

# Which law governs your arbitration agreement?

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The place of arbitration and the law governing the main contract are important factors in determining whether the parties made a tacit choice as to the law governing an arbitration agreement. In the absence of a choice of law by the parties, Greek law governs the validity of arbitration agreements relating to international commercial arbitrations held in Greece.

## **Facts**

A dispute arose between a Romanian manufacturer of Dacia vehicles and a Greek distributor. The distributor alleged that the manufacturer had breached the exclusive distribution agreement and initiated court proceedings in Greece seeking approximately €20 million in damages, despite the existence of an arbitration clause that provided for International Chamber of Commerce arbitration in Paris. While the main contract also provided that it was governed by French law, there was no explicit agreement with respect to the law governing the arbitration agreement.

The Athens First Instance Court accepted the respondent's plea to stay the court proceedings<sup>(1)</sup> and its decision was upheld by the Athens Court of Appeal.<sup>(2)</sup> The distributor subsequently appealed to the Supreme Court.

The distributor's main argument was that Paris was no longer a neutral place of arbitration (and thus the arbitration agreement was null and void), as the manufacturer had since come under French control. In addition, the distributor asserted that the place of arbitration could not – under the circumstances – serve as an indication of the parties' will with respect to the law governing the arbitration agreement. However, the Court of Appeal held that the nationalities of the parties or their shareholders were not criteria for selecting the place of arbitration, and that the place of arbitration cannot in itself cast doubt – in advance – over the independence and impartiality of the arbitrators.

## **Decision**

The Supreme Court upheld the appellate judgment.<sup>(3)</sup> Although the court confirmed once again the severability of the arbitration agreement from the main contract,<sup>(4)</sup> it noted that the parties' choice of law governing the main contract may serve as an indication of a tacit choice with respect to the law governing the arbitration agreement. The court also noted that the parties' choice of the place of arbitration is another important factor that indicates a tacit choice of law with respect to the arbitration agreement. The court went on to say that this determination is based on the interpretation principles in Articles 173 and 200 of the Civil Code.

The court further held that in the absence of a choice (whether explicit or tacit), Greek law should govern an arbitration agreement relating to international commercial arbitrations held in Greece.

## **Comment**

There is a thin line between a tacit choice of law governing an arbitration agreement and a complete absence of choice. In essence, the Supreme Court ruled that in the absence of an explicit choice of

applicable law, factors such as the law governing the main contract and the place of arbitration serve as indications of a tacit choice of law, rather than pointers for determining the applicable law in the absence of a choice. Nevertheless, this is not meant as a hard-and-fast rule and courts should further investigate the will of the parties.

The Supreme Court held that decisions should be based on the interpretation principles laid down by the *lex fori* (ie, the laws of the jurisdiction in which the action is brought). Although not expressly stated, this is the result of its application of the Civil Code. The Supreme Court interpreted the parties' will in the context of the Greek conflict-of-laws rule,<sup>(5)</sup> which confers on parties the freedom to choose the law governing their arbitration agreement.<sup>(6)</sup> In this context, the law governing the main contract and the place of arbitration are significant factors in determining whether a tacit choice was made regarding the law governing an arbitration agreement.

In this case, the decision of the court that was based on the law governing the main contract is controversial, as the severability of the arbitration agreement means that its existence and validity are independent of the existence and validity of the main contract to which it refers. Although the court made particular reference to the severability of the arbitration agreement – with an emphasis on its impact on the determination of whether a different law governed the arbitration agreement – it nonetheless based its decision on the law governing the main contract. Such correlation should be done cautiously and additional indications should be sought (eg, the place of arbitration, in this case).

In regard to the place of arbitration, the relationship between it and the parties in this case was indirect (ie, the controlling interest of a company). Different considerations may apply in cases where the relationship is more direct (eg, the seat of a company) or where the parties want to secure a completely neutral place of arbitration. In such cases, a subsequent change of circumstances that links the parties to the place of arbitration may have important consequences when considering whether the place of arbitration is a decisive or contributing indication of a tacit choice of law governing the arbitration agreement.

The Supreme Court also addressed the issue of determining which law governs an arbitration agreement in the absence of a choice by the parties. Greek case law has invariably held that the law governing an arbitration agreement must be determined in accordance with the general conflict-of-laws rule in contractual obligations. This renders the parties free to choose the applicable law and determines that in the absence of a choice, the contract is governed by the law considered to be the most appropriate in the relevant circumstances.<sup>(7)</sup>

Following Greece's adoption of the UN Commission on International Trade Law (UNCITRAL) Model Law in 1999,<sup>(8)</sup> in annulment proceedings against an arbitral award, the validity of an arbitration agreement is determined under the law chosen by the parties or, failing any indication of choice, under Greek law.<sup>(9)</sup> This law applies to international commercial arbitrations that take place in Greece,<sup>(10)</sup> and the court held that – within the scope of the law – this provision should not be restricted to annulment proceedings, but should similarly apply in all other instances where the validity of an arbitration agreement is examined (as a main or incidental question) by a state court before an award is rendered.

The Supreme Court opted for this far-reaching application of the law to ensure consistency when determining the applicable law at different stages of arbitration. The impact of the decision on determining the law governing the validity of an arbitration agreement in the absence of a choice by the parties is significant, as the law deemed most appropriate based on the relevant circumstances will be replaced by Greek law in international commercial arbitrations held in Greece.<sup>(11)</sup> It is doubtful whether this mono-local approach is a price worth paying to achieve consistency and it should perhaps be reconsidered at the earliest opportunity.

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## Endnotes

(1) Athens First Instance Court Judgment 6711/2006.

(2) Athens Court of Appeal Judgment 7413/2007.

(3) Supreme Court Judgment 1219/2014 (Civil Division A1).

(4) See Supreme Court Judgments 877/2000, 506/2010 and 102/2012.

(5) A Greek court (like any other national court) determines the applicable law, including the parties' freedom to choose the applicable law (which is also recognised by a conflict-of-laws rule), on the basis of its own system of conflict-of-laws rules.

(6) The court also said, in passing, that the *lex fori* again governs the interpretation of the scope of arbitration agreement – in particular, objective arbitrability. Apart from the fact that the two concepts are distinct, this is debatable as it is hard to substantiate why the *lex fori* should take precedence over the law governing the arbitration agreement in determining its own scope.

(7) See Article 25 of the Civil Code.

(8) Law 2735/1999.

(9) See Article 34(2)(a)(aa) of Law 2735/1999.

(10) See Article 1(2) of Law 2735/1999.

(11) The decision appears to be confined to the law governing the validity of an arbitration agreement and does not appear to cover the law governing an arbitration agreement in general. However, in practice, such a distinction is relatively insignificant.

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