

# Jurisdiction of arbitral tribunals in state contracts

May 12 2016 | Contributed by [Rokas Law Firm](#)

**Facts**

**Decision**

**Comment**

When a national legal provision is fixed by means of a stabilisation clause in a concession agreement, it becomes a contractual term of the agreement. Thus, any dispute relating to the interpretation and application of the provision will fall under the scope of the arbitration clause contained in the agreement and the arbitral tribunal's jurisdiction.

## **Facts**

A concession agreement for the building and operation of the Athens International Airport was entered into between the government and a consortium of contractors led by Hochtief on July 31 1995 (ratified by Law 2338/1995). Article 25.1.1 of the agreement provided that "the provisions of Article 26 of Law 2093/1992 as in force at the date of this agreement shall apply to the Airport Company until and including 31 December 2015 or as otherwise provided herein, irrespective of any future repeal or modification".

Article 26 of Law 2093/1992 provided for tax exemptions in favour of airport construction companies, transposing EU law on value added tax (VAT). Article 43.1 of the agreement also provided that:

*"any dispute under, pursuant to or in connection with this Agreement which is not resolved in accordance with Article 44.1 (Resolution) or 44.1 (Panel) shall be referred to arbitration by three arbitrators in accordance with the rules for the time being in force of the London Court of International Arbitration."*

Following a 2011 tax audit, the Greek tax authorities imposed on the airport company additional VAT for various transactions and the corresponding fines for incorrect VAT declarations. The airport company initiated London Court of International Arbitration (LCIA) proceedings against the Greek state. In 2013 the LCIA decided that the VAT and fines that had been imposed by the tax authorities had violated Greek legislation – in particular, Article 26 of Law 2093/1992.

The airport company also filed proceedings before the Greek administrative courts for the annulment of the additional VAT and fines. The Athens Administrative Court of Appeal held that Article 26 was not part of the airport concession agreement, and that the reference to the provisions of Article 26 in Article 25.1.1 of the agreement did not make them part of it. (1) As a result, the court held that the arbitral award should be disregarded as the arbitral tribunal had had no jurisdiction to decide on the application of Article 26. The airport company appealed before the Supreme Administrative Court.

## **Decision**

The Supreme Administrative Court upheld the airport company's appeal. (2) It held that as the parties in the concession agreement had expressly provided that Article 26 of Law 2093/1992 would be applied for the tax treatment of the airport company – in particular, that it would be fixed as it was in force at the date of the agreement – Article 26 was a contractual term. As a result, the court

AUTHOR

**Antonios D  
Tsavdaridis**



held that a dispute arising from this matter fell under the scope of the concession agreement's arbitration clause and thus under the arbitral tribunal's jurisdiction.

## Comment

The Greek state and a taxpayer may validly submit their tax disputes to arbitration.<sup>(3)</sup> This may also be the agreed approach in the context of state contracts such as concession agreements. An arbitral tribunal has exclusive jurisdiction to resolve such disputes and to interpret and apply the relevant terms of the state contract, but it cannot annul an administrative act that has been issued by the Greek state. Instead, administrative acts can be annulled only by administrative courts,<sup>(4)</sup> which are bound by arbitral awards that have been issued in the same dispute. While an administrative court cannot reopen the merits of an award, it can examine whether the arbitral tribunal had jurisdiction in the first place.<sup>(5)</sup>

According to administrative court case law, arbitral tribunals have jurisdiction to decide on the interpretation and application of contractual terms in the state contract that contains the arbitration clause.<sup>(6)</sup> Nevertheless, contractual terms that fix certain legislative provisions for a period and stabilise the applicable national law of the host state to protect the investor from abrupt and adverse changes to the law (ie, stabilisation clauses – in particular, freezing clauses) almost invariably refer to the legislative provisions that they fix only by reference, not by incorporating them into the agreement verbatim. In this context, case law shows that arbitral tribunals have had jurisdiction to rule on the fixing of specific legislative provisions when the provisions were directly incorporated into the contract, not when the contractual terms merely referred to the legislative provisions.<sup>(7)</sup>

In this case, the Supreme Administrative Court reversed the administrative courts' case law by treating Article 26 of Law 2093/1992 – to which the state contract expressly referred to for the purpose of fixing it – as a contractual term, despite the fact that it had not been directly incorporated into the state contract verbatim. Essentially, the court held that the stabilisation clauses broadened the scope of the arbitration clause (and therefore the jurisdiction of the arbitral tribunal) by assimilating the fixed legislative provisions that were referred to only by reference in the state contract with its contractual terms. This stance is the inevitable consequence of the co-existence of a stabilisation clause and an arbitration clause. Otherwise, both clauses would have been stripped of their effectiveness, which the contracting parties (in particular, the investor) had counted on.

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

## Endnotes

(1) Athens Administrative Court of Appeal Judgment 3119/2014. See also its identical judgments 3020/2014, 3021/2014, 3035/2014 and 3036/2014.

(2) Supreme Administrative Court Judgment 582/2015 (Second Division, seven-member session). See also its identical judgments 583/2015, 584/2015, 585/2015, 586/2015 and 587/2015 (Second Division, seven-member session).

(3) 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.

(4) See Supreme Administrative Court Judgments 752/2008 (Second Division), 2576/1997 and 889/1994 (Second Division, seven-member session).

(5) See Supreme Administrative Court Judgments 2623/2013 (Second Division, seven-member session (for further details please see "[Force of arbitral awards before administrative courts](#)")), 752/2008, 1337/2007 (Second Division), 2132/2000, 2576/1997 and 889/1994 (Second Division, seven-member session).

(6) See Supreme Administrative Court Judgments 2623/2013 (Second Division, seven-member

session (for further details please see "[Force of arbitral awards before administrative courts](#)"), 752/2008, 1337/2007 (Second Division), 2576/1997 and 889/1994 (Second Division, seven-member session).

(7) See Supreme Administrative Court Judgments 752/2008 (Second Division) and 1197/2005 (Second Division).

---

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).