

Concept of public policy in domestic arbitration reconsidered

November 19 2015 | Contributed by [IK Rokas & Partners Law Firm](#)

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The Supreme Court recently settled a longstanding debate over public policy as it relates to arbitration, holding that the concept of public policy as grounds to set aside domestic arbitral awards is the 'international' concept of public policy that serves the public interest, not simply individual public policy provisions that serve private interests.

Facts

An International Chamber of Commerce arbitration proceeding took place in Greece under domestic arbitration legislation⁽¹⁾ between a large Greek construction company as claimant and a major Greek refinery as respondent. The dispute concerned a contract for upgrading the refinery's installations. In an award rendered in 2009, the arbitral tribunal applied the hardship provision of the Civil Code⁽²⁾ and adjusted the contracted price following an unforeseen increase of 44% in the cost of steel.

The refinery sought to set aside the award on the grounds (among others) of violation of public policy.⁽³⁾ In particular, it claimed that the award violated the hardship provision of the Civil Code, which in turn led to a violation of public policy.

The Athens Court of Appeal⁽⁴⁾ dismissed the motion to set aside the award, holding that in order to establish a violation of public policy as grounds to set aside a domestic arbitral award, there should be a violation of public policy as understood in the international context (ie, the most fundamental principles of Greek legal order), and not simply of a public policy provision (ie, a provision that cannot be derogated from by agreement), such as the hardship provision of Greek law.

The refinery appealed to the Supreme Court, which referred the case for a full plenary hearing due to its significance.⁽⁵⁾

Decision

The Supreme Court upheld the appeal judgment.⁽⁶⁾ The court held that public policy as grounds to set aside domestic arbitral awards relates to mandatory provisions enacted primarily to protect the public interest and forming the state, cultural, social or economic foundations of the domestic legal order – in other words, public policy as understood in the international context (the equivalent of the reservation of public policy in private international law); the violation of provisions that primarily serve private interests escapes judicial control. The court also held that although international public policy is not violated by the erroneous interpretation or application of law or inadequate reasons of an arbitral award, it is nevertheless violated if the enforcement of such an award would create a situation that runs contrary to the above fundamental principles of Greek legal order. The court further stated that the hardship provision is not part of international public policy, as it cannot be placed among the state, cultural, social and – especially – economic foundations of Greek legal order, because it was enacted to serve private interests.

AUTHOR

[Antonios D Tsavdaridis](#)



Comment

Public policy as grounds to set aside domestic arbitral awards is set out in Article 897(6) of the Code of Civil Procedure, which refers to "public policy provisions". This wording is identical to that of Article 3 of the Civil Code, which refers to provisions that cannot be derogated from by agreement of the parties (the so-called '*jus cogens*'); although it differs from the wording of Article 33 of the Civil Code, which refers to "public policy reservation" in the sense of international public policy. Other provisions that are interpreted as referring to international public policy use the wording "public policy" instead of "public policy provisions". As a result, the prevailing view in case law has followed a literal interpretation of Article 897(6) of the Code of Civil Procedure and accepted that domestic arbitral awards can be annulled for violation of legal provisions that cannot be derogated from by agreement,⁽⁷⁾ despite some case law confining annulments to violations of international public policy.⁽⁸⁾ The Supreme Court, following an attempt to reconcile both approaches⁽⁹⁾ and recent signals favouring the international public policy approach,⁽¹⁰⁾ has now expressly favoured the latter approach.

The Supreme Court followed a teleological interpretation by adhering to the arguments put forward by the prevailing view in the doctrine. The court stated that the inclusion of all provisions that cannot be derogated from by agreement under the notion of public policy as grounds to set aside a domestic arbitral award would essentially lead, given their large number in law, to a review of many awards, contrary to the principle against reviewing arbitral awards on their merits. The court also said that this approach would lead to impermissible different treatment of domestic arbitral awards and foreign⁽¹¹⁾ or international⁽¹²⁾ arbitral awards, through the exercise of stricter control in the former – despite the fact that the power of arbitrators is the same whether the proceedings are domestic, foreign or international.

The practical significance of the judgment – apart from reconciling a longstanding divergence of opinion in case law and the consequent lack of legal certainty – rests in the replacement of a broad margin of judicial control with a narrower one, thus enhancing the finality of arbitral awards and strengthening the pro-arbitration stance of Greek courts.

For further information on this topic please contact [Antonios Tsavdaridis](mailto:a.tsavdaridis@rokas.com) at [IK Rokas & Partners](http://www.rokas.com) by telephone (+30 210 361 6816) or email (a.tsavdaridis@rokas.com). www.rokas.com

(1) Articles 867 to 903 of the Code of Civil Procedure.

(2) Article 388 of the Civil Code.

(3) Violation of public policy is a ground for setting aside a domestic arbitral award under Article 897(6) of the Code of Civil Procedure.

(4) Athens Court of Appeal Judgment 6020/2011.

(5) Supreme Court Judgment 1807/2014 (Civil Division A1).

(6) Supreme Court Judgment 14/2015 (in full plenary), with a majority of 37 out of 41 present judges.

(7) See, for example, Supreme Court Judgment 350/1979 (Civil Division A).

(8) See, for example, Supreme Court Judgment 831/1994 (Civil Division A).

(9) See Supreme Court Judgment 133/2006 (Civil Division A).

(10) See Supreme Court Judgments 20/2011 and 4/2012 (both in ordinary plenary), which made a passing reference to Article 897(6) of the Code of Civil Procedure in interpreting another provision of the Code of Civil Procedure on public policy.

(11) As is the case under Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (ratified by Greece).

(12) See Article 34(2)(b)(bb) of Law 2735/1999 on International Commercial Arbitration (which enacted the UNCITRAL Model Law), expressly referring to international public policy.

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