THE SUBSUMPTION OF ADMINISTRATIVE DISPUTES UNDER ARBITRATION WITHIN THE GREEK LEGAL ORDER

Dimitrios I. Sideris

SCHOOL OF ECONOMICS, BUSINESS ADMINISTRATION & LEGAL STUDIES

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DECLARATION

Student Name:	Dimitrios Sideris
SID:	1104170029
Supervisor:	Prof. Athanassios Kaissis

I hereby declare that the work submitted is mine and that where I have made use of another's work, I have attributed the source(s) according to the Regulations set in the Student's Handbook.

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Dedicated to

Eva Stratigopoulou,

with whom I shared a stormy love

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TABLE OF ABBREVIATIONS

AdmCourtAp	Administrative Court of Appeal
ADR	Alternative Dispute Resolution
AP	Areios Pagos
Art.	Article
CAP	Code of Administrative Procedure
CC	Civil Code
CCP	Code of Civil Procedure
CoG	Constitution of Greece
CoS	Council of State
ECHR	European Convention for Human Rights
ICC	International Chamber of Commerce
ILCCP	Introductory Law in the Code of Civil Procedure
SSC	Special Supreme Court
UNCITRAL	United Nations Committee for the International Trade Law

PREAMBLE

This dissertation was written as part of the *LLM in Transnational and European Commercial Law, Banking Law, Arbitration/Mediation* at the *International Hellenic University* and deals with the institution of arbitration in the area of Greek public law and the most significant legal issues arising therefrom and relating to the arbitrability of administrative disputes, especially within the framework of administrative contracts and development acts, the advantages and disadvantages of the arbitral resolution of administrative disputes, the compatibility of the institution with the Greek Constitution, the extent of the review that the State Courts may exercise over the arbitral awards and some propositions on behalf of the author of the thesis for the further development and improvement of the institution in question. Notwithstanding the fact that this thesis does not entertain pretensions to completeness with respect to the analysis of public law arbitration, which could be the subject of a monograph, it touches the major aspects and answers to the most critical questions thereof.

The Greek bibliography on the matter being rather short, a considerable part of the dissertation was based upon the analysis of the case law of the Greek Supreme Courts, especially the Council of State, and the book *Arbitration and Administrative Disputes* of the famous legal scholar Professor Theodoros Fortsakis. In order to enable a better understanding and an easier literature research on behalf of the english-speaking readers, the whole Greek bibliography has been translated into English except for the ambiguous terms which have been merely transcribed in Latin characters.

At this juncture, just like Homer invokes the Muse in the preamble of his epos with the aim of drawing poetic inspiration, I consider it appropriate to make mention of Asst. Professor Komninos Komnios who helped me carry out the arduous task of deciding upon the subject of the dissertation and acted as the kick-starter for the drafting of my thesis.

Keywords: Arbitration; Administrative disputes; Public law; Constitutionality

Dimitrios I. Sideris
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INTRODUCTION

A major question that comes up as far as arbitration is concerned and has caused a lot of debate in theory relates to its applicability to public law disputes. In the past it has been stated that there is no such possibility[1]. The relative arguments were connected to the particular nature of administrative disputes and to the difficulty of some scholars to accept their arbitral resolution[2].

On the other side of the coin, the particular attention that the arbitration of administrative disputes has drawn should not overestimate the potential specific features of this category of disputes against the private ones, since the underlying difference regards mostly technical issues, i.e. issues of constitutionality, whereas the nature of arbitration itself does not change accordingly[3].

Furthermore, according to the Greek Constitution, which is the fundamental law of our legal order, there is no provision for the judicial monopoly of administrative courts over the resolution of administrative disputes, at least the substantive ones[4]. For this reason, the subsumption of administrative disputes under arbitration has already been expressly recognized by law[5]. The so called annulment claims are excluded from the above rule because they explicitly belong to the exclusive jurisdiction of the Greek Council of State[6], since no arbitral tribunal is vested with the legal power to annul an administrative act or omission. It is worth highlighting that even the ordinary administrative courts, namely the Administrative Court of First Instance and the Administrative Court of Appeal, have no jurisdiction to hear annulment claims unless the legislator expressly assigns this responsibility, making use of the constitutional exception of art. 95(3) CoG[7]. Regarding the designation of an administrative dispute as of substance or as of annulment, a differentiation which directly affects the relevant competence of arbitral tribunals, it is generally stated that every administrative

[1] S. Kousoulis, *Interpretation of Arbitration*, pub. Sakkoulas, 2004, p. 5, *citing G. Oikonomopoulos' remarks on the drawing of Code of Civil Procedure 1957.*
[2] V. Skouris, *Administrative Procedural Law*, pub. Sakkoulas, 1991, p. 195.
[3] T. Fortsakis, *Arbitration and Administrative Disputes*, pub. P.N. Sakkoulas, 1998, p. 32.
[4] S. Kousoulis, *Interpretation of Arbitration*, p. 6.
[5] Art. 871A(5); second subparagraph CCP.
[6] Art. 95(1,3) CoG.
[7] E. Spiliotopoulos, *Textbook of Administrative Law*, Volume II, pub. Nomiki Vivliothiki, 2011, p. 72.

dispute constitutes in principle an annulment claim, whilst the legislator can exceptionally designate certain categories of disputes as substantive ones[8], the exception being in practice more frequent than the general rule.

A distinction that further affects the legal treatment of the arbitrated public law disputes has to do with their affiliation with the so called private property of the State[9], since the underpinning rules are different with regard to the genuine administrative disputes in which the State enjoys the Sovereign's privileges.

[8] P. Dagtoglou, *Administrative Procedural Law*, pub. Sakkoulas, 2014, p. 165.
[9] Usually in these cases the State is referred to as *Fiscus*, by contrast to *Imperium*.

CHAPTER 1 - SCOPE AND INDICATIVE CASES OF PUBLIC LAW ARBITRATION

1.1 Legislative framework

Trying to decipher the legislative framework in which the public law arbitration is conducted we have to determine the applicable rules of the existing legislation. To begin with, it remains debatable in theory whether and to what extent do the provisions of art. 867 et seq. of the Greek CCP apply, *mutatis mutandis*, in the field of public law arbitration in a way that satisfies the necessity for legislative regulation of the institution examined. Assuming that the provisions of the CCP are -to a certain extent- applied by analogy, we draw the conclusion that they are subsidiary to any specific provisions for public law arbitration[10]. However, this is not always the case since any specific provisions for public arbitration overrule the CCP provisions, thereby rendering inappropriate their application on that certain occasion[11]. The divergence in the applicable procedural law described above renders the categorization of the public law arbitration according to its statutory basis necessary, because it is extremely difficult to set general rules regarding the applicability of the CCP or other specific provisions at a time. What is sure is that an arbitration governed by public law could not be based upon the principle of the contractual freedom emanating from art. 361 CC[12], on the grounds that no civil servant or public body is vested with the power to dispose rights of the Sovereign State, e.g. the waiving of administrative coercion that is needed in order to enter an arbitration agreement with the private sector.

1.2 Arbitration of disputes arising from public contracts under private law

The analysis shall first deal with the arbitration of disputes attached to the private property of the State and of public persons governed by public law. This category of disputes can be freely arbitrated by relying on art. 867 CCP, since their nature is

[10] This principle of subsidiarity can be made clear through the reference of the laws regulating the hearing of administrative disputes to the Code of Civil Procedure, e.g. the Presidential Decree for the Council of State 18/1989 which in art. 40 reads: "*As to the remainder and specifically with regard to the notifications, the grounds for the recusal of Judges and staff of the Secretariat and the procedure of the challenge, the conduct of the hearing, the order of the audience of the Court and the potential measures of inquiry, the provisions of CCP regulating the procedure of civil trials before the Supreme Court of Areios Pagos are by analogy applied".*

[11] *Lex specialis derogat legi generali.*

[12] P. Dagtoglou, *Administrative Procedural Law*, p. 23, *a contrario* argument.

private, provided in addition that the provisions of art. 49 ILCCP are fulfilled[13]. In particular, the written opinion of the State Legal Council in plenary session and a consequent joint decision on behalf of the Finance Minister and the respective competent Minister is necessary for the validity of the conclusion of an arbitration agreement[14]. Another differentiation with regard to the general application of art. 867 CCP concerns the appointment of the arbitrators on behalf of the State and its public persons and the extended in their favor deadlines[15]. The scope of this regulatory framework usually involves disputes arising from public property leasing and cases in which the State claims damages against individuals that have damaged state vehicles[16]. It deserves pinpointing that any dispute initiated by the State against an individual, meaning that the claim is not directed against the State but against a private person, even though arising from a public contract, is considered private, hence it is regulated by the framework analyzed above[17].

