# Construction Arbitration in Central and Eastern Europe

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## Contemporary Issues

Edited by

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CHAPTER 9

# Provisional Measures Specific to Construction Arbitration in Greece

*Christos Paraskevopoulos*[*]

## §9.01 THE ARBITRATION FRAMEWORK IN GREECE

While the preferred method of dispute resolution in Greece continues to be litigation, in recent years, arbitration has been gaining ground as an alternative mechanism for the dispute resolution.

For starters, it is important to distinguish between "domestic" and "international" arbitration. Article 1(2) of Greek Law 2735/1999 on International Commercial Arbitration[1] sets the conditions under which an arbitration in Greece may be defined as "international" and, thus, falling under its scope:

> 1. The present provisions, subject to Articles 8, 9 and 36 of the present Law and to the International Conventions that may be in force in Greece, apply to International Commercial Arbitration, the forum of which is located in Greece.
>
> 2. An arbitration is international when:
>
> a) The parties are seated in different states countries, at the time of the conclusion of the arbitration agreement
> b) One of the following locations is not situated in the state-country where the parties are seated
>  aa) The venue of the arbitration if determined within the arbitration Agreement or it can be concluded by it;
>  bb) Any location where a crucial part of the contractual obligations stemming from the commercial relation is going to be fulfilled or the location which holds a strong link with the subject – matter of the dispute;

* The author would like to thank Cleopatra Zerde and Despoina Goupou for their valuable contribution to this chapter.

1. http://www.et.gr/index.php/anazitisi-fek.

c) The parties have explicitly agreed that the subject matter of the arbitration agreement is related to more than one state-country.

Based on the above, an arbitration not meeting the above conditions and, at the same time taking place within the Greek territory between parties of the same nationality, will be a "domestic" arbitration.

"Domestic" versus "international" arbitration in Greece should not be confused with "domestic" versus "international" arbitral awards. Domestic award is the one issued by an arbitral tribunal, the forum of which is located in Greece, whilst an international award is the one issued by an arbitral tribunal seated outside of the Greek territory (Articles 904 and 906 of Greek Code of Civil Procedure (GCCP)).

If an arbitration is "domestic" it will, in principle, be governed by the provisions set out in Chapter VII, Articles 867–903 of the GCCP, whereas if an arbitration is "international" it will, in principle, be governed by the provisions set out in Law 2735/1999 on International Commercial Arbitration ("LICA"), by means of which Greece adopted, with minor changes, the 1985 UNCITRAL Model Law on International Commercial Arbitration. Apart from the above "core" provisions, various other provisions are found in special legislation providing for matters such as the participation of the Greek state in arbitrations, investment arbitrations, energy arbitrations, maritime arbitrations, construction arbitrations, etc.

Between the arbitral proceedings governed by the GCCP provisions and the proceedings governed by Law 2735/1999, the following differences, *inter alia*, can be observed:

- In domestic arbitration, the arbitral tribunal lacks the power to order interim measures (Articles 685 and 889(1) of the GCCP), whereas, in international arbitration, the arbitral tribunal is vested with such a power.
- Under Article 897 of the GCCP, the grounds for annulment of an award issued in the context of a domestic arbitration are broader than those for annulment of an award issued in the context of international arbitration, as provided for in Article 34 of Law 2735/1999. The GCCP also provides (in Article 901) for a declaratory action regarding the nonexistence of an award.
- Article 882 of the GCCP provides for a tight scheme, according to which the amount of the arbitrator's fee is calculated based on the value of the subject matter of the issue, and a cap in arbitrators' fees; special rules on fees apply to State judges acting as arbitrators in both domestic (Article 882(2) and 882A of the GCCP) and international arbitrations, whereas Law 2735/1999 does not impose a limit to arbitrators' fees, which can be higher than those imposed in a domestic arbitration.[2]
- Apart from the ad hoc arbitration, arbitral tribunals are organized by respective Institutions, the most prominent of which are: the Arbitral Tribunal of the Athens Chamber of Commerce and Industry;[3] the Greek Centre of Mediation

2. Tsavdaridis Ant. (2019), *Arbitration. Getting the Deal Through*.
3. www.acci.gr.

and Arbitration;[4] the Hellenic Chamber of Shipping;[5] the Piraeus Association for Maritime Arbitration;[6] the Organisation of Mediation and Arbitration to support collective bargaining between social partners; Panels organized by respective Bar Associations;[7] Panel organized by the Technical Chamber of Greece;[8] Panel organized by the Stock Exchange of Athens.[9]

## §9.02 CONSTRUCTION ARBITRATION IN GREECE

Conflicts arising from construction projects are usually referred to as arbitration, both in Greece and internationally.[10] The reason behind this phenomenon can be attributed to the particularities of these disputes as well as, historically, the "private" nature of the construction sector. From the beginning of the twentieth century, arbitration proceedings were presented as a choice of dispute resolution at the technical chambers at various European countries. But it was not until the 1990s, that arbitration was established as a well-received way of dispute resolution in Europe, mainly due to the high rise of concession agreements of public contracts.[11]

