

Greece: the state of the law in project finance

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The growth of the Greek economy over the past few years has been supported by an increasing number of project finance transactions. The 2004 Athens Olympic Games certainly played a role in this, yet the steady growth of FDI and of PPP projects indicate that project finance is here to stay. Nonetheless, Greek law on project finance is still made up of scattered provisions. It was only recently that a much awaited piece of legislation on PPP finally came into force.

Foreign investment and ownership restrictions

There are generally no restrictions for foreigners having an investment in Greece or owning a project or related company established and operating in Greece, whether through a greenfield venture or an acquisition. Project companies usually take the form of a corporation, i.e. either a company limited by shares (*societe anonyme*) or, less frequently, a company with limited liability (E.P.E.). A project entity may, however, avoid legal personality altogether through the vehicle of the so-called '*koinopraksia*', a joint venture which is registered only for tax purposes and relates to a specific project. Statute 3389/2005 on Public Private Partnerships (PPP) provides for the establishment of special purpose companies which will operate as *societe anonymes* for the purposes of a PPP.

Prior approval needs to be obtained when project or related companies with foreign investment participation wish to purchase real estate in border areas in Greece. Moreover, when project companies wish to bid for public work or procurement projects, there may be an obligation

to declare the identity of the shareholders up to the level of the individual beneficiary.

Project or related companies are not required to make any special registrations, unless, of course, the field in which they are to operate typically requires such approval. The general rules regarding registration of companies, fees and taxes apply in such cases.

Government approvals

No special government approvals are required for project finance transactions, whether carried out by local or foreign parties. Fees and taxes related to the project company are not different from those incurred by and imposed on any entity carrying out business in Greece, whether involved in project finance or not. There may, of course, be several tax implications that may arise in the course of a project finance transaction (e.g. loans may require payment of stamp duty); or there may be a long series of permits (e.g. in construction projects) or licences (e.g. in the energy sector) that need to be obtained before a project gets off the ground. However, such implications or requirements are not peculiar to project finance transactions.

Stricter formalities are required when a project finance agreement qualifies as a public contract, in which case Greek public procurement law may also be applicable. Moreover, in the case of Public Private Partnerships (PPPs), as set out in Statute 3389/2005, the PPP contract may impose an obligation upon the private sector company or consortium to obtain certain approvals; approvals that may be required of the PPP corporate vehicle for the design, financing, operation and maintenance of the project must be issued in the name of such vehicle (art. 20 of Statute 3389/2005).

Relevant government authorities

In the field of telecommunications and postal services, the National Committee for Telecommunications and Postal Services (Statute 2867/2000) shares authority with the Ministry of Transportation and Telecommunications. Both industries have been liberalised discontinuing long-standing state monopolies and opening up competition to several new providers in all sub-sectors of these industries (e.g. mobile telephony, fixed telephony, courier services etc).

In the energy field, the Regulatory Authority of Energy (RAE) shares regulatory responsibility with the Ministry of Development. By and large, the Ministry has the last word on most licensing matters while RAE retains a predominantly advisory role. Production and supply of electricity have now been fully liberalised, in accordance with the EU electricity directives, but true competition is yet to enter the Greek market. Unlike generation and supply, transmission and distribution of electricity have been designated as natural monopolies. As far as the natural gas market is concerned, it has been recently developed in three urban centres (i.e. Athens, Thessaloniki and Thessaly). The market of petroleum products has been fully liberalised.

In the mining sector, several bodies are at play: (i) the Institute of Geological and Mineral Exploration; (ii) the General Directorate of Natural Resources at the Ministry of Development; (iii) the two Mines Inspectorates (for northern and southern Greece); and (iv) local Prefectures which grant most of the concession and leasing rights for the exploitation of minerals. Before the issue of an authorisation for the exploration or exploitation of mines, authorities such as the Archaeological Authority, the Hellenic Organisation of Tourism, and the military authorities give opinions on matters falling within their field of responsibility.