The derogation from the provisions of art. 49 ILCCP could be justified when the dispute in question arises from an international pubic contract. In this case the constrictions of art. 49 ILCCP, being of domestic public policy, are not applicable[18]. This view has been further confirmed by the case law of Areios Pagos, which has ruled that the Greek State is not prohibited from agreeing to an arbitration clause without prior observance of art. 49 ILCCP when the underlying public contract has an international character, i.e. place of arbitration is agreed a third state or governing law is agreed that of a third state[19].

1.3 Arbitration of administrative disputes

Proceeding to the analysis of the arbitration of public law disputes under the strict sense, it is useful to examine, first, the provision for the arbitration clause/agreement and, second, how this clause/agreement functions in administrative law. At first, it is noted that there is no express provision for the arbitration of administrative disputes,

[13] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 152.
[14] Art. 49(1); subparagraph 1 ILCCP.
[15] Art. 49(1); subparagraph 2, art. 49(2) ILCCP.
[16] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 156.
[17] *Idem*, p. 155
[18] Art. 8(1,2) of Decree-Law 736/1970 regarding State Legal Council issues.
[19] AP 986/1986.

unlike the regime analyzed beforehand in relation with the private disputes of the State and its legal persons. Thus, the arbitration of *stricto sensu* public law disputes, namely administrative ones, is legally based upon specific legislative prescription, for instance in the ordinary law, in regulatory administrative acts issued after legislative delegation, in individual administrative acts issued pursuant to the regulatory ones, or in administrative contracts in which the State or the public legal person enjoys authoritative clauses[20].It is a common phenomenon for the legislator to prescribe arbitration clauses in administrative contracts of major importance in order to render them appealing to the counterparty[21]. Notwithstanding it is equally common that these clauses be included in unilateral administrative acts, known as severable administrative acts, which are preparatory for the conclusion of the public contract or even in ministerial decrees concerning investments or capital imports[22].

Regarding the function of the arbitration clause in administrative contracts, there can be either compulsory or potential arbitration with the general practice being in favor of the latter[23]. The Act No 4412/2016, which is currently in force and regulates public works contracts, public supply contracts and public service contracts, opts for the potential arbitration after relevant opinion of the competent technical council and for matters in relation to the execution, interpretation or validity of the Contract[24]. Moreover and in derogation from the provisions regulating the *lato sensu* public law arbitrations [25], the appointment of arbitrators, the applicable procedural and substantive rules, the place of arbitration, the remuneration of arbitrators, the language of arbitration and other relative matters shall be regulated in the Contract itself after the opinion of the competent technical council[26]. The law here goes further so as to preclude the analogous application of other legislative instruments by prescribing even the specific characteristics that the arbitral award under its regime should have. In particular, it reads that the arbitral award must include full, specific and substantiated statement of reasons, whilst it is final and irrevocable and not

[20] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 160.
[21] For the benefits of arbitration in public contracts see Chapter 2.
[22] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 161.
[23] *Idem*, p. 169.
[24] Art. 176(1) of Act 4412/2016.
[25] Probably refers to art. 867 CCP in conjunction with art. 49 ILCCP.
[26] Art. 176(2) of Act 4412/2016.

subject to any ordinary or extraordinary appeal with the exception of the invalidity action against the arbitral award pursuant to art. 897 until 900 CCP[27]. Furthermore, the arbitral award constitutes an instrument permitting enforcement without any need for approval on behalf of the state courts, whereas the disputing parties are obliged to immediate compliance[28]. When it comes to the carrying out of the arbitration, the law reads that it must abide by the 'Rules of Transparency in Treaty based Investor – State Arbitration' of UNCITRAL, which take precedence over the arbitration rules applicable according to the previous paragraph[29]. Last but not least, a repository authority is founded by virtue of a joint ministerial decree of the Ministers of Infrastructure and Justice respectively, which shall be responsible for the maintenance, access to and publication of the information relevant to the Contract[30].

Nevertheless, in order for the above provisions to be applicable, it is crucial that the contract be indeed administrative, meaning that at least one contracting party is the legal person of the State, a local authority or a legal person governed by public law. Otherwise the contract shall not be administrative but private and the rules applied shall be different. In this juncture, it should be pointed out that the Greek case law has adopted accordingly the so called organic criterion instead of the functional one[31]. Relevant is the judgment No 10/1987 SSC which has ruled that when the contract awarder is a legal person governed by private law, even if it belongs to the State or services a public cause, the contract concluded is not considered administrative, thereby rendering any disputes arising therefrom private, too. The major consequence of this observation is the application of the aforementioned legislative framework for the arbitration of private disputes arising between the public legal person and individuals.

Given the tardiness of the State due to the complexity of the rules regulating its function and the consequent lack of flexibility, it is common knowledge that the construction of big-scale public works for the sake of the public interest is entrusted to

[27] Art. 176(3) of Act 4412/2016.
[28] *Ibidem*.
[29] Art. 176(4) of Act 4412/2016.
[30] Art. 176(5) of Act 4412/2016.
[31] S. Flogaitis, *The Administrative Contract*, pub. Sakkoulas, 1991, p. 196 et seq.

ad hoc private entities, which -although founded by the State- are governed by private law. Furthermore, in cases in which the budget of a public construction is too burdensome for the State or a public organ, it is usually preferable that a private investor assume the responsibility of carrying it out on his own expense, vested simultaneously with the right to exploit it for a specific period of time, usually thirty years, in order to amortize the expenditure and generate a reasonable profit. An arbitration clause is almost always included in the contract because this is a means to render it more appealing to the concessionaire and even to achieve a reduced price[32]. Prominent examples of this over time consistent tactic constitute the following investment and development laws: a) Act No 1956/1991 concerning the construction of the natural gas pipeline, b) Act No 2338/1995 concerning the construction of the international airport in Spata, Athens, c) Act No 2395/1996 concerning the construction of the bridge uniting Rio with Antirio, d) Act No 2445/1996 concerning the construction of the Elefsina-Stavrou-Spata Airport freeway and the western ring-road at Avenue Imittou, all of which entail an arbitration clause[33].

1.4 Other forms of alternative dispute resolution in public contracts

It is worth highlighting that in public works contracts, in which the full option for arbitral resolution of potential disputes is not a priori agreed, there is at least a clause for an arbitral expert's report or a mediation clause. The Act No 1955/1991 for the construction of the Athens underground railway and the Act No 2261/1994 for the link between Preveza and Aktion constitute important examples thereof because they provide for the pursuit of an amicable solution between the contracting parties before they approach the state courts[34]. In case that this amicable solution fails, there is also the possibility for an arbitral expertise which shall verify the merits of the case without culminating to a definitive decision though[35]. From all the above it is made evident how significant for the counterparties of the State and of the other public bodies in contracts of great financial value the extrajudicial resolution of disputes is, since they seem to make their best efforts to avoid proceedings before the state courts, possibly

[32] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 184.
[33] *Idem*, pp. 184-191
[34] *Idem*, pp. 191-193
[35] *Idem*, p. 158

being afraid of both privileged treatment in favor of the State and disadvantageous delays. Actually, it is extremely rare for public contracts, especially those designated as investment or development contracts and signed mostly by foreign entities, not to include an arbitration clause for the resolution of the potential disputes arising in the future or at least the provision for exhaustive utilization of ADR techniques before seeking refuge to litigation.