When referring to arbitration proceedings concerning construction projects, the term "construction arbitration" is commonly used. The International Chamber of Commerce ( ICC), in its 2001 Final Report on Construction Industry Arbitrations, pointed out that the term "construction arbitrations" is understood:

> to mean arbitrations that concern all kinds of disputes arising out of projects for construction work, but mainly those relating to the execution of the services (e.g. engineering services) and work necessary for the implementation of the project[12]

Construction arbitration is a subcategory of commercial arbitration, with its particularities. The technical nature of these disputes and the need of technical knowledge, the involvement of many parties, usually of different nationality or involving public entities, as well as the factor of time and urgency regarding the resolution of these disputes, are some of the reasons why construction arbitrations have to be handled in a special way.

When compared to regular court proceedings, arbitration presents important key advantages that have assisted in the establishment of construction arbitration as the

4. www.sae-epe.gr.
5. www.nee.gr.
6. http://www.mararbpiraeus.eu/
7. www.dsa.gr.
8. https://web.tee.gr/tcg/
9. http://www.helex.gr/
10. Mante, J., Ndekugri, I. and Ankrah, N., *Resolution of Disputes Arising from Major Infrastructure Projects in Developing Countries*, p. 98 (https://pdfs.semanticscholar.org/153b/bbc08c080fb6f515d9884832784798c95ea7.pdf).
11. Athanasakis, D. (2007), *Effective Dispute Regimes for Large Infrastructure Projects in Greece,* Paper to 3rd Hellenic Observatory PhD Symposium, LSE, Jun. 14–15, 2007, p. 1 (http://www.lse.ac.uk/europeanInstitute/research/hellenicObservatory/pdf/3rd_Symposium/PAPERS/ATHANASAKIS_DIMITRIOS.pdf).
12. ICC International Court of Arbitration Bulletin, Vol. 12, No. 2.

preferred way of resolving construction disputes. Presented briefly, the benefits of the arbitral procedure can be summed up as follows: (1) the ability of the parties to choose as arbitrators experts in the field of construction disputes, who are capable to navigate through the demanding technical matters as opposed to the random appointment of a judge or a panel of judges in the context of ordinary court proceedings; the range of choice can only be limited by the agreement originally made by the parties; (2) the expectation of a swift conclusion of the arbitral proceedings, especially when time is of the essence for a construction project; and (3) the confidentiality of the proceedings, since the financial or corporate data of the parties involved can be sensitive. Nevertheless, there are, of course, a few important drawbacks of the arbitration. These mainly concern: (1) the cost of the arbitral proceedings which will usually be considerably higher than the cost of ordinary court proceedings in Greece; (2) the duration of the arbitral proceedings which in some cases can be longer than originally expected and even comparable to ordinary court proceedings; (3) the possibility of conflicts; this has become a very common phenomenon in arbitrations, since there is not a vast pool of arbitrators and experts that are usually appointed in construction disputes; (4) the narrow range of legal remedies that an arbitral tribunal may be in a position to provide (i.e., in some cases inability to order interim measures, or even in cases that such an ability exists, limitations in the enforcement of the interim measures); and (5) the fact that ordinary court proceedings may not be avoided after all, as it is quite common in Greece for one of the parties, the State included, to challenge the arbitral award before the Greek Courts, i.e., the local Appeal Court, and seek its quashing on the available grounds.

Failure of the parties to an arbitration agreement to determine the rules applicable to their international arbitration will trigger the application of the provisions of the Law 2735/1999. The GCCP and, in particular, Articles 867–903 thereof, will come into play in domestic arbitrations. In domestic arbitrations, the procedural rules provided in Article 25A of Law 3614/2007 may also apply, together with the GCCP, to disputes arising from agreements of cofinanced public projects.

Moreover, it is common for parties in Greek construction projects to select the ICC Arbitration Rules[13] as the rules governing any arbitral proceedings. As it is known, the ICC Arbitration Rules are extensive and detailed, governing every part of the arbitration proceedings, even before the summons of the arbitral tribunal up to the enforcement of the award. If the arbitration agreement excludes the application of any set of rules other than the ICC Rules, then the procedure will be that of a straightforward, "pure" ICC Arbitration. If the arbitration agreement provides that the proceedings will not be governed solely by the ICC rules, but also by other specially selected rules and provisions, then this will be a case of ad hoc ICC Arbitration. In other words, the arbitration proceedings that follow only the rules set out in the ICC Arbitration Rules are characterized as pure ICC arbitration proceedings. On the other hand, if an arbitration procedure follows the ICC Rules partly and/or with some deviations, then is characterized as "ad hoc" ICC arbitration. The popularity of the choice of ICC Rules

13. https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/.

in construction arbitrations led to the issuance by the ICC, in 2016, of specific guidelines for construction arbitrations, further updated in 2019 with the Report of the ICC Commission on Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management. In Greece, in particular, ad hoc ICC arbitrations have become the norm in cases of concession agreements for construction projects, such as, for instance, the *Concession Agreement for the project of Attiki Odos* (ratified by Law 2445/1996),[14] *the Concession Agreement for the project of Study, Construction, Investment, Operation, Maintenance, Exploitation below the sea road artery of Thessaloniki* (ratified by Law 3535/2007),[15] the *Concession Agreement for the project of Study, Construction, Investment, Operation, Maintenance, Exploitation of the Highway Korinthos-Tripoli-Kalamata and section Lefktro-Sparta* (ratified by Law 3559/2007),[16] etc.

