Construction Contracts Within the Framework of PPP / Concession Projects – A Legal Overview (From a Greek Law Perspective)

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Concessions / PPP Projects – General overview

Under a typical PPP (Public – Private Partnership) structure¹, the Awarding Authority / Grantor (“the Grantor”) executes the Project Agreement with the Project Company, which is a Special Purpose Company (SPC) consisting of the members of the Successful Tenderer (hereinafter referred to as the “SPC” or the “Project Company”). By virtue of the Project Agreement, the SPC undertakes all rights and obligations in relation to the design, construction, financing, operation and maintenance of the Project in accordance with the terms of the Project Agreement. When the project is a “concession”², the main consideration of the SPC consists in the right of exploitation of the Project, namely in the right to charge end users for the use of the project (e.g. in toll motorways). In other PPP structures, the SPC receives annual payments (availability payments) from the Grantor which are linked to the availability of the project and achievement by the SPC of certain performance standards, however the majority of risks lies with the SPC. For instance, in case of failure to meet certain standards (as these are set out in the Project Agreement), the SPC suffers performance deductions.

Within this context, the Project Company is the one to secure the financing of the project mainly through bank debt (the exact ratio of bank debt and equity being dictated by the lending banks). Bank debt is to be provided on a non-recourse or limited recourse basis, whereby the lenders take security over the assets of the Project Company and the project with no recourse / or limited recourse to the shareholders of the Project Company.

The Project Company sub-contracts the construction of the project works to a constructor (hereinafter referred to as “the Contractor”), usually a construction joint venture with joint and several liability of its members.

Sub-contracting of the construction of the project to the Contractor does not affect in any way whatsoever the liability of the Project Company towards the Grantor under the Project Agreement. Furthermore, the Project Company remains the single point of responsibility as well as single point of contact towards the Grantor. In view of the above, it is very important for the SPC to effectively pass all construction risks to the Contractor so as to remain as risk-neutral as possible (with regard to construction).

² For the definition of concession and more specifically public works concession, please see article 1 of clause 1 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the co-ordination of procedures for the award of public works contracts, public supplies contracts and public services contracts, whereby “public works concession: is a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the works or this right together with payment”.

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The Greek market for concessions / PPP

A significant number of major infrastructure projects in Greece are being implemented through a concession scheme. Typical examples of such projects are: Attiki Odos (Athens Ring Road), Athens International Airport, Rion – Antirrion Bridge, Maliakos Kleidi Motorway, Elefsina – Korinthos – Patra – Pyrgos – Tsakona Motorway, Ionia Odos Motorway, Korinthos Tripoli Kalamata Motorway. The above projects are being performed by consortia consisting of major international contractors in collaboration with Greek construction companies.

Furthermore, Greece has recently introduced specific legislation on Public – Private Partnerships (Law 3389/2005) and thereafter has launched a big PPP / PFI programme for the implementation of a number of projects (hospitals, schools, accommodation, etc) through PPP schemes.

Documentation in the above-mentioned projects is based on international standards, as adjusted to reflect particularities of the Greek legal system.

Main characteristics of Construction Contracts in PPP structures

Back-to-back principle

The main characteristic of construction contracts within the context of a PPP Project / concession is the so-called “back-to-back” principle. This means that the Contractor assumes as part of its obligations under the Construction Contract all the obligations relating to the construction works imposed on the Project Company under the Project Agreement. The Contractor undertakes to perform its obligations under the Construction Contract in such a manner to enable the SPC to perform its obligations in respect of the works under the Project Agreement and so that no act, omission or default of the Contractor will constitute, cause or contribute to any breach by the Project Company of its obligations under the Project Agreement.

This means that the risk allocation between the Grantor and the Project Company under the Project Agreement to the extent relating to the construction works is reflected in the Construction Contract, whereby the Contractor undertakes the risks attributed to the Project Company under the Project Agreement (to the extent relating to the construction works).

Should the parties agree that certain construction risks and obligations under the Project Agreement are excluded from the scope of works of the Contractor, this is to be specifically stated in the Construction Contract. A common exclusion is, for instance, heavy maintenance of the construction works, which usually stays with the Project Company. In some projects, the parties also negotiate the exclusion of the Contractor’s liability for latent defects (especially in relation to works that are not constructed by the Contractor but are part of the Project pursuant to the Project Agreement).

