephine Bonello pro et noe vs. John Bonello (31.1.2003)***, the Civil Court held: *"trattandosi di leggi di procedura che hanno progetto l'ordine pubblico mediante un convenzionismo di forma, non si deve ammettere altra interpretazione che la letterale nel senso che ove la legge prescrive una certa forma, questa si debba osservare alla lettera e non per equipollens."*[7] In other words, rules of a procedural nature must be followed *ad unguem* and the Court has no discretion to interpret these rules in an approxamative manner i.e. a statement of defence is not the equivalent of an application, even though both instruments may ultimately contain the same plea.

It seems, therefore, that the Maltese Courts have interpreted Article 742(3) COCP and Article 15(3) of the Arbitration Act in a complementary manner. In all cases of this nature, respondent must first present the apposite application before presenting his statement of defence. Should he

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[6] Chapter 12 of the Revised Edition of the Laws of Malta. In ***George Camilleri vs. Hugh P Zammit ne. (4.5.1998)*** the Court of Appeal ruled that ***Article 742(3) COCP*** was not introduced to neutralize the effect of arbitration clauses but to ensure the control of the use of such clauses by the ordinary civil courts. Similarly, in ***George Xuereb vs. Accountant General (28.2.1997)*** the Court of Appeal stated that the civil courts retain their original and overriding jurisdiction to scrutinize the application and execution of arbitration clauses.

[7] Citing from ***Vol. XVIII pt. I p. 879*** and ***Vol. XLIX pt. I p. 421***.

fail to do this then the arbitration clause is renounced forthwith and respondent may not invoke it any longer before the relative judicial forum.[8]

[4] Conclusion

While Article 15(3) of the Arbitration Act lays down a '*lex specialis'* procedure for the enforcement of arbitration clauses before the Civil Courts, disparities in the way this is to be set up before the ordinary courts will cause unnecessary problems for legal practitioners.[9] As the law stands, whether the plea is set up in a statement of defence or through the use of the application (*rikors*) makes all the difference, even though the substance of the plea remains identical in practice. This means that lawyers must constantly jump from one piece of procedural legislation to another in order to carry out their work effectively. Moreover, one can see no substantial benefit to be gained through this procedure by the party seizing the ordinary courts (plaintiff), since he will equally remain in a position to defend himself and present submissions against the plea should this be raised in a statement of defence, rather than an application. The law also currently allows one party to unjustly escape his obligations under an arbitration clause by virtue of a mere technical failure on the part of the respondent.

Therefore, the *dictum* in ***Zamsul Contractors Ltd vs. Pharmacare Premium Limited (14.6.2012) Civil Court*** remains the more reasonable one:

> *"Jidher li l-ghan wara dan il-provvediment hu sabiex min ikun irid jinvoka l-ftehim arbitrali, f'dak l-istadju jkollu l-fakolta li ma joqghodx jipprezenta twegiba guramentata u jidhol fi spejjez zejda. Dan iktar u iktar meta tqies li klawzola arbitrali ma teskludix il-gurisdizzjoni tal-qorti, izda taghti biss lok biex il-qorti twaqqaf il-procediment (Artikolu 742[3] tal-Kap. 12). Minn qari tal-Artikolu 15 il-qorti ma tistax tikkonkludi li n-nuqqas li jigi prezentat rikors ifisser telfien ghad-dritt tal-konvenut li jinvoka klawzola arbitrali fit-twegiba guramentata, jew li qieghed jirrinunzja ghall-arbitragg. Klawzola arbitrali hi parti mill-ftehim bejn il-partijiet, liema ftehim ghandu l-forza tal-ligi. Bhal rikors, it-twegiba guramentata hi wkoll att gudizzjarju. M'ghandux ikun li persuna li trid tinvoka klawzola arbitrali u ghalhekk trid li jigi onorat l-ftehim, tigi pregudikata ghaliex minflok ghamlet rikors u talbet is-soprasessjoni, ipprezentat twegiba guramentata fejn invokat il-klawzola arbitrali u li ghandha twassal biex il-qorti tordna l-waqfien tal-proceduri quddiemha. Fil-fehma tal-qorti l-ispirtu tal-ligi m'huwiex li wiehed joqghod jintilef f'formalizmu bla bzonn, u l-ligi qeghda biss toffri alternattiva inqas ghalja".*

Contradictions in the interpretation of Article 15(3) Arbitration Act can only be solved through better legislative drafting. Better clarity will reduce litigation on procedural matters such as these and will ultimately save court time.

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[8] Since '***Cobra Installations'***, cases of renunciation of arbitration clauses can now be classified into two general categories: (i) that renunciation which occurs within 'the course of dealing' of the parties and (ii) that renunciation which occurs through the failure to set up the appropriate plea before the judicial forum, in the form required by law. For cases of the first kind vide, *inter alia*: ***Ignatius Gatt vs. Franco Facchetti (10.10.2003) Court of Appeal; Malta Shipyards Limited vs. VPJ Limited (9.11.2012) Court of Appeal; Calibre Industries Ltd vs. Muscat Motors Ltd (25.2.2005) Court of Appeal***. An older case of the second kind is ***Edward Rizzo pro et ne. vs. Major Arthur D. Abbott pro et ne. (26.10.1952) Civil Court.***

[9] In ***Avv. John Refalo ne. vs. Avv. Abigail Bugeja Ne. Et. (24/10/2016) Civil Court***, the same problem arose and the court opted for the more formalistic method found in ***'Cobra Installations'.***