CHAPTER 2 - MERITS AND SHORTCOMINGS OF PUBLIC LAW ARBITRATION

2.1 Advantages of public law arbitration

The advantages and the disadvantages of public law arbitration *in concreto* are more or less the same with those of private law arbitration since the kernel of the institution remains unchanged.

To begin with, the public law arbitration as an institution forms part of the wider concept of alternative resolution of public law disputes. A classic argument in favor of alternative dispute resolution is its procedural expediency in comparison to the administrative court proceedings, whose inordinate delay verges sometimes on the denial of justice. Therefore, the arbitration emerges as a supportive institution of the administrative justice, implementing a more effective operation of the judiciary by relieving a part of its burden with the ultimate aim to ameliorate the Rule of Law[36]. Another major argument in favor of public law arbitration is the satisfaction of the request for more participatory public administration with a view to modernizing its structure and function. In this light the mitigation of the traditional unilateralism of public administration is considered an important step towards the consolidation of a civil service system more receptive of citizens' intent, thus more compatible with the principle of the protection of individuals[37]. The list of advantages of public law arbitration is further enriched with arguments regarding the simplicity and swiftness of the proceedings before the arbitral tribunal in comparison to the formal and complicated court proceedings which cause considerable delays and often higher costs[38]. What is more, the confidentiality principle that underpins the arbitral proceedings allures contracting parties with significant reputation in the marketplace because it reassures that sensitive financial data and other classified company information will not be divulged to the public[39]. On the other hand, the principle of the public conduct of court proceedings[40] and of the pronouncement of the judgment[41]

[36] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 29.
[37] *Ibidem*.
[38] *Ibidem*.
[39] A. Kaissis, *Reversal of arbitral awards; Doctrinal foundation of the grounds for the reversal relating to the arbitration agreement and the arbitral tribunal*, pub. Sakkoulas, 1989, p. 32
[40] Art. 93(2) CoG.

that goes through the Greek judicial system renders it impossible for a business entity to avoid negative publicity as a result of a trial for breach of contractual obligations. The specialized knowledge on technical issues that the appointed arbitrators usually have constitutes also a powerful motive for the option in favor of arbitration since a lot of disputes arising from technical contracts are difficult to resolve by a common judge without familiarization with the corresponding jargon or technical expertise. The arbitrators' familiarization with each of these strictly technical issues is considered very helpful and usually renders any need for expert reports redundant[42]. Finally, the individual counterparty of the State tends to feel a greater degree of security towards the arbitral tribunal than towards the state court because it perceives the latter as an apparatus of the State, therefore as more State-friendly and less keen on the private party's interests, whilst extrajudicial resolution of disputes might additionally contribute -due to mostly psychological factors- to a compromise between the parties that would be an even more profitable solution[43].

2.2 Disadvantages of public law arbitration

At the other end of the spectrum, it is often alleged that the use of alternative dispute resolution might lead to certain pitfalls. The advantages themselves of arbitration, as briefly analyzed above, may be seen in a reverse manner as disadvantages. In particular, it could be stated that the arbitral proceedings are not *ab initio* faster than court proceedings, since phenomena of tardiness might affect arbitral tribunals in the same way they affect state courts, especially in cases in which the exact time for the maximum duration of arbitration is not agreed beforehand between the parties or in cases in which a party seeks purposely to delay the issuance of the arbitral award because of self-interest.

Furthermore and as far as the impartiality of the decision-making body is concerned, it could be reversely argued that an arbitral tribunal does not bear *ipso facto* more elaborate guaranties of impartiality compared to an administrative court. Besides,

[41] Art. 93(3); subparagraph 1 CoG.
[42] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 30.
[43] *Ibidem*.

there is no constitutional provision for personal and functional independence[44] in respect to arbitrators; hence the legal guarantees are *ex prima facie* less[45]. Neither is the administrative judge more affiliated with the state authorities and the state interests because of his special duty to examine the legitimacy of the activities of the public administration. On the contrary, the reason behind the constitutional provision for distinct administrative justice instead of a single jurisdiction system, like in the United Kingdom, lies in the initial inspiration of the Greek legislature from the French model of administrative organization and control system -tracing back to the Napoleonic era- that considered necessary the foundation of a distinct jurisdiction with the responsibility to control the respect of the rule of law principle on behalf of the public organs. This jurisdiction seemed to be more independent towards the authority of the public administration, so it served better the social need for protection against the State arbitrariness. It is obvious that the formal guarantees of impartiality the arbitral tribunals are vested with pale in comparison if examined in parallel with the corresponding constitutional and historical guarantees of the administrative judiciary. Nevertheless, it remains a matter of debate as to whether the investors are influenced by the above arguments since experience has proven that they are characterized by an inherent mistrust towards administrative judges.

The discussion on pros and cons of public law arbitration has been also preoccupied by dogmatic legal arguments concerning the so called purity of law[46]; in other words to what extent could an institution with a fundamentally private law nature be applicable in the domain of public law without jeopardizing the consistency of the legal doctrine. However, this argument is weak in its basis itself because in fact there is no so pure a doctrine but an osmosis of legal rules which serve unequivocally the needs of the human coexistence and change accordingly over time as the human and, therefore, legal needs change, too[47]. In this view, it would be preferable to understand the legal institutions as an instrument for the resolution of potential disputes instead of a

[44] Art. 87(1,2) CoG establishes the enhanced institutional position of the judiciary in the Greek legal order, thereby rendering it fully independent against any political power or other state authorities.
[45] A. Kaissis, *Reversal of arbitral awards; Doctrinal foundation of the grounds for the reversal relating to the arbitration agreement and the arbitral tribunal*, pp. 40-41
[46] Drawing inspiration from Hans Kelsen's theory on the *Purity of Law.*
[47] K. Komnios, lectures at IHU, LLM 2017-2018.

preexisting rigid ultimate goal that becomes itself the ground for the creation of formalistic disputes.

Moreover, the fact that the arbitration, when applied, results in binding arbitral awards which are not amenable to appeal and, therefore, incapable of being challenged -at least as far as the factual part, the so called merits, of the case is concerned- before a superior judicial body constitutes a rational argument that especially in the area of public law the arbitration is considered a deficient institution. On this premise, it is additionally stated that the absence of more levels of jurisdiction in conjunction with the fact that the arbitral tribunal is able to render an award based upon more flexible legal grounds in comparison to a state court results in the arbitration of administrative disputes being considered more prone to legal flaws, hence, less compatible with the principle requiring the protection of the public interest.

From the perspective of the private individual, a major drawback of public law arbitration compared to administrative litigation refers to the means that the private individual has to achieve the provisional suspension of the force of the administrative act which relates to the arbitrated dispute. Whereas the applicant is under certain conditions capable of successfully filing a claim for an interim relief, i.e. a suspension request, before the administrative court, there is no such provision amongst the competences of the arbitral tribunal. This more extensive jurisdictional power of the administrative court aside, the contracting parties of the State, the regional authorities and the other public bodies still opt for the inclusion of an arbitration clause, especially in cases of foreign investors who require international arbitration as a prerequisite for the conclusion of the contract.

A last but not least critical question with regard to arbitration deals with the issue that could be summarized in the expression 'more access to less law'[48]. Should factors like the procedural simplicity and expediency or the presumable lower costs[49] of

[48] K. Komnios, lectures at IHU, LLM 2017-2018.

