PUBLIC PRIVATE PARTNERSHIPS UNDER GREEK LAW

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This report examines the Greek law on Public Private Partnerships. It deals with four specific PPP topics; the concept (I), the award (II), the performance (III) and the remedies (IV), in accordance with the instructions of the General Rapporteur, Prof. François Lichère, with a view to assisting him in the preparation of his general report on PPPs for the XVIIIth Congress of the International Academy of Comparative Law (Washington DC, 2010).

I. CONCEPT

1.1. Origin

Public Private Partnerships (PPP) in the sense of co-operation between the state and private entities under long-term concession contracts in spe-

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Legal bibliography cited in this report is in the Greek language, unless otherwise noted.

cific governmental projects have been known in Greece since 1984. They usually involve significant assets, namely in the area of transport infrastructure, the construction and exploitation of works or the provision of services aiming at the service of the public or the realisation of revenues. Because specific Greek legislation applied only to a limited number of sectors and project types[1], concession contracts for major infrastructure projects (BOT, DBFO) implemented in Greece were ratified as Laws be the Greek Parliament, thus, becoming a *lex specialis* which superseded the general law[2]. In all these projects, the Private Entity undertook the financing, the construction and consequently the operation and maintenance of the project for a certain period of time.

The positive as a whole experience of the Greek State was one of the major reasons, which led, in 2005, to the formal launch of PPP specific legislation upon enactment of Law 3389/2005 on the Co-operation of the Public and the Private Sector (in Greek = *Simbraxis Dimosiou & Idiotikou Tomea* or *SDIT*)[3], and set up a new mechanism for the implementation of PPPs in Greece[4]. However, this new specific legislation on PPPs has not

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[1] Law 1418/1984, Article 4 par. 4 sub. 7; Presidential Decree 609/1985, Article 13; Law 2052/1992, Article 9; as well as various laws regarding the co-operation between the state and private entities in specific types of projects, such as Presidential Decree 158/2002 (Concession of Airport Operation and Construction Licences); Law 2206/1994 (Concession of Casino Operation Licences); Presidential Decree 30/1.2.1996, Article 75 (Co-operation between Organisations of Regional Self-Governance (in Greek = *OTA*) and private entities for the construction and exploitation of works or the provision of services aiming at the service of the public or the realisation of revenues).

[2] E.g. Law 2338/1995 concerning the Athens International Airport; Law 2395/1996 concerning the Rion-Antirion Bridge; Law 2445/1996 concerning the Spata-Elefsis Highway (Attiki Odos). For a detailed analysis of these contracts *see* D. Koutras, P. Skouris & E. Trova, *Concession contracts and Public Private Partnerships – II. The new Law 3389/2005* (Ellinika Grammata, Athens 2005).

[3] Government Gazette no. A 232/22.9.2005. Article 6 par. 4 of Law 3389/2005 has been amended by Article 16 par. 1 of Law 3483/2006, Government Gazette no. A 169/7.8.2006, and Article 3 of Law 3389/2005 has been amended by Article 12 of Law 3840/2010, Government Gazette no. A 53/31.3.2010.

[4] A presentation of Law 3389/2005 may be found in E. Karavi & A. Bokolini, *PPP – Public Private Partnership* (Ant. N. Sakkoulas Publishers, Athens 2005); K. Lampadarios, The new Law 3389/2005 on Public Private Partnerships, *Synigoros* (= Συνήγορος) 51/2005, 14-15; S. Panagopoulos, Public Private Partnerships: Latest developments in the EU and Greece, *Public Contracts & State Aids* (= Δημόσιες Συμβάσεις & Κρατικές Ενισχύσεις – DISKE) 2005, 337-348; A. Kaissis (ed.), Law 3389/2005 on Public Private Partnerships (Ant. N. Sakkoulas Publishers, Athens 2006); EMEDITEKA, *Cooperation between the public and the private sector – The new Law 3389/2005 on PPPs and the international ex-*

repealed the numerous pre-existing legal provisions set out in the previous paragraph. Because the State had extensively consulted with the Banks prior to the enactment of the new PPP legislation, such legislation deals with most of the issues that may arise in a PPP structure.

1.2. Legal definition

Law 3389/2005 (Article 1 par. 2) defines as PPP (*SDIT*) the written commercial co-operation agreements for the performance of construction work and/or services ("Partnership Agreements"), between Public Entities acting within their specific sector of activity and entities governed by private law ("Private Entities").

Apart from (a) the State, Law 3389/2005 (Article 1 par. 1) further considers to be "Public Entities" (b) the Local Organisations of Self-Governance (in Greek = *OTA*), (c) legal bodies governed by public law (in Greek = *NPDD*) and also included companies limited by share or sociétés anonymes (in Greek = *AE*), whose entire share capital belongs to the aforementioned (a)-(c) entities or to another incorporated company of a similar nature.

