Excess of authority as a ground of refusal for an AAA award in Greece

Introduction

The case arises from a a long-running family dispute of the parties over the distribution of assets left by their late brother in the USA. Z. is the sister, and M. the brother of the deceased. Over the course of several years, the parties entered into a series of agreements with an eye towards efficiently dividing the assets and providing for the effective management of the properties and businesses included in the estate. All attempts to settle the dispute amicably failed. Eventually, the case was decided in favour of Z. by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules. The efforts of M. to vacate the award failed. As a next step, Z. sought recognition and enforcement of the US award in Greece. First and second instance courts decided in favour of Z. Upon second appeal (cassation) of M., the Supreme Court ruled that the Athens Court of Appeal failed to examine two grounds of appeal raised by M. The case was sent back to the appellate court [Supreme Court nr. 635/20.5.2021]

Stage 1: USA

The parties entered into an agreement known as the "U.S. Agreement," which set out a process for: (1) an accounting of the affairs of the . . . [U.S. Companies] during the relevant time period leading to a report detailing [an] auditor's findings; (2) . . . [setting] a period in which the Parties would 'confer amicably and in good faith to agree on the amount of any distributions or payments that should be made in order to' realize the objective of equal distribution of the assets or their proceeds and of the earnings of the assets in the relevant period; (3) [and making] a determination as a result of this process as to 'the extent to which [either Party] has received a disproportionate share of prior income or other distributions in respect of [the U.S. Companies] and the amount of such excess benefit.

The U.S. Agreement further provided that, if the parties failed to agree on the amount of the Party Distribution by way of the auditor's report, "the amount of

the D. Distribution, the P. Distribution, the T. D. and/or the Party Distribution as applicable shall be determined by an arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules," subject to confirmation by any court having appropriate jurisdiction.

The audit contemplated in the U.S. Agreement was never completed, and the parties were unable to come to reach an agreement on the amount of the Party Distribution. After several years of litigation in both federal and state courts, Z. instituted the subject arbitration in 2009. The arbitration panel issued its Final Award on March 20, 2014, finding in favor of Z. in the amount of approximately $10.8 million, inclusive of approximately $4.8 million of prejudgment interest.

1. filed a petition to vacate the Final Award on June 16, 2014, and on August 29, 2014, he filed the instant motion in support of that petition. The Petitioner's Arguments for Vacatur were the following:
2. a) Failure to Determine the U.S. Company Distributions.
3. b) Manifest Disregard of the Law and Agreement – "Redefining" the Term "Received".
4. c) Award of Prejudgment Interest as Exceeding Authority.

The Southern District Of New York decided that the Petitioner's motion to vacate the arbitration panel's Final Award is denied and Respondent's cross-motion to confirm the award is granted.

Stage 2: Greece

The application to recognize and enforce the US award was granted by the Athens Court of 1st Instance [nr. 443/2018, published in: Epitheorissi Politikis Dikonomias (*Civil Procedure Law Review*) 2017, 643 et seq, note *Kastanidis*]. The appeal against the first instance court was dismissed [Athens Court of Appeal 5625/2018, unreported]. The final appeal was successful. The Supreme Court ruled that the appellate court did not examine two cassation grounds:

1. No reference is made in the judgment of the Athens CoA in regards to the lack of an arbitration agreement, as evidenced by points 1-9 of the US Agreement, which refer to an arbitral *determination*, not an award.
2. No reference is made in the judgment of the Athens CoA in regards to the excess of authority by the arbitrators.

As a result, the Supreme Court reversed the judgment of the Athens CoA, and ordered Z. to pay the costs of the proceedings.

Comments

An issue that was not examined by the Supreme Court was the conduct of M. during the arbitral proceedings, and the grounds invoked for vacating the AAA award. There is no evidence that M. challenged the authority of the arbitration panel to issue an award. In addition, the arguments for vacatur do not challenge the panel's authority, save the award of Prejudgment Interest under (c), which was dismissed by the Greek instance courts as contrary to the principle of non-revision on the merits.

The question has been addresses by legal scholarship as follows:

One issue that is not dealt with in the Convention is what happens if a party to an arbitration is aware of a defect in the arbitration procedure but does not object in the course of the arbitration. The same issue arises in connection with jurisdictional objections that are raised at the enforcement stage for the first time. The general principle of good faith (also sometimes referred to as waiver or estoppel), that applies to procedural as well as to substantive matters, should prevent parties from keeping points up their sleeves [ICCA Guide to the NYC, 2011, p. 81].

The Federal Arbitrazh (Commercial) Court for the Northwestern District in the Russian Federation considered that an objection of lack of arbitral jurisdiction that had not been raised in the arbitration could not be raised for the first time in the enforcement proceedings; The Spanish Supreme Court said that it could not understand that the respondent "now rejects the arbitration agreement on grounds it could have raised in the arbitration" [ICCA Guide to the NYC, 2011, p. 82]

It is generally accepted that the party resisting enforcement of the award may, under certain circumstances, be barred from raising a defense under Article V(1)(c) in the exequatur proceedings. Preclusion may, in particular, occur if the party resisting enforcement has taken part in the arbitral proceedings without objecting to the jurisdiction or competence of the arbitral tribunal when it had the opportunity to do so [*Wolff/(Borris/Hennecke*), New York Convention, Second Edition, 2019, p. 340 nr. 257].

Conclusion

It is not entirely clear whether the judgment of the Athens Court of Appeal did in fact fail to take into account the grounds aforementioned. As mentioned above, the judgment has not been published in the legal press. However, the extracts reproduced in the ruling of the Supreme Court allow the reader to have some doubts. In any event, the case will be re-examined by the Court of Appeal, and most probably, will end up again before the Supreme Court…