

Greece

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In last year's report we presented the basic features of the Greek legal framework on international commercial arbitration. Here we will attempt to shed some light on the lesser known aspects of the Greek system. The Greek legislature has adapted the legal framework by introducing the UNCITRAL Model Law on International Commercial Arbitration (the Model Law). Nevertheless, the Greek legal regime maintains its own particularities, some of which will be presented. Our focus will be limited to the regulation of international commercial arbitration in Greece and the treatment of foreign arbitral awards in the Greek legal system.

Legal framework

An arbitration is considered 'domestic' or 'international' according to the subject matter of the dispute. According to article 1(2) of the Greek Law on International Commercial Arbitration (GLICA), an arbitration is considered international if:

- (a) *the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or*
- (b) *one of the following places is situated outside the state in which the parties have their places of business: the place of arbitration if determined in, or pursuant to, the arbitration agreement; any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or*
- (c) *the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.*

Domestic and international arbitrations are regulated by two discrete regimes. The GLICA does not regulate every issue that may arise in an international commercial arbitration. The gaps in the Greek legal framework for international commercial arbitration are intended to be supplemented with the Greek conflict of laws rules, the *règles d'application immédiate* (internationally mandatory rules) and with analogous application of the relevant provisions of the Greek Code of Civil Procedure (GCCP) on arbitration.

The Greek legal framework is supplemented by numerous international conventions as the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards and the Washington Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of Other States. Additionally, Greece is party to a significant number of bilateral investment treaties (BITs).

The arbitration agreement

The form of the arbitration agreement

In general, the only formality expressly required by Greek law is the written form of the agreement. In addition, disputes on the validity of the form must be resolved according to the applicable law designated by article 11 of the Greek Civil Code (GCC). According to this conflict of laws rule:

- [an] act shall be formally valid if its form is in conformity with the provisions as to form of the law governing the substance of the act or of the*

law of the place where the act has been concluded or of the national law of all the parties to the act.

The use of alternative dispositive connecting factors is adding flexibility to the legal framework and establishes a favor validatis principle. In cases where the drafting of the arbitration clause might seem to be problematic or contradictory the validity of the arbitration agreement will be safeguarded. Finally, article 7(7), which provides that 'any lack of form is covered if the parties unreservedly participate in the arbitral proceedings', will guarantee that such a defence on the grounds of the form will not be accepted in the context of recognition and execution of a foreign arbitral award in Greece.

Moreover, it is interesting to note that the Greek Supreme Court recently ruled that the validity of a mandate or proxy for the conclusion of an arbitration agreement is also governed by articles 11 and 25 of the GCC (1932/2006 Areios Pagos). This decision confirms, once more, the pro-arbitration tendency of the Greek courts.

Arbitrability

All private disputes may be submitted to arbitration except for those in which the subject matter concerns private legal rights that cannot be freely disposed by the parties (GCCP, article 867(1)). Likewise, insolvency and antitrust issues (with the exception of claims founded on unfair competition) cannot be submitted to arbitration. Article 867(2) of the GCCP expressly excludes labour disputes. Nevertheless, article 1(4)(b) of the GLICA enlarges the scope of disputes for which parties can be referred to international arbitration when compared to the disputes that are subject to domestic arbitration. According to this provision, disputes between 'professionals' and craftsmen or contentions between those categories and their clients relating to the supply of goods or the manufacture of a product (GCCP, article 663(4)) can be referred to international arbitration provided that they are of a commercial nature. With regards to patents and trademarks, a distinction must be drawn between matters relating to obtaining patent certificates from the state and to the registration or cancellation of a trademark, which are not arbitrable, and issues concerning licence fees, damages resulting from a patent infringement, or from the violation of a licence agreement, which are arbitrable.

Effect of the arbitration agreement

Greek law ensures, particularly since the enactment of the GLICA, the strict enforcement of arbitration agreements. Enforceability will be safeguarded before and after the proceeding begins. If a party brings an action before a Greek court and the adverse party promptly and specifically invokes the arbitration agreement as a defence to the judicial action, the court must stay the proceeding and refer the parties to arbitration, provided that the dispute falls within the scope of the arbitration agreement. Reference to the arbitration agreement as a defence must be raised at the first hearing of the case before any other

defence. Furthermore, articles 872 et seq of the GCCP warrant the advancement of the arbitration proceedings in cases where defendants are unwilling to participate in such proceedings. In the situation where the recalcitrant party abstains from the agreed procedure for the appointment of arbitrators, the adverse party is entitled to request the One-Member Court of First Instance (Monomeles Protodikeio) to appoint an arbitrator on behalf of the unwilling party (GCCP, article 878).

