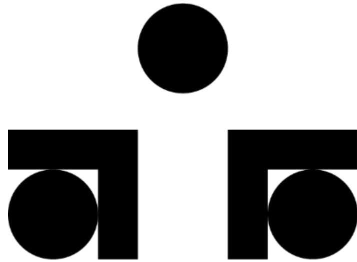
• INSIGHT | TRUST | PASSION •

LEGAL BRIEFING – Dispute Resolution & Restructuring

by Sotiris Foteas – Partner



12 October 2021

s.foteas@aklawfirm.gr

In the era of a "preliminary question" before the Greek Supreme Court*

1. A bill providing for extended amendments into the Code of Civil Procedure (CCP) and other legal frameworks governing the proceedings before the civil Courts was enacted by the Parliament, yesterday October 11.

It is not a purpose of this brief note to summarize the reforms.

It is although necessary to illustrate three main pillars thereof:

There is an abundant reference to electronic procedural means and an explicit legislative rationale to enhance the transition to e-justice.

There is a system of provisions which were introduced during the pandemics in a fragmented manner through the "framework of urgency" (Ministerial Decisions horizontally governing the covid-19 conditions) and now enacted on a permanent basis in order to increase the applicability of paperless procedures and facilitate the completion of relevant formalities.

While a. and b. are open to the question of their practical effectiveness, it is more appropriate to focus on a more institutional innovation, both substantive and procedural, briefly described as the provision of a "pilot hearing" (πρότυπη δίκη) before the Supreme Court for matters of high importance related to legal interpretation (art.2, introducing new article 20A into the CCP) and affecting a broader circle of interested persons.

The case is introduced before the Plenary Session by means of a relevant act issued by a three-member Committee of the Supreme Court, following a request of a party involved in a pending case before inferior civil Courts or a prejudicial question addressed to the Supreme Court by a Court seized to hear a pending case.

2. The concept is not unknown into the Greek legal order, having already been applied before the Administrative Courts with controversial commentary of the doctrine. It is although inspired by the scheme of the prejudicial questions which the national courts are entitled to address to the European Court of Justice (ECJ) when the EU law is to be applied in the context of a case brought before them. In this framework, the national Court issues a preliminary ruling addressing the question of interpretation and is bound to apply the construction of the EU law provisions followed by the ECJ when the case is re-heard in the light of the ECJ's decision responding to the question. This interaction is considered as the principal method of unification in the interpretation of the EU law.

3. Is a similar concept applicable within a unique legal order? In other words, to the extent that there is no interaction between different legal orders, is a prejudicial question to a superior Court an appropriate mechanism to unify the interpretation of laws within the same jurisdiction?

4. Although the innovation may serve purposes of acceleration and legal clarity, a series of doctrinal parameters is triggered thereby:

i. *The scope of the res judicata ("δεδικασμένο")*: Such binding force of the outcome in a heard cease is acknowledged according to the CCP only between the parties of this case in future proceedings. The new provision (par.5) follows the same approach, since the outcome is not extended de iure to other cases. However, it may lead (this appears to be its purpose, in any case) to a de facto binding effect in numerous cases including numerous parties not involved into the "pilot-hearing", resulting thus into an indirect doctrinal amendment of the scope of res judicata as defined so far in the Greek legal order. As a matter of fact, the new law provides for a stay in all pending proceedings until the issuance of the "pilot-decision".
Would an inferior Court be entitled to abstain from the outcome of the "pilot-hearing" in other pending cases? The response tends to be negative.
The boundaries between the res judicata, the simple judicial precedent and the freedom of interpretation become very subtle.

ii. *The system of the control of constitutionality*: This is strictly connected to the power granted by the Constitution to the Greek Courts to conduct a control of conformity of any applicable rule with the Constitution on a standalone basis and in the context of any and all cases («διάχυτος και παρεμπίπτων έλεγχος»). It is a question to what extent the "pilot-hearing" introduces an implied rupture to such power, when the Supreme Court rules especially with respect to a matter of constitutionality. We believe that this establishes an indirect function of the Supreme Court as a "Constitutional Court", which renders the constitutionality control by inferior Courts less effective. An inferior Court

will not rule contrarily to the outcome of the "pilot-hearing" in matters of constitutionality, albeit vested with this power by the Greek Constitution.

iii. *The reversal of the case law*: Another aspect consists in how the interpretation of the law evolves. Provided that the Supreme Court has ruled on a specific matter in the context of a "pilot-hearing", what is the technical manner to amend its position in the future? As a general rule, an issue ruled by a "pilot-hearing" decision is not supposed to be re-heard in such procedure. It is thus expected that any reversal will be reflected in the ordinary case-law of the Supreme Court or will be based on an extra legem re-introduction of the same matter in a "pilot-hearing" when relevant conditions for reversal are mature. As now provided, the concept leads to the "finalization" of the interpretation, which is inconsistent with the general concept of the civil law.

iv. *The lack of supremacy of the interpreted law*: All the above should be read in the light of the main difference between the new provision and the "concept-inspiration" of the ECJ. The latter refers to the interpretation of a rule which has primacy over the domestic rule. The new provision is destinated to govern in principle the interpretation of rules of same superiority. This is a major difference between the two concepts.

5. As always, reforms are assessed after a period of implementation, including here a clearer picture on the eligibility of the cases that will be finally introduced into the Plenary Session of the Supreme Court. However, implementation is usually more constructive when "key-issues" are raised from the beginning.