

## Arbitration & ADR - Greece

### New ruling on implied waiver of setting-aside proceedings

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

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**Facts**  
**Decision**  
**Comment**

The principle that a valid waiver of setting-aside proceedings before an award is rendered can be implied when it is contained in an agreement ratified by law does not apply to the Greek state, which is subject to additional requirements.

#### Background

Under Greek domestic arbitration law, a waiver of setting-aside proceedings is null and void if it takes place before an award is issued.<sup>(1)</sup> However, in arbitration agreements ratified by law (eg, in some state contracts), such a waiver is valid as it is considered a special legislative provision.

"Implied waiver of setting-aside proceedings" reported on an appeal court judgment holding that, in this context, an implied waiver of setting-aside proceedings has the same effect as an express waiver.<sup>(2)</sup> In a similar case the Supreme Court qualified the appellate ruling with respect to the Greek state.

#### Facts

In 2007 the Greek government entered into a concession agreement with the concessionaire and a consortium of contractors for the construction of part of the motorway connecting Athens and Thessaloniki. The parties agreed that all disputes or differences of a non-technical nature 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 forthwith with its rulings."*

The parties also agreed that any award should be rendered within four months of signing of the terms of reference. The concession agreement was ratified by Law 3605/2007 and its provisions acquired legal force.

A dispute subsequently 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 held that although there was no express waiver, an implied agreement to the same effect nevertheless existed.<sup>(3)</sup> As the concession agreement containing the arbitration agreement had been ratified by law, the waiver stemmed from a special legislative provision modifying the general legal provision<sup>(4)</sup> that prohibits the waiver of setting-aside proceedings before an award is rendered. The court argued that the implied agreement was evidenced by:

- the exclusion of any legal means against the award;
- the enforceable nature of the award on its own, which did not require a court declaration; and
- the extremely short period within which the award should be rendered.

The Supreme Court confirmed that such a waiver can be either express or implied, provided that it is clear. Nevertheless, it held that such an implied waiver did not derive from the specific wording of the arbitration clause, as – unlike, for example, an appeal – a motion to set aside an award is not a legal means. Moreover, the court held that, with respect to the Greek state in particular, such a waiver can be express only and not implied; even if an implied but clear waiver were to be accepted, it would be valid only in case of breach of substantive or procedural legal provisions by the award, and not in case of breach of provisions and prohibitions of the law that ratified the agreement.

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## Comment

The Supreme Court was ready to accept in principle the validity of an implied waiver (through an agreement ratified by law). The court did not consider as an obstacle (and in fact, did not even examine the validity of an implied waiver in light of) the policies underlying the strict general legal provision of Article 900 of the Code of Civil Procedure,<sup>(5)</sup> which prohibits even an express waiver in all other cases in which the waiver is not part of a specific legislative provision.

What appears to be valid for any party to an arbitration agreement is not so with respect to the Greek state. The latter is subject to specific protective legislation which stipulates, under certain conditions, that a waiver of proceedings requires a prior opinion of the Legal Council of State.<sup>(6)</sup> Since a waiver through a specific legislative provision would render the above protective legislation inapplicable, it can be valid only if it is made expressly, as the court noted. The result is thus that state parties and private parties are treated differently in arbitration.

The court further held that even if an implied but clear waiver were to be accepted for the Greek state, it would be valid only in case of breach of substantive or procedural legal provisions by the award, and not in case of breach of provisions and prohibitions of the law that ratified the agreement. In this way, the possibility for an implied (but clear) waiver remains open to the Greek state - albeit in a limited and ambiguous way.

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## Endnotes

(1) 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." The Greek International Arbitration Law (2735/1999, enacted on the basis of the United Nations Commission on International Trade Law Model Law) does not contain such a provision; it is questionable whether Article 900 of the Code of Civil Procedure has such a far-reaching effect as to apply to international arbitration as well.

(2) Athens Court of Appeal Judgment 2126/2014.

(3) Athens Court of Appeal Judgment 3982/2013. See comment by K Panagopoulos, in EfAD 2013, at pp 908-909 (in Greek).

(4) *Supra* note 1.

(5) *Supra* note 1.

(6) See Article 6 para 1 of Law 3086/2002 on the Legal Council of State, which is the body of counsel of the Greek state.

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