Generally, it has been observed that the *Kompetenz–Kompetenz* principle tends to prevail in the Greek system as it is depicted, as in article 16(1) and (3) of the GLICA, which provide:

1. *The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. [...]*
3. *The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, the arbitral proceedings continue and an award on the merits is rendered, an integral part of which is the preliminary decision. Such interim award may be challenged only as part of the award on the merits according to the conditions and the procedure of article 34.*

As a final point, it is important to say that Greek courts adopt a quite broad view on the interpretation of the scope of application of arbitration clauses. In this vein, torts, unjust enrichment, and culpa in contrahendo claims attendant to breach of contract claims, are deemed to fall within the scope of an arbitration clause contained in a contract, provided that they are based on the same facts.

The law applicable to the arbitration agreement

The question of the law applicable to the arbitration agreement may arise both before the state courts and before the arbitral tribunal at several stages. The answer to this question is to be found in the GLICA, the GCC and the New York Convention, depending on the stage when the issue arises and on the specific issue. All the above texts consecrate the contractual freedom of the parties as the criterion for the designation of the applicable law. Differentiations might appear only in the case of the absence of a choice of the applicable law. In such circumstances, Greek law will be applicable if the question arises during a procedure to set aside an award that takes place in Greece (GLICA, article 34) and the law of the place where the award has been rendered will be applicable when a Greek court is competent after petition for recognition or execution of a foreign arbitral award (article 5(1) of the New York Convention).

The law applicable to the parties' capacity

GLICA, akin to the Model Law, does not provide a specific answer as to the law governing the parties' capacity. Under the Greek conflict of laws rule, the capacity of a person to execute or enter into a contract is governed by the law of that person's nationality (GCC, article 7). It must be added, however, that a foreign individual is deemed to be capable in executing a contract even if the law of that person's domicile does not recognize that capacity, provided that she is competent under Greek law (article 9 GCC). This provision does not apply to contracts relating to family law, the law of successions, or to contracts relating to real property located outside Greece (GCC, article 9(b)). Finally, the

competence of legal entities to enter into and execute an arbitration agreement is governed by the law of the seat of the company. Pursuant to Greek jurisprudence, the seat is deemed to be the 'actual' seat (as opposed to the articles' seat) that is the place where the administration of the company effectively takes place.

Practical problems concerning the authorisation of persons signing on behalf of legal entities have been addressed in Greek law in article 65(2) of the GCCP, according to which 'the settlement, recognition or withdrawal from the rights claimed under the action and the agreement to arbitrate are invalid if there is no authorisation for their making'. Parties on several occasions have tried to invoke this argument to invalidate arbitration agreements in international contracts. However, according to Greek court judgments and the prevailing view of Greek scholars and practitioners, this provision does not apply to international commercial arbitrations and specifically to the entities or departments representing a corporate entity when they sign arbitration clauses in international contracts.

Since 1965, Greek jurisprudence has rendered it possible for the Greek state to be a party to an arbitration agreement in an international context. According to that authority, any limitations that may exist concerning the participation of public law entities in arbitration agreements do not apply in the case of international commercial relations. Article 49(1) of the Introductory Law of the Code of Civil Procedure concerning domestic arbitration provides that the state can be a party to an arbitration agreement only after the previous opinion of the plenary session of the Legal Council of the State (Nomiko Symvoulion tou Kratous) and a decree issued by the minister of finance and the competent minister. This requirement has been explicitly excluded from arbitration agreements between the Greek state and foreign individuals or legal entities by virtue of article 8 of Legislative Decree No. 736/70.

The arbitral process

The law applicable to the arbitral process

Some preliminary remarks should be made concerning the rules applicable to the arbitration procedure. Traditionally, Greek law provided for a uniform treatment of domestic and international arbitration. Following the enactment of the GLICA, the complete set of procedural rules is to be found in the GLICA in conjunction with the GCCP. The Greek legislature's primary concern is to safeguard the principle of equality of arms. This purpose is served by several provisions in the GLICA. Moreover, as to confidentiality, there are no specific provisions in Greek law. Therefore, confidentiality basically rests on the parties' will. Lastly, no language restrictions exist in the Greek framework and it's very common to have arbitrations take place in Greece to be conducted in English.