## §9.03 PROVISIONAL MEASURES IN CONSTRUCTION ARBITRATION IN GREECE

The right to effective judicial protection, as reflected in Article 6 of the European Convention on Human Rights, includes the possibility to request provisional protection[17]. The remedy of interim measures can be defined as "any temporary measure which, at any time prior to the issuance of the award, by which the dispute is finally decided, is ordered by the court."[18] Some common types of interim measures of protection ordered by courts or tribunals include *inter alia* the granting of a guarantee, the conservatory attachment of assets, partial payment of claims and any other type of appropriate injunction or application for the production of certain documents.[19]

The remedy of interim measures is compatible with arbitration and available under different institutional arbitration rules. The right of the arbitral tribunal to grant provisional measures specific to construction arbitration and its interaction with the State courts depend on the set of rules applicable in each case. In the following sections, we will take a look at this matter in light of the applicable law and procedural rules.

14. http://www.et.gr/idocs-nph/search/fekForm.html#results.
15. http://www.et.gr/idocs-nph/search/fekForm.html#results.
16. http://www.et.gr/idocs-nph/search/fekForm.html#results.
17. *See* p. 24 of https://rm.coe.int/168007ff55.
18. Article 26 para. 2 of UNCITRAL Arbitration Rules (https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf).
19. Articles 704, 706, 707, 728 and 731 of the GCCP.

## [A] Domestic Arbitration

### *[1] General Provisions*

As mentioned above, a domestic construction arbitration in Greece, unless otherwise provided in the arbitration agreement, will, in most cases, be governed by the provisions of GCCP.

#### *[a] Provisional Measures Ordered by the Arbitral Tribunal*

The GCCP includes Chapter VII, Articles 867–903, setting out the framework for arbitration in Greece. When a domestic arbitration is not, by exception, falling within the scope of any special legal framework (e.g., rules regarding the public contracts), it will be governed by the aforementioned Articles of the GCCP.

Regarding provisional measures, Article 889 of GCCP states that:

> 1. The arbitrators may not order, amend, or revoke interim measures of protection.
> 2. If the competent court has ordered interim measures of protection and a time period has been fixed for the filing of an action or a situation has arisen calling for the application of paragraph 5 of Article 715 and paragraph 5 of Article 729, the applicant shall be bound to initiate within the prescribed time period the arbitral proceedings. The provisions of paragraph 2 of Article 693, paragraph 5, item 2 of Article 715 and paragraph 5, item 2 of Article 729 shall also be applied in such a case.

Whereas according to Article 685 of the GCCP, any agreement between the parties vesting the arbitral tribunal with such authority (i.e., to order interim measures) is considered null and void.

In particular, Article 685 of the GCCP states that:

> Every arbitration agreement regarding interim measures proceedings is not valid.

Therefore, in domestic arbitration, arbitral tribunals are explicitly prohibited from ordering provisional measures, the parties cannot grant to the arbitral tribunal such authority and, if they do, their agreement will be invalid. It follows that there is no possibility to exclude the State courts from granting provisional measures and that any such agreement will be invalid. This is supported both in Greek legal theory and case law. In particular, regarding the validity of an arbitration agreement excluding the State courts' jurisdiction to order interim measures, it is written in the interpretations of GCCP both by K. Kerameus, D. Kondilis and N. Nikas[20] and by V. Vathrakokoilis[21] that such an agreement would be invalid. The same view was taken in the Decision No. 8178/1981 of the Court of Appeals,[22] which stated: "[…] based on the combination of the provisions of Articles 685 and 889 GCCP, it is clear that the jurisdiction of States

20. Kerameus, Kondilis and Nikas, (2000), *Interpretation of GCCP II*, Art. 685 para. 1.
21. Vathrakokoilis (1996), *GCCP*, Art. 685, p. 59.
22. Court of Appeal of Athens Decision No. 8178/1981, *NoB 1982.823.*

