## Arbitration - Greece

# Pro-enforcement bias of New York Convention given effect under Articles V and VI

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

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In the enforcement stage of a foreign award in a cotton arbitration, a court held that litispendence is not a valid ground for resisting enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It also held that the concept of public policy, perceived as international, should be given a narrow interpretation.

### Facts

The non-fulfilment of three agreements for the sale of cotton, entered into in 2010 by two Greek companies, led to international arbitration under the bylaws of the International Cotton Association in Liverpool. The final award, issued in February 2012 on appeal (by the Technical Appeal Committee of the International Cotton Association), ordered the seller to pay approximately €4.7 million, plus interest and costs, to the purchaser. The seller rushed to file court proceedings in Greece, seeking to obtain a judgment declaring the award null and void. The purchaser moved to enforce the award in Greece under the New York Convention.

In the enforcement proceedings initiated by the purchaser, the seller opposed enforcement, arguing that:

- the court proceedings it had already initiated resulted in litispendence that barred the continuation of the enforcement proceedings; and
- the award violated public policy under Article V(2)(b) of the New York Convention.(1)

As regards public policy in particular, the seller argued that:

- it had been refused the opportunity to present its case orally;
- the parties had been represented not by counsel, but by arbitrators selected from a pool of arbitrators who were not independent or impartial, as they had been repeatedly appointed as arbitrators for claimants and respondents in a number of cases involving non-fulfilment of contracts in 2010; and
- it had no obligation to "the impossible" – as it described the obligation that it was held liable to fulfil.

### Decision

The Trikala First Instance Court dismissed the seller's defences.(2) With regard to the litispendence defence, the court held that the existence of domestic litispendence (ie, proceedings pending before a domestic court between the same parties related to the same subject matter) does not in itself bar the recognition and enforcement of a foreign arbitral award under the New York Convention. Notwithstanding this, the court added that pending setting aside proceedings are dealt with specifically in Article VI of the New York Convention,(3) which affords discretion to the enforcement court, provided that such proceedings are pending before a competent authority of the country in which, or under the law of which, the award was made, pursuant to Article V(1)(e).(4) The Greek courts have been deemed not competent to hear a petition to set aside an arbitral award made under a foreign procedural law.(5)

Regarding the public policy defence (under Article V(2)(b)) – which the court identified as international rather than domestic, and interpreted narrowly following a long line of Supreme Court decisions(6) – it was held that, under the bylaws of the International Cotton Association, the conduct of an oral hearing rests on

the discretion of the tribunal.(7) In the case at hand, the tribunal refused the request for an oral hearing, and as documents-only arbitration is not unknown under Greek law, it was deemed that there had been no violation of due process. The seller further argued that there had been a violation of due process because the parties had not been represented by counsel,(8) and the arbitrators were not impartial as they had been repeatedly appointed for claimants and respondents in many instances involving non-fulfilment of contracts. The court also dismissed this argument.

The court stressed that non-representation by counsel (who nevertheless assisted in the preparation of submissions) does not violate due process.(9) In order to establish lack of impartiality of an arbitrator, specific acts or omissions indicative of a breach of his or her duty to be impartial must be evidenced; his or her capacity or professional status *per se* is insufficient.

Finally, the court held that control of the award on grounds of substantive public policy did not involve a review of the merits, including matters of law, and in particular whether the tribunal had applied the law that was applicable under the Greek conflict-of-laws rules or the governing law clause of the agreement. In this respect, the court held that even tribunal errors that affect the amount awarded pertain to the merits and thus cannot be reopened through the public policy ground at the enforcement stage.

**Comment**

The New York Convention's grounds for resisting enforcement are exclusive and include no defence based on domestic or international litispendence. The closest situation to this is the existence of pending setting aside proceedings, but only before the competent authority (ie, of the country in which, or under the law of which, the award was made). A frivolous setting aside petition to any other authority lacking competence, including a domestic court, does not satisfy the requirements of Article VI; disguising it as a procedural requirement of the forum (eg, lack of litispendence) clearly undermines the purposes of the New York Convention. For example, filing two separate contemporaneous petitions for enforcement of a foreign arbitral award within the same jurisdiction may give rise to a litispendence defence stemming from the forum's procedural rules; however, this marginal case was an entirely different matter compared to litispendence alleged due to a frivolous setting aside petition.

Regarding the public policy defence, the court reiterated well-established case law, which interprets narrowly public policy as international, rather than domestic. Violation of due process, which in the case at hand was raised (by the respondent) as pertaining to procedural public policy under Article V(2)(b) of New York Convention, is also an independent ground for resisting enforcement under Article V(1)(b).(10) Although these two grounds may overlap to a large extent, raising this defence under Article V(1)(b) instead of Article V(2)(b) bears a potential difference: whereas the standard of fairness as part of the procedural aspect of public policy under Article V(2)(b) is always determined on the basis of the law of the forum which is the place of enforcement, it may be that the same exercise under Article V(1)(b) involves the procedural law of the arbitration or even an international standard of fairness inherent in the provision, instead of the law of the forum.(11) Yet as the due process concept that results from the applicable law approach to be adopted is common, the matter appears more academic than practical.

Another aspect of the interaction between the grounds of Articles V(1)(b) and (2)(b) relates to the burden of proof: the public policy ground under Article V(2)(b) may also be raised by the court *ex officio*, while the violation of due process defence under Article V (1)(b) is invoked only by the party resisting enforcement (which has the burden of proof). Although in practice parties usually invoke both provisions, whether a court is at liberty to raise *ex officio* the defence of public policy of Article V(2)(b) for a violation of due process is debatable.(12)

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**Endnotes**

(1) Article V(2) of the New York Convention provides that:

> "*Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*
>
> *(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or*
>
> *(b) The recognition or enforcement of the award would be contrary to the public policy of that country.*"

(2) 43/2013.

(3) Article VI of the New York Convention provides that:

> "*If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security*."

(4) Article V(1)(e) 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…(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made*."

(5) Supreme Court (in plenary), Judgment 899/1985.

(6) For example, see Supreme Court (in plenary) Judgments 6/1990 and 11/2009.

(7) Bylaw 308.1 of the International Cotton Association provides that:

> "*Where either party or both parties request an oral hearing, they shall apply in writing to the tribunal. The tribunal may grant or decline the request without giving reasons. Their decision shall be final*."

(8) Bylaw 308.4 of the International Cotton Association provides that:

> "*Parties may be represented by one of their employees, or by an Individual Member of the Association, but they may not be represented by a solicitor or barrister, or other legally qualified advocate. Parties may be accompanied by a legal representative at any oral hearing. Such legal representative may advise the party but may not address the tribunal*."

(9) In its Judgment 1572/1981, the Supreme Court (in plenary) held there to be no violation of due process, and thus public policy, if the parties were required to be represented by arbitrators instead of counsel (this case involved a bipartite tribunal with an umpire).

(10) Article V(1)(b) 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 the award is invoked…was otherwise unable to present his case*."

(11) For an overview of the various approaches see A Jana (*et al*), in H Kronke (*et al*), *Recognition and Enforcement of Foreign Arbitral Awards – A Global Commentary of the New York Convention*, 2010, pp237-240.

(12) See AJ van den Berg, *The New York Arbitration Convention of 1958*, 1981, pp299-301 and p376; D Otto (*et al*), H Kronke (*et al*), *op cit*, p367.