The private entities conclude the Partnership Agreements with the public sector through ordinary incorporated companies established exclusively for the purpose of the co-operation (Special Purpose Vehicle or SPV) in accordance with the provisions of Greek Law 2190/1920 on companies limited by shares or sociétés anonymes (in Greek = *Anonimes Eteries* or *AE*) as in force at the time of the Partnership Agreement. Entities of the public sector, described above (Article 1 par. 4 Law 3389/2005), may not be shareholders of such SPV or hold shares in that SPV in accordance with provisions set out in Law 2190/1920, in the SPV's articles of association and/or the Partnership Agreement; institutionalised PPPs are thus exempted from the scope of application of Law 3389/2005 and not permitted in Greece. This structure aims to facilitate the financing of the project, since credit institutions financing the projects prefer to transact with an SPV, which is not burdened by obligations irrelevant to the project.

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perience (Ant. N. Sakkoulas Publishers, Athens 2007); A. Papakonstantinou, Public Private Partnerships as a form of efficient exercise of public policy, *Epitheorisi Dimosiou Dikaiou & Dioikitikou Dikaiou* (= Επιθεώρηση Δημοσίου Δικαίου και Διοικητικού Δικαίου – EDDDD) 2007, 833-844. For an overview of the Greek PPP regime in the English language *see* P. Verveniotis, Public Private Partnerships – The new Greek Law, *The International Construction Law Review* 2006, 150-166; Ch. Gramatidis, Public-Private Partnerships in Greece, *Comparative Law Yearbook of International Business* 2009, 175-195.

1.3. Contractual PPPs – Requirements of the Law

Greek Law on PPPs considers only the category of contractual PPPs. The co-operation contracts fall within the scope of application of the PPP (*SDIT*) rules if they fully comply with the conditions set out in Article 2 of Law 3389/2005 set out below:

(a) Their object is the execution of works or the provision of services in an area which is part of the Public Entity's responsibility as defined by law or by agreement or in its memorandum of association. However certain categories of services which are solely and exclusively reserved to the State pursuant to the Greek Constitution, in particular national defence, police, administration of justice and enforcement of criminal justice cannot be carried out via a PPP.

(b) They provide that in return for a financial contribution paid either in whole or partly by a Public Entity or by the final users of the works or services, the Private Entity/s are to bear a substantial part of the risks associated with the financing, construction, the availability of relevant work and related risks, for example, managerial and technical risks. In that sense Greek contractual PPPs include the usual concession type agreements as well as the public procurement type agreements (PFI type).

(c) They provide that Private Entities will finance, in whole or partly, the execution of the work or services , and

(d) The total amount which is payable by the Public Entity to the Private Entity pursuant to the Partnership Agreement does not exceed the amount of 200m. Euros excluding VAT.

Despite the enumerated conditions the material scope of the PPP rules may be broadened in certain cases by unanimous decision of the Public Private Partnerships Joint Ministerial Committee referred to in Article 3 of Law 3389/2005 and may cover exceptionally a Partnership Agreement even if one or more of the aforementioned conditions are not met. However, specifically with regard to the requirement that the private sector assumes a substantial part of the risk, it should be noted that, if the Private Entity would end up not assuming substantial risks related to the project, then it could be questionable whether the project should still constitute a PPP or whether it would be a common public work/service to be awarded and executed according to the European and Greek provisions on public works and services.

1.4. Economic importance

In Greece, PPPs are a valuable tool for the construction of public infrastructure and the delivery of services to citizens. They focus on the provi-

sion of public services through the active involvement of the private sector. For example, through a well structured PPP, public infrastructure can be designed, built and operated by a private entity. In this regard PPPs are an alternative method for achieving an optimized mix of private and public funds. Moreover, PPPs supplement the existing framework of concession projects which, as already mentioned, must be ratified by the Parliament. To date, projects, such as the Athens International Airport and the Rion-Antirion Bridge, have been carried out via concession agreements, while 52 projects with a total value of 5.7 billion Euro have been approved and more than 100 international companies have participated in PPP tenders since March 2006 when the PPP legal framework, adopted in 2005, was put into practice[5].

In particular, PPP structures which have already been launched focus on[6]:

- infrastructure (motorways, parking lots);
- education (schools, universities, sport centres);
- environment (waste management, wastewater treatment, desalination);
- health (hospitals);
- ports (infrastructure);
- public sector buildings (courthouses, prisons, fire stations, municipal and regional buildings);
- public sector real estate development.

