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EUROPE

Greece

A Pioneering Arbitration Act

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On 4 February 2023, Greece passed its new International Commercial Arbitration Act (Law 5016/2023) that marks the culmination of a collective effort over several years, and involved a drafting committee, a consultative committee, and public consultation. The legislative text that emerged revisits fundamentally the prior Act (Law 2735/1999), which had basically transposed the 1985 UNCITRAL Model Law, and reflects and indeed goes beyond the 2006 version of the Model Law, being at the vanguard in many important respects.

The new International Commercial Arbitration Act (the 'Act'),[1] which entered into force on 4 February 2023, streamlines the text of the prior Act and improves it on accuracy and readability for both Greek and foreign readers. The main innovations of the new Act are outlined below.

1. International regime can apply to purely domestic cases

This is the effect of Article 3(2)(c), which provides that an arbitration will be regarded as 'international' if 'the parties have expressly agreed that this Act shall apply'. This resolves a debate, which arose under the prior Act and the UNCITRAL Model Law, whether an objective connecting factor with another jurisdiction is required for 'internationality'. The new Act provides that the parties' subjective intent suffices.

2. Widest possible subject-matter arbitrability

Article 3(4) is unusually explicit and capacious: 'unless prohibited by law', any dispute may be arbitrated. Practice and scholarship will doubtless contribute to defining what such prohibition may consist in. But the Act takes a clear policy stand in favour of the widest arbitrability, and it will be incumbent on a party resisting submission to arbitration to identify a statutory provision amounting to a prohibition.

Article 3(4) is complemented by Article 11(2), which provides that bankruptcy or insolvency proceedings do not affect the arbitration agreement, again unless otherwise provided by law.

3. Validity of arbitration agreement assessed by reference to the most favourable of three laws

Article 11(1) of the Act eschews a conflicts-of-laws methodology and adopts an *in favorem validitatis* approach. An arbitration agreement will be given effect to if it is valid under (i) its own proper law, (ii) the law of the seat, or (iii) the law governing the parties' substantive relationship. The provision, which follows the Swiss and Dutch approaches, applies notably to issues of substantive validity and entry into force, termination, and scope (temporal, personal, etc). At the same time, it spells out all three possible legal systems governing issues of validity.

1 Law 5016/2023 was published in [2023] *Official Gazette* No 21 (4 Feb. 2023) and entered into force on 4 February 2023. The Drafting Committee comprised: Prof Constantin Calavros (Chairman), Dr Georgios Petrochilos KC, Antonias Dimolitsa, Prof. Evangelos Vassilakakis, Dr Anna Mantakou, Prof. Athanassios Kaissis, Prof. Panagiotis Giannopoulos. The Consultative Committee comprised: Alexander Fessas, Prof Loukas Mistelis, Prof. Stavros Brekoulakis, Dr Antonios Tsavdaridis, Dr Georgios Panopoulos. An unofficial English translation of the law is available at 'Greece passes new arbitration law' (GAR, 8 March 2023). The original Greek text is available at various sources, including the *Official Gazette* site: www.et.gr.

4. Arbitration agreement may be concluded in whatever form

Pursuant to Article 10(1), the only requirement of form is that the content of the arbitration agreement be 'memorialized' in writing. Thus the parties may conclude an arbitration agreement orally, so long as they refer to a written document which records the content of the arbitration agreement. When it comes to what qualifies as a document 'in writing' for the purposes of the Act, Article 10(2) includes a broad, indicative list ranging from letters and telegrams to electronic recordings.

5. Electronic forms of communication recognized in the widest terms

Article 6(1)(a) recognizes that electronic communications may be used for service of pleadings and other procedural documents; Article 10(2), dealing with the arbitration agreement, includes a similarly broad definition for 'document'; and Article 28(2) permits hearings and other meetings to be conducted not only in person but through 'any modalities [the tribunal] considers appropriate'.

6. Confidentiality/transparency – a matter for the parties or the tribunal to determine

Putting to rest debates about the existence or inexistence of an implied duty of confidentiality, Article 27 makes it plain that there is no default rule and the parties – or failing them the tribunal – must decide whether the proceedings, pleadings, hearings, and resulting decisions are confidential or not. This will bring clarity and also opens the door to transparency, especially in cases involving matters of public interest.

7. Multiparty arbitrations specifically regulated

There are two main innovations. First, under Article 16, if the multiple claimants or multiple respondents fail jointly to appoint one arbitrator, the appointing authority may either make that missing appointment or empanel the entire tribunal; and in the latter case, 'in the light of all relevant circumstances, confirm or revoke any arbitrator's appointment'. Secondly, in order to have clarity from the outset and deal with tribunal constitution accordingly, the respondent is encouraged to formulate claims against parties not appearing as claimants (but bound by the arbitration agreement) through its initial response to the notice of arbitration, thereby making them parties to the arbitration; see Article 24(1). The Act thereby recognizes that there may be multiple opposed camps in an arbitration, such as the owner of the project, the main contractor, and sub-contractors.