[49] It is a matter of debate as to whether the arbitration is actually less costly than litigation, given the high remuneration packages of arbitrators, the expensive operational fees for the institutions that carry out the arbitration in cases of institutional arbitration, etc.

arbitration override the fundamental interests in effective judicial protection? Alternatively, is the quality of the provided justice the same when the decision-making body is an arbitral tribunal, namely a private person, no matter how renowned or under the auspices of which prestigious institution[50] it acts? In order for this question to be answered convincingly it is necessary that we draw some arguments from the constitutional basis of arbitration and determine the exact article of the Constitution that allows its use[51]. If we accept that the constitutional basis of arbitration is art. 5(1) CoG about economic and contractual freedom then the public law arbitration would have practically no legal ground since the State bears no right of contractual freedom; it is instead bound by the rule of law principle which prescribes that the public administration may only proceed to acts for which has competence by law[52]. Therefore, we should endorse the predominant opinion noting that art. 8(1) CoG is the constitutional basis of arbitration. In this respect, since nobody can be deprived from his lawful Judge[53] without consent, it results *a contrario* that the consent is the requisite that justifies the use of arbitration for the resolution of disputes. In this way, the joint consent of the parties bypasses the concerns about the legal policy correctness[54].

[50] E.g. ICC.
[51] For more details on constitutional issues see Chapter 3.
[52] T. Fortsakis, *Arbitration and Administrative Disputes*, pp. 58-61.
[53] A Judge vested with all the constitutionally provided prerequisites for his personal and functional independency and not a special judicial commission, an *ad hoc* court or any other judicial scheme that would violate the guarantees of the established justice system.
[54] A. Kaissis, *Reversal of arbitral awards; Doctrinal foundation of the grounds for the reversal relating to the arbitration agreement and the arbitral tribunal*, pp. 48-53

CHAPTER 3 - CONSTITUTIONALITY ISSUES AND CRITICAL CASE LAW

3.1 Traditional jurisprudential approach

The constitutionality of public law arbitration shall be examined under the prism of the five jurisprudential milestones that were of catalytic importance for the evolution of the institution as it is nowadays known.

In the past and for a relatively long period of time the Greek case law had not dealt with the matter of the constitutionality of the subsumption of public law disputes under arbitration since the affirmative answer of the corresponding question had been considered more or less self-evident[55]. As a result, there evolved the so called 'classic' jurisprudential approach on behalf of the two Greek Supreme Courts, namely Areios Pagos and the Council of State, which accepted tacitly that the arbitration of administrative disputes is neither expressly forbidden by the Constitution nor contrary to the principle of exclusive jurisdiction of administrative courts over administrative disputes under three prerequisites: its voluntary character, its concrete provision by the law and that it does not aim to the annulment of an administrative act[56]. Examining more accurately the aforementioned criteria we should draw the following observations. First of all, the inclusion of an arbitration clause in a public contract should not be mandatory or unilaterally imposed without the other party's consent; the contracting parties should enjoy the right to opt for litigation at any time if they wish so. Secondly, the resolution of administrative disputes through arbitration should be expressly prescribed by a legal instrument, whether it be a formal law or a substantive law, e.g. an administrative act. Finally, it should be made clear that in no way is any arbitral tribunal vested with the legal power to annul an administrative act, thus it is manifestly inadmissible to bring an annulment claim before it due to lack of relevant competence. In other words, only substantial administrative disputes could be subsumed under and resolved via arbitration. The majority of the relevant case law on behalf of the Council of State during this jurisprudential phase regards disputes from the field of taxation and in particular the admissibility of arbitration clauses precluding the jurisdiction of the so called tax courts, precursor to the current administrative

[55] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 122.
[56] *Idem*, p. 123.

courts, to which the relative competences have been gradually subjected after the entry into force of the Constitution of 1975[57]. It follows from the settled case law of the Council of State during this period that these arbitration clauses do not suffer from anticonstitutionality, thus the competence of the arbitral tribunal precludes the jurisdiction of tax courts.

3.2 Departure from the 'classic' jurisprudence on behalf of the Council of State

However, already since 1987 the ordinary administrative courts had begun to depart from the until then settled jurisprudence of the Council of State by adopting a less arbitration-friendly stance, thereby ruling that the common (non-constitutional) legislator is prohibited from subsuming tax disputes under arbitration because only the state courts are capable of controlling the legality of the imposition of tax burdens in the exercise of public authority[58]. For example, the Administrative Court of Appeal of Athens in its judgment 2833/1987 ruled that the arbitration clause in a public contract established through and prescribed by formal law and subsuming the potential tax disputes arising therefrom contravenes to the Constitution on the grounds that a private entity (the arbitral tribunal) could bear no right to resolve taxation issues, a competence which belongs to the field of sovereign administration[59]. Since then and due to the quality of the Council of State as court of cassation for the substantial disputes (the annulment claims are never subsumed under cassation before the Council of State) adjudicated by the ordinary administrative courts the case law started to change with a gradual recognition of certain conditions as prerequisites for the validity of the subsumption of administrative disputes under arbitration, whereas these conditions were not designated as prerequisites during the first jurisprudential period before 1988. Exactly this change to the until that time settled case law of the Council of State culminated in the total contradiction to the case law of the civil supreme court of the country, Areios Pagos, thereby signalizing the necessity for the

[57] I. Symeonidis, *The historical evolution of the institution of ordinary administrative courts in Greece*, available at www.adjustice.gr last access 19 November 2018.
[58] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 130.
[59] AdmCourtAp of Athens 2833/1987.

Special Supreme Court to adjudicate the critical legal matter pursuant to art. 100(1) (e) CoG and rule on the issue of the constitutionality thereof[60].

In particular, the Council of State dealt again with the issue of constitutionality of the arbitral resolution of administrative disputes arising in the context of investment legislation in the case 3441/1988 adjudicated by its Second Chamber, which heard the appeal against the 1295/1984 judgment of the Administrative Court of Appeal of Athens with regard to the validity of the arbitral clause of a public contract involving capital imports from abroad. According to the Second Chamber the legislator rightfully assigned the competence of resolving disputes arising from administrative contracts to the arbitral tribunal, thereby ruling that although pursuant to art. 94 (1) CoG does the adjudication of administrative disputes belong to the ordinary administrative courts, the common legislator is not prohibited from assigning the exclusive competence for the resolution of potential disputes related to the interpretation and execution of an administrative contract or of an administrative act and in correlation with the meaning and the consequences thereof. Therefore, the provisions of the administrative contract in question were considered valid and compatible with the Constitution [61]. Nonetheless, the Court further ruled that any assignment of competence to the arbitral tribunal to annul administrative acts, in this case the tax assessment notice issued by the competent tax authorities, infringed the Constitution since the corresponding competence has been exclusively reserved on behalf of the Constitution for the administrative courts[62]. Moreover, the Court ruled that the arbitral tribunal is not vested with the power to decide neither on the interpretation and application of Greek laws nor on matters outside the contract signed and the decree ratifying it[63].

The aforementioned case was finally brought before the plenary session of the Council of State due to its having been considered as of major interest. The judgment 3131/1989 of the plenary session of the Court, issued after the referral of the case on behalf of the chamber, signalized the change in the until that time settled case law of

[60] The Special Supreme Court has competence to decide *erga omnes* on the constitutionality of a concrete legal matter in case the rulings of two or more supreme courts juxtapose with each other.
[61] Second Chamber CoS 3441/1988.
[62] *Ibidem*.
[63] *Ibidem.*

the supreme administrative court of Greece. In particular, the Court ruled that the provisions of the decree and the contract in question, which prescribed the arbitral resolution, were compatible with the Constitution only because the article 112 of the Constitution of 1952, whose superior status relative to ordinary laws was maintained pursuant to art. 107 (1) of the current constitutional text[64], provided for the issuance of a one-off law for the protection of foreign investment capital[65]. The ratio behind this provision is the stimulation of foreign investors to import capital in Greece since they enjoy a special regime of tax treatment and an enhanced level of legal certainty. Thus, amongst the motives of the constitutional legislator, the option for the arbitral resolution of potential disputes with regard to the import and investment of foreign capital has been included[66]. However, according to the Council of State, solely this specific constitutional provision, which enables the issuance of a one-off ordinary law with a higher normative rule, renders the possibility of the arbitral resolution of the corresponding potential disputes falling under the area of the administrative law compatible with the Constitution, otherwise only the administrative courts would be competent for the resolution of any conflict[67]. The judgment of the supreme administrative court of Greece goes further on dealing with the extent of the power of review that the administrative court might exert over the jurisdiction of the arbitral tribunal[68]. The Council of State ruled that on condition that the arbitral award is produced before the materially and territorially competent administrative court, the latter may decide upon the matter whether the dispute resolved fell indeed under the competence of the arbitral tribunal or not[69]. In other words, it is stated that the competence of the arbitral tribunal is limited to the diagnosis of issues arising between the contracting parties defined in the decree in respect with the interpretation and the overriding of certain legal gaps in the content of the Legislative Decree ratifying the contract[70], hence it does not entail the resolution of any kind of dispute arising from and because of the execution of the investment contract and the interpretation of the

