

BUSINESSLAWHIGHLIGHTS

ABOUT THE AUTHOR



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A Quarterly Contribution by Nassos Felonis Attorney & Counselor at Law of Counsel to the Chamber

The purpose of this column is to present in a nutshell, certain major legal developments, which may be of interest to local and foreign enterprises in their business planning. For further information on the subjects discussed below or other business matters, please contact Mr. Felonis at the Chamber's Office.

I. EEC INTEGRATION

As the milestone year of 1992 for the EEC's integration draws closer, the landmark decision 2152/1986 of the Council of the State (en bane) deserves special mention, since it increasingly becomes of greater importance and relevance.

1. Council Decision

This case concerned the freedom of Common Market companies for developing their economic activity in Greece as well as their freedom of establishment for such purpose, and in particular certain conditions and restrictions imposed by the Greek Mining Code against the acquisition of mining rights by foreign companies. Pursuant to them, the Ministry of Industry, Energy and Technology (Y.B.E.T.) denied the approval of a mining contract entered into by an EEC company, because of non-compliance with certain special conditions applicable when the other contracting party is a foreign company (i.e., the requirement of an approval by the Council of Ministers prior to signing the relevant contract, as per article 8 of the Mining Code).

The Council of the State annulled this rejection as discriminating unjustifiably against EEC companies and it held that such an unequal treatment was not allowed. Then it went on to make several rulings of general application and of extreme importance to the process and objective of the EEC's integration. The main principles of the Court's holding are as follows:

- a) As of 1-1-1981 (i.e., the date on which Greece's Accession Treaty into the European Communities came into effect), the EEC Legislation became an integral part of the Greek Internal Legal System and according to article 28 of the Greek Constitution, it prevails over any opposite provision of the Greek Law;
- b) As of that date, all provisions of the Greek Law opposite to the EEC Law are automatically inapplicable, without having to be adjusted by abolishing the conflicting ones;
- c) The EEC Treaty has established full freedom of all Common Market persons (legal or natural) for developing and pursuing their business activities in the territory of all other Member States, as well as equal treatment in the exercise of such freedom between the nationals and companies of each Member State and the nationals and companies of the

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other Member States; and d) As a result of the above, neither any restrictions on the freedom of business development and establishment for such a purpose may be imposed by a Member State nor any discrimination against the nationals and companies of the other Member States in relation to the exercise of said freedom may be applied by any Member State, as compared to the respective treatment of its own nationals and companies.

2. P.O. 92/1986

It is note worthy that in view of this litigation, YBET enacted the Presidential Decree No. 92/1986 (OEK 33/A'/28-3-1986), which fully adopted and complied with the above principles, providing that: (i) all the provisions of the Mining Code which impose prohibitions, restrictions and conditions on the acquisition of mining rights in general by foreign persons (legal or natural) are not applicable, when the interested foreign party is an EEC national or a company (the latter, if established according to the laws of a Member State and it also has its charter seat, central management and main establishment within the EEC) (1), and

(1) In this respect, it should be pointed-out that the definition of an EEC company is not in full compliance with the respective definition of article 58 of the EEC Treaty, where the last two requirements are stated disjunctively ("or") and not cumulatively ("and"), as in the P.D. Of course, in the event of conflict, the definition of the EEC Treaty shall prevail, according to the principles stated above.

(2) - Part D': Transfer of Technology
- Part E': Application of the European Patent Convention
- Part F': Final and Transitional Provisions
- Pan G': Establishment of the Greek Atomic Energy Committee

(ii) the provisions applicable to local persons for acquiring any mining rights, apply also to all EEC persons as described above (Equal Treatment).

II. PATENTS - TECHNOLOGY TRANSFER

Law No. 1733/1987 (OEK 171/A'/22-9-1987) replaced the old legislation on patents (dated since the 1920s), P' by establishing new institutions and introducing several major improvements and modernizations, which in summary are as follows:

1. Industrial Property Organization (O.B.I.)

The Patent Division of the Ministry of Industry has been superseded by the establishment of OBI, which is a separate Government Agency, supervised by YBET and governed by a seven (7) - member Board. OBI's stated objective is to contribute to the technological and industrial development of the country, mainly through the following functions:

- a) granting the patent certificates and other certificates (i.e., for modification, model use and technical innovation),
- b) registration of technology - transfer agreements,

- c) preparation and supervision of the application of international treaties on patents and technology transfer,
- d) cooperation with other similar organizations (national and international) and connection with data banks,
- e) surveying and inventory of the patents and other technology used in Greece and abroad,
- f) classification of patents and technology-transfer contracts per category of use, taking also into account the internationally applicable criteria.