8. Joinder and consolidation provided for specifically and comprehensively

Article 24 provides that there may be multiple claimants or respondents; as well as 'third-party intervener[s] with a legal interest in the resolution of the dispute' – a broad concept which seeks to capture various different types of interventions. All such parties may in principle sought to be joined in the proceedings or seek themselves to join in the proceedings.

Since the feasibility of joinder is intricately tied up with an opportunity to participate in the constitution of the tribunal (as Article 24(3) recognizes), early joinders are encouraged by Article 24(1), as noted at paragraph 7 above.

Article 24(2) also provides that parallel proceedings may be consolidated, even if they are pending before different arbitrators.

9. Interim measures regulated comprehensively

Article 25 is a detailed provision which distils the essence of the relevant provisions of the 2006 version of the UNCITRAL Model Law in a compact, economically formulated text. This article expressly provides for:

- The principle of proportionality in interim measures, well-established in Greek procedural law as well as international practice;
- *Ex parte* preliminary orders, if advance notice of a request for interim measures may prejudice or frustrate the object of the interim measures;
- A duty to compensate the respondent later in the proceedings, if an interim measure was obtained inconsistently with good faith (e.g. the tribunal was misled) or shown in retrospect to have been unjustified – in short, the applicant of interim measures must weigh its responsibilities at the outset;
- A duty for the State courts to recognize and enforce tribunal-ordered interim measures, except in very limited circumstances of (notably) violation of public policy.

10. Set-aside modernized

It is spelt out that the Act does not allow for 'judicial review' on the merits of an arbitral award. The Act preserves an innovation of the 1999 Act, which sought to discourage dilatory tactics by permitting challenges to awards on jurisdiction/admissibility only as part of the final award. Nevertheless, recognizing that such challenges may be meritorious and their resolution may

avoid wasted time and costs, Article 23 now permits them (i) by agreement of the parties, or (ii) by leave of the arbitral tribunal.

Pursuant to Article 43(7), parties may at any time waive the right to seek to set aside an arbitral award, by express agreement in writing. The parties retain the right to invoke set-aside grounds to oppose recognition or enforcement.

Awards dismissing claims on jurisdictional grounds (i.e. negative jurisdictional rulings) may now also be challenged, thus rectifying a shortcoming of the UNCITRAL Model Law. If the award is overturned, the arbitration agreement is to revive, in case its temporal scope has expired, so the case can be determined on its merits.

The set-aside court may remand the award to the tribunal, in circumstances where it is more practical for a defect to be cured by the tribunal (e.g. a claim or reason omitted to be dealt with) rather than to start fresh arbitration proceedings.

Under Article 43(2) (3), if it emerges that the award was procured through fraudulent or forged evidence, bribery or corruption, such grounds may be raised within three years of the issuance of the award. This exception to the normal three-month rule for set-aside actions is justified on grounds of public policy, and emulates the rules that apply to court judgments.

11. Nature and scope of *res judicata*

Article 44 clarifies that arbitral awards have *res judicata* effect equivalent to court judgments. In that context, it clarifies further that such effect may extend (i) to decisions 'on preliminary matters' that were necessary to decide to arrive to final dispositions (e.g. matters of corporate status, party capacity, etc.), and (ii) to parties that did not participate in the arbitration but are bound by the arbitration agreement.

12. Framework for arbitral institutions

Article 46(1) of the Act establishes a framework for the founding, operation, and supervision of arbitral institutions, to be further detailed by administrative acts of the Ministry of Justice. In parallel, Article 46(2) confirms that arbitral institutions established in other jurisdictions may provide their services in Greece (including by opening branches, etc.), thereby clarifying the position and allowing for greater transparency.

The new Act is a comprehensive, modern, and robust framework for the arbitral process, including interactions with the courts. It will provide parties, practitioners, and the courts a strong foundation upon which further to develop arbitration in Greece for decades to come – which is indeed a legislative objective expressly stated in Article 1 of the Act.[2]

2 Article 1 of the Act provides: 'The purpose of this Act is to consolidate within the Greek legal order international arbitration as flowing from party autonomy, such that parties may freely: (a) decide to submit their disputes to arbitration; (b) select arbitrators; (c) shape the arbitral process; and (d) elect the law applicable to the resolution of their dispute', see unofficial translation, supra note 1.