The progress of the arbitration proceeding

The GLICA provides the parties with a specific time frame within which they have to proceed with all necessary actions. Therefore, according to article 23(1) of the GLICA, the respondent has to submit his defence within 30 days from the time he was notified that the claimant had submitted his application, provided that the application contains the facts of the case and a specific claim. To the contrary, if a claim is not asserted in the application, the claimant has to submit such a claim within a period not specifically determined by law but left to the parties' discretion or the arbitral tribunal. The parties are also obliged to submit any documents or to indicate any other kind of evidence that they intend to use within this time frame that is eventually fixed based upon a common agreement or by the arbitral tribunal.

Counterclaims

As a rule, any counterclaim must be filed simultaneously with respondent's defence. It is, however, accepted that a counterclaim may also be filed at a subsequent phase of the proceeding's progress. In fact, it is widely argued that a counterclaim can not be filed after the end of the final hearing. For the sake of completeness and because in the context of arbitration the most flexible formulas should be advanced, we cannot exclude the existence of circumstances where the filing of a counterclaim, even at this stage, could be deemed to be preferable as to time and effectiveness for the resolution of the disputes.

Furthermore, it is illustrative to cite an example of jurisprudential complications concerning counterclaims. In a Supreme Court ruling, the parties had executed a clause according to which 'the first party' was free to choose between state courts and arbitration and 'the second party' would only have recourse to arbitration proceedings. The first party filed an application before a state court of competent jurisdiction and the respondent submitted a counterclaim before that court. The claimant moved the court to rule that the counterclaim was subject to arbitration. The Court of First Instance accepted the request. This ruling was affirmed by the Court of Appeal. The Supreme Court, however, had a different view on the issue: it ignored the original clause in the agreement and held that claimant's petition to submit the counterclaim to arbitration was contrary to principles of good faith and that claimant was therefore in violation of article 116 of the GCCP. It has been underscored that by reversing the decision of the Court of Appeal, the Supreme Court actually held that following the claimant's decision to submit its claims to the state courts, instead of proceeding to arbitration, the forum where any and all disputes between the parties was to be resolved had been determined and selected: the state courts.

Use of illegally acquired means of evidence

The question of whether arbitrators could have recourse to the use of illegally acquired evidence is a fascinating issue with respect to awards sought to be executed in Greece. To provide a complete answer to this challenging query, one should first address the question of applicable law vis-à-vis the issue of the illegality or legality of the act by which evidence was collected, particularly because what in some countries might be considered illegal, in other countries might be perfectly legitimate. At the same time, some countries distinguish between the procedural methodology of gathering evidence and the actual use of evidence before a court. In those countries, while the gathering of evidence may be illegal, its admissibility might be permitted under certain circumstances. The arbitrators should always consider the laws of the countries in which there would be a particular interest to ensure enforceability of their award. If one of the countries concerned is Greece, it would become clear that the legal framework is rather restrictive. Since the 2001 amendment of the Greek Constitution, the provisions of articles 9A and 19 not only proscribe the gathering of evidence in violation of constitutional liberties, but also its use.

Article 9 of the Constitution provides:

1. *Every person's home is a sanctuary. The private and family life of the individual is inviolable. No home search shall be made, except when and as specified by law and always in the presence of representatives of the judicial power.*
2. *Violators of the preceding provision shall be punished for violating the home's asylum and for abuse of power, and shall be liable for full damages to the sufferer, as specified by law.*

Article 9A provides:

All persons have the right to be protected from the collection, processing and use, especially by electronic means, of their personal data, as specified by law. The protection of personal data is ensured by an independent authority, which is established and operates as specified by law.

Article 19 provides:

Use of evidence acquired in violation of the present article and of articles 9 and 9A is prohibited.

1. *Secrecy of letters and all other forms of free correspondence or communication shall be absolutely inviolable. The guarantees under which the judicial authorities shall not be bound by the secrecy, for reasons of national security or for the purpose of investigating especially serious crimes, shall be specified by law.*

Therefore, the use of such evidence in the context of international commercial arbitrations could create problems for the recognition of foreign arbitral awards.

Annulment of the award

In order to determine the extent and the intensity of the control exercised by state courts over arbitration awards, the character of an award as domestic or foreign has to be assessed. Thus, the nationality of an arbitration award constitutes the criterion based on which the authority of Greek courts to control and assist arbitrations will be determined. Before the enactment of the GLICA, most legal scholars contended that the award's 'nationality' would derive from the law governing the procedure as a whole. Nevertheless, there is jurisprudence holding that the place of issuance of the award is the most important factor in determining the parties' will in the absence of an explicit choice of the applicable law of designation. Under the GLICA, it has been declared that '[c]ompetent to decide on the application provided by article 34(2) for setting aside the award is the Court of Appeal, in the jurisdiction of which the award is rendered.' Greek law does not provide for recourse against foreign arbitral awards. Only domestic awards can be set aside.