Chemical refining is supervised by the so-called General Chemical Laboratory of the State (a department of the Ministry of Economy).

In so far as ports are concerned, the Ministry of Merchant Marine is responsible for the organisation, management, maintenance and development of ports and port facilities, which are still all under state control. This is expected to change in the near future primarily through Public Private Partnership (PPP) arrangements.

In the water sector, the competent authorities are the Ministry of Development and the regional departments

for the Administration of Water Resources. Yet, other ministries may get involved depending on the use of water (e.g. the Ministry of Agriculture for agricultural purposes; the Ministry of Transportation for transportation purposes and so on). The sector is still largely controlled by the State and municipal authorities.

Fiscal treatment of foreign investment

In the past, Greece has enacted various laws to promote foreign investment. The most significant piece of such legislation is Legislative Decree 2687/1953 which provides certain incentives and protection of foreign capital to foster long term investment projects, especially in the infrastructure sector. Although Legislative Decree 2687/1953 has, from a practical point of view, become inactive in many respects, it has introduced general principles on the treatment of foreign investment which are still in force. Protection is provided in the form of:

1. Terms and conditions governing importation of foreign capital cannot be modified without the investor's consent.
2. International arbitration applies for the settlement of disputes between the investor and the Greek government.
3. Protection of a project's assets from expropriation.
4. Exemptions from taxes, contributions and duties imposed by local authorities and municipalities.

In addition to Legislative Decree 2687/1953, Greece has in recent years enacted various investment laws. The one currently in force is Statute 3299/2004 which introduces substantial and procedural changes to the regime of state aid to corporations and provides for various types of incentives (i.e. cash grants, leasing subsidies, tax relief and a cash grant for payroll expenses relating to employment created by an investment). The cash grant for payroll expenses covers a percentage of the total payroll cost of each new employment position, depending on the geographical area. The law was partially amended at the end of 2006 to be harmonised with the new regional aid map that will apply to the EU for the period 2007 – 2013.

The incentives available, based on the zone and category of investment are set out in Table 1.

The law provides medium-size enterprises with additional aid of up to 10% and small and very small enterprises with additional aid of up to 20%.

Table 1: Incentives available

Cash grant and/or leasing subsidy or cash grants for wages:

Investment	Zone A	Zone B	Zone C
Category 1	20%	30%	40%
Category 2	15%	25%	35%

Income tax exemption:

Investment	Zone A	Zone B	Zone C
Category 1	60%	100%	100%
Category 2	50%	100%	100%

In addition to Statute 3299/2005, a new law introducing Public-Private Partnerships (PPPs) was enacted in September 2005 (Statute 3389/2005). The law lays down the foundation for the active development of state-owned real estate and the more efficient provision of public goods and services through partnerships with the private sector.

Nationalisation and expropriation

Art. 106 of the Greek Constitution (para. 3) stipulates that:

"... a law may regulate matters concerning the takeover of enterprises or the compulsory participation therein by the State or other public bodies, if the said enterprises are of monopolistic nature or of vital importance to the development of national resources or have as their main purpose the rendering of services to society as a whole."

Such nationalisation or expropriation is rather a matter of the past and reserved for undertakings that, first, are either monopolistic or of a general interest to the entire society or vital for the development of the country's national resources; and secondly, they have run into such circumstances that the only way to rescue them and protect public interest is for the State to walk in. Nonetheless, in the period between 1975 and 1990, this constitutional option was sometimes abused as reflected in rulings of the European Court of Justice [e.g. ECJ C-19/90, ECJ C-381/89, ECJ C-441/93]. Be that as it may, Legislative Decree 2687/1953, which remains in force under article 107 of the Greek Constitution, provides that assets of undertakings which have been incorporated or substantially financed through foreign capital are excluded from any expropriation.

