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Greece: Trends & Developments

Gregory Logothetis, Ioannis Kaptanis, Manolis Kasotakis and Athina Xinopoulou
Koutalidis Law Firm

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Trends and Developments

Contributed by:
Gregory Logothetis, Ioannis Kaptanis, Manolis Kasotakis and Athina Xinopoulou
Koutalidis Law Firm see p.6

Introduction

For the past two years, the impact of the COVID-19 pandemic has been the centre of attention, attracting huge public interest and causing massive changes to various aspects of people's lives. The legal order came under extreme pressure to cope with these unprecedented conditions by introducing a series of adaptations in order to ensure social distancing and remote communication in an environment used to traditional physical presence.

Every cloud has a silver lining, however. The impact of COVID-19 proved to be a key factor in expediting the measures necessary to lead into a new digitalised era of legal procedures. Long-delayed initiatives were finally implemented within a relatively short period of time, thereby paving the way for an alternative, more efficient and tech-oriented approach to traditional concepts. Examples include the introduction of remote hearings, the digitalised submission and/or service of judicial documents, and the widespread use of electronic signatures for signing documents.

After almost two years of restrictions, society was more than ready to exit the pandemic and return to normality, while retaining only the useful outcomes of such an experience. At that point in time, however, the Russian–Ukrainian war struck and shifted the balance once again in multiple ways, introducing yet another period of global uncertainty. It quickly became apparent that the world was facing a fresh challenge in the form of a serious energy crisis. Naturally, an event of such magnitude would also have repercussions in the field of law.

Adjustment Clauses in Power Supply Contracts

The global energy crisis has been impacting the international community for more than a year now – with Europe being forced to deal with the Russian invasion of Ukraine, which creates a new wave of diverse effects and complications around the energy sector. Prices for electricity, oil and natural gas have abruptly spiked, largely as a consequence of Europe's dependence on Russian gas.

In Greece, the first arena in the legal environment to experience the impact of the energy crisis resulting from the war was – as expected – the field of energy law. The main issue to arise primarily concerns the so-called adjustment clause. The adjustment clause is a means of calculating the charges for electricity consumption, designed to reflect the impact of fluctuations in the price of electricity production. Technically, it is based on the imposition of a "basic charge" per kilowatt-hour (kWh), which is linked with the "Day-Ahead Market Price" (DAM) – ie, the MWh price set at the end of trading for the orders of the previous day.

The issues that have arisen in relation to such adjustment clauses are twofold. The first concerns how transparent such clauses are from an average consumer's point of view; in other words, whether such clauses are drafted in a manner that enables the average consumer to

understand the variables included therein that result in the consumer being charged for the provision of the relevant service. The second aspect is whether such clauses entitle electricity suppliers to unilaterally intervene in the contractual balance to a certain extent, in order to amend the charges agreed in a manner that reflects the market fluctuations resulting from the energy crisis.

Consumer unions have already challenged the validity of such clauses before the ordinary courts. In this regard, the Athens Multi-Member Court of First Instance has granted a provisional order in response to requests from consumer unions – the effect of which extends until a decision is reached on the key issue of the clauses' validity. According to such provisional order, suppliers may not cut off power in vulnerable households owing to non-payment of the additional charges incurred by the application of the adjustment clause.

Nonetheless, the Public Power Corporation (PPC) (the leading power supply company in Greece) has requested the Supreme Court to hold a pilot trial on the matter – presumably in order to expedite things, avoid a scenario in which contradictory decisions are issued by lower courts, and thus reduce its exposure to risks arising from use of the adjustment clause. The Supreme Court stuck to a more literal interpretation of the relevant legal provision permitting such pilot proceedings and rejected the request. However, more on this point of public interest will no doubt follow, as the PPC is highly likely to appeal the first instance judgment.

Meanwhile, in response to immense social pressure, the legislator was forced to take action. Specifically, by virtue of Article 138 of the recently enacted Law 4951/2022, adjustment clause charges or any other relevant clause ceased being applied to floating electricity supply tariffs from 1 August 2022 until 1 July 2023 – with a governmental discretion to either extend or curtail this period.

Furthermore, the same Article (as amended by Law 4964/2022) imposes the obligation on electricity suppliers to publish the fixed charges and the electricity supply charges for power and energy applicable to the above-mentioned tariffs in a clearly visible space on their websites by the 20th day of the month before the month in which said charges are due to be applied.

