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Greece: Annulment of an Arbitral Award for Violation of Public Policy in View of Recent Case Law

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Two recent decisions (nos. 14/2015 and 176/2015) delivered by the Greek Supreme Court analyze the issue of annulling arbitral decisions on public policy grounds. Since arbitration is particularly valuable for the contractual freedom, the general tendency is to restrict the powers of civil courts when they (re)consider and overturn an arbitral award, so that private interests and contracts are not arbitrarily violated.

Decision no. 14/2015 of the Greek Supreme Court focuses on the meaning of “public order” of Article 33 of the Greek Civil Code. In this case, the Court examined whether the decision of the Court of Appeals, when confirming the award of an arbitral tribunal, failed to apply the provisions of Article 897 para. 6 of the Greek Code of Civil Procedure, relating to public order. These issues were initially addressed in the context of the Court of Appeal and then by the First Civil Division of the Supreme Court, which then referred the issue to the plenary session in order to answer the following question: **What exactly falls within the meaning of “public order provisions”, whose infringement establishes grounds for annulment of an arbitral award? And more specifically, do these provisions have the general meaning of *ius cogens* in the Greek legal order according to Article 3 of the Greek Civil Code even if they serve primarily private interests and not a public one, or alternatively do these provisions include only the fundamental constitutional, legal, moral social or economic values and opinions of the state in the meaning of public order under the stricter wording of Article 33 of the Greek Civil Code?**

Article 897 para. 6 of the Greek Code of Civil Procedure provides that an arbitral award can be repealed in total or partially if it violates the public order or public morality. In this context, an award may be repealed when this violation expressly and exclusively derives from the content of the arbitral award itself, thus not only from its decision but also from its reasoning. Also, Article 33 of the Greek Civil Code provides that any rule based on foreign law should not be applied if such application violates public morality or public order. Furthermore, Article 3 of the Greek Civil Code states clearly that freedom of contracts may not exclude the application of public order provisions, this article having been interpreted as a rule of law that serves the public or social interest. Additionally, Article 388 of the Greek Civil Code governs the situation in which the circumstances which the parties considered for the conclusion of a contract, based on good will, were then altered due to unforeseeable events. This may turn the conditions agreed upon in the contract excessively unbearable for the debtor and a court may, for that reason, amend the contract or terminate it as a whole or for the part not yet executed.

The facts of the case were the following: In 2003, MOTOROIL S.A. and AEGEK S.A. entered into a contract for a project for the provision by AEGEK of building and electromechanological work in the refineries of MOTOROIL. Due to an enormous rise in the prices of steel, after the oil crisis of 2004, AEGEK requested from MOTOROIL an additional fee of 623,712 Euro, claiming that its expenses were significantly increased due to the new steel prices and this event could not be predicted by the parties. In accordance with an agreed arbitration clause in their contract, the two companies asked the arbitral tribunal to decide whether this unforeseen event would constitute a reason to amend the consideration of the contract based on Article 388 of the Greek Civil Code. The arbitral tribunal concluded that MOTOROIL had to pay additional costs to the other party, given that an unpredictable event took place (namely, the increase of steel prices), in relation to the circumstances under which the initial contract was concluded.

MOTOROIL applied for the annulment of the arbitral award before the competent local court. MOTOROIL argued that the tribunal should not impose the additional contractor's fee given that the increase did not result in an unreasonable burden for the other party, and the tribunal should also not impose its decision retrospectively given that the project had by that time finished. The Court of Appeal, when deciding in the annulment proceedings, underlined that an arbitral award cannot be annulled on the grounds of a misapplication of Article 388 of the Greek Civil Code due to the fact that the wording of this Article is not contradictory to Article 33 of the Greek Civil Code, which protects public order. If that was the case then the arbitral award could be annulled on public order grounds. The case was then brought before the Supreme Court.

The majority of the Supreme Court, after examining the Court of Appeal decision, upheld its wording, noting that Article 388 para. 1 of the Greek Civil Code does not establish a fundamental constitutional, cultural, legal, moral, social or economic rule of the State, and in the sense that it is NOT a rule of public order, within the meaning of Article 897 of the Civil Procedure Code and of Article 33 of the Civil Code. Therefore, the unforeseeable events rule of Article 388 of the Greek Civil Code has not been established to serve the public benefit, but quite the opposite – it serves private interests. In this context, an arbitral award may not be annulled due to the misapplication of Article 388 of the Greek Civil Code.

On the other hand, Decision no. 176/2015 of the Supreme Court of Greece had adopted a different point of view. The important element of this decision was the wording of the decision of the Court of Appeal regarding the definition of the rule of public order. The case was related to public procurement for the leasehold of a property to be used for touristic purposes in Lagonisi Attica. The parties (the lessor, the highest bidder of the procurement, and the lessee) concluded a contract for the project and after further requirements were added, the lessor requested an additional contract which would include the extra costs and projects triggered by these additional requirements, which had been indeed signed. The amending contract included several new terms which were not part of the initial procurement procedure. When the dispute concerning building licenses arose, the lessor invited the other party to implement the terms of the contract. However, the latter asked the arbitral tribunal to decide whether the claims of the lessor were fair and reasonable. The tribunal decided in favor of the lessor. The lessee resorted to the annulment of the arbitral award. The lessee argued that **a contract, which burdens excessively and unreasonably the other party, infringes public morality to the extent that it may create an unfair imbalance in favor of one party. Accordingly, the Court of Appeal decided correctly to annul the arbitral award on grounds of public order.**

As a short conclusion we would like to note that the violation of public order as an annulment basis

should always be examined on *ad hoc* basis so that respective applicable laws could be applied and read in line with the facts of each case. For this reason, there are only basic principles of law that would lead with certainty to the annulment of an arbitral award on public policy grounds.


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