Foreign employee restrictions

Restrictions apply only to citizens of so-called third countries (i.e. non EU member states) and – for a transition period – to citizens of Bulgaria and Romania. According to article 15 of Statute 3386/2005 on the arrival and domicile of foreigners, non-EU citizens who wish to be employed in Greece must first enter into an employment agreement with a Greek employer, and then obtain both an employment visa and a residence permit. Article 17 of the same statute provides that board members, administrators, executives and clerical staff who are not citizens of an EU member state are granted a residence permit if their employer has set up a subsidiary or a branch in Greece. This permit is granted initially for a period of up to one year and may be renewed for subsequent two-year periods.

Title to natural resources

Minerals found in the ground are not the property of the land owner. Statute 210/1973 ('Mining Code'), as amended by Statute 274/1976, provides that the right to explore and produce minerals can only be granted by the State through a concession agreement according to the provisions of the Mining Code. Special rules, however, may apply to certain minerals (e.g. lignite). In the case of lignite, the right to explore and exploit belongs exclusively to the State which to date has assigned this right at no cost mainly to the Public Power Corporation (PPC), the formerly vertically integrated electricity undertaking.

Ownership of hydrocarbons is vested in the Greek state. Under Statutes 2289/1995 and 367/1976, the State has the right of research, exploration and production for all hydrocarbons reservoirs within the Greek territory, whether onshore or offshore. When those reservoirs are on private land, the State has the right to expropriate such properties for the need of exploration and production of oil or natural gas. It is provided that both surface and subsurface mineral rights on private properties may be expropriated for such purposes.

In accordance with the Greek Civil Code, streaming water (e.g. rivers), water in the ground, fountains and lakes are for common use, and belong to the State. However, small artificial lakes situated in private properties belong to the land owner, and water supply reservoirs belong to the Municipality or Prefecture where they are situated.

Exploration and exploitation activities related to natural resources may be performed by a legal or natural person

residing in any member state of the EU. Exploitation rights may be granted to a non-EU natural or legal person only following an approval of the Ministerial Council.

Royalties on the extraction of natural resources

In the hydrocarbons sector, Statute 2289/1995 provides that royalties are payable to the State for hydrocarbons (mainly oil) exploration and production. The State may opt between two types of concession contracts: a leasing contract or a contract for production sharing. Statute 2289/1995 provides that the concessionaire is subject to a special income tax of 40%. The imposed tax is calculated on the net income of the concessionaire as accrued from the activities of prospecting, exploring and exploiting hydrocarbons. Statute 2289/1995 (e.g. arts 8 and 9) and Presidential Decree 127/1996 set out a complex system of revenue classification and expense allowances as well as various exemptions from customs duties.

The Mining Code sets out the maximum royalty at 6% of the selling price of the crude minerals or 2% of the selling price of the processed mineral. The royalty can be paid in cash or in minerals, as decided by the State. The concessionaire is subject to a tax of 5%, and this is calculated by the competent Minister or Prefect.

Security rights

The following types of collateral are available to project finance transactions:

1. Hypothecs and hypothec prenotations on immovable property (land, buildings and flats).
2. Preferred ship mortgage and ship hypothec over ships.
3. Pledge on moveable tangible property (e.g. industrial equipment) and negotiable instruments (e.g. securities, shares etc.).
4. Pledge on intangible property (i.e. receivables, intellectual property rights, patents, trademarks etc).
5. Pledge on bank accounts.
6. Guarantee – pursuant to a contract of guarantee, the guarantor promises to pay a creditor in case the debtor defaults.

Applicable law

PPPs and public contracts are typically governed by Greek law. Project agreements not involving the public sector may be governed by the law the parties choose to the extent that this is permissible. This may not be the case,

for instance, with certain employment matters and security rights. Greece is a party to the 1980 Rome Convention on the law applicable to contractual obligations.

Financing agreements are usually governed by Greek law, yet foreign law (most notably English law) may sometimes be chosen depending on whether the financing institutions are domiciled in Greece or not.