[64] The Constitution of 1975 as revised.
[65] Plenary Session CoS 3131/1989.
[66] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 133.
[67] Plenary Session CoS 3131/1989.
[68] For more detailed information on judicial review see Chapter 4.
[69] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 134.
[70] *Idem*, p. 135.

Greek legislation even if the investment is directly concerned therefrom[71]. However, the responsibility of the administrative court does not extend to the review of the merits of the case resolved by the arbitral tribunal in case the latter has been declared competent since the competence provided by the Legislative to it is characterized as exclusive[72]. In fact, the administrative court might control the competence of the arbitral tribunal over the hearing of a concrete legal or factual matter relevant to the investment contract but in no way could the first enter in the examination of the merits of the case for which the latter has had exclusive competence. Therefore, it has been made evident that both the public administration and the administrative courts are bound by the arbitral award with regard to issues resolved by the latter when they examine petitions or legal remedies of the same parties in a subsequent phase.

The aforementioned case law constitutes the first step of the Council of State towards the solidification of the principle of the total prohibition of arbitration in the field of administrative disputes pursuant to the articles 93 (1), 94 (1,3) and 95 (1,3) of the Constitution, according to which the administrative justice is strictly restricted to the administrative courts in a way that even the common legislator does not bear the competence to regulate differently[73]. Moreover, it is alleged that the special nature that the Constitution ascribes to administrative disputes excludes the possibility of them being subsumed under arbitration because they presuppose the existence of an administrative act or the omission of the public administration in the context of exercising official authority, whilst the constitutional legislator has expressly declared that no one is entitled to control the legality of an administrative act or an administrative omission apart from the administrative judge[74]. The sole exception to the above rule is reserved for the so called one-off higher-ranking ordinary laws issued pursuant to article 107 CoG in relation to the protection of foreign capital imports[75]. Taking all the above factors into account, it seems irrational that although the one-off higher-ranking ordinary laws may allow the application of arbitration for administrative disputes the Council of State interpreted the spirit of a series of articles

[71] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 135.
[72] *Ibidem*.
[73] *Idem*, p. 138.
[74] *Ibidem*.
[75] *Ibidem*.

of the Constitution in a way that forbids this sort of arbitrations because, if we should accept that the intent and purpose of the Constitution was to exclude arbitration as a means for the resolution of administrative disputes, it would be more consistent to accept that the one-off laws also point in the same direction, namely against the possibility for arbitral resolution of administrative disputes, since they form part of the same constitutional order[76]. In addition, it looks like that the higher status of these one-off laws in comparison to the other ordinary laws aims at the avoidance of the constitutional revision of the privileged treatment in favor of the State or its bodies pursuant to articles 93-95 CoG, which were endorsed by the aforementioned case law[77].

3.3 Persistence of Areios Pagos in the traditional approach

At the other end of the spectrum, the supreme civil court of Greece, Areios Pagos, did not alter its settled case law, maintaining its consistent arbitration-friendly position. In a relevant case brought before the First Chamber of Areios Pagos the constitutionality of the arbitration of administrative disputes was discussed. The Court ruled that pursuant to articles 112 of the Constitution of 1952 and 107 (1) of the Constitution of 1975, whose ratio has been the protection of foreign capital with the further intent to facilitate the implementation of foreign investments and boost the financial growth of the country, every dispute arising between the contracting parties from the implementation of public contracts signed within the context of the aforementioned protective investment legislation and referring to the execution or interpretation of the conditions thereof or the extent of the rights and obligations emanating therefrom should be exclusively resolved via arbitration, by way of derogation from the provisions concerning the arbitrations of the State[78]. In particular, the Court ruled that the provision of the investment contract in question, referring to new tax or tariff legal instruments which established a more favorable regime for the appellant but which are not applicable in case they contravene to the current contract, should be interpreted in a way that enables the arbitral resolution not only of private law disputes arising therefrom pursuant to articles 867 CCP and 94 (3) CoG but also

[76] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 138.
[77] *Ibidem.*
[78] First Chamber AP 981/1992.

substantial administrative disputes pursuant to article 94 (1) CoG, hence including a taxation dispute[79]. In other words, the contested provision pursued the arbitral resolution of potential disputes so as to avoid the jurisdiction of state courts, either civil or administrative, because the possibility of their interference constitutes an investment disincentive given the delays caused by the strict procedural requirements and formalities[80]. For this reason, the judgment culminated in declaring the arbitration of the substantial administrative dispute which arose from the execution of the investment contract in question as valid and compatible with art. 94 (1) CoG since, according to Areios Pagos, the reference to the jurisdiction of administrative courts aims plainly to define the separation between private and substantial administrative disputes adjudicated by civil and administrative courts respectively and not to forbid the subsumption of both private and substantial administrative disputes under the jurisdiction of arbitral tribunals given that the institution of arbitration was already known in the foreign and domestic legal order at the time, thus it would be expressly stated[81]. Finally, the judgment 981/1992 of the First Chamber AP, taking into consideration the conflict with the case law of the Council of State on the exact same critical legal issue referred the case to the Supreme Special Court.

3.4 Resolution of the question raised by the Special Supreme Court

Although the Special Supreme Court had already dealt with the divergence between Areios Pagos and the Council of State over the question of the constitutionality of the subsumption of administrative disputes under arbitration in its 6/1992 judgment, the critical issue had not been properly resolved due to a legal maneuvering of the first which attempted a compromise between the judgments of the two Supreme Courts[82]. In particular, the Special Supreme Court ruled that there had been no conflict in the case law of the two Supreme Courts because each one had based its legal reasoning on a different constitutional basis; on the one hand, the Council of State was seized of a dispute over taxation, namely a substantial administrative dispute, and ruled that the term of the administrative contract which provided for the arbitral resolution of tax

[79] First Chamber AP 981/1992.
[80] *Ibidem*.
[81] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 140.
[82] Areios Pagos and Council of State.

disputes infringed art. 94 (1) CoG establishing the jurisdiction of ordinary administrative courts over the substantial administrative disputes, whereas Areios Pagos had ruled on the occasion of an annulment claim concerning the legality of the administrative acts revoking planning permissions (a dispute that had been subsumed under arbitration pursuant to the terms of the underlying contract) that there had been no contravention to art. 95 (1) (a) CoG which lays down the jurisdiction of the Council of State with regard to the annulment of the enforceable administrative acts due to misuse of power or violation of the law[83]. Therefore, the Supreme Special Court avoided taking a clear side by ruling that each one of the supreme courts had founded the judgment upon a different constitutional provision, thereby denying the existence of any kind of conflict.

