Arbitration - Greece

Hague Service Convention does not apply to arbitration documents

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A Greek court recently considered the relationship between the Hague Convention 1965 on the Service Abroad of Judicial and Extrajudicial Documents on Civil and Commercial Matters and the New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. It held that the formality of the Hague Service Convention cannot be reconciled with the flexibility of the New York Convention, which inevitably has priority as a special set of rules designed exclusively for arbitration. The latter's provision for "proper notice" (in Article V(1)(b)) does not preclude service by mail (with evidence of actual delivery) as provided by the China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules.

Facts

In 2008 a Chinese company entered into two agreements for the sale of around 60 tons of pistachio nuts to a Greek company. Although the Chinese company delivered the goods, the Greek company did not fulfil its obligation to pay the agreed price. The Chinese company decided to resort to the dispute resolution mechanism provided in the agreements. Both agreements provided for arbitration in Beijing under CIETAC's 2005 Arbitration Rules. The arbitral tribunal was constituted in June 2009, proceeded to a hearing, which applied the Vienna Convention 1980 on the International Sale of Goods and Incoterms 2000, and issued its award in October 2009. This award ordered the respondent Greek company to pay the price with interest and costs, although the respondent did not appear or in any way participate in the arbitration.

The Chinese company sought to enforce the award in Greece under the New York Convention. The Greek company resisted enforcement, claiming, among other things, that it had not been properly informed of the appointment of the arbitrator, and in general of the commencement and course of the arbitration, in breach of Article 5(1)(b) of the New York Convention,(1) as:

- it was not notified in accordance with the Hague Convention, but only by courier; and
- the various arbitration documents were not notified in Greek, but only in the Chinese original and the English translation.

Decision

The court dismissed the respondent's arguments.(2) It held that the Hague Service Convention, which required the official service of documents through state authorities, did not apply in the case at hand for three reasons:

- Although the Bilateral Treaty 1994 on Judicial Assistance between China and Greece made reference to the Hague Service Convention, it did not specifically include arbitral awards.
- Rather, the bilateral treaty made reference to the New York Convention with respect to arbitral awards.
- Article 5(1)(b) of the New York Convention, which requires proper notice to be given regarding the appointment of the arbitrator or the arbitration proceedings, does not preclude service by mail, while any additional requirement (eg, official service through state authorities) would run counter to this provision, undermining the nature of arbitration proceedings by making them more protracted and inflexible.

The court held that timely notification of the commencement of arbitration, the appointment of the arbitrator, the fixing of the hearing and the issue of the award by

courier (as provided in Article 68 of the CIETAC 2005 Arbitration Rules),(3) with evidence of actual delivery to the respondent, satisfied the 'proper notice' requirement of Article 5 (1)(b) of the New York Convention.

The court also held that the notification of all arbitration documents in Chinese and English, and not in Greek, did not violate Article 5(1)(b) of the New York Convention, as the nature of the parties' transactions was international and the international sale agreements were drafted in English, while Article 5(1)(b) of the New York Convention does not require the arbitration documents to be translated into the language of the party notified.

Comment

Article V(1)(b) is a fundamental provision of the New York Convention, ensuring that the requirement of due process is met. It also addresses the issue of notice, which, although formal, has significant consequences in the exercise of the parties' substantive rights. A notice is perceived in terms of content, time and form. Article V(1)(b) does not specify the notification means to be used, opting for a more abstract approach which requires that the notice be "proper". The option to be more specific is left to the parties' agreement, the adopted arbitration rules and the applicable national laws, but always with regard to the autonomous interpretation of the convention.

The issue of the applicability of the Hague Service Convention considered by the court relates to the form of the notice. The starting point of the court's ratio was the 1994 bilateral treaty(4) between China and Greece, which makes specific reference to the Hague Service Convention(5) (for the service of documents) and the New York Convention(6) (for arbitration), both of which are in force in China and Greece. The court found that the formality of the Hague Service Convention could not be reconciled with the flexibility of the New York Convention, which inevitably had priority as a special set of rules designed exclusively for arbitration. It is almost universally accepted that by choosing arbitration, the parties tacitly agree to dispense with a broad spectrum of formalities stipulated by procedural provisions.