Jurisdiction and waiver of immunity

According to Council Regulation (EC) No 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, the parties may by agreement confer jurisdiction upon a court or courts of a Member State to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, provided:

- the agreement conferring jurisdiction is in writing or evidenced in writing or is in a form which accords with practices which the parties have established between themselves or in a form which accords with a usage which is widely known in trade or commerce; and
- it is not contrary to special provisions applying to insurance matters, consumer contracts and employment contracts or to the exclusive jurisdiction of the courts pursuant to art. 23, that is in relation to proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property or the validity of the constitution, the nullity or the dissolution of companies or the validity of entries in public registers.

The Regulation applies to specific matters of a pecuniary nature and excludes revenue, customs or administrative matters, bankruptcy, winding-up, judicial arrangements, compositions and analogous proceedings, the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession, social security and arbitration.

Under general rules of procedure (arts 3, 42 *et seq.* Code of Civil Procedure) the parties may elect to submit their disputes to a foreign jurisdiction provided the subject-matter of the dispute is of a pecuniary nature, there is specific reference to the competent foreign court or it can at least be identified according to the procedural rules of the foreign jurisdiction, the choice of the foreign

court is the outcome of free negotiations and does not depend upon the discretion of one of the parties. If the agreement refers to disputes that may arise in the future, the agreement must be in writing. Otherwise, the agreement can be oral, express or implied, unless it derogates from the exclusive jurisdiction of the competent Greek court, in which case it must be express. The agreement is not valid if the recourse to the foreign jurisdiction is impossible and results in denial of justice, e.g. where the foreign courts refuse to hear the case because under their procedural rules they do not have jurisdiction or where the decision will not be recognised in Greece.

Submission to a foreign jurisdiction may also be tacit if the defendant makes an appearance without challenging the jurisdiction of the foreign court.

Waiver of immunity is effective provided it is express. Immunity is mainly enjoyed by states for acts of government, i.e. acts exercised as part of the sovereignty of a state (*iure imperii*) and not for acts of commercial nature (*iure gestionis*). However, in the latter case the state may also enjoy immunity if judicial proceedings would harm its sovereignty rights or reduce its independence and dignity. Waiver of immunity as a jurisdictional bar may not include execution proceedings for which special waiver may be required.

International arbitration

International Commercial Arbitration is governed by Statute 2735/1999, which transposed the UNCITRAL rules into national law. Its scope covers any commercial dispute or a dispute of an economic nature. The provisions of Statute 2735/1999 are applicable when the place of the arbitration is in Greece. Investment disputes are governed by Statute 608/1968 which ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).

Disputes that are automatically referred to arbitration are those referring to the protection of foreign investments pursuant to Legislative Decree 2687/1953.

Greece is a party to several international conventions dealing with civil procedural matters, both multilateral and bilateral. Greece is a party to the two Geneva Conventions on Arbitration of 1923 and 1927, and the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, but not the European Convention on Commercial

Arbitration of April 21, 1961. The Geneva Convention of 1927 and the New York Convention of 1958 are quite frequently applied by Greek courts.

Labour disputes are explicitly excluded from arbitration and so are family law matters.

Article 903 of the Code of Civil Procedure governs the recognition, whereas art. 906 governs the enforcement of foreign arbitral awards. Recognition of foreign arbitral awards can be recognised in Greece if the following conditions are met:

1. The arbitration agreement on the basis of which the arbitral award was granted is valid under its governing law.
 2. The subject matter of the award is arbitrable under Greek law.
 3. The award cannot be challenged by any review or other legal remedies.
 4. The party on which the arbitral award was imposed has not been deprived of its right to defence during the arbitral proceedings.
 5. The foreign award is not contrary to a domestic judgement binding the same parties to the same cause of action.
 6. The award is not contrary to the Greek public order.
- A foreign arbitral award may be executed in Greece upon being declared enforceable; the prerequisites for enforcement are the same as those required for recognition.

A concluding note

Following enactment of Statute 3389/2005 on Public Private Partnerships, PPP projects are expected to dominate the Greek economy in the next few years together with the many energy projects for the construction of gas-fired power plants, wind farms and photovoltaic sites which are now in the pipeline.

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