For this reason, the need for the Special Supreme Court to be seized of the matter afresh was made evident after the issuance of the 981/1992 AP judgment[84] which was perceived as being in conflict with the last judgment 1793/1991 CoS. This occasion led to the issuance of the judgment-milestone 24/1993 SSC according to which the Constitution does not forbid the legislative provision for the possibility that the Public Administration and the taxable person agree for the subsumption of a tax dispute under arbitration. In particular, the Special Supreme Court more or less endorsed the solution that Areios Pagos had given in favor of arbitration by claiming that the real meaning of art. 94 (1) CoG did not prohibit the common legislator from providing for an arbitral resolution of tax disputes arising from the execution of an investment contract between the Public Administration and its counterparty since the Constitution in article 78 (4) does not prohibit the Public Administration from laying down any exemptions from taxation[85]. Thus, it is obvious that the Special Supreme Court elaborates here an argument *a majore ad minus*, ruling that since the common legislator is capable of enforcing tax exemptions he is also capable of providing for the arbitral resolution of tax claims in certain cases. Despite the correctness of the conclusion, the reasoning of the Special Supreme Court is weak because the reference to art. 94 (1) CoG is in this case inadequate without additional reference to art. 8 (1)

[83] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 141.
[84] As described above in 3.3.
[85] SSC 24/1993.

CoG[86]. What is more, art. 98 (4) CoG does not prohibit the common legislator from laying down tax exemptions but it renders him exclusively responsible for this duty through the issuance of the corresponding ordinary laws, whilst it is clear that he cannot authorize the Public Administration with the power to decide thereupon[87]. For this reason, neither positive nor negative arguments could be drawn from the reasoning of the Special Supreme Court in judgment 24/1993 concerning the constitutionality of the arbitral resolution of administrative disputes, whereas it is more appropriate to claim that it would be compatible with the Constitution to subsume ad hoc under arbitration any tax dispute that shall arise from a defined legal relationship with the joint agreement between the Public Administration and the taxable person[88].

The opinion of the minority in the 24/1993 SSC could be summarized in pointing that the article 94 (1) CoG should be interpreted under the prism of art. 1 (1,2) CoG so as to acquire the meaning that the common legislator is prohibited from subsuming substantial administrative disputes, hence tax disputes as well, under 'private courts' like the arbitral tribunals because the review of the legality of the administrative acts issued in the exercise of State authority has been exclusively assigned to the competent State Courts[89]. Therefore, according to the minority, the State authority characterizes both the unilateral administrative acts and the administrative contracts, whilst being an expression of the principle of popular sovereignty emanating from art. 1 (2,3) CoG which is the foundation of the democratic state and not a right subject to expropriation[90]. Since the arbitral tribunals can be seized solely of disputes regarding private rights subject to expropriation it is absolutely inappropriate to vest them with the responsibility to review the legality of the administrative course of action through a special regime of 'capitulations' in the delivering of justice in the area of administrative disputes, namely disputes arising in the occasion of the exercise of State authority, because this would be equivalent to the refutation of the principle of

[86] P. Dagtoglou, *Administrative Procedural Law*, p. 29.
[87] *Ibidem*.
[88] *Ibidem*.
[89] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 143.
[90] *Ibidem*.

popular sovereignty[91]. Especially when it comes to disputes in the area of taxation, the constitutional provisions for the effective imposition and allocation of tax burdens in a strict and unimpeachable way precludes the assignment of decisive competence concerning the interpretation and application of taxation laws to private persons by the common legislator notwithstanding the fact that the latter is by virtue of art. 78 (4) CoG capable of deciding upon tax exemptions under certain circumstances[92]. Therefore, the term of the contested contract which provided for the arbitral resolution of administrative (tax) disputes infringed not only art. 94 (1) but also 1 (2,3) CoG[93].

3.5 The jurisprudence of the Council of State after the judgment 24/1993

The impact of the judgment 24/1993 SSC on the case law of the Council of State has been apparent ever since; the latter has returned to its initial stance towards the matter by adopting an arbitration-friendly perspective that accepted in principle the constitutionality of the subsumption of administrative disputes under arbitration, an evolution that is clearly reflected by the judgments of its Second Chamber 3635/1994 and 198-214/1995.

For instance, in its judgment 198/1995 CoS the Second Chamber, which was seized of a tax dispute through the procedure of cassation, ruled that art. 28 of the 27-8-1960 contract between the Greek State and the founders of "Aluminum of Greece AEVE", ratified under the Legislative Decree No 4110/1953, about an investment for which a capital import from abroad had taken place with the approval of the Royal Decree 584/1960, issued itself by virtue of the Legislative Decree 2687/1953, did not contravene to art. 94 (1) CoG as long as the administrative court is capable of reviewing the competence of the arbitral tribunal, thereby ignoring the arbitral award on the grounds of lack of competence, however, in case the latter is declared competent, the court cannot proceed to the review of the factual and legal correctness of the award whose determination is here binding[94]. Furthermore, the binding

[91] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 143.
[92] Minority in SSC 24/1993.
[93] *Ibidem*.
[94] Second Chamber CoS 198/1995.

character of the arbitral award is further extended to the constitutionality questions raised within the framework of the interpretation of the terms of the underlying contract upon which the tribunal has expressly or tacitly decided[95], a major novelty in the jurisprudence of the supreme administrative court which had never in the past accepted the competence of the arbitral tribunal to interpret authentically the law[96].

To make a long story short, the relevant Greek case law commenced with the tacit acceptance of the constitutionality of the subsumption of administrative disputes under arbitration except for the competence for the annulment claims restricted to the exclusive jurisdiction of administrative courts. Then the Council of State changed its case law and by going on the exact other side ran contrary to the relevant jurisprudence of Areios Pagos and resulted in the resolution of the conflict by the Special Supreme Court which endorsed the classic arbitration-friendly stance. This development is fervently applauded amongst theorists and practitioners even though it would be dogmatically more accurate to endorse the founding of the relevant argument on the principle of the lawful judge pursuant to art. 8(1) CoG[97].

[95] Second Chamber CoS 198/1995.
[96] See CoS 3441/1988 above.
[97] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 146.

CHAPTER 4 - JUDICIAL REVIEW OF ARBITRAL AWARDSUNDER PUBLIC LAW

4.1 Constitutionality of the exclusion of validity review

There has been a lot of debate as to whether the arbitral awards issued on administrative disputes should be subject to judicial review and what the legal nature of the petition for their reversal is. The answer to the question above differs depending on the view adopted with regard to the categorization of arbitration as an institution belonging to the organization of the official justice by virtue of the Constitution or as a completely autonomous and alternative solution thereto[98]. On the one hand, it is crucial that the autonomy of arbitration be enhanced in respect to its position in parallel with the official system of justice, thereby promoting its disengagement from the ex post control of the State Courts[99]. On the other hand, it is also of vital importance that arbitration as an institution abides by certain rules and does not exceed certain limits so as to be considered a sufficient and respectable means of justice next to the official one; thus, it is necessary that the arbitral award be subject to review by the competent State Courts in order for the aforementioned prerequisites of good repute to be fulfilled[100].

Especially when it comes to arbitration of administrative disputes, the relation with the state jurisdiction is not the same as when an arbitration of private disputes is at stake since the prerequisites of the judicial review differ considerably exactly because of the nature of the arbitrated dispute. Given that a lot of public contracts, especially in the framework of foreign investments, and unilateral administrative acts and legislative instruments, e.g. the Legislative Decree 2687/1953, ratifying the aforementioned contracts include arbitration clauses providing that the arbitral award shall constitute an instrument permitting enforcement without any need for affixing an enforcement clause on behalf of the single Judge of the Court of First Instance at the Secretariat of which the arbitral award has been submitted pursuant to art. 918 (2) (d) CCP, thereby

[98] S. Kousoulis, *Constitutional Dimensions of Arbitration*, Nomiko Vima 42 (1994), pub. Athens Bar Association, p. 768-769.
[99] *Ibidem*.
[100] *Ibidem*.

rendering any sort of review on behalf of the State Courts redundant[101], vivid controversy concerning the constitutionality of the corresponding clauses has been triggered oftentimes. It is to be accepted that the monopoly of the State with regard to the enforcement of the decisions of the Judiciary applies when it comes to the enforcement of arbitral awards, too. After all, it is common ground that only the State enjoys the legitimate monopoly of means of violence[102] in order to implement the decisions of the state organs issued by virtue of their respective competences and, consequently, reassure the rule of law. Therefore, the awards rendered by arbitral tribunals could not be directly implemented without the intervention of a state organ that could vest the award with the power of enforcement[103], this state organ being here the single Judge of the administrative Court of First Instance[104].