2. Patents

Patents are granted for noval inventions which incorporate inventive activity and are subject to industrial application. The invention may refer to a product, method or industrial application.

— Novelty: The requirement of world-wide novelty has been introduced by the new Law. As such it is considered anything that is known anywhere in the world through written or oral description or through any other way, prior to the submission date of the relevant patent application (or the priority date).

— Inventive activity: An invention is considered to incorporate such an activity if, according to the opinion of an expert, it does not result in an apparent way from the existing technical level.

— Industrial application: An invention is considered to be subject to industrial application, if its object may be produced or used in any part of the productive process.

a) Exclusions

(i) The following are not considered inventions:

- discoveries, scientific theories and mathematical methods,
- aesthetic creations,
- designs, rules and methods for

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the exercise of intellectual activities, for games and for the exercise of economic activities, as well as computer programs,

- presentation of information,

(ii) The following are not considered subject to industrial application:

- methods of surgical and therapeutical treatment of the human body or the body of animals,
- diagnostical methods applied to the human body or the body of animals. However, these exclusions are not applicable to products and particularly to substances or compositions used in the application of the above methods.

(iii) No patents are granted in the following cases:

- for inventions the publication or application of which, is contrary to public order or good morals,
- for varieties of plants or species of animals or biological production methods of plants or animals, except for microbiological methods and products produced through these methods,
- for pharmaceutical products (according to the meaning of article 2 of L. 1316/1983).

b) Worker's Invention

The rule is that an invention made by a worker belongs to him (free invention), except if the invention is either a "service invention", when it belongs totally to the employer, or a "dependent invention", when it belongs 40% to the employer and 60% to the employee. — "Service invention" is defined as the product of the contractual relationship of the worker to its employer for the development of inventive activity. In such a

case however, the worker is entitled to a reasonable fee, if the invention is particularly beneficial to the employer. — "Dependent invention" is defined as the one made by the worker through the use of the materials, means or data of the company where he works. In such a case, the employer has a priority right to exploit such an invention against the payment to the inventor of a fee analogous to the economic value of the invention and the resulting profits. The inventor is obliged to immediately notify its employer of such an invention and to provide all necessary data for the joint submission of the relevant patent application. If the employer does not express such an interest within four (4) months, then said application may be submitted only by the worker and the invention belongs totally to him. It should be noted, that according to the Law any agreement limiting the above rights of the worker is invalid.

c) International Priority

In case that a patent application has been filed abroad, its beneficiary has a priority right if within twelve (12) months therefrom it files in Greece an application for the same invention, subject however to the condition of reciprocity. In the new application the date and country of the first filing should be mentioned. The priority right reverts back to the time of the first filing abroad.

d) Patent Validity

The duration of validity of a patent is twenty (20) years, commencing from the next day of the regular

submission of the relevant patent application. If a priority right is invoked on the basis of a filing abroad, the validity period of the patent is calculated from the next day of the filing in Greece.

e) Rights of the Patent Holder

The patent grants to its holder (legal or natural person) the exclusive right for the above-mentioned period, to exploit, use and trade its invention and the products produced thereby. Further, the patent holder is entitled to prohibit third parties from exploiting productively its invention, as well as to import, without its consent, the products protected by the patent.

3. Application of the European Patent Convention

Greece has ratified the European Patent Convention signed in Munich on 5 October 1973, by the Law No. 1607/1986 (<DEK 85/A/30-6-1986). When the claimant is a Greek national, the application for the granting of a European patent must be filed with OBI, provided that no priority is asserted on the basis of a previous filing in Greece. The granting of a European patent may be asked for all the Countries that have acceded to the Convention, for some of them or for only one of them. Such patent is granted by the European Patent Office, based in Munich (and having also a branch office in the Hague). The European patent, when granted as above, has in Greece the same effect as the Greek patent granted by OBI.

4. Other Certificates

a) Modification Patent

If an invention constitutes modification of another invention already protected by a patent (main patent), then its beneficiary may claim the issuance of a new patent (modification patent), provided that

(3) This prohibition is valid for the period during which is in force the relevant reservation made by Greece according to article 167.2 (a) of the European Patent Convention (i.e., initially for ten (10) years, with the possibility of an extension for another five (5) years, as per article 167.3 of the Convention). It should be clarified however, that this prohibition covers only patents for pharmaceutical products per se. and not patents for production methods of pharmaceutical products.

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the object of the new patent is connected with the main patent. The modification patent follows the main patent and expires with it. It may be converted into a main patent, if requested by its holder; in that case, its duration shall be as per para. 2(d) above and its filing date shall be considered the date of the application for the granting of the modification certificate.

