

## Arbitration & ADR - Greece

### Jurisdiction of courts or tribunals to uphold validity of arbitration agreements

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

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Although the non-existence or invalidity of an arbitration agreement constitutes grounds to challenge an arbitral award, it cannot be raised as such if a court has previously issued a final decision in favour of the agreement's existence or validity in the course of staying court proceedings and referring the dispute to arbitration. State courts have jurisdiction to decide on the existence or validity of an arbitration agreement, unless these matters have been specifically referred to arbitration.

#### Facts

In a construction dispute that arose out of a contract for work in 2003, the contractor filed a civil writ before the state courts requesting an outstanding portion of his fee. The principal disputed the jurisdiction of the state court and asked for the dispute to be referred to arbitration, pursuant to an arbitration clause contained in the underlying contract. The respondent filed a counterclaim requesting a refund of part of the fee already paid as unjust enrichment, on condition that the court upheld its jurisdiction. The court found that there was a valid arbitration agreement between the parties and referred the whole dispute (claim and counterclaim) to arbitration.<sup>(1)</sup> As no appeal was filed against that first-instance judgment, it became final and binding. The claimant then initiated arbitration proceedings and requested the appointment of a sole arbitrator (as provided in the arbitration clause) by the competent court. The arbitrator proceeded and heard both the claim and counterclaim, and issued an award in favour of the respondent by dismissing the claim and upholding the counterclaim.

The claimant sought to set aside the award, asserting that the arbitrator had exceeded his power by deciding on the counterclaim. He also questioned the validity of the arbitration agreement, asserting that what the parties had agreed on was not arbitration, but valuation (arbitrage-expertise).

The Court of Appeal held that the arbitrator had not exceeded his powers as the state court had referred the entire dispute to arbitration.<sup>(2)</sup> The court also held that as the first-instance judgment which had referred the matter to arbitration was not appealed, it had become final and binding. The claimant appealed before the Supreme Court.

#### Decision

The claimant asserted that the counterclaim was filed on condition that the state court upheld its jurisdiction and that the judgment could not acquire the binding effect because only the arbitrator had the jurisdiction to rule on the validity of the arbitration clause. The Supreme Court dismissed the appeal.<sup>(3)</sup>

As regards the excess of power argument, the court held that it was evident from the first-instance judgment that the counterclaim had not been made conditional upon the state court accepting its jurisdiction; thus, it had been rightly referred to arbitration. The court further held that although the non-existence of the arbitration agreement constitutes grounds to set aside an award,<sup>(4)</sup> this course is not open to the losing party if a state court has already ruled on the validity of the arbitration agreement on occasion of a request to refer a pending dispute to arbitration. As such, in this case a judgment had already been issued and had become final and binding; this prevented the appeal court from reopening the matter in the course of setting aside proceedings. However, the court went on to state that an appeal court hearing a motion to set aside an award would have no jurisdiction to rule on the validity of the arbitration agreement in the first place, if the matter had been referred by the parties to arbitration. Nevertheless, in this case it was evident from both the initial first-instance judgment that referred the parties to arbitration and the appeal court judgment, that the arbitration agreement did not include this particular matter in its scope.

#### Comment

The Supreme Court dealt with two issues:

- the extent to which a state court can refer a dispute involving a claim and counterclaim to arbitration; and
- which body is competent to decide on the existence and validity of an arbitration agreement.

In respect of the first issue, parties should be aware of the following:

- A counterclaim can be filed before a state court on condition that the court upholds its jurisdiction and does not refer the dispute to arbitration.
- If such a condition is put by the counterclaimant, only the claim can be referred to arbitration; the arbitral tribunal lacks the power to decide on the counterclaim filed before the state court and the respondent should file a new counterclaim in arbitration.
- If such a condition is not put by the counterclaimant, the state court will refer the whole dispute (claim and counterclaim) to arbitration and the arbitral tribunal will not exceed its power in deciding on the counterclaim.

In respect of the second issue, parties should consider the following:

- Unless the parties have agreed otherwise, the existence and validity of an arbitration agreement (and hence the jurisdiction of the arbitral tribunal) is decided by state courts.
- Such a decision, when it becomes final, is binding on other courts and the arbitral tribunal.
- A state court may decide on this matter at either an early stage, following a request by a party to stay court proceedings and refer the dispute to arbitration, or at a later stage, following a motion to set aside the arbitral award.
- If a state court has decided on this matter at the stage of staying the court proceedings and its judgment has become final, the parties are prevented from raising this matter in the course of setting aside proceedings after the award has been rendered.
- Nevertheless, a court lacks the power to decide on this matter where the scope of the arbitration agreement specifically extends to its existence and validity.

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#### Endnotes

- (1) Multi-member First-Instance Court of Euritania, 19/2004.
- (2) Lamia Court of Appeal, 9/2009.
- (3) Supreme Court, 45/2013 (A2 Civil Division).
- (4) Technically, under domestic arbitration law, the non-existence of an arbitration agreement is not grounds to set aside the award, but grounds for a declaratory action regarding the non-existence of the award (Article 901 of the Code of Civil Procedure).

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