II. AWARD

2.1. Legal limits to the use of PPPs

Under the PPP Law (3389/2005) any work or service belonging to the competence of the Public Entities as qualified by this law may become the subject of a PPP Agreement. However activities that under the Greek Constitution fall exclusively and directly within the ambit of State powers are prohibited from becoming a subject of a PPP Agreement. Said activities are in particular national defence, police patrolling, the award of justice and the execution of criminal sanctions imposed by the courts (Article 2 par. 3 of Law 3389/2005).

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[5] Information available at: www.sdit.mnec.gr.

[6] For more details and statistics see www.investingreece.gov.gr.

2.2. Committees on governmental policy implementing of PPPs

2.2.1. Not independent from the government public bodies

A Joint Ministerial Committee (JMC) headed by the Minister of Economic Development, Competitiveness and Shipping[7], and a Special Secretariat for PPPs (SSPPP) have been set up by virtue of the PPP law (Articles 3 and 4 Law 3389/2005) to put into practice PPP structures and monitor their implementation. The JMC is responsible for drawing the general policy of the government regarding the implementation of PPP projects. In particular, it decides on the approval or revocation of PPP structures, the participation of the State in the financing of said projects, the payment of the Private Entity involved through funds from the Program of Public Investments as well as any other related item. The role of the SSPPP is to promote the institution of PPPs and assist both the JMC and Public Entities involved or to be involved in a PPP during the procurement, negotiation and execution stage of the co-operation contracts. For the fulfilment of its duties the SSPPP may, *inter alia,* conduct research aiming to gather information in order to assess what work and/or services may be carried out through PPPs and evaluate any economic, technical, legal and other problems connected with PPPs. In this respect, a non-binding list of potential works and services ("List of Proposed Partnerships") which may be carried out using the PPP structure set out in Law 3389/2005, is prepared by the SSPPP. Subsequently, the SSPPP shall notify each relevant Public Entity of the integration of works or services of their competence in the List of Proposed Partnerships and invite them to submit an application to JMC expressing their consent to the implementation of the particular project under the PPP structure provided by Law 3389/2005 ("Application for Declaration of Compliance"). The JMC shall publish its decision ("Decision on Declaration of Compliance") either approving or rejecting, in whole or partly, the Application for Declaration of Compliance. Upon a positive Decision on Declaration of Compliance, the selected Public Entity shall undertake the role of the Awarding Authority, while the SSPPP shall undertake the co-ordination of the Award Procedure for the selection of the Private Entity that will participate in the Partnership (Article 4 of Law 3389/2005).

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[7] Permanent members of the JMC are the Ministers of Economic Development, Competitiveness and Shipping, of Finance, of Infrastructure, Transport and Networks, and of Environment, Energy and Climate Change, and extraordinary members of the JMC are the Ministers whose powers include the involvement of a Public Entity in a PPP.

2.2.2. SSPPP executives

The SSPPP executives are not independent from the government. They include the Special Secretary of PPPs**,** appointed jointly by the Prime Minister and the Minister of National Economy, the Director of the SSPP, appointed by the Minister of National Economy and the other personnel of the SSPPP, which are civil servants employed as contractors on fixed term contracts by decision of the Minister of National Economy or transferred to the SSPPP by joint decision of the Ministry of the Interior, Public Administration and Local Government and the Minister of National Economy as well as any other relevant Minister.

Executives of the SSPPP should have extensive experience and be recognised in their specialist areas and in particular have experience in issues relating to methods of financing, preparation, processing, analysis and assessment of financing models, legal topics such as tender documents, drawings, legal support during public procurement, preparation and negotiation of contracts including concession agreements, financings, lending and other agreements necessary for securing adequate financing, issues relating to technical matters, insurance, taxation and accountancy, to design, construction, operation and maintenance of works, as well as knowledge of the relevant standards applicable to the foregoing (Article 6 par. 1 and 2 of Law 3389/2005).

2.2.3. Non compulsory assistance from experts and advisors

Based on substantiated proposals from the SSPPP, the JMC shall decide whether to enter into separate agreements for the provision of work or services with advisors in relation to financing, technical matters, taxation, legal issues, insurance or other, as well as with special scientific collaborators and experts, who may be individuals or legal persons with an established reputation and with specialist expertise relating to the areas in which they would be providing services (Article 6 par. 4 of Law 3389/2005).

2.3. Award procedures

The PPP Law (Articles 7-15 of Law 3389/2005) lays down a special legal framework regarding the procedure for procurement to be followed for the choice of the Private Entity that will assume the execution of the works or the provision of services and will sign the co-operation contract with the "selected" Public Entity ("Awarding Authority"). In this respect,

Law 3389/2005 incorporates all the procurement provisions of EU Directive 2004/18/EC with the exception of the negotiated procedure without prior publication of contract notice provided for in Article 31. Therefore, the Law governs all issues regarding the general principles, the criteria and the procedures applicable to the general principles, the criteria and the procedures applicable to the award[8].