The invalidity of the main patent does not mean necessarily invalidity of the modification patent as well.

b) Model-Use Certificate

This certificate is granted for every three-dimensional object with a defined size and shape (such as tool, organ, instrument or their spare), which is new, industrially applicable and with the capability of resolving a technical problem.

The claimant of a patent may request instead of a patent, the issuance of such a certificate, which has a seven (7)-year validity period.

c) Technical Innovation Certificate

For a new solution to a certain technical problem (technical innovation) realized by one or more employees of a company and which is of relevance to its activities, such a certificate may be granted as an acknowledgment of their creative contribution to the company.

5. Patent Licensing

According to the Law, there are three types of licensing:

a) Contractual

As a rule, the patent holder may grant an exploitation license to third parties through the signing of a licensing agreement. In case of a joint patent, the consent of all beneficiaries is required. Subject to a contrary agreement, such license is non-exclusive, non-transferable and non-inheritable.

b) Non-Contractual

Under certain conditions, a third party may request through the Courts the granting of an exploitation license of a patent, without the consent of its holder. These conditions, which must all concur, are the following: (i) the expiration of a three (3) -year period from the grant of the patent or of a four (4) -year period from the submission of the relevant patent application; (ii) the relevant invention has not been productively exploited in Greece or, in case it has, the production of the products is not sufficient to cover the domestic demand; (iii) the third party is in a position to productively exploit the protected invention; and (iv) said party has notified the patent holder of its intent to request such a license, one month prior to the commencement of the Court proceedings.

The relevant Court petition must be accompanied by an opinion of OBI as to the concurrence of the above conditions and the terms and conditions for the granting of such a license. OBI's opinion is not binding for the Court. If the Court accepts the petition, then it grants the license and stipulates at the same time in its decision the terms and conditions of the license and of the productive exploitation of the invention in Greece, as well as the compensation to be paid to the patent holder (which is analogous to the extent of the industrial exploitation of the protected invention). The above license is not granted if the patent holder is in a position to justify the non-exploitation or non-sufficient exploitation in Greece. Further, the granting of such license may not preclude other licenses (contractual or noncontractual). Lastly, such a license

may not grant an importation right of the products covered by the invention.

c) Licensing to the State

For imperative reasons of servicing the public health and the national defense of the country, it is possible by a justified decision of the Minister of Industry (and of the other competent Ministers, as the case may be) for an exploitation license of an invention to be granted to Public Sector organizations, who are in a position to exploit the invention in Greece; provided however that the invention has not been productively exploited in Greece or the production of the products is not sufficient to cover the domestic demand.

In the same decision and after OBI's opinion, the amount and the terms of payment of the compensation to the patent holder are determined. Said amount is analogous to the extent of the industrial application of the invention. In case of a disagreement by the patent holder, the compensation is determined by the Courts.

6. Technology - Transfer Contracts a)

Types of Contracts

As such contracts are considered mainly the following:

- licensing agreements of a patent ' and model-use certificate,
- transfer agreements of a patent and model-use certificate,
- provision of technical construction instructions, designs or services,
- provision of organization and management services, as well as specialized consulting services or follow-up and audit services,
- disclosure of industrial secrets, production methods or processes and know-how in general,
- joint research or development of

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- new technologies, experimental or pilot programs or projects,
- provision of technical assistance through personnel training.

b) Invalid Conditions

Any conditions of a patent licensing agreement opposite to the EEC Competition Legislation (in particular art.3 of Regulation 2349/1984) are invalid. The same applies to export-restriction provisions included in technology-transfer contracts. As to the latter however, the Minister of Industry may allow such a restriction, if it is justified by serious reasons of economic development and public interest and provided that such a clause does not violate Greece's international obligations.

c) Registration

The technology-transfer contract is subject to registration with OBI by the Contracting Party based in Greece within one month from its signing.

The registered contract and all data supplied are kept confidential under the protection of the Law.

The following are not subject to registration:

- the ad hoc use of foreign engineers and technicians for the installation or repair of plants or machinery,
- advice, designs or related services which usually accompany the supply of machinery or equipment, if they are provided without extra charge,
- urgent technical assistance or repairs, if based on a previous contract already registered,
- technical training provided by educational organizations or enterprises for their employees,
- weapon systems.

d) Non-Registration Consequences

Any lawsuit or other action brought before the Courts in relation to a dispute between the

Contracting Parties arising from a technology-transfer contract, is not discussed without an OBI's certification that it has been registered.

III. EXPORT CREDIT INSURANCE

The Government in an effort to support and promote the export trade of the Country, has recently established an export credit organization based on the international standards and practices.

