

Supreme Court rules on scope of arbitration agreements

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Facts

Decision

Comment

An arbitration agreement which covers future disputes or differences arising out of the initial agreement also covers future disputes or differences arising out of subsequent agreements that are supplementary to the initial agreement.

Facts

A landowner contracted with a construction company for the construction of a rehabilitation centre for individuals with longstanding health conditions. The parties entered into three consecutive agreements to cover each phase of construction. All of the agreements contained identical clauses which incorporated by reference the arbitration clause contained in the tender specification. Subsequently, the parties entered into non-written agreements to cover either additional works not provided for in the initial agreements or works that had been provided for, but where the parties changed their modalities.

A dispute arose between the parties regarding the amount owed to the contractor with respect to the additional works. The parties had agreed to determine the amount on completion of the additional works.

The contractor initiated arbitration against the landowner and an award was partially rendered in its favour. The landowner sought to set aside the award on the grounds that the arbitrators had exceeded their power by deciding on a matter involving subsequent agreements for additional works which fell outside the scope of the arbitration agreement. The competent court dismissed the motion, holding that the initial agreements and the subsequent agreements were complementary and indivisible as referring to the same project. **(1)** The landowner appealed before the Supreme Court.

Decision

Dismissing the appeal, the Supreme Court held **(2)** that an arbitration agreement may validly refer to future disputes; in such cases, it must determine the definite legal relationship out of which such disputes will arise, but it is not necessary to refer to specific disputes. The Supreme Court added that an arbitration agreement does not extend its scope to disputes arising out of a subsequent agreement between the same parties, even if the subject matter concerns the initial agreement. Nevertheless, the Supreme Court held that such an extension shall occur where the subsequent agreement is supplementary and indivisibly related to the initial agreement (which contains the arbitration clause), as these are not separate agreements with related subject matter.

Comment

The Supreme Court decision rests essentially on the doctrine of severability (or separability) of the arbitration agreement, which provides that the validity of the arbitration agreement is not dependent on that of the initial agreements, as these two agreements are considered separate from

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and independent of each other. **(3)** The independence of the arbitration agreement from the initial agreement to which it relates is the basis for the recognition of its extended scope to disputes arising out of agreements entered into subsequent to the initial agreement. Clearly, this extension is dependent upon the will of the parties, which is one of the pillars of arbitration and is reflected in its contractual foundation.

The requirement upon which the Supreme Court based the extended scope of the arbitration agreement – which essentially amounted to the close link between the initial and subsequent agreements – stems directly from the parties' contractual freedom.

Inevitably, the determination of the parties' will to have all disputes arising out of separate agreements resolved under the initial arbitration agreement involves an interpretation of the arbitration agreement and the other agreements by the courts. Particular attention must be paid to the wording of the arbitration clause – a less restrictively worded agreement would confer the broadest scope – and the nature of the subsequent agreements.

The relevance of a subsequent agreement to the initial agreement is not, in itself, an adequate indication of severability; **(4)** it must also be supplementary and indivisibly related to the initial agreement so as to form together an independent agreement (ie, it is crucial that the agreements are inextricably intertwined).

In light of the Supreme Court's decision, a subsequent agreement for additional works not provided for in the initial agreement and a subsequent agreement modifying the provisions of the initial agreement **(5)** would fall under this category. There is no additional requirement that the subsequent agreement adhere to the same form as the initial agreement. Case law has accepted that an arbitration clause contained in an agreement which provides for a contractual obligation also covers disputes arising out of the subsequent agreement providing for the corresponding *in rem* obligation. **(6)**

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Endnotes

(1) Court of Appeal of Thessaloniki 731/2014.

(2) Supreme Court 113/2016 (Civil Division A2).

(3) The severability of the arbitration agreement is upheld by Greek case law; see Supreme Court 329/1977; 544/1996; 877/2000; 113/2016.

(4) This stems from the peremptory legal requirement to clearly specify the disputes or differences referred to arbitration; see the legal opinion by C Calavros, *Elliniki Dikaiosyni*, 1985:833-838 (836).

(5) See the legal opinion to the same effect by N Nikas, *Epitheorisi Politikis Dikonomias*, 2013:43-50 (45-46).

(6) Supreme Court 26/1998. It is no surprise that the court invoked the doctrine of severability of the arbitration agreement to support its ruling in this instance.

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