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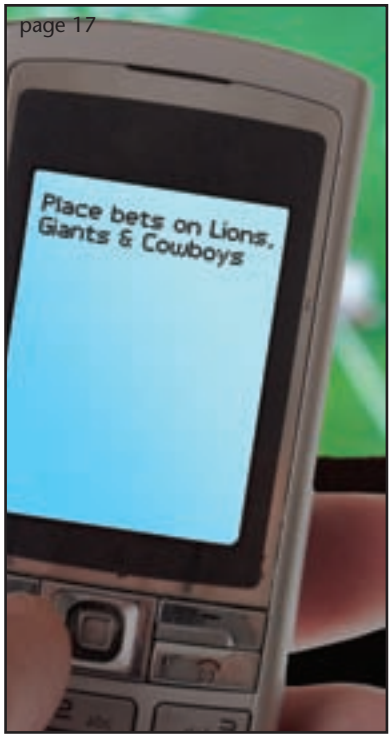

ADVERTISER INDEX

On the Cover: IMGL's Regulator of the Year Francesco Rodano, photographed by Michele Giannarelli.

CASINO MANAGEMENT, PRIVATIZATION AND PROCEDURES IN GREECE: A CONCESSION OR A CONTRACT FOR THE SUPPLY OF SERVICES?

By Dimitris V. Papavasiliou

The European Court of Justice (ECJ) has heard reference for preliminary ruling following the decision of the High Administrative Court of Greece (*Symvoulio tis Epikratias - Conseil d' Etat*) nr 606/2008, published Feb 15, 2008. The case pertains to the well-known Mont Parnes Casino which was operated by the State Tourism Development Company—ETA SA—a real-estate asset manager of the National Tourism Organization which acts between the public and private sectors.

In June 2001, the Hellenic Casino Parnes SA was set up as a 100 percent subsidiary and administrative arm for casino operations. Following privatization plans begun in 2002, a consortia/joint venture (consisting of Hyatt Regency, Hellenic TEB, etc.) was awarded the tender to purchase 49 percent of the Mont Parnes Casino through the incorporation of a new company. The tender notice and the contract attached to it stipulated, inter alia, that in the event another casino should become operational in the wider area (prefecture of Attica), the contracting authority must compensate the contractor 70 percent of the contract price.

In 2002, a case was initiated against the Greek state by a consortium (Casino Attica) that participated unsuccessfully in a public procurement procedure related to the Casino Parnitha. Following the decision, it appears that in their petition they requested the annulment of the certification act for compliance conformity and "transparency" (regarding the composition and its share-holding relation) issued by the National Broadcasting Council which had successfully participated as competitor in the tendering process before the signature of the contract. The petitioners argued, inter alia, non-compliance to the domestic but also to the fundamental rules of the EC treaty.

In the context of the above case, the court had to examine the legality of the nature of the public contract of a mixed form (sale of shares, supply of work/commission to carry out works, and supply of services) that occurred during the privatization and the sale of 49 percent of the Casino Parnitha's shares following the public procurement. The court also had to examine the admissibility of the petition request, whether it was a matter of concession or a contract for the supply of services.

The court also had to estimate if the business risks within the contract in question lie with the contractor (specifically, if the contractor assumed the responsibility and business risk for organizing and performing the services in question) or if the (non-competition) compensation clause was eliminated or substantially reduced.

Following the government's decision and an international tender notice- procurement for privatization of the SA Corporation of Hellenic Casino of Parnitha (2001), a contract for the sale of shares was concluded in November 2002. The selling company ETA SA was the beneficiary of the casino license and had the right to operate that casino (by virtue of the law 2837/2000 art. 9 par.4). A clause was included in the draft contract attached to the tender notice that stated in the event another casino should become operational in the Attica area, the contracting authority is held to pay the contractor compensation.

In a reversal of previous jurisprudence and settled case law, the court originally concluded that the request of annulment was inadmissible because not all the members of the consortia appealed or appeared at the court hearings. However, following this first decision, the court postponed the final ruling to clarify some matters that were posed at the following preliminary (2008/C142/30). The following questions were posed to the ECJ:

• Does a contract by which the contracting authority entrusts the contractor undertaking the management of a casino business and the execution of a development plan--consisting in the upgrading of the casino premises and the commercial exploitation of the possibilities offered by the casino's licence, and that contains a term under which the contracting authority is obliged to pay the contracting undertaking compensation should another casino lawfully operate in the wider area in which the casino in question operates--constitute a concession not governed by Directive 92/50/EEC?

• If the first question referred for a preliminary ruling is answered in the negative: Does a legal action brought by persons who have participated in the procedure for the award of a public contract of mixed form--providing, inter alia, for the supply of services subject to Annex I B to Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209), and in which they plead breach of the principle of equal treatment of participants in tender procedures (a principle affirmed by Article 3(2) of that directive)--fall within the field of application of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative

provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395), or is its application precluded as, in accordance with Article 9 of Directive 92/50/EEC, only Articles 14 and 16 of the latter apply to the procedure for the award of the above mentioned contract for the supply of services?

• If the second question referred for a preliminary ruling is answered in the affirmative: Accepting that a national provision in accordance with all the members of a consortium can bring a legal action against the awarding of the contract, is not in principle contrary to community law and specifically to Directive 89/665? And is it in addition necessary, from the viewpoint of application of that directive, to examine, in order to make a declaration of inadmissibility, whether those individual members thereafter retain the right to claim before another national court any damages which may be envisaged by a provision of national law?

