LEGAL BORROWING: WHY SOME LEGAL TRANSPLANTS TAKE ROOT AND OTHERS FAIL

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I. PREAMBLE

It is recognized that even in cases where a written statutory law (institution, legal concept, or structure) is the same within two countries, its judicial interpretation may well differ because of the divergence in legal tradition and legal thought in each country. The same factors are also valid with regard to legal transplants being successful or not, which are inevitable and have been a major, if not always the main, factor in legal change in the Western world. Nevertheless, the convergence of legal thinking, in two countries, especially legal thought concerning labor law regulations, requires an examination into the scope of transplantation and the actual reasons and extent of adoption.

The general but substantial purpose of labor law in Greece (that was also the reason of its creation) is the protection of workers who are the weak party in the employment relationship, mainly due to their substantially different social and financial status in comparison to employers. This differentiation has become clearer in recent years due to the increasingly competitive conditions of modern market imposing flexibility in labor relations, which leads in most cases to their partial deregulation. There are numerous examples where the concept of individual autonomy (i.e., contractual freedom) is manipulated, evidently resulting in a disadvantageous negotiation position for workers. The establishment of workers' collective entities (trade unions, work councils, etc.) for the protection of worker interests has counterbalanced to some degree these basic differences

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and has equalized bargaining conditions for both social partners (employers and workers).

This study examines two institutions borrowed from other countries: Legal transplantation in the areas of individual labor law and collective labor law. There are two main notes we shall make before the particular examination of each situation: First, it is a fact that the internationalization of private labor law relationships necessitates in many cases the adoption of several previously unknown legal concepts and structures. New forms of employment that are the natural consequence of internationalization are considered in some countries to be the solution to the desired flexibility for the social partners. However, other countries view new employment forms as a phenomenon that threatens stability and leads to total deregulation of employment relationships, an opinion mainly expressed by workers unions. Second, legal borrowing in the framework of collective labor law (i.e., copying and applying foreign institutions, regulations, etc.) takes place cautiously, given that the trade unions' position is not similar in all countries, not even within Europe. This dissimilar position of trade unions is primarily a result of their different financial and bargaining status and the type of the type of legal protection that each country's labor law grants trade union activities (i.e., in some countries the principles of bargaining autonomy and freedom of association are safeguarded through constitutional provisions).

II. TEMPORARY AGENCY WORK: A TRANSPLANT THAT SUCCEEDED

A. Introduction

The rapid growth of the so-called "new forms of employment" or "atypical employment" (terms used to distinguish the "non-traditional" employment relationships from typical, classic, and strict employment) resulted in the multiplication of rules and the development of a new typology concerning labor contracts. These "new forms of employment" were created under the pressure of growing unemployment and new technologies in order to cover the companies' needs for a flexible, cheap workforce. The appearance of new forms of employment has gradually necessitated a different approach to employment relationships and the revision of traditional labor law rules and principles in order to integrate several of them into the preexisting framework. However, only some atypical employment relationships can be covered by legal rules, for it is

commonly understood that new employment forms not covered by the "updated" labor law revisions will always arise.[1]

Furthermore, provided that labor law in all European countries includes provisions of public order that protect the employees' minimum rights, adjusting to the new circumstances is difficult due to the nature of the atypical employment. The public order provisions serve the employers' needs for flexibility but provide little protection for workers. The term "atypical employment," which supplements "typical employment" and expresses the developments taking place in the area of labor law, covers several situations, most concerning temporary occupation. One of the most common types of these "new forms of employment" is temporary agency work.

The practice of using external workforces to cover several employment needs has recently become a rapidly expanding practice for companies worldwide. Nevertheless, is not a new phenomenon. According to historians, there were offices in Anglo-Saxon countries whose main business consisted of placing domestic staff and hotel employees with other businesses in need of labor. However, such situations were rare and mostly connected to abusive behaviors against employees. Temporary agency work as part of a company's regular business activities was first developed in the United States after World War II. The first company that exercised temporary agency work in a professional manner in Europe (for the commercial and industrial sector) was the American company "Manpower." In this sector of employment, the company "Business Aid" that was established in France in 1926, is also mentioned as a "pioneer" of European temporary agency work, but Manpower is considered responsible for the developed form and extent of temporary employment.[2]

The term "temporary work" is commonly used in many countries to describe temporary agency work, but it is not the appropriate term. There are many types of work of temporary or short duration, for example, the work performed by a worker on the basis of various forms of limited duration contracts, such as fixed-term, seasonal, or part-time employment.[3] Moreover, the term is not only inaccurate,

1. Geotas Kravaritou, *Oi Synepeis twn Newn Morfwn Apasxolhshs sto Ergatiko Dikaio kai thn Koinwnikh Asfalish* [*The Consequences of the New Forms of Employment as Regards to the Employment Law and Social Security*], 17 THESEIS (1986), *available at* http://www.theseis.com/1-75/theseis/t17/t17f/oisinepeies.htm.

2 Ioannis Koukiadis, *Trimereis sheseis ek parohis ergasias* [*Tripartite Employment Relationships*], THESSALONIKI 255–60 (1997).

3. A fixed term is a full-time or part-time employment relationship, in which the parties agree on a precise end date or time length for the relationship. Seasonal work is usually full-time employment connected to a specific season of year. Part-time employment is stable work

it is also confusing. The term "temporary agency work" denotes a triangular employment relationship involving a worker, a company acting as a temporary work agency, and a user company, whereby the agency employs the worker and places him or her at the disposal of another company (called the "User Company").[4] It is necessarily temporary only if the tasks performed at a particular firm are of a temporary nature.[5] Agency work is not the only type of triangular employment relationship. There are a number of other, less well-known and recognized three-way employment relationships in the area of paid employment.[6] The creation and development of temporary work that supplements traditional employment was a result of many factors, such as the convergence of the employer and worker interests and the complexity of the developed economies that facilitate mediation in several sectors of modern business activities.