Yet there is a more general question regarding the applicability of the Hague Service Convention in arbitration, which is independent from the application of the New York Convention. Whether the Hague Service Convention applies to arbitration documents has been considered by the Japanese, Chinese and Russian authorities,(7) and answered in the affirmative by the Lithuanian authorities.(8) Some arbitration rules go so far as to waive application of the Hague Service Convention,(9) although such a waiver - even considering that the convention applies to arbitration - would be invalid in the vast majority of jurisdictions. Nevertheless, the Hague Service Convention text is not supportive of its application to arbitration. The convention applies in cases of "civil or commercial matters" (as per Article 1). This term, although interpreted in a broad, liberal and autonomous manner,(10) relates to the nature and subject matter of the causes of action,(11) and not to the documents falling under its scope. Such documents are either judicial or extrajudicial. While judicial documents require the involvement of a state court, which obviously cannot include arbitration (except for marginal cases, such as when a court appoints or replaces an arbitrator),(12) extrajudicial documents (in which arbitration documents could seemingly fit) should emanate from "authorities or judicial officers" (as per Article 17 of the convention). However, arbitrators, tribunal secretaries, arbitral institutions or parties to an arbitration can hardly be considered as "authorities or judicial officers".

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Endnotes

(1) Article V(1) of the New York Convention provides that:

> "*1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:… (b) The party against whom that award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.*"

(2) Thessaloniki First Instance Court (single member), Judgment 22340/2012.

(3) Article 68 (Service of Documents) of the CIETAC 2005 Arbitration Rules provides that:

> "*1. All documents, notices and written materials in relation to the arbitration may be sent to the parties and/or their representatives in person, or by registered mail or express mail, facsimile, telex, cable, or by any other means considered proper by the Secretariat of the CIETAC or its Sub-Commission. 2. Any written correspondence to a party and/or its representative(s) shall be deemed to have been properly served on the party if delivered to the addressee or delivered at*

his place of business, registration, domicile, habitual residence or mailing address, or where, after reasonable inquiries by the other party, none of the aforesaid addresses can be found, the written correspondence is sent by the Secretariat of the CIETAC or its Sub-Commission to the addressee's last known place of business, registered address, domicile, habitual residence or mailing address by registered mail or by any other means that provides a record of the attempt of delivery."

The essence of Article 68 of the 2005 Arbitration Rules remains the same under the 2012 Arbitration Rules and forms part of Article 8(1) and (3).

(4) Ratified by Law 2358/1995.

(5) Article 14.

(6) Article 26.

(7) See "Synopsis of Responses to 2008 Questionnaire" (Hague Conference), Question 21(a)(i) at p18 and Question 21(b) at p19 (available at www.hcch.net).

(8) See "Synopsis of Responses to 2003 Questionnaire" (Hague Conference), Question 6.2 at p11 (available at www.hcch.net).

(9) See, for example, Rule 2.1 of the 2013 Rules for International Arbitration of the Independent Film and Television Alliance, which provides that:

"*[t]he party initiating arbitration (hereinafter called 'claimant') shall give to the other party (hereinafter called 'respondent') formal written notice of arbitration (the 'Notice of Arbitration'). Claimant shall be solely responsible for complying with applicable law regarding service of process on respondent(s) and, if required pursuant to any applicable agreements, for providing a copy of the Notice of Arbitration to third parties (i.e. non-parties to the arbitration). The parties waive application of the Hague Convention for Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters with regard to service of process.*"

(10) See "Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions", Hague Conference, 2003, para 69 at p12 (available at www.hcch.net).

(11) See "Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions", Hague Conference, 2009, para 14 at p5 (available at www.hcch.net).

(12) See the analogous position under the Hague Evidence Convention, which can be made available for use in arbitration proceedings, provided that a request for the taking of evidence under the convention is presented by the relevant judicial authority of the state where the arbitration proceedings take place; see "Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Convention, Hague Conference 2003, *op cit*, para 38 at p9.