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Greece's New Law on International Commercial Arbitration

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On 4 February 2023, Law 5016/2023 (the "2023 Law"), Part A of which is entitled "International Commercial Arbitration", was published in Greece's Official Government Gazette (see an unofficial English translation here). Prior to the 2023 Law, Greek-seated international arbitral proceedings were governed by Law 2735/1999 (the "1999 Law"), which was based on the 1985 version of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"). The 2023 Law's key novel features, summarized below, primarily concern (i) the scope and validity of the arbitration agreement, (ii) the constitution and (iii) jurisdiction of the arbitral tribunal, as well as (iv) the finality of, and possibility of recourse against, arbitral awards.

Background

According to the Special Legislative Committee (see Explanatory Report) set up by the Greek Ministry of Justice to revise the 1999 Law (the "Committee"), the impetus behind the government's decision to propose a wholly new framework governing international commercial arbitration was to render Greece an attractive arbitral jurisdiction at the global or regional level. This, in turn, implied a need to go beyond the 2006 Model Law by considering best practices post-dating the latter.

Scope and Validity of the Arbitration Agreement

Article 3.4 of the 2023 Law establishes a rebuttable presumption in favour of arbitrability. It is of note that, under the 1999 Law, which did not establish such a presumption, much controversy surrounded the arbitrability of public law disputes, including, notably, disputes relating to tax breaks under PPP contracts. While, in Decision 24-1993 (see here, in Greek), the Special Supreme Court had found that the submission of public law disputes to arbitration did not contravene the Greek Constitution, opinions in the opposite direction were frequently expressed in scholarship. By establishing an express presumption in favour of arbitrability, Article 3.4 aims to put doubts of this nature to rest.

Further, Article 10 provides that the arbitration agreement should be recorded in a "document"; the latter term is not restricted to letters or means of "telecommunication" recording an agreement, but instead encapsulates any electronic recording which permits the subsequent confirmation of its

author's identity and provides access to the relevant agreement's content. Article 10, according to the Committee, is intendedly flexible to capture forms of communication not foreseeable under the current state of communication technology.

What is more, paragraph 1 of Article 11 provides that the arbitration agreement shall be valid if it is in conformity with the law to which the parties have subjected it, the law of the place of arbitration or the law governing the contract. Resembling Article 178(2) of the Swiss Private International Law Act ("**PILA**"), this provision establishes the principle of *favor validitatis* as regards the substantive validity of arbitration agreements. Separately, paragraph 2 provides that bankruptcy and insolvency proceedings do not affect the substantive validity of the arbitration agreement, introducing clarity in respect of an issue which remains contentious even in some of the most advanced arbitral jurisdictions.

Lastly, Article 24 expressly governs the joinder of parties and consolidation of disputes, and is a novel provision not contained in the 2006 version of the Model Law; importantly, Article 24 clarifies that the enjoined party can participate in the proceedings either as an additional claimant/respondent or as a third-party intervener with legal interest in the dispute.

Constitution of the Arbitral Tribunal

Where the co-claimants or co-respondents in a multi-party proceeding are unable to agree on the joint appointment of an arbitrator, Article 16 of the 2023 Law provides that this appointment shall be made by local courts. More generally, Article 17 establishes the authority of local courts over the constitution of the arbitral tribunal if, within 90 days from the filing of the request for arbitration, an arbitral tribunal has not been formed, for any reason. Wishing to limit the local courts' degree of interference with party autonomy, the Committee nonetheless phrased these arrangements in dispositive terms.

Further, Article 19.2 provides that the decision regarding the challenge of an arbitrator is made by the non-challenged arbitrators. This provision, according to the Committee, is an expression of the principle of *nemo iudex in cause sua* and echoes the unanimous rejection in arbitral theory of the *primo loco* rule established in the 1985 version of the Model Law. Importantly, the same provision clarifies that the challenged arbitrator must be afforded an opportunity to present an opinion on the merits of the challenge.

Lastly, Article 21.1 provides that the stage from which arbitral proceedings must resume following the reconstitution of an arbitral tribunal shall be decided by the arbitral tribunal itself, by majority. In turn, Article 21.2 empowers local courts to appoint or substitute an arbitrator where a party has exercised its right to appoint an arbitrator against good faith. The purpose of these provisions is, as noted by the Committee, to discourage "guerilla" tactics.

