

Arbitration & ADR - Greece

Implied waiver of setting-aside proceedings

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

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In a recent decision the Athens Court of Appeal held that a valid waiver of setting-aside proceedings before an award is rendered can be implied, provided that it is contained in an agreement that is ratified by law and thus acquires legal force.

Facts

In a concession agreement between the Greek government and the concessionaire joint venture for the construction of a sub-water motorway in Thessaloniki in 2007, the parties agreed that all disputes or differences of a non-technical nature arising out of the operation of the concession agreement would be resolved through arbitration under the International Chamber of Commerce Rules of Arbitration, as modified by the agreement. The parties also agreed that:

"the arbitral award shall be final and irrevocable, not being subject to any ordinary or extraordinary legal means, and constitute an enforceable title without the need to be so declared by state courts, the parties being bound to comply with its rulings."

The parties also agreed that any award should be rendered within four months of signing the terms of reference. The concession agreement was ratified by Law 3535/2007 and its provisions acquired legal force.

A dispute arose between the government and the concessionaire. After an arbitral award was rendered, the state filed a motion to set aside the award. The respondent claimed that the parties had effectively agreed to waive setting-aside proceedings.

Decision

The Athens Court of Appeal heard the motion to set aside the award.⁽¹⁾ The court observed that although Article 900 of the Code of Civil Procedure expressly prohibited any prior waiver of a party's right to file a motion to set aside the award,⁽²⁾ it could validly be modified by another legislative provision with the same legal force, as is the case when a concession agreement is ratified by law and its provisions acquire legal force.⁽³⁾ The court held that although there was no express waiver of the parties' right to file setting-aside proceedings, there was an implied agreement that clearly had the same effect. The court argued that the implied agreement was evidenced by:

- the exclusion of any legal means against the award;
- the enforceable nature that the award had on its own without the need to be so declared by a court; and
- the extremely short period within which the award should be rendered.

Comment

Greek domestic arbitration law stipulates that a waiver of setting-aside proceedings before issuance of an award is null and void⁽⁴⁾ – and the parties cannot dispense with this provision. Such waiver is permissible only if stipulated in a specific legislative provision having the same force as the general legal provision of Article 900 of the code prohibiting the waiver. Case law has repeatedly held valid express waivers that were contained in such specific legislative provisions.⁽⁵⁾

In one of its first judgments on this issue⁽⁶⁾ the Athens Court of Appeal accepted that such a waiver need not be express, but could also be implied. In other words, the court accepted that a waiver can result from the interpretation of an agreement between the parties that has acquired legal force. Accepting an implied waiver, even where a legislative provision to this effect is involved, may raise concerns,⁽⁷⁾ particularly in view of the policies underlying Article 900, which prohibits even an express waiver in all cases where the waiver is not part of a specific legislative provision. It appears that this

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controversial issue will have to be resolved by the Supreme Court.

It remains to be seen whether under Greek international arbitration law⁽⁸⁾ – which lacks a similar provision to Article 900 of the Code of Civil Procedure – a waiver of the setting-aside proceedings before the issuance of the award, not being a legislative provision, will be held valid.

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Endnotes

- (1) Athens Court of Appeal Judgment 2126/2014.
- (2) Article 900 of the Code of Civil Procedure provides that "A waiver of the right to file a motion to set aside an arbitral award before such award is rendered shall be null and void".
- (3) This has been accepted in many instances in the past – for example, see Supreme Court Judgment 812/1984. Such a legislative provision is conceivable only when the government is a contracting party and the parties intend to give the force of law to their agreement (usually a concession agreement) in order to enhance its binding force and make possible provisions that otherwise would not be permissible due to existing legal provisions that cannot be dispensed with solely by the parties' will.
- (4) *Supra* note 2. Conversely, a waiver following the issuance of the award is permissible and valid.
- (5) *Supra* note 3.
- (6) Athens Court of Appeal Judgments 339/2012, 2562/2012 and 3982/2013; but also *contra* 1359/2013.
- (7) See A Dimolitsa, *DEE 2014* at pp 987-989 (in Greek); but see also K Panagopoulos on Athens Court of Appeal Judgment 3982/2013 in *EfAD 2013* at pp 908-909 (in Greek).
- (8) In Law 2735/1999, through which Greece adopted (with minor changes) the 1985 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration.

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