• When it has been held by settled case law of a national court that an individual member of a consortium may also bring an admissible legal action against an act falling within a public procurement procedure, is it compatible with Directive 89/665/EEC (interpreted in light of Article 6 of the European Convention on Human Rights as a general principle of community law) to dismiss a legal action as inadmissible, because of a change to that settled case-law, without the person who has brought that legal action first being given either the opportunity to cure the inadmissibility or the opportunity to set out his views relating to that issue?

It must be mentioned that at the time the decision was under appeal there was no regulative text in EEC community law (prior to Directive 2004/18/EEC of the European Parliament and the Council, March 13, 2004) containing a definition of a "contract for the performance/supply of services" that could be applied to the present case.

After the ECJ issued a decision in the *Parking Brixen* case, it is generally accepted that public services concessions are excluded from the scope of council Directive 92/50/EEC relating to procedures for the award of public services contracts (*Parking Brixen* paragraph 42). That directive was replaced by Directive 2004/18/EC of the European Parliament and of the Council of 31/3/2004 on procedures for the award of public works contracts, public supply contracts and public services contracts (Article 17 of which expressively provides that it is inapplicable to service concessions).

However, even though public services concession contracts are considered excluded from the scope of Directive 92/50, as replaced by Directive 2004/18, it does not hold that public authorities executing these contracts are not bound to comply with fundamental rules of the EC treaty and general principles (see Case C-324/99 *Telaustrie and Telefonedress, Coname* (2005) ECR -I- 0000, *Parking Brixen*, etc.), as well as with those of the Greek Constitution Act, etc.

Apart from the above aspects of the pending case, the Greek High Administrative Court's decision and the arguments made before it highlight some interesting points regarding the actual "monopolist" structure of Greece's gaming regulatory framework. It also sheds some light on other pending national and EU procedures in the European Court regarding "the monopoly of casinos" and their licensing procedures. Following are some of these noteworthy points:

• It is not clear beyond a reasonable doubt that an essential condition for the qualification of the contract for the performance/supply of services has been met (specifically that the activities involved (the operation of a casino enterprise) are amongst those activities that by their nature, their object and because of the rules that apply to them, tend to be the responsibility of the state and as such are subject to exclusive or special rights);

• The operation of a casino is a profitable business activity and general supervision will be exercised by Greece and its competent bodies by virtue of Laws (L. 2206/94 etc…) over casinos. In light of this, one should consider if the activities in question as well casino activities are subject to the responsibility of the state and of special or exclusive rights;

•According to an opinion of a majority of the court, casino services offered by the contractor in question are mentioned as activities that can constitute the object of exclusive or special rights because of the provisions of the Law 2206/1994 for reasons of public interest under the control of the state.

At this "early" stage of the dispute, it is difficult for those not versed in the case to predict or even guess what the final judgment will be, or what the implications will be for future tenders processes. This uncertainty is due to the complexity of the matter, the variety of the opinions and the unknown outcome to the questions referred to the ECJ for preliminary ruling.

One thing is beyond a shadow of a doubt: If the court finds in favor of admissibility and, secondly, in favor of the complainants, the case will serve an indisputable legal basis for a future claim toward Greece. Thus, it would be possible to file, at least for remedy, an action involving the state's liability under the Greek Civil Code and/or its introduced law (articles 105–106) for damages in a further procedural stadium at a different court.

Eventual final acceptance by the court's judgment and consequently an annulment of the above act as *a lato sensu*, part of the tender procedures and the extent this would influence their final results (specifically the validity of the contracting party (Athens Resort Casino) as a successful bidder), remains to be seen.

Extended comments and updates will be presented in a future issue. For the full text of the decision you may contact Dimitris V. Papavasiliou at info@paplaw.gr or fax +302103820165. ⎔

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Thus, even with the relaxation of the prohibition on communications devices, numerous protection mechanisms remain in place. Accordingly, this repeal should not be seen as a relaxation of compliance requirements. As Sayre noted in the Aug. 22, 2008, Industry Letter: "[T]he Gaming Control Board will continue to be aggressive in its observations within the books and will conduct both overt and covert observations to ensure that licensees and patrons are complying with federal statutes pertaining to the transmittal of wagering information, state statutes regarding messenger bettors, and gaming regulations concerning such areas as book wagering reports, messenger bettors, the structuring of wagers, wagering communications, suspicious wagers, and house rules, among others."

Nevada Gaming Regulation 22.135 no longer has any particular practical merit; its implementation is difficult and burdensome on the books and the regulation conflicts with the regulations permitting mobile gaming. Moreover, numerous other regulations and measures remain in place to ensure that layoff wagering does not occur.

Nevada gaming authorities remain committed to maintaining strict compliance with all relevant statutes and regulations pertaining to race and sports wagering. Cellular phone use in the sports books will be closely monitored, and if any illegal activity is reported within this one-year "probationary period," gaming authorities will be quick to re-enact this prohibition. As such, race and sports books must recognize and appreciate their regulatory responsibilities to ensure that the repeal of Nevada Gaming Regulation 22.135 is permanent and not jeopardized by inattention. For the time being, however, sports books across Nevada will have a new look to them, free of the signage prohibiting cellular phone use. ⎔

1 Use of communications devices prohibited. Except for the use of a mobile communications device used as part of a mobile gaming system, a book shall not allow a person to use a communications device within the premises of the book. The premises of the book shall be considered any area where race book or sports pool wagers are accepted. A person who is found to be using a communications device within a book's premises must be advised to immediately discontinue use of the device or be escorted off those premises. Communications devices include, but are not limited to, paging devices, cellular telephones, radios and computers that are being used to transmit or receive information. NGC Regulation 22.135.

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