Jurisdiction of the Arbitral Tribunal

Article 23.4 of the 2023 Law provides that the arbitral tribunal's preliminary decision on its jurisdiction may be challenged only as part of the award on the merits, unless the parties have otherwise agreed or the arbitral tribunal provides its consent to a preliminary challenge.

Importantly, read together with Article 43.2.a.aa, this provision suggests that challenges are possible irrespective of whether the relevant award denies or confirms jurisdiction, a matter which was previously contentious in Greek arbitration theory and jurisprudence.

With regard to the arbitral tribunal's power to order interim measures, paragraph 1 of Article 25 notably provides that the arbitral tribunal may order any measure it deems necessary and, contrary to the 2006 Model Law, does not set out a list to that effect. Paragraph 3 provides that, in circumstances of extreme urgency and after hearing the respondent (unless such a hearing would undermine the order's effectiveness), the arbitral tribunal may issue a preliminary order pending its decision on interim measures. Further, paragraph 5 restricts the grounds for refusing the recognition and enforcement of interim measures to public policy or the existence of a prior decision on the relevant request. Finally, paragraph 6 provides that the requesting party may be condemned to pay reasonable damages should it violate its duty of good faith, or in case the interim measure turns out to be unjustified.

Lastly, Article 35 allows the arbitral tribunal to order, *proprio motu*, that the parties produce documents and other pieces of evidence likely to prove material to the outcome of the arbitration. According to the Committee, this provision, which is not included in the 2006 Model Law, affords to arbitral tribunals increased control over the proceedings so that the range of their case management powers may approximate that of Greek courts.

Finality of, and Possibility of Recourse Against, Arbitral Awards

Article 43.2.a.ee establishes as a new annulment ground the existence of the grounds for "revision" established in Article 544, paragraphs 6 and 10 of the Greek Code of Civil Procedure, namely a final and irrevocable decision by a competent criminal court regarding fraud or false testimony, as well as the occurrence of passive bribery or breach of duty.

Further, Article 43.2.b provides that an award rendered against international public policy may be subject to annulment regardless of the law applicable to the underlying dispute, thereby correcting a previous decision by the Greek Supreme Court (see here, in Greek) which, without a clear legal basis, had restricted international public policy to awards applying foreign law.

As another improvement, Article 43.4 crystallizes the jurisprudence of the Greek Supreme Court according to which, in light of the principle of *exceptio doli generalis*, a party may not rely upon its own actions or omissions when requesting the annulment of an award.

What is more, when the Court of Appeal determines that there is a ground for annulment, Article 43.5 provides that it may refer the dispute to the original arbitral tribunal in order for the latter to cure the relevant defect, to the extent that the original tribunal can indeed be reconstituted and the defect is indeed curable. A new award must then be rendered within 90 days from the referral. The Committee considered this provision essential *in favorem arbitrationis* and in the interest of arbitral economy.

Finally, Article 43.7 provides that the parties may waive their right to request an annulment of the award, by written, express and specific agreement. It clarifies, however, that this waiver has no impact on the right to resist enforcement or execution. The Committee partially drew inspiration in this regard from Article 192, paragraphs 1 and 2 of the PILA, seeking to reduce the financial and

transactional costs of arbitral proceedings without prejudicing the parties' right to judicial protection in case of a flawed award.

Conclusion

The 2023 Law has been described by one of its drafters, Georgios Petrochilos, as the Model Law "on steroids" (see here). While it is true that the 2023 Law takes the (2006) Model Law a step further, in many ways, it can also be seen as a rather moderate version thereof; it streamlines several of its provisions, limits its grounds for challenging awards and decisions and omits issues which applicable arbitration rules typically address in sufficient detail. At the same time, the 2023 Law "corrects" a series of unworkable decisions rendered by Greek courts and introduces a wide range of innovations, reflecting concerns and best practices which the 2006 Model Law did not anticipate. Overall, the 2023 Law is neither a minimalistic, PILA-style instrument, nor is it the result of a verbatim and uncritical transposition of the 2006 Model Law into the Greek legal order. It is an innovative and carefully drafted instrument, geared toward eliminating the pathologies of Greek arbitration law and "liberalizing" a bureaucratized jurisdiction.

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