Under construction contracts governed by Greek law, the (explicit) incorporation of the back-to-back principle as a general clause in the Construction Contract is sufficient for its effective application, there is namely no need to incorporate each any every clause of the Project Agreement relating to construction in the Construction Contract (as per the UK practice) in order to ensure that the back-to-back principle is applicable. However, the Contractor explicitly acknowledges that it has full knowledge of the Project Agreement.

In addition to the provisions of the Project Agreement, the Contractor is usually requested to declare full knowledge of certain other agreements entered into by the Project

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3 Greek law belongs to the civil law legal family.
Company (e.g. certain financing agreements, operation and maintenance agreement, independent engineer, etc – together with the Project Agreement usually referred to as “Relevant Agreements”) and is aware of the obligations risks and liabilities of the Project Company there-under.

**Lump sum – fixed price contract**

Another characteristic of construction contracts within the context of PPP Projects / concessions is the nature of the contract as “lump sum – fixed price”. In consideration of the performance of the construction works, the Contractor is entitled to a lump sum price, which includes all risks, costs, fees and duties relating to the construction works, including the remedy of any defects. The contract price remains valid for the whole duration of the Contract and can only be amended in the cases specifically stated in the Construction Contract.

The nature of the contract as “fixed price” is a pre-requisite for the bankability of the project, as the funding requirements of the project need to be fixed in advance.

In view of the above, the Contractor is requested to expressly acknowledge that it has satisfied itself as to the correctness and sufficiency of the Contract Price, thus waiving any rights to claim for increases (unless otherwise specifically agreed under the Construction Contract).

Therefore, any grounds for price adjustment are always extensively negotiated between the Project Company / Lenders on the one hand and the Contractor on the other.

Typical exceptions that are considered as acceptable under standard market practice are:

- Variations requested by the SPC or the Grantor
- Compensation Events (i.e. entitlements to monetary compensation) provided for in the Project Agreement to the benefit of the SPC
- [Material] breaches of the Construction Contract by the SPC.

**Design and Construction or just Construction?**

In many projects, the Contractor undertakes full responsibility for the design of the project, such contracts being described as “Design and Construction Contracts”. By virtue of a “Design and Construction Contract”, in addition to construction, the Contractor undertakes all risks and obligations of the SPC under the Project Agreement with regards to design. The Contractor may sub-contract the design to the external designers, but retains full responsibility for the development of the design. The Contractor shall ensure that the designer maintains sufficient professional liability insurance.

In other cases, the design is provided by the SPC (or the Grantor), meaning that the SPC / Grantor may retain some design risk, the development of the design however is shifted to the Contractor.

**Joint and several liability of the members of the Construction Joint Venture**

The Contractor is usually an unincorporated joint venture, whose members are jointly and severally liable towards the SPC and the Lenders. In a number of projects, the members of the construction joint venture are the shareholders of the SPC or the construction affiliates of the shareholders of the SPC (this is the case in the major concession projects in Greece), there may be projects however, where the major shareholder in the SPC is an investment fund.
The joint and several liability is a significant security for the SPC and its lenders, as they can claim against any of the members (at their absolute discretion) in relation to the performance of the works by the Contractor.

As to their internal relationship (e.g. in the constitutive document of the joint venture), the members of the joint venture try to limit their liability to their percentage participation in the construction joint venture, however such internal arrangements are only applicable in their internal relationship and do not affect in any way whatsoever the joint and several liability of each member towards third parties.

Under Greek law, a joint venture has no legal personality but only tax personality. Consequently, the Construction Contract is signed by both the joint venture (as autonomous tax entity) and its members. Similarly, any lawsuits are to be addressed to both the joint venture and its members.

**Independent Engineer**

In big projects (including in Greece), the Construction Contract is usually administered / supervised by an Independent Engineer (a highly reputed international firm of engineers) who is approved both by the Grantor and the Lenders (owing a duty of care to the latter). The Independent Engineer, among others, certifies all payments to the Contractor by issuing payment certificates, issues the defects liability certificates, certifies events of default, acts as adjudicator.