Courts to order, amend or revoke interim measures is preserved even if there is an arbitration agreement for the main dispute and the arbitral tribunal has no authority to order, amend or revoke interim measures, **whereas any parties' agreement regarding the opposite is invalid** (emphasis added)[…]," as well as in Decision No. 2300/1987 of the Single Member Court of First Instance of Patras,[23] which similarly held that: "[…]the State courts' competence to order, amend or revoke interim measures is preserved, even if there is an arbitration agreement in force, as the arbitral tribunal does not have the jurisdiction to grant provisional measures, since any agreement **regarding the opposite is invalid** (emphasis added) […]." Thus, the conclusion that is drawn is that under the provisions of the GCCP, as interpreted and applied by the Greek Courts, the arbitral tribunal does not have the power to order provisional measures. The aforementioned provisions of the GCCP do not only apply to domestic arbitrations but also to disputes under arbitration agreements with "foreign-related" factors, which explicitly provide for the application of GCCP. In other words, the parties of an arbitration agreement, which may not be domestic, can agree that the provisions of the GCCP on domestic arbitration will apply to the *subjudice* arbitration. It is also worth mentioning that a part of Greek legal literature supports that, even without an explicit mention of the provisions of the GCCP into the arbitration agreement, in cases where the statutory framework governing the international arbitration does not include specific provisions for certain issues, the general provisions of the GCCP apply. Finally, a common example of this complementary application can be found in the public works concession agreements in Greece,[24] which often specifically provide for the complementary application of the GCCP to the ICC rules, which are usually chosen as the main procedural set of rules.

*[b] Provisional Measures Ordered by the State Court*

As it was explained above, the Greek State courts have the sole jurisdiction to order provisional measures, even in cases where the main dispute has been referred to arbitration, with the arbitral tribunals being explicitly prohibited from ordering provisional measures. Interim measures by State courts may be ordered before the initiation of the arbitration proceedings, as well as after.

Regardless of the dispute resolution mechanism selected by the parties, provisional remedies are governed by the same set of rules, i.e., Articles 682–738 of the GCCP. Under the provisions of the GCCP, provisional measures are subject to two conditions. The first condition lies in the correlation of the requested measure to a specific substantial right or, in the case of regulatory provisional remedies, to a legal relationship from which rights and obligations may arise, even in the future. The second prerequisite reflected in Article 682 of the GCCP is the existence of an urgent situation, that has to be temporarily settled or the avoidance of imminent danger. Both these requirements must be proven before the State court by the party seeking

23. Single Member Court of First Instance of Patras Decision No 2300-1987, *EnautD 1987.437-438.*
24. Law 4412/2016 (http://www.et.gr/idocs-nph/search/fekForm.html#results) and Law 4413/2016 (http://www.et.gr/idocs-nph/search/fekForm.html#results).

provisional protection. The State court has the authority to grant the following interim measures upon request: security for a monetary claim; registration of a prenotation of mortgage, which is a provisional mortgage that can be turned into a mortgage when the secured claim is recognized finally by virtue of a court decision; conservatory seizure of movables, immovables, rights in rem thereon, claims and all assets of the debtor either in his or her hands or in the hands of third parties; the placement in judicial escrow (custody) of movables, immovables, a group of objects or of a business in the event of a dispute pertaining thereto, such as for their legal ownership or possession; the temporary adjudication of certain categories of claims; the temporary regulation of a situation via the court's order to do, omit or tolerate a certain act by the party against which the application has been filed; the sealing, unsealing, signing or public deposit.[25]

### *[2] Special Provisions on Public Contracts*

By exception to what is provided in the GCCP, Article 25A of Law 3614/2007 introduces a specific provision for disputes related to certain types of public contracts. The said Article, which was added to Law 3614/2007 by virtue of Article 64 of Law 4155/2013 on National Electronic Public Procurement System ("NEPPS") has been amended by virtue of Laws 4177/2013 and 4264/2014.

#### *[a] Provisional Measures Ordered by the Arbitral Tribunal*

Article 25A provides for recourse to arbitration proceedings regarding disputes arisen from public procurement for cofinanced public projects. In order for the public contracts to fall within the scope of this provision, they need to meet some prerequisites:

(1) The work needs to fall under the definition of public works of Article 1(2) and (3) of Law 3669/2008, which was replaced by Article 377 of Law 4412/2016.
(2) It needs to be cofinanced by EU funds.
(3) The contracting authority of the cofinanced public work must be a public undertaking, as the latter is defined in Article 1 of Law 3429/2005.
(4) The cofinanced public contract shall include a clause stating that the resolution of the disputes arising from it is subject to Articles 76 and 77 of Law 3669/2008 regarding public procurements, which was replaced by Article 377 of Law 4412/2016, which incorporated into Greek legislation the Directive 2014/24/EU.

In particular, the definition of a public work in Article 1(2) and (3) of Law 3669/2008 has been replaced by the definition of "work" presented in Article 2(7) of Law 4412/201, which states that "a work means the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfill an economic or

25. Paraskevopoulos, Ch. (2019), *Dispute Resolution 2019 – Greece, Getting the Deal Through*.

technical function." When the above four conditions are met, the disputes arising out of these public works can be referred to the arbitration proceedings governed by Article 25A of Law 3614/2007. The procedure described in the said Article is a sui generis procedure, as it is a combination of the GCCP provisions, to which paragraph 8 explicitly refers to, and certain special provisions/exceptions.

