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Greek Investors Can Proceed With €300M Cyprus Claim

By **Caroline Simson**

Law360 (February 10, 2020, 10:38 PM EST) -- An international tribunal has greenlighted arbitration initiated by nearly 1,000 Greek bank depositors and bondholders who say they sustained heavy losses following Cyprus' 2013 financial crisis, marking what appears to be the first mass arbitration since bondholders filed claims against Argentina beginning in 2007.

The International Centre for Settlement of Investment Disputes tribunal concluded that it has jurisdiction over the claims in which the investors — composed of seven companies and a group of 951 Greek bank depositors and bondholders — accuse Cyprus of rendering their bonds worthless and substantially decreasing their deposits' value when Laiki Bank was merged with the Bank of Cyprus. The investors claim to have lost some €300 million (\$327.24 million).

The arbitrators ruled 2-1 in the Feb. 7 decision that the claims were substantially similar enough to allow the proceeding to move forward.

"The claims are linked in a single dispute in that they are all claiming essentially the same treaty breach under the two [bilateral investment treaties], they complain about the same illegality, they have essentially identical prayers for relief, and they base themselves on the same factual background to establish their claims," the decision said.

Cyprus' appointed arbitrator, Marcelo G. Kohen, wrote in a dissent that he had "serious doubts about the homogeneity of the claims."

In the majority decision, the tribunal nevertheless expressed concern about how the proceeding would be managed given the high number of claimants, including, for example, how costs could be awarded against multiple claimants and the potential for changes in counsel. They invited the parties to comment on the possibility of leading with a liability phase before proceeding to a damages phase and gave Cyprus the opportunity to seek security for costs.

Attorneys for the investors hailed the tribunal's "landmark" decision, saying in a statement that the claim is the first mass arbitration since three cases filed against Argentina by bondholders following that country's debt crisis in the early 2000s. Those claims, filed in 2007 and 2008, were either settled or discontinued.

"This precedent-setting decision has major implications for investor-state arbitration," said Grant & Eisenhofer director Olav Haazen. "At a time where investor-state arbitration is under attack and the [European Union] is trying to put an end to bilateral investment treaties between member states, the *Adamakopoulos v. Cyprus* decision catapults ICSID, once again, to the forefront of international arbitration jurisprudence."

Haazen added that since the Argentine bond cases all related to the same matter, it was not clear before Friday's decision whether mass claims were admissible in other contexts.

An attorney for Cyprus, Curtis Mallet-Prevost Colt & Mosle LLP partner Justin M. Jacinto, said that while his client disagrees with the tribunal's decision, the country "looks forward" to addressing the merits of the case.

"The actions challenged by claimants were a legitimate exercise of the state's regulatory powers taken in the public interest to resolve a banking crisis, as the EU courts have already recognized in rejecting similar claims from depositors and bondholders of the banks," he said.

The claimants held deposits in Laiki Bank and Bank of Cyprus, which sustained losses in 2012 and 2013 as a result of the Greek economic crisis. In response, Cyprus reached an agreement with the European Commission, the European Central Bank and the International Monetary Fund to merge Laiki Bank with the Bank of Cyprus.

The bondholders allege that this so-called "bail-in" resulted in their Bank of Cyprus bonds being converted into bank equity, rendering them worthless, or in the case of Laiki Bank, bonds were rendered worthless through the "resolution" measures for that bank. Deposit holders with assets over \$100,000 in both banks, meanwhile, argued that they received a "haircut" reducing their deposits to \$100,000 as a result of the merger.

In the decision, the tribunal rejected Cyprus' argument that the claim was barred under the European Court of Justice's decision in the Achmea case, where the court concluded that dispute resolution provisions in investment treaties between EU member states are contrary to EU law.

In Achmea, the ECJ found that these provisions improperly allow tribunals to review questions of EU law without giving them the ability to refer those issues to the ECJ, the supreme judicial authority on the interpretation and application of EU law.

But the tribunal concluded that scenario was a "limited possible incompatibility."

"Investment tribunals deal with disputes relating to the obligations set out in a BIT and such substantive obligations are interpreted and applied on the basis of the principles of international law, not the domestic law of a party," according to the decision. "Investment tribunals have no mandate to decide on the rights of the parties under EU law."

Kohen dissented on this point as well, warning that "it is not in the interest of investment arbitration to extend jurisdiction where there is none and where there is not even any political or moral reason to do so."

The tribunal majority is composed of presiding arbitrator Donald M. McRae and Alejandro Escobar.

The investors bond and deposits ranged from €100,000 to €50 million. They initiated the claim in 2015.

Cyprus is represented by Mark H. O'Donoghue, Justin M. Jacinto, Peter M. Wolrich, Luciana Ricart, William Hampson and Sena Tsikata of Curtis Mallet-Prevost Colt & Mosle LLP, its attorney general, Costas Clerides, and by Elena Zachariadou, Mary-Ann Stavrinides and Despina Kyprianou of the Office of the Attorney General.

The claimants are represented by Jay Eisenhofer, Olav Haazen, Caitlin Moyna and Alice Cho Lee of Grant & Eisenhofer PA, Stephen Fietta, Ashique Rahman and Oonagh Sands of Fietta, Geoffrey Jarvis, Stuart Berman and Emily Christiansen of Kessler Topaz Meltzer & Check LLP, John Kyriakopoulos of Kyros Law and Chrysthia Papacleovoulou.

The case is Theodoros Adamakopoulos and others v. Republic of Cyprus, case number ARB/15/49 in the International Centre for Settlement of Investment Disputes.

--Editing by Jill Coffey.