**Typical legal issues raised during negotiations of Construction Contracts**

Although the construction contract documentation has been standardized to a significant extent, negotiations between the SPC and the contractors are usually very hard as it is not always easy to find a mutually beneficial agreement given the distinct interests of the two sides: On the one hand, the Project Company seeks to flow (ideally) all construction risks down to the Contractor and protect itself against claims and on the other hand, the Contractor seeks to shift certain risks that it is not in a position to control to the Project Company and reserve certain rights to claim.

Given the back-to-back principle, it is much easier to reach an agreement when the underlying agreement, namely the Project Agreement, provides for a fair risk allocation between the Project Company and the Grantor.

A few typical issues that are being extensively discussed during the negotiations of the Construction Contract are the following:

**Equivalent Project Relief**

“Equivalent Project Relief” is a fundamental principle in Construction Contracts within the framework of PPPs / concessions. This principle ensures that there is no funding shortfall for the SPC and is a fundamental conditions for the bankability of the project.

A typical “Equivalent Project Relief” (EPR) clause provides that, where the Contractor claims any sum of money, extension of time or other relief or benefit which is the same (or substantially the same or similar) to an equivalent entitlement of the SPC from the Grantor, the Contractor will only be entitled to receive from the SPC the relevant benefit (sum of money, relief, extension of time, etc) to the extent that it is agreed or determined under the Project Agreement that the SPC is entitled to receive from the Grantor the said benefit and only receive such benefit to the extent and at the time at which the SPC actually receives such benefit under the Project Agreement.

As a matter of Greek law, such a clause is valid and enforceable and has not raised any concerns from a legal point of view.
Given that, pursuant to EPR, the entitlement of the Contractor to a benefit emanating from the Project Agreement is dependent on the actual receipt of the said benefit by the SPC under the Project Agreement, the Contractor usually requests that the SPC is under an obligation to pass an EPR claim to the Grantor (unless such claim is frivolous or vexatious) and keep the Contractor involved in the process. Furthermore, the Contractor would often seek to clarify in the Construction Contract that, in case the SPC’s entitlement is diminished or extinguished as a result of wilful default or gross negligence of the SPC of its obligations, then the said entitlement will be deemed for the purposes of the Construction Contract as not have been so diminished or extinguished.

**Penalties and liquidated damages for delay**

The timely completion of the works is crucial for the SPC. The Project Agreement usually provides for penalties or liquidated damages for late completion as well as for an SPC Event of Default in case of failure to achieve completion within the agreed time limits. Timely completion is a major issue for the Lenders as well. The latter usually wish to impose a shorter deadlines for completion than those set out in the Project Agreement so that they can step-in and rescue the project before the Grantor is entitled to terminate the Project Agreement by reason of late completion, while there are always SPC Events of Default under the Finance Documents relating to late completion. Furthermore, even at an earlier stage (i.e. before a termination event is triggered), a potential late completion may entail significant costs and losses for the SPC, such as increased financing costs, late commencement of operation (and thus loss of revenue) etc.

In view of the above, a Construction Contract always includes penalties and / or liquidated damages for late completion. The size of the said penalties / liquidated damages takes into account any penalties / liquidated damages imposed by the Grantor to the SPC in connection with late completion of the works as well as a pre-estimate of losses of the SPC as a result of late completion, e.g. financing costs, loss of revenue, etc.

Please note that, in order to effectively deal with late completion, the SPC may chose among penalties and liquidated damages, such choice depending on the governing law of the Construction Contract.

Under Greek law, for instance, there is a clear differentiation between penalties and liquidated damages.

Penalty clauses (contractual penalties) are valid and enforceable under Greek law and are expressly regulated in the Greek Civil Code (articles 404 - 409).

More specifically, pursuant to article 404 of the Greek Civil Code, the parties may agree on the payment of a penalty sum in case the debtor does not perform or improperly performs an obligation. The penalty is forfeited if the debtor fails to perform (for a reason attributed to it) or the debtor is in default. Please note that, in the above case, the penalty is forfeited even if the creditor (i.e. the SPC in the case at issue) has not actually suffered any damage (see article 405).