For the question highlighted above both jurisprudence and theory have taken sides mostly in favor of the compatibility with the Constitution of the exclusion of judicial review of the arbitral awards on certain occasions. In particular, the Court of Areios Pagos has verbatim ruled that "the resolution of disputes provided by arbitrators possessing guarantees of efficiency and impartiality is established by excluding the application of the provisions of the Code of Civil Procedure and the under any means refuge to the State Courts, the possibility of interference of which would inevitably generate hesitation with regard to the importation and investment of foreign capital due to the delays caused by the necessary compliance with formalities and procedural requirements"[105]. This jurisprudence could be characterized as settled due to its constant and stable adoption in most of the decisions rendered by the chambers of the supreme civil court, whereas no significant divergent positions in the examined case law could be found. Furthermore, according to AP 356/1991[106] the exclusion of the option for an invalidity action – petition for the reversal of the arbitral award or any

[101] By virtue of the general principle "*Lex specialis derogat legi generali*" or "*Lex posterior derogat priori*" in accordance with the legislative and chronological framework and on condition that the corresponding legal provisions are of the same normative value.
[102] Max Weber, *Politics as a vocation*, pub. Papazisis, 1987.
[103] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 115.
[104] For the discussion as to the jurisdiction of the civil or administrative judge see 4.3 below.
[105] Plenary Session AP 750/1986, Elliniki Dikaiosini, pub. Sakkoulas, 1986, pp. 1122-1124.
[106] Review of Commercial Law, 1993, p. 386.

other legal remedy before the state courts under the circumstances described above infringes neither art. 20 (1) nor art. 8 (1) CoG.

The dominant view in theory follows more or less the settled case law on the matter, thereby affirming the constitutionality of the legislative exclusion of invalidity actions, which ratifies the consent of the counterparties[107], namely the State or the public body and the private natural or legal person. However, there are also opinions of some academic legal writers[108] that express serious reservations regarding the compatibility of such exclusion both with the Constitution and the ECHR[109]. According to them, the right to be heard by a court, based upon art. 20 (1) CoG in conjunction with art. 6 (1) ECHR, is not fulfilled but only through the provision of a legal remedy before an official court that will review the arbitral award at least for potential violation of procedural requirements. They further elaborate their argument by claiming that since the Legislative Decree 2687/1953 itself, which is of a higher normative status, does not entail any relevant exclusion clause, the exclusion clause included in the contracts and the ratifying acts, which are vested with regular normative power, contravenes to the constitutional order, whilst the lack of the possibility of review is to the detriment even of the investors themselves since they remain defenseless against any violation of the terms thereof[110].

4.2 Constitutionally indispensable scope of the judicial review of arbitral awards

The determination of the requisite substance of the judicial review over the awards rendered by arbitral tribunals requires the resolution of the issue concerning the relation between the official state justice and the private one, which is the major problem in connection with the profound nature of arbitration[111]. The scope of the judicial review of the arbitral awards is reflected in art. 897 CCP which sets out the

[107] G. Mitsopoulos, *Admissibility of the petition for the opposition against the administrative implementation measures*, Diki 21 (1990), p. 801 et seq.
[108] T. Fortsakis, *Arbitration and Administrative Disputes*, pp. 110-112.
[109] Article 6 (1) ECHR establishes the right to a fair trial.
[110] T. Fortsakis, *Arbitration and Administrative Disputes*, pp. 111-112.
[111] S. Kousoulis, *Fundamental Problems of Arbitration*, Volume II, pub. Sakkoulas, 1996, p. 30.

grounds for the revocation of an arbitral award, thereby outlining the minimum standard that the task of review should respect[112].

Pursuant to art. 897 CCP "an arbitral award can be totally or partially reversed only by virtue of a court judgment and on the following grounds:

1. If the arbitration agreement is invalid,

2. if the arbitral award was issued after the arbitration agreement ceased to apply,

3. if the arbitrators were appointed in violation of the terms of the arbitration agreement or the legal provisions or if the parties had revoked them or if they rendered the award in spite of their exemption request having been accepted,

4. if the arbitrators acted overstepping the powers with which they are vested by the arbitration agreement or by the law,

5. if the provisions of art. 886 (2), 891, 892 CCP were violated,

6. if the arbitral award is contrary to the public order or morality,

7. if the arbitral award is incomprehensible or contains contradictory provisions,

8. if there exist reasons for the reopening of the procedure pursuant to art. 544 CCP".

Taking all the above into consideration, we easily draw the conclusion that the judicial review of arbitral awards prescribed by the Greek legal order involves, on the one hand, the conditions on which the arbitration of a dispute is permitted and, on the other hand, the compliance on behalf of the arbitrators with the fundamental guarantees that constitute the cornerstone of any form of justice, either official or private.

In particular, the State Court shall examine whether the arbitration clause/agreement is valid, hence whether there is indeed a genuine voluntary declaration of intention for the exclusion of the jurisdiction of the official justice, whether this arbitration clause/agreement has been legislatively approved in order to acquire the necessary

[112] A. Kaissis, *Reversal of arbitral awards; Doctrinal foundation of the grounds for the reversal relating to the arbitration agreement and the arbitral tribunal*, p. 45.

normative status and whether the subject of the arbitration clause/agreement is capable of settlement by arbitration. However, the judicial review should not be limited to the control of the validity of the arbitration clause/agreement, hence merely to matters of pure form, but should extend further to the control of the respect to considerations of judicial policy, thereby satisfying the need for the realization of the rule of law. For this reason, the state court shall review the application of fundamental principles as well, e.g. the principle of the equality of arms between the disputing parties in proceedings before the arbitral tribunal, the principle of independence and impartiality of arbitrators, the principle of *audi alteram partem*[113] etc.

4.3 Legal nature of the invalidity action and enforcement of the arbitral award

Regarding the legal nature of the invalidity action, namely the legal remedy leading to the judicial review of an arbitral award, the prevailing view is that it does not constitute an appeal but rather a procedure for the review of the elements of the external legality of the award. Therefore, the legal protection provided via this legal remedy is not primary because justice has already been administered primarily by the arbitral tribunal[114], whereas the state court carries out solely a review over the lawfulness of the procedure. In theory, though, legitimate concerns have been raised with regard to the need for a means of rectification of the potential irregularities that the arbitral award might contain; in other words, the vital question is whether there exists any need for the provision of correction of the arbitral award and whether the extent of the correctional power of the court should differ depending on the nature of the arbitrated dispute as private or administrative.

With respect to the latter segment of the aforementioned question, it is important that the specific character of the administrative disputes be underlined. In particular, the outcome of the arbitration in the case of administrative disputes concerns at a larger scale the public interest, thereby resulting in the need for intensification of the review exercised in comparison with the resolution of private disputes. At the same time, nevertheless, the fact that the subsumption of administrative disputes under

[113] From the Latin language: “Listen to the other side”, which is interpreted as “let the other side be heard as well”.
[114] S. Kousoulis, *Constitutional Dimensions of Arbitration*, Nomiko Vima 42 (1994), pp. 771-772.

arbitration was a scheme devised with the aim to serve the legitimate interests of investors, especially from abroad, who wish to circumvent the tardiness of official justice -towards which they remain skeptical- constitutes the ground for the justification of a less meticulous judicial review of the arbitral award. In this way an oxymoron arises; although the arbitral resolution of an administrative dispute would justify a stricter review on behalf of the State Courts due to the increased involvement of the public interest, the teleological interpretation of the public law arbitration culminates in the exact opposite conclusion.