What is also of particular interest is the fact that, as a consequence of the variation in the supply charges, consumers were vested with the right to switch to another electricity supplier or select another category of supply invoice – without giving rise to any right to compensation of the supplier for early withdrawal.

Although the energy crisis and its impact on energy law in particular has been the focus of interest during the past few months, ultimately it must be noted that energy law is not the only field of law to experience the results of the Russian invasion. The energy crisis has led to a significant increase in prices for the vast majority of consumer products and services. Such an unforeseeable increase can be expected, with mathematical certainty, to result in the need for review and possibly readjustment of a large number of contractual relationships that were entered into before the war. Issues that were raised during the COVID-19 pandemic – in relation to the application of hardship or force majeure clauses, unforeseeable change of circumstances and inability to perform – will arise again. This time, however, it will be as a consequence of the war.

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Law 4967/2022 and the Reform of Greek Civil Law

In September 2022, the Greek Parliament enacted Law 4967/2022 on contracts for the supply of digital content and services as well as on contracts for the sale of goods. Law 4967/2022 transposed EU Directives 2019/770 and 2019/771 of the European Parliament and the Council into Greek law, thereby bringing about noteworthy amendments to the Greek Civil Code (GCC) – particularly with regard to sales law.

As per the official explanatory memorandum of the new law, the legislation's primary aim is to adapt private law to the requirements of modern transactions in the provision of digital content and digital services. Success in this field will hopefully establish certainty and security in such transactions, thereby helping to pave the way for the digital economy to grow unimpeded.

Notably, as a result of the amendments brought by the new law, the provision of digital content or services is introduced for the very first time in the Greek legal order.

By virtue of these newly entered provisions, the standing rules that govern every sales agreement shall now also apply to contracts for the supply of digital content and digital services (Article 513A of the GCC). Besides that, the obligation of the seller to deliver an item that conforms to the terms and provisions of the sale contract is set explicitly as per Article 534 of the GCC. Additionally, Articles 535A and 535B GCC outline certain criteria, according to which the subjective and objective requirements for compliance with the sale contract shall be deemed fulfilled.

Article 538 of the GCC places further emphasis on the digital aspects of a sale contract by stipulating that, in the case of goods with digital elements, the seller must ensure that the consumer is informed of and supplied with updates (including security updates) that are necessary to keep those goods in conformity. It explicitly underlines that this obligation shall remain valid for as long as the buyer is reasonably entitled to expect such updates or where the sale contract provides for a continuous supply of updates for the whole period this obligation remains active.

In a novel departure from the previous regime, it must be noted that liability of the seller now extends to the sale of goods with digital elements under the new provisions. Furthermore, in the event that the goods do not confirm to the specific qualities and requirements provided by the sale contract, Article 539 of the GCC introduces a regime of strict liability (irrespective of the existence of any fault on behalf of the seller).

Finally, as per Article 554 of the GCC, new specific provisions have been introduced with regard to the statute of limitation on claims arising from defective goods with digital elements.

Draft Bill on International Commercial Arbitration

In the field of dispute resolution, the long-awaited draft bill on international commercial arbitration, which had been taking shape since September 2020, was presented by the Minister of Justice to the cabinet and opened for discussion and comments on the expected amendments to the currently effective Law 2735/1999 that regulates international commercial arbitration in Greece. Back in 1999, this particular law enacted the UNCITRAL Model Law, which had been embraced by many countries globally.

The new draft bill mainly strives to correct the errors of Law 2735/1999, as well as modernise

the standing provisions. Up until now, the applicability of Law 2735/1999 required at least one element of the case to be foreign to the Greek legal system – for example, the applicable law selected by the parties should be Swiss law. That said, it was common in domestic cases for the parties to invoke the existence of supposedly foreign elements, for the purpose of circumventing the provisions of the Greek Code of Civil Procedure that apply to domestic arbitrations. The draft bill addresses this issue by offering the parties the option/discretion to choose that the provisions of the new law on international commercial arbitration are enacted to govern their dispute.