The parties can apply to set aside an award within three (3) months from receipt of the award (GLICA, article 34(3)), for the same reasons as those provided in the UNCITRAL Model Law.

Limitation to the challenge of the arbitral award

The right to challenge an arbitral award cannot be exercised in a way that manifestly exceeds the limits imposed by good faith, morality or its social or economic purpose (GCC, article 281). An example drawn from the jurisprudence of the Greek Supreme Court arises from a litigant who does not invoke during the arbitral proceedings a flaw in the constitution of the arbitral tribunal or does not challenge the validity of the arbitration agreement, thus creating a reasonable expectation in the adverse party that he will not challenge the award on such a basis before domestic courts.

An ex ante waiver of the right to challenge an award is invalid because this would adversely compromise the public interest in exercising some control over arbitral awards by state courts (GCCP, article 900). Accordingly, only an ex post waiver can be recognised, while an ex ante waiver is only possible in cases where this agreement is ratified by law.

Recognition and enforcement of foreign arbitral awards

As mentioned, Greece has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards pursuant to Legislative Decree No. 4220/1961. The enforcement of foreign arbitral awards is to be sought before the One-Member

Court of First Instance of the district where the debtor's domicile is located. Where no party is domiciled in Greece, the One-Member Court of Athens is competent to exercise jurisdiction. (GCCP, articles 905(1) and 906). In any event, Greek courts have traditionally had a very favourable stance towards the recognition and enforcement of foreign arbitral awards. Public policy as an obstacle to the recognition of foreign arbitral awards is always construed in accordance with Greek rules of private international law. Thus, Greek courts in the majority of cases reject claims that foreign arbitral awards are contrary to public policy considerations. However, there is a rather illustrative list of procedural and substantive law issues that have been found in Greece to be contrary to international public policy:

- a party-appointed arbitrator raising arguments on behalf of the appointing party or submitting evidence for this purpose even if such intervention is provided for in the procedural rules governing the arbitration;
- violations of fundamental principles of a fair hearing;
- anti-suit injunctions protecting or facilitating the arbitration process;

- excessive insurance claims; and
- punitive damages, to the extent that they are disproportionately excessive and therefore fulfil a penalising function (not valid as to the excess under the GCC, articles 409 and 281).

* * *

Greece is equipped with a modern legal framework for international commercial arbitration as it is attested by the acceptance of and proclivity for enforcement of arbitral clauses and support for the arbitration process from the very commencement of the proceedings, to the enforcement. Furthermore regarding the means to challenge an arbitral award, the Greek legislature is prudent. The original approach of the Model Law is followed. Nevertheless particularities of the Greek legal order, such as those concerning the use of evidence, have to be taken into consideration from all the participants in arbitration. As to the recognition of foreign arbitral awards, the New York Convention is applied and the Greek legal rubric declines recognition and enforcement only in the most extraordinary circumstances. Arbitration is deemed a reliable means of international dispute resolution in *pari materia* with judicial recourse.

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Lambadarios Law Offices was founded in 1863 by Konstantinos E Lambadarios, Sr in Athens and has been operating continuously since then with a well-respected Greek and international clientele. The firm today numbers 20 lawyers and five partners, all located at its offices in the centre of Athens. Many of the firm's partners and associates are well-respected individuals in their fields of expertise nationally and internationally. Two of the partners are alumni of Cleary, Gottlieb, Steen & Hamilton, giving the firm a unique advantage in working with international clients. Name partner Dimitri Lambadarios was appointed in 2006 as the president of the Greek Tourism Organisation. It is the firm's policy to strive to provide a high level of legal advice without disregarding personal contact with clients. Proof of this approach is that some clients have been with the firm for 30 years.

The firm specialises in a wide variety of domestic and international commercial work, offering a high level of legal services to its clients worldwide. The firm has an extensive foreign clientele, mainly based in North America and the European Union, that has either established business in Greece or requires legal advice on a wide range of legal subjects relating to doing business with a Greek partner. The bulk of the firm's work relates to corporate law, M&A, banking, structured finance and securities, and it has advised clients entering the Athens Stock Exchange. Moreover, the firm has represented foreign and domestic clients in numerous litigations and arbitrations in the ICC. The firm's IP expertise includes trademark, patent and copyright law.
