Arbitration - Greece

Form requirements in arbitration clauses incorporated by reference

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Incorporation of an arbitration clause by reference should be made expressly. Such an express reference should be clear as to the meaning of the clauses intended to be incorporated and the identity of the set of standard terms referred to.

Facts

In May 2004 a Greek textile company agreed to purchase a power loom manufactured by a German company. The agreement was concluded through an exchange of letters between the parties. In particular, the Greek company sent a written offer and the German company replied by sending a written confirmation, which was eventually signed by both parties.

Under the agreement, the loom had to be suitable to produce heavy fabrics to be used by the army. However, the loom was unsuitable for the purpose and, despite the German manufacturer's assurances that it would fix the problem by January 2005, 85% of the Greek company's production was brought to a standstill. As a result, the Greek company initiated court proceedings in November 2005 against the German company in the Thebes First Instance Court, requesting damages of approximately €3 million. The respondent German company requested a stay of proceedings, claiming that the parties had agreed to refer any disputes to arbitration. The written confirmation contained two terms in the text that was signed by the parties, which read:

- "For any other detail the General Terms of Supply apply"; and
- "For additional details please consult our enclosed General Terms of Delivery".

Another term appeared on the last page of the confirmation – after the signatures of the parties – which read "Enclosed General Terms of Delivery and Assembly G/G, VWA, V, K, K1, K6, KD, VW, TAW". The respondent said that the reference was to the Orgalime(1) General Conditions for the Supply of Mechanical, Electrical and Electronic Products (known as 'Orgalime S2000'), Clause 44 of which provides:

> "*All disputes arising out of or in connection with the contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with said rules.*" (2)

The Orgalime S2000 was submitted to the court by the respondent but not by the claimant. The court granted the requested stay(3) and the claimant appealed to the Athens Court of Appeal.

Decisions

The Athens Court of Appeal dismissed the appeal.(4) The court applied Article II(1)(2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards(5) and held that the written form requirement is met when, in the agreement signed by the parties, a reference is made to standard terms of a specific kind of international commerce transaction, which contain an arbitration clause, even though the parties did not sign the text which contains these terms and the arbitration clause, since such reference constitutes an accession to and acceptance of such terms and the signatures of the parties in the agreement containing the reference suffice. The court also held that an arbitration clause contained in another document referred to by the parties is valid, as its knowledge and acceptance is presumed by the reference, particularly in international transactions; the reference to the content of the arbitration

clause need not be express and specific provided that such clause is common and known to those dealing in the particular commercial sector. The court went on to say that if the reference is made to a document that is unknown to one of the parties, the principle of good faith requires that such reference may also include an arbitration clause, and hence the written form is met. The claimant appealed to the Supreme Court.

The Supreme Court upheld the appeal.(6) Although it appears that the place of arbitration (and in turn the place where the award would be issued) was outside Greece, the court did not apply the New York Convention but rather the national provisions on the form of an arbitration agreement. The court held that:

- there was no express reference to an arbitration clause anywhere in the signed documents exchanged between the parties;
- the term "Enclosed General Terms of Delivery and Assembly G/G, VWA, V, K, K1, K6, KD, VW, TAW" does not constitute such an express reference, without clarifying the meaning of the letters and numbers contained therein;
- the term "For additional details please consult our enclosed General Terms of Delivery" also does not constitute such an express reference; and
- in any case, it was not clarified why the unsigned term "Enclosed General Terms of Delivery and Assembly G/G, VWA, V, K, K1, K6, KD, VW, TAW" and the signed term "For additional details please consult our enclosed General Terms of Delivery" were identical to the Orgalime S2000, in particular Clause 44 on arbitration, which has a completely different name and was drafted by a third party.

Comment

The Supreme Court confirmed once again a long line of decisions requiring an express reference to an arbitration clause contained in a document for its valid incorporation in a different document.(7) Nevertheless, the crux of the judgment related not to the requirement for an express reference, but rather to the way in which such express reference is achieved. A reference to a combination of letters and numbers, even if they correspond to an arbitration clause, is insufficient to be taken as express, provided that their meaning is not clarified. Equally, the requirement for an express reference is not met in case of a vague reference ("For additional details please consult our enclosed General Terms of Delivery"); the intention of the parties to incorporate clauses from another document in their agreement should be clear in the wording used. Care should also be taken so that the title of any set of standard terms is referred to accurately and not in brief or by using a name that does not correspond to its official title. Finally, an express reference to an arbitration clause (which is tantamount to an arbitration clause itself) should be covered by the signatures of the parties. Although the New York Convention provides that the written form requirement is met in case of an exchange of letters, even unsigned,(8) under Greek law, which contains an equivalent provision, the letters exchanged should be signed.(9) Interestingly, and contrary to the Athens Court of Appeal that applied the New York Convention (with respect to the formal validity of the clause of reference), the Supreme Court applied Greek arbitration law, even though it appears that the place of arbitration was not in Greece (and the award that would have been issued would have been a foreign award). Although Article II(2) of the New York Convention is silent on the issue of incorporation of an arbitration clause by reference, many national courts, applying the convention, accept in principle the formal validity of an express reference, while some others accept even a general reference.

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Endnotes

(1) Orgalime (an acronym derived from the *Organisme de Liaison des Industries Métalliques Européennes*) is the European engineering industries association.

(2) This provision remains unchanged as Clause 46 of Orgalime S2012.

(3) Thebes First Instance Court Judgment 8/2007.

(4) Athens Court of Appeal Judgment 7195/2007.

(5) Article II(1)(2) of the New York Convention provides:

> "*1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. 2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or*

contained in an exchange of letters or telegrams."

(6) Supreme Court Judgment 539/2013.

(7) This stance was first taken by the Supreme Court (in plenary) in Judgment 236/1966 in the case of incorporation in a bill of lading of an arbitration clause contained in a charterparty.

(8) Article II(2), *op cit;* at least on the basis of its more liberal interpretation.

(9) Article 869(1) provides that "An arbitration agreement is entered into in writing. An agreement in writing is entered into through the exchange of signed letters, telegrams, telexes or signed facsimiles".