2.3.1. Principles

The Award Procedures and the relations between the Public Entity acting as Awarding Authority and the Candidates or Tenderers and/or any third party involved, are subject to the principles of equality of treatment, transparency, proportionality, mutual recognition, protection of public interest, protection of rights of individuals and commercial rights of the private entity (commercial secrets), freedom of competition and protection of the environment and viable and sustainable development (Article 9 par. 1 (a) of Law 3389/2005).

2.3.2. Criteria

The award of contracts by a Public Entity acting as Awarding Authority is based on either the criterion of the most economically advantageous Offer/Bid or the lowest price criterion (Article 10 par. 1 of Law 3389/2005). When the first criterion is used, the Awarding Authority examines and assesses the Offer/Bid in accordance with the Agreement's parameters such as quality, price, technical adequacy, functional and aesthetic characteristics, environmental impact, cost, efficiency and technical progress, date of completion or delivery date (Article 10 par. 2 of Law 3389/2005).

2.3.3. Procedure

The Invitation for Tender established by the Awarding Authority sets out the minimum qualifications that Candidates should have. When mixed agreements, including works and services are being awarded the Awarding Authority may apply either Open or Restricted Type Procedures, in accord-

[8] *See* G. Patrikios, *Public Private Partnerships – The pre-contractual stage* (Nomiki Bibliothiki, Athens 2009).

ance with the Procedures of Competitive Dialogue and, in certain cases, may elect to conduct the tender on the basis of Negotiated Procedures.

2.4. Transparency

If Law 3389/2005 (Article 1 par. 3) applies to the main contract such law is equally applicable to "Ancillary Agreements" defined as the agreements entered into between (a) Public Entities and third parties and/or (b) Private Entities and third parties, whether ancillary to, or in execution of the main co-operation agreement. Thus, there is a legal duty for the partner to respect a minimum of transparency for the award of the contracts he will sign with third parties for the performance of the PPP.

III. PERFORMANCE

3.1. PPP experience

Due to the relatively recent adoption of the PPP legal framework in Greece, to date there are no projects implemented under the provisions of Law 3389/2005[9]. For the same reason, there are no surveys pertaining to the performance of such contracts and explaining their advantages and disadvantages as compared with "classic" public contracts.

As already mentioned, however, up to the enactment of Law 3389/2005 major infrastructure projects have been realised in Greece through the structure of concession contracts, which were ratified as Laws by the Greek Parliament[10]. Given the successful outcome of these projects, PPPs are expected to enable the state to create significant new infrastructure and the private entities to enter into favourable long term contracts for the exploitation of the realised projects[11].

3.2. Clauses

PPPs are implemented through Partnership Agreements, whereby all the aspects of a project, not only during its construction period but also during

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[9] The first Partnership Agreement concerning the design, construction, financing and facility management of six fire stations and one fire service has been signed on 15 April 2009 (information available at: www.sdit.mnec.gr).

[10] *See supra*, note 2.

[11] For a detailed analysis *see supra*, I. 1.4.

its operational phase, as well as the obligations of the contracting parties, are clearly set out and agreed upon[12].

According to Article 17 of Law 3389/2005, the Partnership Agreement and the Ancillary Agreements shall contain the terms and conditions determined by the Public Entity in the Invitation for Tender. The terms of these agreements, supplemented by the relevant provisions of the Greek Civil Code, constitute the sole contractual framework, to the exclusion of the special legislation on public works and services.

Such agreements shall include an explicit and thorough description of the rights and obligations of the parties. In particular, they shall provide for:

(a) the object of the agreement, the remuneration of the private party as well as the allocation between the contracting parties of any contribution paid by the final users of the project;
(b) the monitoring of the execution and operation of the work or service;
(c) the method of ensuring the quality of the project at the stage of execution and operation of the work or service;
(d) the time schedule for the implementation of the project, the conditions of its modification and the relevant penal clauses;
(e) the terms on which the use of any assets shall be granted to the private party;
(f) the financing of the project;
(g) the potential approval by the public authority of the financing agreements of the private party;
(h) the allocation of risks between the parties and the consequences of events of force majeure;
(i) the insurance coverage of the project or of the private party;
(j) the protection of environment and antiquities;
(k) the protection of intellectual and industrial property rights;
(l) the method of operation, maintenance and exploitation of the project;
(m) the amount of consideration paid by the final users of the project, the method of collection and its readjustment;
(n) the method of allocation of any benefits that may accrue from the refinancing of loans or from the attainment of specific percentage of return of the private party's investment;
(o) any guarantees offered by the private party for the proper and timely performance, operation and maintenance of the work or service;

[12] There are not standardised forms of contracts at the current state of PPP development.

