Arbitration - Greece

Supreme Court supports validity of award upholding amended claim

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The Supreme Court recently held that an amendment of claim or counterclaim in international arbitration is admissible, provided that a series of requirements – pertaining to the parties' agreement, the tribunal's permission and fundamental principles of justice – are met. A request for preventive protection, even for future disputes that are conditional on the occurrence of a certain event, is not groundless, provided that future disputes fall within the scope of the arbitration agreement.

Facts

The Organisation for Economic Reconstruction of Enterprises (OERE), a Greek state-controlled entity active in the 1980s and 1990s, nationalised a paper mill company whose shares were subsequently sold to a holding company. The share purchase agreement between OERE and the holding company contained an arbitration clause providing that any dispute or difference arising out of or in connection with the share purchase agreement would be finally resolved through binding arbitration in Athens under the International Chamber of Commerce (ICC) Rules of Arbitration. The Greek state (as legal successor to OERE after it was wound up) and the holding company resorted to arbitration over a series of claims and counterclaims arising out of the share purchase agreement. The holding company raised a counterclaim for more than €13 million for various costs that were to be borne by OERE under the share purchase agreement. The holding company amended its counterclaim on March 23 2008 and requested payment of the amount claimed to the paper mill company instead, after the Greek state had disputed its right to request payment for itself. The Greek state replied to the amended counterclaim on April 2 2008 and the arbitral tribunal issued its award on April 4 2008, awarding approximately €12 million to the paper mill company.

The Greek state sought partially to set aside the arbitral award before the Athens Court of Appeal based on various grounds, including that:

- an impermissible amendment of the counterclaim had taken place that led to a decision on matters beyond the scope of the submission to arbitration; and
- one of the disputes on which the arbitral tribunal had issued a declaratory decision was not a future dispute, but rather a conditional dispute that had not yet arisen; thus, the tribunal lacked jurisdiction to hear it.

The appeal court dismissed the motion to set aside the award, and the Greek state appealed to the Supreme Court.

Decision

The Supreme Court dismissed the appeal.(1) The court invoked:

- Articles 2(e),(2) 19(1),(3) and 23(2)(4) of Law 2735/1999 on international commercial arbitration and Article 19(5) of the ICC Rules of Arbitration, regarding the amendment of claims; and
- Articles 18(6) and 24(2) and (3)(7) of Law 2735/1999 and Articles 21(1),(3)(8) and 22 (1)(9) of the ICC rules regarding equality between the parties.

The court concluded that in principle, the arbitral procedure is freely determined by the parties and is flexible. As a result, unless otherwise agreed by the parties, they may – subject to the tribunal's express or tacit permission – amend or supplement their claims or counterclaims during the arbitral proceedings, or submit new claims or

counterclaims even after their termination if the tribunal so permits under the ICC rules, provided that they relate to the same legal relationship referred to arbitration and the principles of equality and contradiction are not violated. The court held that an amendment of claim or counterclaim meeting the above requirements does not exceed the scope of the submission to arbitration, which constitutes grounds to set aside an arbitral award.(10) In particular, it was established that:

- the holding company had amended its counterclaim (by requesting payment of the claimed amounts to be made to the paper mill company) on March 23 2008, after the Greek state had already disputed its right to claim such amounts for itself;
- the Greek state replied to the amended claim on April 2 2008; and
- the tribunal issued its award on April 4 2008, having taken into consideration both parties' submissions.

In view of these circumstances the court held that the Greek state had adequate time to present its case and that there was no violation of its right to respond to the allegations of the other side.

The court also invoked Article 7(1) of Law 2735/1999,(11) which stipulates that the parties may submit to arbitration not only disputes which have arisen, but also disputes which may arise in the future. Although the Greek state argued that disputes which may arise do not include disputes that are non-existent and are conditional on the occurrence of a certain event, the court dismissed such an assertion. In particular, the Greek state argued that:

- the declaratory part of the award related to third-party claims against the paper mill company;
- OERE had undertaken in the share purchase agreement to cover such cost;
- such third-party claims had not yet materialised; and
- the Greek state had not even refused to cover them.

The court held that future disputes need not be specified in an arbitration agreement, as long as it can be inferred from the latter (even with the assistance of the interpretation rules for contracts contained in the Civil Code) that they fall within its scope. In particular, the court held that such future disputes, which may arise following a potential refusal of the Greek state to cover potential payments of third-party claims, constitute future disputes falling within the scope of the arbitration clause contained in the share purchase agreement.