The last but not least controversial issue is whether the judicial review described above should be exercised by the civil or the administrative courts, given that the basic pleas of invalidity are outlined in the Code of Civil Procedure whose provisions apply by analogy unless they contradict with the relevant provisions of the ratifying legislative instrument[115]. Typical example of the above scheme is art. 898 CCP according to which "competent for the adjudication of the invalidity action is the court of appeal within whose area of jurisdiction the arbitral award has been issued". Although this provision refers to the competent civil Court of Appeal it is to be upheld as a general principle that for the invalidity action especially against arbitral awards resolving administrative disputes the competent court is correspondingly the administrative Court of Appeal; likewise for any other reference by the Code of Civil Procedure to the competence of civil courts applied by analogy for duties relevant with the public law arbitration.

As a side note it should be reiterated that the dispute is designated as administrative on condition that the legal remedy is lodged by the private person against the legal person of the State, a local authority or any other public body and never vice versa, no matter if it derives from and because of an administrative contract. On the contrary, when the proceedings are initiated on behalf of the State or any of its organs against the individual the dispute is designated as private because the criteria of the exercise of public authority and the clauses of state prerogatives are not fulfilled, hence such disputes shall be adjudicated by the competent civil courts[116].This view has been also upheld by the jurisprudence, the most eminent being the judgment 2324/1991

[115] AdmCourtAp of Athens 1449/1994, Dioikitiki Diki 1994, pp. 1380-1381.
[116] Ep. Spiliotopoulos, *Textbook of Administrative Law*, Volume I, pub. Legal Library, 2011, pp. 197-199.

AdmCourtAp of Athens which ruled that when the State does not act unilaterally by virtue of its special privileges, e.g. administrative coercion, but opts instead for judicial protection by lodging an action for damages against the individual, the respective dispute is not administrative in spite of emanating from the administrative contract because the subject of the litigation is not the unlawful conduct of a public sector body but of a private one.

It follows from the foregoing that in case of a subsumption of an administrative dispute under arbitration two alternatives might exist. On the one hand, when the State (or public bodies treated as having such status) brings claims art. 918 CCP applies and the arbitral award must be vested with the enforcement clause by the competent Judge; in this case the arbitral tribunal is treated as a civil Court and its award is subject to the same obligations in order to be enforced[117]. On the other side of the coin, when the private party brings the claims against the State (or its equivalents) then the arbitral award is treated as a judgment of an administrative Court so that art. 199 (1) CAP applies by analogy[118]. In this case, in Prof. Fortsakis' opinion, the competent Judge for the attachment of the enforcement clause is the president of the civil court who performs an administrative task pursuant to art. 94 (4) CoG which provides for the possibility of assigning certain administrative duties to Judges[119].

[117] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 119.
[118] Prof. Fortsakis refers to art. 59 (1) Presidential Decree 341/1978 which has already been incorporated in the new Act 2717/1999, namely the Code of Administrative Procedure.
[119] T. Fortsakis, *Arbitration and Administrative Disputes*, p. 119.

SYNOPSIS - CONCLUDING REMARKS

The arbitration is not a new institution but it has been known for years as an alternative justice administered by private persons of good repute, special skills and expertise in the area of the resolution of a certain category of disputes at a time, including administrative ones, for instance disputes arising from public construction works, disputes deriving from the execution of development laws for the attraction of foreign investors, disputes concerning the taxation of the ventures etc. In every category of disputes examined above it was evident the large scale of the interest at stake, either by reference to the amount of capital invested or to the great importance of the creation of a trusting atmosphere towards the foreign capital owners with the aim to attract international investments to the domestic market, thereby boosting economic activity and ameliorating in the long run the national finances and the economic indicators. The mistrust towards the State and the public institutions in general that characterizes foreign capital owners and constitutes a common phenomenon not only in the Greek reality but also in possibly every country of the world that acts as a recipient of foreign investment capital has led to the emergence of institutions like arbitration, belonging more or less to the sphere of private initiative and serving the cause of the avoidance of meddling with the jurisdiction of the State because the wide variety of national legal orders across the world and the specific particularities in the operation of each one of the state apparatuses would considerably hamper the realization of foreign investments; the lack of familiarity of the capital owner with the particular legal order would constitute a disincentive since phenomena like tardiness, corruption or other factors of uncertainty would discourage the progress of the venture.

Exactly in this environment of lack of confidence towards the diversity of legal systems and philosophies the institution of public law arbitration plays the role of the guarantor since any potential dispute deriving from the implementation of the investment, e.g. the misinterpretation of the contractual terms, the breach of the contractual obligations etc, shall be resolved without the interference of the state justice whose considerable delays are often seen as a serious obstacle to any large-scale investment, either international or domestic. Furthermore, the fact that a lot of

efforts have been made in order to harmonize the legal framework of arbitration all over the globe, for example through the development of common legal standards, like the UNCITRAL Model Law and the UNCITRAL Arbitration Rules, and their adoption on behalf of the majority of the countries that aspire to become hosts of foreign investment, encourages even more the interested parties to negotiate and include an arbitration clause in the contracts they sign. In other words, the possibility of having an option for arbitration when entering a contract with the State or any public body equivalent thereto generates confidence and feelings of security that reflects positively to the economic indicators, which is the kernel of any reform that the State lately attempted in order to improve its competitiveness at the international level.

For this reason, it is to be strongly advocated that the legislator should assume any possible measures to facilitate the inclusion of arbitration clauses in administrative contracts and the taking place of effective arbitral proceedings with the least possible chances for reversal of the arbitral award on the grounds of misinterpretation of the law. In particular, it would be of great benefit to lay down a concrete legal framework for the public law arbitration so as to avoid interpretations by analogy of provisions of private law arbitration and legal vacuums that lead to inconsistent case law and legal uncertainty.

Furthermore, when it comes to constitutionality issues with regard to public law arbitration, we should endorse the view that the right to opt for the arbitral resolution of an administrative dispute finds its constitutional basis in art. 8 (1) CoG, whereas art. 26 (3), 87 (1), 93 (1), 94 (1,3) CoG allocate the competences within the framework of the state sovereignty and the authorities which constitute its enunciations (Legislature, Executive and Judiciary) pursuant to the principle of separation of functions, thus it would not be tenable that the aforementioned constitutional provisions should be interpreted as restricting the jurisdiction of arbitral tribunals and establishing a monopoly in favor of State Courts despite the explicit intent and consent of both contracting parties. The fundamental principle *in dubio pro libertate*[120], which underpins our legal order, contributes to the recognition of arbitration as a constitutional individual right without contravening to the principle of lawfulness of

[120] When in doubt, (opt) in favor of liberty.

the administrative action since in the case of public law arbitration the Administration has been legislatively authorized to agree the subsumption of substantive administrative disputes under arbitration, thereby rendering any contradictory argument with regard to the power of disposal devoid of substantial content. Derogation from the above position lays down solely art. 95 (1,3) CoG which expressly and outright reserves the competence for the annulment of administrative acts to the Council of State and on specific conditions to the Administrative Courts of Appeal by precluding any other body, i.e. arbitral tribunals, from the power of annulment of administrative acts or omissions.

Finally, it is crucial that *de lege ferenda* the fragmented regulatory framework concerning public law arbitration becomes more consistent and solid in order to overcome obstacles like the controversy as to the proper legal remedy for the review of arbitral awards and the jurisdiction of the competent court respectively, whilst it would be also advisable that *de Constitutione ferenda*, in view of the imminent or a future constitutional reform, a relevant provision which expressly establishes the possibility of arbitral resolution of administrative disputes be laid down so as to constitutionally confirm the current arbitration-friendly case law and avoid potential informal constitutional changes[121] attributed to the divergent pre-interpretative perceptions of each member of the Judiciary.

[121] Different interpretations of the same constitutional provision, usually vague enough, due to the change in circumstances or varying pre-interpretative perceptions of the Judge.

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