The payment of a penalty does not exclude any further claims for actual damages. Articles 406 – 407 of the Greek Civil Code expressly provide that the creditor (i.e. the SPC in the case at issue) is entitled to claim for “further proven damages” over and above the penalty amount.

Furthermore, please note that the size of a penalty may be challenged before the competent court by the debtor if it is excessive, as article 409 of the Greek Civil Code expressly provides that “if the agreed penalty is disproportionately high, the court may decrease it to the appropriate size following relevant request by the debtor. Any agreement to the contrary is null and void”.
The notion of penalties in case of delay in completion is provided for in the Greek legislation for public works, therefore, Greek concession contracts often provide for a certain amount of penalties for each day of delay in completion. The said penalties, to the extent they are related to delay in construction attributable to the Contractor, are flowed down to the Contractor by virtue of the relevant Construction Contract. The liability of the Contractor for penalties is usually capped.

Notwithstanding any such penalties however, the SPC and the Contractor usually agree on the payment of liquidated damages (i.e. pre-estimate of the amount of damages / compensation which will be payable in the event of breach of contract, including delays) in case of delay in completion, in line with international standard practice in the PPP market.

Construction Contracts usually provide that the payment of liquidated damages by the Contractor is in full and final settlement of all claims related to late completion. The amounts of liquidated damages are calculated by taking into account the losses and additional costs of the SPC as a consequence of the Contractor’s delay. However, the Contractor’s liability for payment of liquidated damages is always capped.

As far as Greek law is concerned, neither the Greek legislation on public works nor the Greek Civil Code include any specific provisions defining or otherwise regulating liquidated damages. Therefore the validity of liquidated damages under Greek law is to be examined in the light of general principles of Civil law, and more specifically contractual freedom (article 361 Civil Code) and limitations of liability (see detailed analysis on limitation of liability below), given the fact that liquidated damages operate as an upper ceiling as regards liability for compensation. Contractual provisions on liquidated damages payable by the Contractor in case of delay are valid under Greek law, subject to the mandatory Civil Code provisions on limitation of liability and the fundamental principles of Civil law (e.g. abuse of right, nullity in case of contradiction with the requirements of good faith and “bonos mores” etc under articles 178, 179, 281,288 of the Greek Civil Code).

Last but not least, the term “liquidated damages” implies that the beneficiary has incurred actual damage (in contrast to penalties). Similarly, one could argue that they also presuppose fault on the part of the obligor. Therefore, a fair request of the Contractors is to clearly state in the Contract that liquidated damages are not due when the Contractor’s delay is excused in accordance with the terms of the Contract (e.g. entitlement to extension of time due to a relief event, including force majeure).

**Force Majeure and Relief Events**

In line with the back-to-back principle, the definitions of “Force Majeure”, “Relief Events” (whereby the Contractor is released from its obligations and liability) and “Compensation Events” (entitling the Contractor to monetary compensation) under the Construction Contract mirror the respective definitions in the Project Agreement. As afore-mentioned, any claim of the Contractor in connection with such events is subject to Equivalent Project Relief, meaning that the relevant entitlement of the Contractor is subject to the respective entitlement of the SPC under the Project Agreement.

In addition to the above, Construction Contracts often provide for an additional relief event / compensation event (over and above those set out in the Project Agreement) in relation to material breaches by the SPC of its obligations under the Construction Contract, being understood that the relevant claims of the Contractor are not subject to Equivalent Project Relief.
Concessions / PPP Projects

Fitness for purpose

One issue that lawyers of the Project Company and the Contractor often fight over when negotiating design and construction contracts is the inclusion (or exclusion) of a “fitness for purpose” obligation. The Contractor’s acceptance of a “fitness for purpose” obligation effectively means that the Contractor is guaranteeing that, once constructed, the works will meet certain requirements of the Project Company. As a consequence thereof, in case the completed works do not work as intended for any reason, the Project Company is entitled to claim against the Contractor without any need to demonstrate any negligence or fault on the part of the Contractor. Given that this may be an open-ended obligation on the Contractor, if such “fitness for purpose” obligation is accepted, the Contractor should ensure that the Contract specifically defines what the “purpose” of the works is in a very narrow and precise manner.