First, Article 25A of Law 3614/2007 introduces a type of statutory arbitration, since there is no need for an arbitration agreement to have been concluded between the parties. On the contrary, one party can choose to refer the dispute to arbitration, by merely announcing it to the other party and to the competent Minister at the time. The latter is responsible for judging within sixty days, whether the dispute will be referred to arbitration proceedings (paragraph 3 of Article 25A). In paragraph 4, it is also mentioned that the party wishing to opt for arbitration must, before doing so, lodge an administrative objection regarding the act or omission of the other party (within fifteen days of having knowledge of the fact), for which the other contracting party must issue a decision within a two-month period (paragraph 4 of the said Article). The purpose of Article 25A, as described in the explanatory report of the said Law, is the establishment of a flexible and fast procedure for resolving the disputes arising from the execution of the agreements of cofinanced public works and accelerating the time of execution of these works. In spite of the intent of the Greek legislator, the predescribed obligatory preliminary procedure may actually defy the purpose of Article 25A, as it can lead to delays that should be avoided in arbitration procedures.

In particular, Article 25A of Law 3614/2007 states:

> […] 5. Each party that considers that there is a dispute to be resolved, it can recourse to arbitration proceedings within 60 days since the date of service on it of the decision of the other contracting party on the objection or the expiry of the two-month deadline, according to the provisions of par. 4 of the present Article, via lodging an application for submitting the dispute to arbitration, which is notified to the other party. The petition must include a clear description of the dispute and must appoint an Arbitrator on behalf of the applicant. Copy of the application will be notified compulsorily to the Arbitrator appointed by the applicant.
>
> 6. The arbitral tribunal consists of three (3) Arbitrators. Every party will appoint one Arbitrator. The appointing of Arbitrator by the defendant is compulsorily notified to the applicant, to the Arbitrator appointed by the applicant and to the Arbitrator appointed by the defendant. In case of non-appointment by the defendant within eight (8) days since the serving on it of the petition requesting arbitration, the second Arbitrator will be appointed on its behalf by the President of the Supreme Court, within 10 days since the receipt of the said petition. […]
>
> 8. The arbitration is conducted in Athens, in Greek, and it is ruled by the provisions of Article 867 to 903 of GCCP. The arbitral tribunal implements the terms of the present paragraph and the provision of the Greek Legislation. The Arbitrators decide by majority. The arbitral tribunal is entitled, within the scope of a pending dispute, to order the expert's examination and to issue temporary suspension decisions.
>
> 9. The arbitral award defines the expenses of the arbitration and of the expert's report, if any, and the allocation of them to the parties. The award is issued as soon as possible but not later than four (4) months since the date of appointment of the

> third Arbitrator. The arbitral tribunal may, following a petition of each of the parties or by its own initiative, to prolong the said deadline for an important reason.
>
> 10. The arbitral award is immediately enforceable, it is not subject to any legal remedies, and it is binding for both Parties, which explicitly assume the obligation to comply with it immediately. In exception, a lawsuit to cancel the arbitral award is permitted on the grounds mentioned in Article 897 GCCP. In the case that danger of irrevocable or difficult to reverse damage due to the execution of the decision is presumed, a partial or total suspension of the execution of the decision challenged may be ordered, after application of one of the parties on the condition that a respective guarantee is provided or without a guarantee if the lawsuit for cancelation is well founded, or the execution of the decision may depend on the granting of a guarantee by the winning party.

From the above, it follows that one notable difference to what is ordinarily provided in the GCCP is that provisional measures can be ordered by the arbitral tribunal. Specifically, in paragraph 8, it is stated that the arbitral tribunal has the power to issue an arbitral award ordering "temporary suspension." As the above paragraph is *lex specialis* to the GCCP, it prevails over the contrary provisions of Articles 685 and 889 of the GCCP, thus vesting the arbitral tribunal with authority to grant provisional measures in the form of "temporary suspension." Lacking the explicit mentioning of any other interim measure in the said paragraph, it can be argued that the temporary suspension is the only type of provisional measure that the arbitral tribunal may order. Nevertheless, even if provisional measures are limited to the ordering of "temporary suspension," this provision of paragraph 8 creates a "rift" to the general prohibition of Article 889 paragraph 1 of the GCCP and constitutes a welcomed novelty.[26]

*[b] Provisional Measures Ordered by the State Court*

As mentioned above, Article 25A(8)of Law 3614/2007 includes an immediate reference to the provisions 867–903 of GCCP, which also apply in these arbitration proceedings. Taking as a given that the previous mentioned Article seems to vest the arbitral tribunal with authority to order only the provisional measure of temporary suspension and in correlation with the combination of Articles 685 and 889 of the GCCP, it could be argued that the State court preserves the authority to grant provisional measures in the disputes falling under the scope of Construction Disputes. Besides, Article 889 of the GCCP is *ius cogens*, which means that State court, could not be alienated from its power to order provisional measures, even if this was agreed by parties. The same appears to be accepted by at least some part of Greek legal theory.[27] Therefore, it can be supported that in these disputes, the arbitral tribunal "shares" competence with the State courts, which can always offer interim relief to any of the parties. However, the said Article does neither explicitly regulate the issue of the competence of the State court to order

