

Government Procurement, Bribery, and an Olympic Size Scandal at the ICC

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It is well known that Greek public finances have been in a precarious state since the country's debt crisis erupted in 2010. In an environment of tough fiscal consolidation, compensation awards running in millions present a significant economic and political challenge. This post discusses a case before the Greek Supreme Court that resulted in a pending liability of €39.8 million (reaffirmed in January 2017) which exposes a trail of corruption and administrative inefficiency all the way back to the Athens Olympics of 2004. This case is an aspect of the famous Siemens corruption scandal that has plagued Greek public life for over a decade.

The case involves a dispute arising from a 2003 contract between Science Applications International Corporation (SAIC) and Greece for the supply of a public security infrastructure system, which was to be used at the 2004 Athens Olympics. SAIC is a US based multinational with prior experience in security systems for Olympic games. The company won the contract to build the C4I security system after a bidding process that lasted for more than a year. SAIC contracted Siemens as its subcontractor to carry out the actual work of software design and material deployment. Subsequently, it was claimed that SAIC won the contract because bribes were paid via Siemens to Greek officials as part of a wider network of underhand transactions organised by the German company in order to obtain a variety of defence and infrastructure contracts in Greece over a number of years.

The security system in question was delivered just weeks before the opening ceremony for the Olympics, but never worked properly. Due to the operational failure of the system, the Greek government refused to formally accept delivery and pay SAIC. SAIC in response initiated arbitration proceedings at the ICC's International Court of Arbitration in April 2006. The Greek government partially settled, but a second dispute arose in 2008, when Greece refused to make the final payment on the contract, prompting additional arbitration proceedings. The ICC tribunal concluded that the Greek government had breached its contract with SAIC for the design and installation of the system and rendered a €39.8 million award in favour of the claimant in July 2013.

Arbitral awards are capable of enforcement in Greece as per standard international practice. The Greek arbitration statute, introduced in 1999, is based on the UNCITRAL Model Law and deals with international commercial arbitrations, while other legislation and provisions in the Civil Procedure Code cover domestic arbitrations. Greek law is welcoming of commercial arbitration and there has been an effort to harmonise the treatment of arbitral awards with international standards. Even tax disputes are arbitrable if an investment agreement between the state and a foreign investor so provides. Greek courts will determine their jurisdiction over an award on the basis of the arbitral seat. An award can be set aside for the same reasons as those provided in the UNCITRAL Model Law. Under

the arbitration statute, the Court of Appeal is the only competent court to decide an application for setting aside an award. Greek law does not provide for recourse against foreign arbitral awards, but enforcement can be refused for the reasons laid out in the New York Convention, which Greece joined in 1961.

Attempting to block enforcement of the ICC award in favour of SAIC, Greece turned to the Athens Court of Appeal, arguing that the award went against international public policy and that the arbitration procedure did not comply with the parties' agreement. The Greek Government filed an application for annulment and suspension of the award's enforcement before the competent Athens court as the enforcement place. Jurisdictional issues aside, a key question before the court was whether, as a matter of public policy, the presence of corruption in procuring a contract with a public authority spoils an arbitration clause present in the agreement, therefore rendering subsequent awards invalid. The Court of Appeal seemed to think so. The Athens court annulled the ICC award in June 2014 (decision n.3690/2014). The court noted that the five year delay in the delivery of the agreed system illustrated the fact that SAIC had never been in the position to deliver on-time. Further, it found that SAIC was acting on behalf of its sub-contractor SIEMENS (Hellas) SA, a company part of a group (SIEMENS, Germany, AG) investigated for corruption between 2002-2007. The Court of Appeal concluded that the contract between SAIC and the Greek Government had been the outcome of corrupt practices used by SIEMENS companies against Greek interests and the ICC award was therefore annulled as contrary to public policy.

SAIC applied to US courts objecting to the Greek judgment, arguing that the decision of the Court of Appeal was repugnant to U.S. public policy and that domestic courts lacked authority to overturn foreign arbitral awards. SAIC also brought the matter before the Greek Supreme Court arguing that the decision was incompatible with Greek legislation, which – as was mentioned above – precludes national courts from invalidating foreign arbitral awards. The American court invited the U.S. government to submit evidence on the petition in 2015, asking for guidance on how much deference it had to afford the Athens court's decision. The U.S. ultimately declined in January 2016, and the Judge then decided to hold the pending motions until the Greek Supreme Court made its decision.

The Greek Supreme Court concluded (decision n.517/2016) in May 2016 that the Court of Appeal, by reviewing the substantive facts, retried the merits of the case, which is beyond its powers. Therefore, its decision no. 3690/2014 was quashed and the case was returned for re-consideration to the Court of Appeal by a differently staffed bench. On the back of this decision, the US court issued confirmation of the ICC award in January this year, making the €39.8 million liability enforceable against the Greek state, pending once again the outcome of the Greek appeal under a re-convened Court of Appeal.

What is the conclusion that we can draw from this case? Highly politicised disputes (high ranking members of the Greek political elite were implicated in the Siemens bribery scandal and a variety of commissions and investigations are still in the process of untangling a web of corruption in both Greece and Germany) will inevitably take a long time to resolve. An arbitral process however that has not ended with enforcement of an award more than 10 years after it started, especially when the award itself can have significant consequences on the financial position of the parties, is not something to celebrate. One wonders whether Greek officials regret their decision to appeal, considering that an early settlement of the dispute would have cost significantly less and could have been achieved when fiscal space was wider than it is now. The message to draw therefore? Settling an ICC case may be better than appealing the resulting award.