(p) the substitution of the private party or of its creditors;
(q) the payment of any compensation by the defaulting party;
(r) the reasons of termination of the agreement;
(s) the applicable law;
(t) the dispute resolution process;
(u) the priority range of the annexes and appendixes;
(v) the specification of the minimum requirements of operation and maintenance included in the tender documents;
(w) the determination of the delivery of the project to the state after the expiry of the exploitation period, the obligations regarding training or know-how transfer by the private party to the public authority, the technical specification for the works or services at the time of delivery and the guarantees following the assumption of the project by the public authority;
(x) hygiene and safety requirements for employees and users of the work or service;
(y) the dispute settlement process by referral to an Experts Committee appointed jointly by the contracting parties.

3.3. Assignment

Under Article 25 of Law 3389/2005 the SPV which enters into a Partnership Agreement may assign the benefit of such agreements or its rights according to it -provided that these are ascertainable- to credit or financial institutions that participate directly or indirectly in the financing of such Partnership Agreement.

3.4. Changes in the SPV's shareholdings

Transfers of shares, increases in share capital, issues of bonds as well as any form of merger, divestiture, acquisition or other corporate reorganisation of the SPV require the written consent of the Public Entity, as provided for in Article 28 of Law 3389/2005. The specific criteria and conditions for granting this consent shall be determined in the Partnership Agreement.

3.5. Allocation of risks

A substantial part of the financial and technical risks related to a project is borne by the Private Entity. Article 2 par. 1 (c) of Law 3389/2005 pro-

vides that the Private Entities shall assume the risks related to the financing, construction and availability or demand of the relevant work, and such related risks, as management and technical issues. More specifically with regard to financing, Article 18 of Law 3389/2005 states that the SPV shall bear the responsibility and risk of the financing that is required for the proper fulfilment of its obligations under the relevant Partnership Agreement and all other Ancillary Agreements. The SVP is required to demonstrate to the Public Entity involved that there is sufficient financing available for the fulfilment of all obligations undertaken pursuant to the relevant Invitation for Tender. Financing mainly includes: (a) SPV own funds; (b) the capital obtained by the SPV under any form of loan or credit and particularly under loans, bonds and securities against future or existing demands; (c) necessary guarantees or assurances required for the provision of capital or credit under (a) and (b) above; (d) resources from the exploitation of the Partnership assets during the construction period[13].

The same Law includes, however, certain special provisions regarding the obligation of the Public Entity to assist the Private Entity in the process of construction of the project; otherwise it bears the risk of compensating the latter for any damage incurred. In particular, Article 19 of Law 3389/2005 provides that in cases where the remuneration of the SPV is paid, wholly or partially, directly by the final users of the project, the Public Entity is required to provide any assistance deemed necessary to allow the SPV to collect the said amounts. Moreover, according to Articles 21, 23 and 24 of Law 3389/2005, the Public Entity is obliged to compensate the Private Entity in the case of delays attributed to the intervention of public authorities when required, such as the Archaeology Service and Public Utilities, as well as in case of delays in issuing acts of expropriation of land.

3.6. Control of Ancillary Agreements

As mentioned above[14], Ancillary Agreements are defined as either those between the Public Entities and third parties or those between the Private Entities and third parties. Both are also governed by Law 3389/2005, which governs the main Partnership Agreement.

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[13] *See* I. Venieris, Methods of financing in Public Private Partnerships, *Chronika Idiotikou Dikaiou* (= Χρονικά Ιδιωτικού Δικαίου – ChrID) 2008, 105 et seq.

[14] *Supra*, II. 2.4.

This Law does not provide for a special procedure of monitoring, by the Public Entity, of the Ancillary Agreements that the SPV signs with third parties in order to fulfil its obligations under the Partnership Agreement[15]. The SPV remains the solely liable to the Public Entity for the fulfilment of its contractual obligations as well as for any damages caused due to breach of law during the performance of such obligations, according to Articles 334 and 922 of the Greek Civil Code[16]. The internal relationship between the SPV and its subcontractors is governed by the Ancillary Agreement[17].

3.7. Off-balance sheet treatment

The Preamble to Law 3389/2005 explicitly makes reference to the Eurostat methodology regarding the definition of an asset as "non-public". According to this latter methodology, the assets involved in a PPP should be classified as non-government assets if both of the following conditions are met: (a) the private partner bears the construction risk, and (b) the private partner bears at least one of either the availability or demand risk. Under Eurostat decision No 18/2004, such assets shall be recorded off-balance sheet for government[18].

