

Arbitration & ADR - Greece

Force of arbitral awards before administrative courts

Contributed by **IK Rokas & Partners Law Firm**

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Introduction

When an arbitral award is invoked before an administrative court in the course of litigation stemming from an agreement between the Greek state and a private party, the court has no authority to rule on the expiry of the agreement if the award, although rendered in another case, was issued under the arbitration mechanism provided in the same agreement between the same parties and for the same issue. A ruling that the agreement had expired would effectively annul the award, and annulment can result only from a judgment issued by a (non-administrative) court of appeal following a motion to set aside the award, not from an interlocutory holding by an administrative court.

Facts

An agreement was entered into between the Greek state and Petrola SA (controlled by shipping magnate John Latsis) in 1972 for the construction of a major oil refinery in Attica, Greece. The agreement was ratified by Legislative Decree 1211/1972 and provided for tax exemption regarding the transfer of real estate in connection with the investment. The agreement also provided for the resolution of any disputes through arbitration, while the parties waived their right to file a motion to set aside an award by way of derogation from the legislative prohibition of such waiver (the waiver was permissible since the agreement took the form of a legislative decree). The period of the agreement was extended by a subsequent agreement (which did not take the form of a legislative instrument).

In 2003 Petrola had to pay tax on the transfer of real estate to the Greek state. Following Petrola's merger with Hellenic Petroleum (ELPE), the latter filed a petition against the Greek state before the Athens First Instance Administrative Court requesting a refund of the tax already paid on the grounds of the tax exemption provided in the agreement and an earlier arbitral award issued in 2003 between the same parties, which – in regard to another real estate transfer – had found that the tax exemption was still in force. The first-instance court dismissed the petition by holding that it was not bound by that arbitral award as the tax exemption (which remained in force through an extension of the applicability of the initial agreement by a later agreement not ratified by a legislative instrument) was unconstitutional.⁽¹⁾

ELPE filed an appeal and the Athens Administrative Court of Appeal held that it was bound by the arbitral award as the question of constitutionality of the tax exemption fell under the arbitral tribunal's exclusive jurisdiction, which had specifically dealt with this matter acknowledging the constitutionality of the tax exemption.⁽²⁾

Decision

The Greek state sought to annul the appellate judgment before the Supreme Administrative Court, arguing that the tribunal that issued the 2003 arbitral award had no authority to deal with the case as the agreements between the investor and the Greek state had expired. This argument was dismissed by the court.⁽³⁾ The court held that even if the state's argument was valid, the consequence would be the annulment of the arbitral award, which can be declared only by a judgment of the competent (non-administrative) court of appeal following a timely petition to set it aside, and not through an interlocutory holding of an administrative court (such a petition did not take place and could not have taken place as the parties had waived their right to file a motion to set aside an award).

The court went on to say that, otherwise, an award's ruling on the interpretation of an agreement's provisions is a matter that falls under the tribunal's exclusive jurisdiction, and thus is binding on the administrative court as to the solution given on the specific question. Although an arbitral tribunal has no authority to annul administrative acts of the state (as such authority is provided only to specific administrative courts by the Constitution), it may nevertheless resolve disputes falling under its jurisdiction in a manner that is binding for the administrative courts. Such issues (or others

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depending on them) may arise before an administrative court even at a later time between the same litigants. The court explained that when an earlier arbitral award, issued under the same agreement and between the same parties, was invoked before an administrative court and the issue before the court was the same as that which arose before the arbitral tribunal, although the administrative court had the power to decide whether that issue fell under the exclusive jurisdiction of the arbitral tribunal, after concluding that it did there were no grounds that would allow the court to enter into the merits of the tribunal's findings.

Comment

This judgment confirms the pro-arbitration stance of the Greek administrative courts. This becomes even more significant considering that in the area of administrative law, state intervention and the Constitution may limit the parties' contractual freedom. For example, the Supreme Special Court has held that the Constitution does not prevent the Greek state and a taxpayer from submitting tax disputes to arbitration.⁽⁴⁾ In the same vein, it has been held that provisions stipulating the arbitration of tax disputes in investment incentives legislation (Law 4171/1961) and the legislative decree that ratified the agreement that was the subject matter in the case at hand were also constitutional.⁽⁵⁾

Bearing in mind the court's findings, parties should be aware of the following when invoking an arbitral award before an administrative court:

- Any party may invoke an arbitration award that was not issued in respect of a particular dispute pending before an administrative court, provided that the award was issued under the same agreement, between the same parties and in connection with the same (or a related) issue that is pending before the administrative court.
- The administrative courts have no authority to annul an arbitral award. Annulment of an arbitral award can be declared only by a judgment of the competent (non-administrative) court of appeal.
- The lack of authority of administrative courts to annul an arbitral award remains, even where the competent (non-administrative) court of appeal cannot be seized of a motion to set aside the award because the parties have waived their respective rights (although such waiver is not permissible under general arbitration law, it is perceived as a permissible legislative derogation if the relevant agreement takes the form of a legislative provision, which is often the case in investment agreements between the Greek state and a private party).
- The validity of an arbitral award cannot be addressed by an administrative court, even as an interlocutory matter.
- Matters that would lead to the annulment of an arbitral award (eg, whether the agreement of the parties had expired before the parties resorted to arbitration) do not fall within the jurisdiction of the administrative courts.
- An arbitral tribunal has no authority to annul an administrative act of the state – this right is reserved only to specific administrative courts by the Constitution.
- An administrative court has the authority to decide whether a specific issue falls under the jurisdiction of the arbitral tribunal.
- An administrative court is bound by the arbitral award for all matters falling under the jurisdiction of the arbitral tribunal.
- The merits of the arbitral award are not open to review by an administrative court. This includes a ruling of the award on the constitutionality of any of the provisions in the underlying agreement between the parties.

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Endnotes

(1) Athens First Instance Administrative Court Judgment 8711/2006.

(2) Athens Administrative Court of Appeal Judgment 1161/2008.

(3) Supreme Administrative Court Judgment 2623/2013 (Second Division, seven-member session), referred by Supreme Administrative Court Judgment 1069/2013 (Second Division, five member session). See also identical Supreme Administrative Court Judgment 2624/2013 (Second Division, seven member session).

(4) Supreme Special Court Judgment 24/1993. The Supreme Special Court resolves conflicts between, for example, judgments of the Supreme Court (sitting for civil and criminal cases) and the Supreme Administrative Court.

(5) Supreme Special Court Judgment 24/1993; Supreme Administrative Court Judgment 889/1994 (Second Division, seven member session).

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