26. Strogili, Eir. (not dated), *The New Procedure of Arbitration for the Co-financed Public Works. Theory and Action*.
27. Kerameus, K. (1981), *Issues on Arbitration by Comparative Law Perspective, Dedication to G. Oikonomopoulos*, pp. 105 et seq.

provisional measures nor its interaction with the authority of the arbitral tribunal. The question arisen is whether the State court has concurrent competence to order provisional measures and especially the provisional measure of temporary suspension. The said issue also arises under the international set of rules, and we believe that should be dealt with in a uniform manner in both cases.

First, we consider that the answer to this question lies in Articles 682–738 of the GCCP regarding the provisional measures, and, especially, in the conditions under which the interim measures may be granted, the types of measures available and their enforceability (Article 700 (1) of the GCCP), as indicated above.

With regard to the relation between the competences of the two judicial authorities (i.e., arbitral tribunal and State court), it seems that there is a concurrent competence, which may cause a conflict in cases where the requested interim measure is that of the temporary suspension, which, as elaborated before, is the only measure that, at least per the letter of the Greek law, could be ordered by both bodies. In such cases of conflict, the problem should be resolved by taking into consideration a time criterion. As we will analyze below, the majority of the legal literature suggests that in cases of conflict, the competent is the body is the one that seizes the case in the first place. As such, the State court has the power to order provisional measures, even if the main dispute is subject to arbitration proceedings under Article 25A of Law 3614/2007 unless the arbitral tribunal has received first an application for interim measures.

Furthermore, it is worth mentioning that Greek Law 4412/2016 on Public Procurement, which incorporated the Directive 2014/24/EU of the European Parliament and European Council on public procurement, dated February 26, 2014, provides for the possibility for the parties to include an arbitration clause in their public contracts. Article 2(5) of this Law establishes the procedure for procurement with respect to public contracts, i.e., contracts for pecuniary interest, concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services.

In particular, Article 176(2) provides for the possibility to include an arbitration clause as follows:

> By way of derogation from the provisions in force set out for the State's Arbitrations and after the legal opinion of the competent technical adviser, the Public Contract determines the applicable rules, the rules governing the appointments of arbitrators, the venue of the arbitral tribunal, the payment of the arbitrators and any other relevant issue.

Under paragraph 4 of the said Article, the arbitration will be conducted under the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, effective as of April 1, 2014. These Rules are a set of procedural rules ensuring the publicly of the investor-State arbitrations arising under investment treaties.

Other relevant provisions referring disputes to arbitration can be found in Law 4413/2016 on Public Concession Agreements (Article 65), in Law 2229/1994 regarding the execution of important public projects (Article 5(16)) and in Law 3389/2005 on public-private partnerships (Article 31). These provisions clearly provide that disputes

that arise from any type of agreements falling within the scope of the aforesaid respective Laws can or must be referred to arbitration, as the case may be, under the specific rules applicable in each case.

### [B] International Arbitration

#### *[1] Law 2735/1999, Incorporating the UNCITRAL Model Law*

Law 2735/1999 incorporates the provisions of the UNCITRAL Model Law on International Commercial Arbitration and adopted by the United Nations Commission on International Trade Law on June 21, 1985. The UNCITRAL Model Law was amended in 2006, and it now includes more detailed provisions on interim measures.[28] However, Law 2735/1999 does not reflect the latest amendment of the UNCITRAL Model Law.

##### *[a] Provisional Measures Ordered by the Arbitral Tribunal*

We have already presented the prerequisites for an arbitration to be considered as international and, thus, fall under the scope of Law 2735/199. Article 17 of Law 2735/1999 provides that, unless otherwise agreed by the parties, the arbitral tribunal may order provisional and protective measures upon request of one of the parties. The arbitral tribunal may choose at its own discretion the type of the "provisional and protective" measures that it considers adequate and appropriate.

In particular, Article 17 states that:

> Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

However, the competence of the tribunal does not extend to offering interim relief against a third party to the arbitration, in which case State courts have exclusive competence. Should a party fail to comply voluntarily with the measures ordered by the tribunal, the other party may resort to the competent court requesting the imposition of such relief, pursuant to Article 17(2) of Law 2735/1999, which provides that "The State court of Article 9[29], following request of one party, may impose the interim relief measure that was ordered according to par.1, unless the State court has already seized the case following request for granting a equivalent provisional measure." Article 34 of Law 2735/1999 provides for the possibility of annulment of the arbitral award before the competent State court, which is the one mentioned in Article

28. UNCITRAL official site (2019) (http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html).
29. Article 9 Law 2735/1999: "It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."