3.8. Delivery of the project

At the end of the operational period determined in the Partnership Agreement the projects implemented under a PPP structure are transferred from the private partner to the contracting authority. The delivery of the

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[15] It should be noted, however, that under Article 25 of Directive 2004/18/EC, in the contract documents, the contracting authority may ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors, without prejudice to the question of the principal economic operator's liability.

[16] Article 334 of the Greek Civil Code refers to the liability from the breach of a delegatee and provides that a delegating party shall be liable for such breach as if the breach was his own in respect of persons employed by him in order for him to perform an obligation. Under Article 922 of the Greek Civil Code a master or a person who has assigned to another the performance of an obligation shall be liable for the damage incurred by a third party due to breach of law by the servant or the assignee while performing such obligation.

[17] I. Venieris, *PPP: Public Private Partnerships – The contractual framework* (Nomiki Bibliothiki, Athens 2007) 419 et seq.

[18] Eurostat decision No. 18/2004 issued on 11 February 2004 on the *Treatment of public-private partnerships* (available at: epp.eurostat.ec.europa.eu).

project to the Public Entity after the expiry of the exploitation period is determined by the Partnership Agreement.

The particular régime of the constructions and/or goods that are due to be rendered to the Public Entity at the end of the contract term depends on the form of the partnership in question. For example, in case that real rights (such as ownership) over the constructions or goods are transferred to the SPV, it may be provided that such rights shall be transferred *ipso jure* to the Public Entity or that the constructions or goods shall be purchased by the Public Entity or by a third party after the expiry of the Partnership Agreement. Similarly, if the SPV is granted the right of use or exploitation of the contractual constructions or goods, the Partnership Agreement may provide that it shall be returned to the Public Entity, retained by the SPV under conditions or transferred to a third party, etc.[19].

The Partnership Agreement shall provide, moreover, for the technical specification of the works or services at the time of delivery. It may also provide for the appointment of a third party that shall confirm the technical compliance of the constructions or goods that are to be rendered to the Public Entity with the relevant specifications set out in the Partnership Agreement[20].

3.9. Expiry – termination

The Partnership Agreement must specify its term. The intention of the parties should be that the agreement expire on the expiry date agreed upon by the parties. However, in accordance with Article 17 of Law 3389/2005, the Partnership Agreement must also provide a comprehensive account of the grounds for early termination by each contracting party and their consequences of such termination. Particularly the compensation payable in such case should be precisely specified.

For instance, the Private Entity should be allowed, among other things, the right to terminate the Partnership Agreement where the Public Entity acts in a way that renders their contractual relationship untenable or completely frustrates the ability of the Private Entity to deliver the service. Such may be the case of a failure by the Public Entity to make payment of specific amounts that are due under the agreement or the breach by the Public Entity of certain other contractual obligations. Similarly, the Part-

[19] Venieris, *supra* note 17, 396-399.

[20] *Ibid*., 399-401.

nership Agreement shall deal with the possibility of early termination due to the Private Entity's default in the event of breach of specific contractual obligations. The Partnership Agreement shall specify the conditions of valid termination (e.g. the requirement of service of a termination notice) as well as the compensation due in case of breach. The Partnership Agreement shall, furthermore, define the *force majeure* events that can lead to termination and shall determine the rights of the relevant parties if this occurs. In case of termination due to an event of *force majeure* there shall be provided that the Public Entity should pay reasonable compensation to the Private Entity on the principle that *force majeure* is neither party's fault and that, to a certain extent, its financial consequences should be borne by both parties on an equal basis. Early termination could also be initiated voluntarily by the Public Entity on the condition that the Public Entity pays to the Private Entity termination compensation intended to reinstate the latter in the economic position in which it would have been in the absence of early termination[21].

IV. REMEDIES

4.1. Dispute resolution at the pre-contractual stage

Law 3389/2005 does not contain specific provisions concerning the remedies available at the pre-contractual stage. However, the Invitations for Tender that have been published so far[22] provide that disputes arising in the course of the process prior to the conclusion of a Partnership Agreement are governed by Law 2522/1997[23], which regulates the remedies available at the stage up until the conclusion of public works, services and supplies contracts[24].

According to the provisions of Law 2522/1997, any interested party having a legitimate interest in being awarded a particular Partnership Agreement and which has been or risks being harmed by an infringement

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[21] *Ibid*., 393 et seq.

[22] Information available at: www.sdit.mnec.gr.

[23] Government Gazette A 178/8.9.1997. Law 2522/1997 implements Directive 89/665/EEC in the Greek legal order.

