

Arbitration - Greece

Suspensive effect of arbitration to alien court proceedings

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

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Facts Decision

Court proceedings may be stayed in cases where a preliminary matter in the proceedings is also the subject matter of a pending arbitration that does not involve the same parties.

Facts

In 2009, following explosions during the cutting of a series of tunnels as part of the construction of the main motorway connecting northern and southern Greece, a major rockfall occurred. The incident resulted in the closure of the existing road for five months. The cause of the rockfall was disputed – being attributed either to *force majeure* (involving the geological peculiarities of the area in combination with rainy weather) or to the explosions. The matter was thus referred to an International Chamber of Commerce (ICC) arbitration between the Greek state and the concessionaire. During arbitration, the concessionaire claimed that it was not liable for the rockfall and that the Greek state had to compensate it for its additional expenses and potential liability to third parties.

As a result of the rockfall, all vehicles had to follow diversions that increased travel times and distances. Eleven intercity bus operators claimed that they suffered millions of euros in losses and initiated separate court proceedings against the concessionaire and the Greek state.

As the respondents' liability (an issue also pending in the arbitration proceeding) was a preliminary matter in the court proceedings, the respondents sought to stay the court proceedings, invoking Article 249 of the Code of Civil Procedure.⁽¹⁾ This provision gives the court discretionary power to stay proceedings for preliminary matters that are pending before another civil or administrative court or authority until a final decision is issued. As the procedural rule does not provide for arbitration specifically, the respondents sought to invoke its application by analogy. The claimants were opposed to the request, claiming that:

- the provision did not apply to arbitration;
- as they were not parties to the arbitration, a ruling on liability would not be binding on them. Therefore, there was no point in staying the court proceedings;
- they had no right to participate in the pending arbitration, whereas the respondents were party to the arbitration; and
- the respondents' attempt to stay the proceedings was a delaying tactic.

Decision

The Thessaloniki First-Instance Court applied the provision by analogy to arbitration and upheld the request to stay the court proceedings until the issuance of an irrevocable arbitral award.⁽²⁾ The court found that fundamental evidentiary matters within the court proceedings, including the issue of liability, were also the subject matter of the arbitration proceedings. The court held that although the arbitral award would not be binding, it would be taken into consideration as evidence and would significantly contribute to the court's decision. The court went on to say that Article 249 of the Code of Civil Procedure applied since the court proceedings were dependent on the arbitral award and the risk of contradictory decisions would be avoided. Finally, after ascertaining that the arbitration proceedings were not frivolous (as the hearing was imminent following detailed submissions by the parties), the court held that staying the proceedings would not be detrimental to the claimants' interests.

Comment

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Staying court proceedings in cases where an arbitration agreement exists between the parties is a standard tool, available in virtually all legal systems in order to facilitate the enforcement of an arbitration agreement, whether arbitration proceedings have been initiated or not.⁽³⁾ This is the case when a dispute arises between two parties and one of them seeks to bring the matter before the state courts contrary to their agreement to arbitrate; if the dispute falls under the scope of the arbitration agreement, any ordinary court proceedings will normally be stayed. However, a stay of court proceedings that arise out of a matter that does not fall under an arbitration agreement between the same parties, or indeed that involve another party that is not a party to the arbitration agreement, is a different matter.

Although Article 249 of the Code of Civil Procedure invests courts with discretionary power to stay proceedings if a preliminary matter is pending before another civil or administrative court or authority, it is uncertain whether the courts will use their discretionary power with regard to arbitration until a final decision is issued, as Article 249 makes no express reference to arbitration.

However, the Thessaloniki First-Instance Court has confirmed the application of Article 249 to arbitration by analogy.⁽⁴⁾ In so doing, the court placed significance not so much on the reference to civil or administrative courts or authorities, but primarily on the rationale behind the provision, which aims to consider other proceedings that would significantly contribute to the court's decision.

Subject to confirmation of this approach by the appellate courts and the Supreme Court, interested parties should consider the following factors when seeking to invoke (or resist) Article 249 of the Code of Civil Procedure with respect to pending arbitration:

- Application of Article 249 is possible by analogy with respect to a pending arbitration.
- Article 249 may be applied either on the request of a party or on the court's own motion.
- The court is not obliged, but has discretionary power to stay proceedings.
- The party against which the motion to stay is brought need not be a party to the pending arbitration proceedings. The same appears to be the case with regard to the party bringing the motion to stay, as the crucial factor is the relation between the subject matter of the court and arbitration proceedings, rather than the relation of any of the parties to the court proceedings with the arbitration.
- There is no need for the prospective arbitration award to be binding on the parties to the court proceedings or the court itself. However, the arbitration award must significantly contribute to the court's decision (eg, by deciding on the liability which is also an issue in the court proceedings).
- The arbitration must be pending (ie, the arbitration proceedings must have been initiated; the mere existence of an arbitration agreement does not suffice).
- The arbitration proceedings initiated should not be frivolous or intended as a delaying tactic, in which case the purpose of Article 249 could be frustrated.
- The court proceedings may be stayed until either a final or an irrevocable arbitral award is issued, at the court's discretion. Typically, as appeals are not provided for in arbitration agreements or institutional arbitration rules, an arbitral award will be final. However, if the court stays the proceedings until the issuance of an irrevocable arbitral award, the parties to the court proceedings should wait for the motion to set aside the award to be dismissed (all the way up to the Supreme Court) or for the period for bringing such a motion to be exhausted.

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Endnotes

(1) Article 249 of the Code of Civil Procedure provides that:

"If adjudicating on a dispute depends entirely or partly on the existence or not of a legal relationship or on the invalidity or rescission of a legal act that forms part of other proceedings pending in a civil or administrative court or on a matter that shall be or is being adjudicated by an administrative authority, the court may on its own motion or upon request of a party order the adjournment of the case until the other proceedings are finally or irrevocably concluded or until a decision that cannot be appealed against is issued by the administrative authority. If the administrative authority has not as yet dealt with the case, the court sets a time period within which the party has to cause the authority to act."

(2) Thessaloniki First-Instance Court Judgments 20241/2013, 24196/2013, 24775/2013, 24785/2013, 24787/2013, 24788/2013, 24791/2013, 24806/2013, 26621/2013, 26622/2013 and 26630/2013.

(3) See Article II(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; Article 8(1) of Law 2735/1999 (through which Greece adopted the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration); and Article 264 of the Code of Civil Procedure.

(4) Recently, Article 249 of the Code of Civil Procedure was applied by analogy to arbitration in two instances, but in slightly different circumstances. In one instance, the party resisting the stay belonged to the same group of companies as the party against which the party requesting the stay had initiated the pending arbitration proceedings (Livadia First-Instance Court Judgment 110/2012). In another instance, the party resisting the stay had merged with the party against which the party requesting the stay had initiated the pending arbitration proceedings (Livadia First-Instance Court Judgment 111/2012). In contrast to these cases, the parties resisting the stay in the Thessaloniki court judgments had no relation whatsoever with the party against which the party requesting the stay had initiated the pending arbitration proceedings.

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