Comment

The Supreme Court reaffirmed the pro-arbitration stance that it has taken in recent years. It did so by providing a bold solution on two contoversial issues. Under Greek civil procedure law, the subject matter of a civil writ is crystallised on filing, in terms of both its legal grounds and its requests. This is justified to avoid the respondent being taken by surprise and to facilitate adjudication of the dispute by providing legal certainty. Nevertheless, different considerations apply in arbitration, whose contractual nature prevails. As long as the parties agreed that an amendment to a claim (or counterclaim) is permissible, there should be no problem in the admissibility of an amended claim (or counterclaim). Such agreement is commonly contained in the arbitration rules selected by the parties, which form part of the arbitration agreement. If the relevant provisions are clear regarding the requirements to be met and the extent of the tribunal's intervention in allowing or disallowing an amendment, then, provided that no violation of these provisions has taken place, a subsequent annulment of the award on these grounds will be unlikely. The fact that the amended counterclaim and the resulting award were upheld in the marginal circumstances of the case in question shows on the one hand that the prohibition of amendments of claims under Greek civil procedure law has not filtered into the case law on arbitration, and on the other that the appropriate checks and balances are not neglected.

Preventive judicial protection is not unknown in Greek civil procedure law in actions for enforceable and declaratory relief, subject to various statutory requirements set by Article 69 of the Civil Procedure Code. However, even in this case the legal relationship from which the action stems must have already been formed. A future and uncertain legal relationship does not fall within the scope of such protection. In the circumstances of the case in question, the arbitral tribunal was ready to accept that a request for a declaratory decision recognising the contractual obligation of the Greek state under the share purchase agreement was not available under many national laws, including Greek law. Nevertheless, the majority of the tribunal held that such request should not fail in international arbitration, as the subject matter of the action and its legal basis were clearly determined, thus allowing the parties to comply with the tribunal's decision once the event that made the claim definite had occurred. Both the Athens Court of Appeal and the Supreme Court disregarded this argument by holding that the disputes were future, but definite, and thus fell within the scope of the arbitration agreement; contrary to the tribunal's findings, they noted that the same preventive protection would

be available before the state courts and under Article 69 of the Civil Procedure Code. It remains to be seen whether a request for preventive protection that falls clearly outside the scope of Article 69 will be determined valid in international arbitration.

For further information on this topic please contact Antonios Tsavdaridis at IK Rokas & Partners by telephone (+30 210 361 6816), fax (+30 210 361 5425) or email (a.tsavdaridis@rokas.com).

Endnotes

(1) Supreme Court Judgment 102/2012 (A1 Civil Division).

(2) Article 2(e) of Law 2735/1999 provides that:

> "*For the purposes of this Law:… (e) where this Law refers to an agreement of the parties or to the fact that they may agree, such reference extends also to the arbitration rules included in the agreement.*"

This provision is equivalent to Article 2(e) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.

(3) Article 19(1) of Law 2735/1999 provides that "Subject to the provisions of this Law, the parties, with their agreement, freely determine the arbitral procedure". This provision is equivalent to Article 19(1) of the UNCITRAL model law.

(4) Article 23(2) of Law 2735/1999 provides that:

> "*Unless otherwise agreed, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal does not allow this having regard to the delay in making it.*"

This provision is equivalent to Article 23(2) of the UNCITRAL model law.

(5) Article 19 of the 1998 ICC Rules of Arbitration provides that:

> "*After the Terms of Reference have been signed or approved by the Court, no party shall make new claims or counterclaims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the Arbitral Tribunal, which shall consider the nature of such new claims or counterclaims, the stage of arbitration and other relevant circumstances.*"

(6) Article 18 of Law 2735/1999 provides that "During the course of the arbitral proceedings the parties shall be treated with equality. Each party shall be given the opportunity of presenting his case and furnishing evidence".

This provision is equivalent to Article 18 of the UNCITRAL model law.

(7) Article 24 of Law 2735/1999 provides that:

> "*2. The parties shall be given sufficient advance notice by the arbitral tribunal of any meeting [of the arbitral tribunal] and of any hearing. 3. All statements, documents or other information submitted or notified to the arbitral tribunal by one party shall be communicated to the other party. Also the expert report or any evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties by the arbitral tribunal.*"

These provisions are equivalent to Articles 24(2) and (3) of the UNCITRAL model law.

(8) Article 21 of the 1998 ICC Rules of Arbitration provides that:

> "*1. When a hearing is to be held, the Arbitral Tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it... 3. The Arbitral Tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present.*"

(9) Article 22(1) of the 1998 ICC Rules of Arbitration provides that:

> "*When it is satisfied that the parties have had a reasonable opportunity to present their cases, the Arbitral Tribunal shall declare the proceedings closed. Thereafter, no further submission or argument may be made, or evidence produced, unless requested or authorized by the Arbitral Tribunal.*"

(10) Article 34(2)(a)(cc) of Law 2735/1999 provides that:

> "*An arbitral award may be set aside... only if:... (a) the party making the application invokes and proves that:... (cc) the award […] contains decisions on matters beyond the scope of the submission to arbitration.*"

This provision is equivalent to Article 34(2)(a)(iii) of the UNCITRAL model law..

(11) Article 7(1) of Law 2735/1999 provides that:

> "*[An a]rbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*"

This provision is equivalent to Article 7(1) of the UNCITRAL model law.