[24] Patrikios, *supra* note 8, 116-117. Cf. Koutras, Skouris & Trova, *supra* note 2, 55 et seq., 129 et seq., as regards the evolution of the case law of the Council of State on the application of Law 2522/1997 to disputes arising in the course of the process prior to the conclusion of concession contracts before the enactment of Law 3389/2005.

of Community or national legislation relating to public contracts, has the right to have recourse to review proceedings (a) in the form of interim measures to suspend any decision relating to the contract award process, (b) by an application for the annulment of such decision, or (c) even by an action for damages incurred by it from the infringement of the applicable legislation.

In the first place, a quasi-judicial recourse shall be filed before the appropriate body of the Public Entity, as defined in the Invitation for Tender. Interim measures against a decision of the said body, applications for the annulment of the Public Entity's decisions and claims for damages shall be addressed to the competent courts. The jurisdiction of the court before which remedies may be sought depends on the nature of the contracting authority in question[25]. The Council of State (the supreme administrative court in Greece) has jurisdiction over cases where the contracting authority is (a) the State, (b) Local Organisations of Self-Governance, or (c) legal bodies governed by public law; in case that the contracting authority is an incorporated company under Article 1 par. 1 (d) of Law 3389/2005, civil courts have jurisdiction.

The deadline for filing a quasi-judicial recourse before the competent body of the Public Entity is generally very tight. Such recourse shall be filed within five days from the date on which the decision of the Public Entity was notified to the interested party. A petition for interim relief to stay the tender proceedings has then to be filed within ten days from the Public Entity's explicit or tacit dismissal of the recourse. Should the petition be sustained, the interested party has to file an ordinary application for the annulment of the Public Entity's decision within thirty days. The hearing date for this application cannot be set later than three months from its filing.

4.2. Dispute resolution at the contractual stage

Under Article 17 of Law 3389/2005, the Partnership Agreement may provide for a dispute settlement process at a first stage by referral to an Experts Committee appointed jointly by the parties.

Apart from this, Article 31 of the same Law provides that any dispute arising in relation to the validity, the implementation or the interpreta-

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[25] Cf. in the English language E. Spiliotopoulos, *Greek administrative law* (Ant. N. Sakkoulas, Athens/Bruylant, Brussels 2004) 326 et seq., 330.

tion of the Partnership Agreement or the Ancillary Agreements shall be resolved by arbitration. To the exclusion of any legal provisions that apply to state arbitrations[26], the Partnership Agreement or the Ancillary Agreements shall contain rules concerning: (a) the appointment of arbitrators; (b) the applicable arbitration rules; (c) the venue of the arbitral tribunal or body; (d) the arbitrators' fees (as long as they are not determined by the arbitration rules); and (e) the language in which the arbitration will be conducted. It is also provided that the arbitral award is final and not subject to any ordinary or extraordinary judicial means of appeal. Moreover, it is directly enforceable, without having to be declared as such by ordinary courts. The same Article provides that Greek substantive law is applicable to the resolution of these disputes.

It has been argued that this provision may give rise to constitutional law concerns[27]. In particular, the provision of obligatory submission of all disputes related to the agreements in question to arbitration, as well as the exclusion of any judicial means of appeal and the direct enforcement of the arbitral award, without recourse to any enforcement recognition procedures, may infringe Article 8 par. 1 of the Greek Constitution stating that no person shall against his will be deprived of the judge assigned to him by law. Such provision may, furthermore, infringe the constitutional provisions of Articles 20 par. 1 and 26 par. 3, which refer to the right of a person to receive legal protection by the courts and to the exercise of the judicial power by the courts of law, the decisions of which shall be executed in the name of the Greek People.

It should be noted, first of all, that, given the landmark decision no. 24/1993 of the Supreme Special Court on the constitutionality of the arbitrability of administrative law disputes[28], the provision of the resolution of such disputes arising at the contractual stage of PPPs through arbitration shall not be contested.

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[26] For instance, Article 49 of the Introductory Act to the Code of Civil Procedure concerning the conditions that shall be met by the state in case of arbitration of private law disputes.

[27] A. Tachos, Comments on the new Law 3389/2005 "Public Private Partnerships", *Dikaio Epicheiriseon & Eterion* (= Δίκαιο Επιχειρήσεων & Εταιριών – DEE) 2005, 1245-1247, at 1247.

[28] Supreme Special Court 24/1993, *To Syntagma* (= Το Σύνταγμα – ToS) 1994, 171; *Dioikitiki Diki* (= Διοικητική Δίκη – DiDik) 1994, 47.

Moreover, case law[29] and doctrine[30] agree on the constitutionality of the mandatory arbitration by law for the resolution of all disputes concerning the implementation of a contract, provided that such clause is also contained in the contract signed voluntarily by the parties[31].