This institution, created by Law No. 1796/1988 (OEK 152/A'/II-7-1988), is called "Export Credit Insurance Organization (O.A.E.n.)" and it is a legal entity in private law, governed by a seven (7) - member Board and supervised by the Minister of Commerce. OAEI has replaced and succeeded the so-called "Export Credit Insurance Fund (K.A.J.I.E.)".

1. Activities

1.1 OAEFJ provides guarantees, insurance and reinsurance for the following acts or transactions:

- exports of goods produced in Greece,
- provision of engineering consulting services, supervision and construction of technical works abroad by Greek companies,
- construction, conversion or repair in Greek shipyards of any ships or vessels and irrespective of the shipowner's nationality or the ship's flag, provided that their value is paid in foreign exchange,
- foreign exchange claims arising from the performance of the acts mentioned in paras, (a)-(c) above,
- exporting of Greek goods for sale or participation in trade fairs or exhibits,
- leasing of machinery, tools and transportation means for the execution of technical works abroad,

- participation in international bids for the supply of goods or services, the performance of studies and the undertaking of supervision or construction works,
- expenses incurred by Greek exporting companies locally or abroad in relation to the acts mentioned in paras, (a)-(c) above,
- export credits granted by financial institutions operating in Greece to Greek companies and enterprises established abroad or by Greek companies to enterprises established abroad for the purpose of performing the acts mentioned in paras, (a)-(c) above,
- letters of guarantee issued by financial institutions or insurance companies in relation to the above-mentioned acts,
- investments made abroad by Greek companies.

1.2 OAEI provides advice, information and technical support for the collection of due export claims by their beneficiaries.

1.3 OAEI may acquire due claims in foreign exchange arising from the acts mentioned in paras, (a)-(c) above, collect them for its own behalf and transfer them further locally or abroad.

2. Covered Risks

OAEH may cover the following risks:

- non-creditworthiness of the buyer or employer (legal or natural person), or delay in their payments,
- non-acceptance of the goods or non-payment of their value by the buyer (legal or natural person, foreign government or organization controlled by it), due to their destruction (total or partial) during transportation or defect caused during transportation or other reason, for which there is no fault of the seller,

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- c) non-acceptance of the work (project) or non-payment of its value by the employer, due to its destruction (total or partial) or defect caused during its execution, provided that there is no fault of the contractor,
- d) invalidation of the import or export license by a State act of the country of importation or exportation,
- e) arbitrary (non-justified) termination, modification or non-performance of the contract by the buyer or employer,
- f) prohibition of transfer of foreign exchange,
- g) imposition of moratorium in the country of destination of the goods, provision of services, execution of works or performance of investments,
- h) subsequent necessary change of the transportation means or of its course during the carriage of the goods,
- i) acts or activities of a foreign State (or organization controlled by it), proven by official documents, which prevent the performance of the contract or the normal operation of the investment or amend the initial status of the investment (such as nationalizations or expropriations),
- j) force majeure events such as war, civil commotion, terrorist acts, acts of God and strikes, which make impossible (partially or

- totally) the performance or timely performance of the contract or the normal operation of the investment,
- k) reduction of the sale price in foreign exchange of an exported Greek product or service, in comparison to the one prevailing at the time of entering into the insurance contract,
- l) devaluation against the drachma of the transaction currency, in comparison to the exchange rate prevailing at the time of entering into the insurance contract,
- m) sales promotion expenses abroad, not covered by the revenues of respective sales of goods or provision of services.

3. Miscellaneous Matters

a) Reinsurance

OAEII may cover through reinsurance the risks mentioned above, if they have been undertaken by an insurance company operating in Greece.

b) Maximum Cover

OAEFI's cover through guarantees, insurance or reinsurance may not exceed 90% of the obligation covered or of the damage.

c) Substitution

In case OAEH pays a

compensation, it is automatically substituted in the rights and obligations of the insured according to the Law and the provisions of the relevant insurance contract.

d) State Guarantee

OAEII's obligations from guarantees, insurance and reinsurance are automatically covered by the guarantee of the Greek State within a certain limit, as determined each time by Presidential Decrees.

e) Foreign Exchange Cover

It is allowed that the guarantees, insurance and reinsurance provided by OAEIT, be agreed in foreign exchange and in a currency included in the Bulletin issued by the Bank of Greece. Such a cover is subject to the limit set by the Minister of National Economy.

f) Tax Exemptions

The insurance policies issued by OAEII as well as the rights arising therefrom, the premiums and the insurance compensations are exempted from any taxes, duties or other charges, except for VAT (if applicable according to the existing provisions).