The Greek Civil Code does not specifically regulate “fitness for purpose”, but certain provisions on sales of goods and work contracts (applicable mutatis mutandis to works contracts) have an equivalent effect, for instance, if contractually agreed, there may be an obligation to guarantee certain “promised qualities” i.e. without any need to prove negligence / fault (see clauses 537 and 689 of the Civil Code).

Limitation of liability: Overall liability cap and exclusions thereof

The Contractor’s liability under the Contract is capped to a maximum amount, usually expressed as a percentage on the Contract Price.

Under Greek law the parties are, in principle, free to contractually limit in advance a party’s liability (on the basis the general principle of contractual freedom – article 361 of Greek Civil Code). The validity of such agreement, however, would be subject to certain restrictions by mandatory provisions of the law which expressly forbid limitation of liability on certain specific cases.

Pursuant to clause 332 of Greek Civil Code, any agreement which excludes or limits in advance liability for gross negligence and willful misconduct is null and void. Furthermore, clause 332 also stipulates that agreements that exclude liability (even for slight negligence) in advance are null and void on certain cases.

In view of the above, the (pre-agreed) liability cap does not apply in case of gross negligence and willful misconduct.

Nevertheless, the SPC and its Lenders seek to impose further exclusions from the liability cap on top of those imposed by mandatory legislative provisions (which are applicable event if they are not included in the contract). This is another topic giving rise to lengthy discussions when negotiating Construction Contracts.

Typical causes that the SPC / Lenders seek to exclude from the liability cap are the following:

- Amounts recovered or recoverable by the Contractor from insurances
- Rectification of defects (this may entail significant risk for the Contractor in case major latent defects arise)
- Indemnities paid to third parties
- Abandonment of the works over a pre-determined period of time (usually qualified and precisely defined)
- Payment of liquidated damages for delay (which are subject to a separate sub-cap)

It is in the best interest of the Contractors to minimize the list of exclusions from liability cap, make sure that the list of exclusions is exhaustive and that the relevant liability cap is
also applicable in case of termination compensation for Contractor default (given that, in such a case, liability may be quite substantial).

Defects Liability and Liability for Latent Defects

Construction Contracts provide for specific defects liability periods, starting as of the issuance of the relevant substantial completion certificate for the works.

The duration of the applicable defects liability periods is subject to negotiations between the parties, also taking into account any defects liability periods stipulated in the Project Agreement and any liability periods under the applicable law. In terms of international precedent, the duration of defects liability is usually in the range of 12-24 months. Furthermore, it is quite common to have different defects liability periods for each category of works (in case there are various types of works within the Contractor’s scope).

In Greek projects, “latent defects” are usually defined by reference to clause 692 of Civil Code, which refers to “defects that cannot be identified by regular inspection upon the handover of the works”.

Very often, the duration of the defects liability period is equal to the statutory limitation period for claims relating to defects (being 10 years under Greek law with regard to civil works).

During the applicable defects liability period, the Contractor is responsible for rectifying –at its own cost- any defects, as may be identified by the SPC or the Independent Engineer (as the case may be).

It is to the benefit of the Contractor that the Contract provides that, at the end of each defects liability period, the Independent Engineer will issue a certificate certifying that the relevant works are free from defects and that the Constructor has performed its obligations under this Agreement in respect of rectification of defects to the relevant Works.

Contractual relationship between the Contractor and the Lenders: The Contractor Direct Agreement and the Financing Documents as “Relevant Agreements”.

It should be noted that, although the Lenders of the Project are, in principle, contracting with the SPC only, there are a number of provisions in the Finance Documents that are directly and closely linked to the construction works. Given the principle of “privacy of contract”, the said provisions are not binding on the Contractor. Nevertheless, specific actions and consents may be needed on the part of the Contractor so that the security arrangements agreed between the Project Company and the Lenders are put into effect. Therefore, there is a need to establish a link between the Contractor and the Project Lenders. According to standard practice (also adopted in the Greek projects), this is done as follows:

- The Contractor is given copies of certain Financing Documents (or parts thereof) and is required to acknowledge (by explicit provisions in the Construction Contract) that it has full knowledge of the obligations and liabilities of the Project Company towards the Lenders in relation to the construction works and undertakes not to cause a breach of the said obligations by the Project Company.