6 paragraph 2 of Law 2735/1999, excluding any other remedy. There is however the possibility, based on *a contrario* interpretation of Article 35(2) of Law 2735/1999, for the parties to agree to recourse against the award before another arbitral tribunal. The said Article does not clarify if the provided procedure of annulment corresponds only to final arbitral decisions; thus, it can be assumed that the procedure can apply to awards ordering interim relief measures. The grounds for annulment of an award are exhaustively enumerated in the said mandatory provision and reflect the grounds under Article 34 of the UNCITRAL Model Law.[30]

The possibility to annul an arbitral award ordering provisional measures has been confirmed by the Greek case law. In the Decision No. 4744/2012,[31] the Court of Appeal of Athens accepted the request for the annulment of the arbitral decision ordering interim measures, since according to its reasoning, the relevant arbitral award was not issued in the context of international arbitration and, therefore, the arbitral tribunal lacked the competence to order provisional measures. In its own wording, the Court ruled that "it was not proven that the requirements of Article 1 par. 2 of Law 2735/1999 were met, in order for the said arbitration to be characterized as international arbitration, and thus the ordering of provisional measures by the arbitral tribunal to be acceptable."

*[b] Provisional Measures Ordered by the State Court*

In international arbitrations, State courts have the authority to order interim measures before or after the beginning of the Arbitration procedure. Specifically, Article 9 of Law 2735/1999 states that:

30. These grounds are the following:

(a)
- (i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not under the law to which the parties have subjected it or, failing any indication thereon, under the Greek law; or
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains provisions on matters beyond the scope of the submission to arbitration, provided that, if the provisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains provisions on matters not submitted to arbitration may be annulled; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the competent court that seizes the case, after the submission of the relevant request finds that:
- (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- (ii) the award is in conflict with the public policy of this State, as the latter is defined in Article 33 of the Greek Civil Code.

31. http://www.dsanet.gr/1024x768Auth.htm.

> It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

Since the arbitral tribunal before its constitution, cannot, by fact, grant provisional measures, the State court holds the exclusive authority to order provisional measures before the commencement of the arbitration proceedings. The State court also has the exclusive competence to order interim relief against a third party to the arbitration. Moreover, before the amendment of the UNCITRAL Model Law in 2006, which, as previously mentioned, is not transposed into Greek legislation, it was argued that the State court had exclusive authority in cases of ex parte granting of interim measures. However, under Article 17B of the amended Model Law, it is explicitly stated that, "Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested." Therefore, after the said amendment, the exclusive authority of State court cannot be readily supported, even if this amendment has not yet been introduced to the Greek Legislation since the UNCITRAL Model Law includes the general principles of international arbitration.[32]

As to the provisional measures after the commencement of the arbitration proceedings and the constitution of the arbitral tribunal, the two judicial authorities hold concurrent authority. The latter raises questions regarding the issue of conflict of competence between the two bodies. The prevailing view in Greek legal literature suggests that such a conflict could be resolved by taking into account the time that each judicial authority was addressed with the request for interim measures. Based on this criterion, the body which holds competence is the one before which the request was first submitted. Thus, in cases of two pending requests for interim measures, the competent body is that seized first. There is also the opposite position in the Greek legal literature claiming that after the establishment of the arbitral tribunal, the State courts have subsidiary/auxiliary competence. The latter view could not be readily supported, as the amended UNCITRAL Model Law provides in Article 17J that, "A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration."[33]

### [C] Construction Arbitration under the ICC Arbitration Rules

#### *[1] Interim Measures by the Arbitral Tribunal*

The 2017 ICC Arbitration Rules contains, *inter alia*, provisions for interim relief under Article 28. Where a party is in need of urgent interim or conservatory measures and

32. Filiotis, I. (2015), *Arbitration and Provisional Measures*, EpolD, 14.
33. *Id.*, 13–14.

cannot await for the constitution of the arbitral tribunal, the party may apply to the Emergency Arbitrator under Article 29 and Appendix V to the ICC Arbitration Rules.

#### *[2] Interim Measures by the State Court*

In ICC arbitration proceedings, State courts possess concurrent jurisdiction to grant interim measures upon the request of a party. In practice, it is common that a party will need the assistance of the State court when the arbitral tribunal is not yet constituted.[34] This is illustrated by Article 28(2) of the ICC Arbitration Rules, which refer to the possibility of the parties to address the State courts and that such request "shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal." Decision No. 1184/2013 of the Single Member First Instance Court of Athens[35] regarding a dispute with an underlying arbitration clause referring to ICC Rules, clearly stated that, "the hearing of the petitions for interim relief measures before the States Court (Magistrate's Court of Kropia and First Instance Court of Chalkida) does not mean the annulment of the arbitration agreement […] since the possibility to demand provisional measures before the arbitral tribunal was not included in the arbitration agreement […]."

### [D] Enforceability of Decisions/Awards Ordering Interim Measures

The enforcement of a decision or an award ordering interim measures is subject to applicable law at the place of the enforcement. As a general rule, domestic decisions or awards are immediately enforceable under Article 904 of the GCCP, without any further proceedings, whereas, under Article 905 of the GCCP, international decisions or awards first need to be declared enforceable.