The exclusion by law of any judicial means of appeal has also been addressed in past cases. This case law concerned contractual provisions that were ratified as Laws by the Greek Parliament, in accordance with Law 2687/1953 on investment protection. In this respect, it has been pronounced that the exclusion of any judicial means of appeal against the arbitral award -including the action for annulment under Article 897 of the Greek Code of Civil Procedure[32]- as provided by Law 2687/1953 (a norm of superior formal force) as well as by the specific contracts and the Laws ratifying them, does not infringe the provisions of the Greek Constitution[33]. This approach was approved and elaborated by a part of the doctrine. It has been argued, namely, that, in any case, the arbitral tribunal is considered to be a "court" in the meaning of Articles 20 par. 1 of the Greek Constitution and 6 par. 1 of the European Convention on Human Rights. Therefore, any restriction imposed by law as regards the judicial means of appeal against arbitral awards (including the action for annulment under

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[29] Areios Pagos 78/1976, *Nomiko Vima* (= Νομικό Βήμα – NoV) 1976, 606; Areios Pagos 828/1979, *Dik*e (= Δίκη) 1979, 753; Areios Pagos 796/1982, *Dike* 1982, 1088; Areios Pagos 1828/1987, *Dik*e 1988, 933; Athens Court of Appeal 4168/1982, *Dike* 1982, 689, etc.

[30] P.D. Dagtoglou, The constitutionality of the arbitral resolution of administrative law disputes, *Elliniki Dikaiosini* (= Ελληνική Δικαιοσύνη – EDni) 1992, 481-484, at 481; Th. Fortsakis, *Arbitration and administrative law disputes* (Law & Economy – P.N. Sakkoulas, Athens 1998) 94-95, 168.

[31] Cf. A. Mantakou, General principles of law and international arbitration, *RHDI* 2005, 419-434, at 421 *et seq*., for a comprehensive analysis in the English language in the context of Article 6 par. 1 of the European Convention on Human Rights.

[32] Article 897 of the Greek CCP provides for an action for annulment of an arbitral award on the grounds of (a) nullity or expiration of the arbitration agreement; (b) irregularities in the appointment of arbitrators; (c) exceeding powers granted to the arbitrators by the parties or by law; (d) irregularities in the arbitration proceedings (e.g. violation of the principle of equality between the parties); (e) deficiencies in the award itself (e.g. awards violating provisions governing their form and content, unintelligible or self contradictory awards, awards contrary to public order or to customs and usages etc.); or (f) any circumstances that may give rise to an extraordinary procedure for a serious miscarriage of justice.

[33] Areios Pagos 356/1991, *Epitheorisi Emporikou Dikaiou* (= Επιθεώρηση Εμπορικού Δικαίου – EED) 1993, 386. *See* also Areios Pagos 625/1966, *NoV* 1967, 563; Areios Pagos 314/1968, *NoV* 1968, 843; Areios Pagos (Plenary Session) 750/1986, *Dike* 1987, 553, etc.

Article 897 of the Greek CCP) does not infringe these provisions[34]. In this respect, one could argue that the action for annulment under Article 897 CCP, as "judicial means of appeal", may be considered as restricted by Article 31 of Law 3389/2005, despite the lack of explicit provision.

The direct implementation of the arbitral award without previous recourse to any enforcement recognition procedures, as provided by Article 31 of Law 3389/2005, may also be justified on the same grounds.

Finally, with regard to the provision of Article 31 of Law 3389/2005 relating to the law governing the validity, the implementation or the interpretation of the Partnership Agreement and the Ancillary Agreements, it may be argued that Greek substantive law is applicable only in case of lack of any express choice of other law by the parties[35].

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[34] K.D. Kerameus, Einschränkungen der Klage auf Aufhebung von Schiedssprüchen, *Studia Juridica III* (Sakkoulas/Kluwer, 1995) 295-310, at 307 *et seq*. (also published in: R. Holzhammer, W. Jelinek & P. Böhm (Hrsg.), *Festschrift für Hans H. Fasching zum 65. Geburtstag*, Menzsche Verlags- und Universitätsbuchhandlung, Wien 1988, 257 et seq.); *idem*, Legal restriction of any appeal and action for annulment against arbitral awards – Legal advice, *EDni* 1989, 261-263, particularly at 263 (also published in: *Studia Juridica II*, Ant. N. Sakkoulas Publishers, Athens 1994, 467 et seq.). *Contra* K. Beys & K. Kalavros, Annulment of an arbitral award in case of contractual and legal exclusion of the relevant constitutive right – Legal advice, *Dike* 1987, 148-172; Fortsakis, *supra* note 30, 113.

[35] *See* E. Vassilakakis, The arbitration of disputes concerning Public Private Partnerships, *Synigoros* 55/2006, 50-51, at 51, who interprets Article 31 in combination with Article 17 par. 2 (s) of Law 3389/2005.