In aiming to favour arbitration, the draft bill starts from two key presumptions: the presumption of arbitrability and the presumption of validity. The former suggests that every dispute is arbitrable unless the law forbids it, whereas the latter states that the arbitration agreement is valid as long as it fulfils the requirements of at least one of the following laws:

- the law the parties subjected the arbitration agreement to;
- the law of the seat of the arbitration; or
- the law governing the parties' essential agreement.

Both the above-mentioned rules mark significant progress towards making arbitral proceedings in Greece more attractive and functional.

Conflicting Judgments of the Supreme Court Call for Legislative Regulations

In the space of a few months, the Supreme Court has issued contradictory judgments on the subject of the standing of loan servicing companies to initiate auction proceedings with regard to real estate while acting as assignees of funds that have purchased non-performing loans via a securitisation of receivables pursuant to Law 3156/2003 (rather than pursuant to Law 4354/2015 on non-performing loans). This issue has arisen following a recent Supreme Court decision (No 822/2022) that prohibits real estate auctions by loan servicing companies, although Supreme Court judgments No 1102/2022 and 1343/2022 explicitly permit such course of action. Needless to say, this situation has caused significant confusion.

At present, two scenarios qualify as possible. The first suggests the Ministry of Finance is rather likely to bring an amendment to Parliament that will specifically address this matter and clarify that loan servicing companies legitimately act on behalf of SPVs that were created during loan securitisations. The second one, on the other hand, discusses whether the matter should be resolved by the Plenary Session of the Supreme Court.

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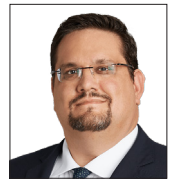
Koutalidis Law Firm

Koutalidis Law Firm is situated in Athens and consists of 60 partners and associates. The firm has recent and current experience of handling a large volume of high-value and complicated court cases before all levels of the Greek judicial system – in addition to a significant number of arbitrations (either institutional or ad hoc), most of which are international and involve enforcement proceedings. The arbitration, litigation and mediation department at Koutalidis Law Firm counts a number of major companies among its key clients, including Hochtief, Vinci, Tecnimont, Invensys, Aegean Motorway, Fraport Greece, Aegean Airlines, Deutsche Bank, Alpha Bank, National Bank of Greece, Cyprus Popular Bank, ANEK, Netcompany-Intrasoft and the Hellenic Republic Asset Development Fund. The firm also provides services for major pharmaceutical companies/distributors such as Genesis Pharma and Jakovides Hellas, as well as shipping and industry magnates.

Authors

Gregory Logothetis is a partner at Koutalidis Law Firm and head of its arbitration, litigation and mediation department. He is an attorney qualified before the Supreme Court who has acted as head of the Procurement and Contracts Department of the Public Power Corporation for several years, where he is still active as senior counsel. Gregory's particular focus is in construction, civil, commercial and administrative law disputes (including enforcement proceedings) and he has extensive experience in arbitration and complex litigation as counsel and arbitrator. He is a member of the Piraeus Bar Association, the International Bar Association, the DIS Arbitration Council and the International Chamber of Commerce Hellas.



Ioannis Kaptanis is a partner at Koutalidis Law Firm and a member of its arbitration, litigation and mediation department. He is an attorney qualified before the Supreme Court who specialises in construction and civil, commercial and administrative law disputes (including enforcement proceedings) – with a particular focus on disputes arising from major projects and concession agreements – as well as banking litigation. Ioannis is a member of the Athens Bar Association and has studied at the University of Athens, where he obtained his LLB, Master's in civil law and PhD in civil law.

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Koutalidis Law Firm

Manolis Kasotakis is a senior associate at Koutalidis Law Firm, and an attorney qualified before the Court of Appeals. A member of the Athens Bar Association, he has significant experience in arbitration (national and international, particularly under the ICC, LCIA, UNCITRAL and LMAA Rules) and commercial litigation.

Athina Xinopoulou is a senior associate at Koutalidis Law Firm and an attorney qualified before the Court of Appeals. A member of the Athens Bar Association, her main focus is in arbitration and commercial litigation. Athina studied at the University of Athens (LLB, 2006, and LLM, 2008) and the University of Tübingen (PhD in civil law, 2012).

Koutalidis Law Firm

115, Kifissias Avenue (The Orbit)
GR-11524
Athens
Greece

Tel: +30 210 360 7811
Fax: +30 210 360 0069
Email: info@koutalidis.gr
Web: www.koutalidis.gr

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