

Authority to enter into an arbitration agreement

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Facts

Decision

Comment

A person acting as a legal representative of a legal entity must be specifically authorised in order to validly conclude an arbitration agreement. This precondition is not required where the arbitration agreement is entered into by the competent organ of the legal entity, although the valid conclusion of an arbitration agreement can be made conditional on additional requirements being met, such as the approval of the entity's general assembly.

Facts

Following the participation of a Greek bank (Hellenic Postbank) in the share capital of another Greek commercial company, a shareholders' agreement was entered into between the parties, which contained an arbitration clause. Hellenic Postbank was later taken over by another Greek bank (Eurobank), which took up the former's claims and liabilities (apart from a series of non-performing loans that were transferred to a 'bad' bank). After some time, both parties terminated the shareholders' agreement and brought claims and counterclaims in arbitration and an award was rendered.

Eurobank sought to set aside the arbitral award on grounds of invalidity of the arbitration agreement and, in particular, by invoking that Hellenic Postbank's then-chief executive officer (CEO) was not specifically authorised to validly conclude the arbitration agreement and that the latter's validity was conditional on the approval of Hellenic Postbank's general assembly, which was never given.

The Athens Court of Appeal dismissed Eurobank's application.⁽¹⁾ Eurobank appealed before the Supreme Court.

Decision

The Supreme Court dismissed the assertion regarding the lack of specific authorisation by the bank's CEO.⁽²⁾ The court held that the requirement that specific authorisation be obtained for the person acting as a legal representative for the valid conclusion of an arbitration agreement refers only to a person acting as a proxy or an agent of the legal entity and does not refer to an organ of the legal entity – the very function of which is to represent the entity, such as the board of directors or its substitute (eg, the CEO).

The assertion regarding the lack of the general assembly's approval was upheld by the court, as it was found that the Court of Appeal dismissed it without proper consideration of the evidence presented by Eurobank.

Comment

The problem of whether an organ of a legal entity must be specifically authorised in order to validly conclude an arbitration agreement has been a matter of concern in Greek case law for some time. It owes its existence to the abusive effort of some entities to evade arbitration agreements which they have previously concluded. In earlier case law, Greek courts have accepted⁽³⁾ that a specific

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authorisation is also required for persons that serve as substitute organs of legal entities, based on a provision in the Code of Civil Procedure which requires a specific authorisation for the conclusion of arbitration and settlement agreements and the recognition and waiver of writs.(4) However, the Supreme Court quickly rejected this approach on the premise that an organ of a legal entity is a reflection of the will of the entity itself,(5) which is equally true even if another person (eg, the CEO) has been substituted to perform the functions of the organ.(6) The Supreme Court's recent decision is a confirmation that its previous case law stands firm.

Irrespective of the above, the court acknowledged that the validity of an arbitration agreement can be made conditional on additional requirements being met, such as the approval of the entity's general assembly. Although this matter has been referred back to the Court of Appeal for further consideration, it results from the Supreme Court's decision that such an impediment for the validity of the arbitration agreement can be remedied on grounds of the legal entity's conduct, either through the unreserved participation of the entity in the arbitration proceedings or on the basis of the abusive nature of any subsequent contesting of the valid conclusion of the arbitration agreement despite such unreserved participation by the entity.

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Endnotes

(1) Athens Court of Appeal judgment 5819/2014.

(2) Supreme Court judgment 472/2016 (Civil Division A1).

(3) See, eg, Athens Court of Appeal judgment 5276/1980.

(4) Article 65(2) of the Code of Civil Procedure. The better view is that this provision applies only in respect of proxies or agents and solely in the context of a pending civil trial before state courts.

(5) See Supreme Court judgments 586/1983 and 563/1989 (Civil Division A).

(6) See previous note; provided that this is permissible by the company's articles of association.

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