The enforcement of the State court's domestic decisions granting interim relief is subject to the general rules of enforcement under Article 700(1) of the GCCP. Certain (minor) modifications to the general provisions of enforcement are stemming from the nature of the provisional remedies as an accelerated form of protection. Thus, contrary to the general enforcement procedure, where the court issues an enforceable copy of the judgment, including the writ of enforcement, which has to be served to the debtor so that the enforcement may commence, Article 700(2) of the GCCP provides a different procedure. In particular, the court does not have to issue a writ of enforcement, and the debtor does not need to be served with a formal invitation to comply with the content of the provisional remedy; the enforceable instrument is a copy or an extract from the judgment ordering the conservatory measure.

As to the enforcement of a domestic arbitral award ordered under Article 25A of Law 3614/2007, the arbitral award is immediately enforceable and binding for both parties, as provided under Article 25A(10):

34. Marchac, Gr. (1999), *Interim Measures in International Commercial Arbitration under the ICC, AAA, LCIA & UNCITRAL Rules*, 10 American Review of International Arbitration, p. 123.
35. https://lawdb.intrasoftnet.com/nomos/3_nomologia_rs_sub.php.

> The arbitral award is immediately enforceable, it is not subject to any legal remedies and it is binding for both Parties, which explicitly assume the obligation to immediately comply with it. In exception, a lawsuit to cancel the arbitral award is permitted on the grounds mentioned in Article 897 GCCP. In the case that danger of irrevocable or difficult to reverse damage due to the execution of the decision is presumed, a partial or total suspension of the execution of the decision challenged may be ordered, after application of one of the parties on the condition that a respective guarantee is provided or without a guarantee if the lawsuit for cancelation is well founded or the execution of the decision may depend on the granting of a guarantee by the winning party.

The above provision clearly states that the arbitral decision is *immediately enforceable* and thus, subject to the general rules of enforcement under Articles 904–1054 of the GCCP. In case the arbitral award orders the provisional measure of temporary suspension, which as stated above seems to be the only interim measure that can be ordered by an arbitral tribunal, then the temporary suspension will take effect as of the issuance of the award without any further need for its enforcement, as the award shall be by its issuance binding on the parties.

As to the enforcement of a domestic arbitral award under Law 2735/1999, i.e., an award issued by an arbitral tribunal seated in the Greek territory, such award is enforceable from its date of issuance, but the enforcement procedure must first be filed with the Secretariat of the Single Member Court of First Instance in the territory where the award was issued, as provided by Articles 893(2) of the GCCP and 32(5) of Law 2735/1999. Enforcement can then commence on the basis of a certified copy of the enforcement order, under Articles 904 and 918 of the GCCP. Once this order has been served, Article 926 of the GCCP provides that the enforcement actions can commence within three working days after the service of the order.

On the other hand, the enforcement of an international arbitral award, by virtue of Article 36 of Law 2735/1999, is subject to the provisions of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) incorporated into the Greek national legislation by Legislative Decree No. 4220/1961.

Nevertheless, in order for the above provision to be implemented, it is required that the forum of the arbitration must be a Member State of the New York Convention. In cases where the forum is not at a Member State of the New York Convention, the international award is recognized provided that the conditions set out in Article 903 of the GCCP are met. Under the latter, an award is recognized when: (a) the arbitration agreement is valid under the law of the State that issued it; (b) the disputed item can be subject to an arbitration agreement; (c) the award cannot be appealed or no proceeding against its validity is pending; (d) the unsuccessful party has not been deprived of the right to a defense during the arbitration proceedings; (e) the award is not contrary to a judgment issued by the Greek State courts that sets a precedent between the parties and concerns an issue to which the foreign judgment relates; (f) the award is not contrary to the public order or moral values of Greece.

If the above conditions are met, the international award is declared enforceable in ex parte proceedings by the Single Member Court of First Instance of the region where the party against whom the enforcement is sought has its registered seat or residence, as provided for by Article 905 of the GCCP.

### [E] Conclusion

In the last fifteen years, we have witnessed the rise of arbitration as the preferred dispute resolution mechanism for construction disputes in Greece. Even though the economic crisis halted the continuance and the conclusion of many projects in the Greek territory, the Country now appears to have entered an era of stability and—hopefully—growth. This can only be good news for construction projects, and it is likely to lead to the continuation of the trend of choosing arbitration as the preferred dispute resolution mechanism. In this context, identifying the regime applicable to interim measures protection, as attempted above, will be of key importance.

Whereas in the International Commercial Arbitration Proceedings in Greece, the parties can vest the arbitral tribunal with authority to grant interim measures, in domestic arbitration the aforementioned provisions of the GCCP do not allow this. This is an issue. The concurrent jurisdiction of both State courts and arbitral tribunal in International Commercial Arbitrations also presents challenges.

On the other hand, in domestic arbitrations, the parties may only recourse to the proceedings before the State courts, which have the general advantages and disadvantages of every court procedure.