- The Contractor is requested to enter into a Direct Agreement with the Lenders. As a minimum, the Direct Agreement ensures that, in case (a) the Contractor issues a termination notice under the Construction Contract due to default by the Project Company or (b) an Event of Default has occurred
and is continuing under the Financing Agreements and provided that (in both cases) the Lenders have stepped into the shoes of the Project Company (including in its relationship with the Contractor) in order to rescue the Project, the Contractor does not immediately terminate the Construction Contract but continues with the performance of the Construction Contract subject to certain conditions. The Contractor would then have as counterparty the Agent Bank together with the Project Company (on a joint and several basis) or in place of the Project Company (as the case may be). Thus the Lenders are capable of rescuing the Project in the event of Project Company default, by stepping in and ensuring continuation. The Direct Agreement – which is the outcome of negotiations between the Lenders and the Contractor – specifically regulates the Contractor’s rights to terminate under the above circumstances as well as the liability of the Lenders and the Project Company towards the Contractor in the event of step-in. Within the context of the Direct Agreements, the Lenders try to negotiate with the Contractor that the latter waives certain rights in the event of step-in, with a typical example the Contractor’s right of set-off, which is usually expressly agreed upon in Construction Contracts. From a Contractor’s point of view, it is advisable that the Contractor resists any request to waive any rights already agreed upon under the Construction Contract.

Security package

The performance by the Contractor of its obligations under the Construction Contract is typically secured by a number of bonds / letters of guarantee (letters of guarantee in the Greek projects).

In a typical concession / PPP project, the following bonds / letters of guarantee are in place to the benefit of the Project Company:

- Performance Bond / Good performance Letter of Guarantee: This is the main security for good performance. The amount of the letter of guarantee / bond is expressed as a percentage of the Contract Price (as negotiated with the Project Lenders).
- Advance Payment Bond / Letter of Guarantee. This is relevant where the Contractor receives an advance payment from the Project Company in order to cover mobilization and other costs
- Retention Bond / Letter of Guarantee (if any): As additional security for good performance, Construction Contracts often provide for the Project Company’s right to deduct a percentage (to be agreed) on the amount payable under each payment certificate. The Contractor may then elect, at its sole option, to provide a respective Retention Bond to the Project Company and receive full payment.

Lenders insist that the above-mentioned bonds / letters of guarantee are “on demand”, namely immediately payable by the issuing bank upon first demand of the beneficiary (without any right or obligation of the issuing bank to verify in substance the entitlement of the beneficiary to claim).

Nevertheless, as far as the good performance letter of guarantee is concerned, a fair requirement of the Contractor in this respect is to involve an independent third party in the determination of the default that triggers the forfeiture of the letter of guarantee.

4 Contractors would seek to extend the liability of the Agent to both past and present obligations of the Project Company.
Under such a scenario, the wording of the relevant letter of guarantee would provide that the written request to be submitted by the Project Company to the issuing bank for a claim under the letter of guarantee should be accompanied by a certificate issued by the Independent Engineer certifying that the Contractor is in breach of its obligations under the Construction Contract, will specify the breach and will certify the amount of the claim.

The involvement of the Independent Engineer in the process ensures that there are no abusive / “hair trigger” claims on the letter of guarantee.

One should note that the above-mentioned requirement does not affect in any way whatsoever the nature of the performance letter of guarantee as “on demand”, given the fact that, once the issuing bank has received the request of the beneficiary and the required certificate of the Independent Engineer, the issuing bank is obliged to pay the claimant, without any duty to check whether the ground for forfeiture have actually occurred.

As far as Greek law is concerned, this interpretation has been confirmed by established case – law of the Greek courts.

Needless to say that the above topics are only a few of the numerous issues that arise during negotiations of the construction documentation. Nevertheless, one should keep in mind that each project has its own characteristics and gives rise to different issues.

I take the opportunity to highlight the importance of having a sufficiently balanced Project Agreement, providing for a fair risk allocation between the Grantor and the Project Company. If this is the case, it is much easier to flow down the construction risks and liabilities to the Contractor in a way that strikes a fair balance between the interests of the parties.

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**J&P-AVAX** is a major Greek construction company which is active in Greece, Cyprus, the Balkans and the Middle East.