The growth of temporary agency work since 1960 is a widespread phenomenon occurring mainly in western Europe. The growth of temporary agency work is the most recent expression of the development of atypical employment that has been observed in the European Union in the last two decades.[7] According to C.I.E.T.T.,[8] the temporary agency work industry in the European Union currently employs over seven million workers—1.9% of the European Union working population. An average of 2.8 million workers worked through employment agencies on any given day in 2001.[9]

In some countries, the conditions governing the employment of temporary workers and the activities of temporary agencies are

performance where the weekly or daily working hours are shorter than standard or full-time employment and the employee usually receives correspondingly reduced pay.

4. The term "user company" appears in the European Industrial Relations Observatory On-line (EIRO). François Michon, Instituto di Richerche Economiche e Sociali [Institute of Economic and Social Research], *Temporary Agency Work in Europe* (1999), *available at* http://www.eiro.eurofound.ie/1999/01/study/tn9901201s.html.

5. DONALD STORRIE, TEMPORARY AGENCY WORK IN THE EUROPEAN UNION 95 (2002), *available at* http://www.fr.eurofound.eu.int/publications/files/EF0202EN.pdf.

6. Michon, *supra* note 4. In Greece, "indirect employment" and "group employment" are also recognized as forms of tripartite employment.

7. STORRIE, *supra* note 5, at 1.

8. Confédération Internationale des Entreprises de Travail Temporaire [International Confederation of Temporary Work Businesses] (C.I.E.T.T.) was founded on May 17, 1967 in Paris. It brings together in a national confederation of employment businesses from thirty countries that supply workers to their clients for temporary assignments and includes six of the world's businesses, a distinction recognized by national and international organizations and governments. The European Commission recognizes Euro-C.I.E.T.T. as the social partner for the temporary employment sector within the framework of the European Social Dialogue.

9. C.I.E.T.T., ANNUAL REPORT OF ACTIVITIES 21 (2002), *available at* http://www.ciett.org/info/0,000001,en,16,2,publications.htm.

strictly regulated. In others, such as the United Kingdom and Ireland, the legislative and regulatory framework is very flexible.[10]

The four main reasons[11] for this rapid growth of agency work in European Union, "which make temporary work a key element in boosting the capacity of the labour market, undertakings and workers to adapt" are the following:

> Generally speaking, undertakings have seen an increased need for flexibility in managing their labour force, particularly because of the more rapid and greater fluctuations in their order books. Temporary work can thus help to cope with a shortage of permanent staff or a temporary increase in workload. . . . Undertakings . . . having increased needs for qualified workers with a wide range of skills and need them on a temporary basis too. Quality temporary work can thus provide a more effective response to today's economy's need for flexibility. From the point of view of temporary workers themselves, this form of employment is often a means of gaining access or returning to the labour market, especially for young people. . . . More recently, undertakings have been using temporary work because they are short of staff with certain qualifications, especially in occupations related to information technologies. Finally, the legislative framework has become far more flexible: today, the majority of the Member States have put this form of employment on their statute books and many have made their regulations more flexible, whereas just a few ago it was prohibited in some Member States.[12]

10. For a detailed study on this argument, see Explanatory Memorandum of Proposal Directive on Working Conditions for Temporary Workers, COM (02) 149 final [hereinafter Amended Proposal] and ROGER BLANPAIN, EUROPEAN LABOUR LAW 348 (9th rev. ed., Kluwer Law International 2003).

11. According to the Greek literature, temporary agencies have been created to cover labor market demands for staff required to serve the following needs for a specific period of time: Processing specific projects that cannot be carried out by the permanent personnel either because they are deficient in number or skills; supplementing the permanent workforce in times of temporary or causal absence for annual leave, pregnancy, educational leave, illness, or compulsory military service; seasonal needs or increased workloads during peak times, such as tourist or holiday periods; saving the time of more valuable personnel involved in other areas, such as announcements of job positions, evaluation procedures, or interviews; the company seeks a guaranty of employee ability provided by the temporary agency's specialization, given that the temporary agency usually agrees to replace a worker with another one if the user company is unsatisfied; decreasing business expenses by reducing permanent staff to meet only standing needs and using additional staff for the periods when other needs arise. In the last situation, the company does not have to pay unnecessary salaries or other remunerations for periods when its activities are limited. The use of temporary agencies could also be an alternative to the overtime work provided by permanent staff. Ioannis Lixouriotis, *O efodiasmos Epiheiriseon me Prosopiko "Prosorinis Apasholisis" os Antikeimeno Leitourgias ton EPA* [*The Supply of Companies with Temporary Agency Workers as Object of Temporary Agencies*], 1 DIKAIO EPIHEIRISON KAI ETAIREION [ENTERPRISES' AND COMPANIES' LAW] 43, 43 (2002).

12. Blanpain, *supra* note 10, at 347; Amended Proposal, *supra* note 10.

Finally, from a macroeconomic perspective, temporary agency work is often viewed as a tool for promoting flexibility in the labor market. It improves job matching and reduces frictional unemployment.[13] "Job matching," is a potential benefit of temporary agency work because of the exchange of information between the worker and the user firm during the assignment period; on the one side the worker can assess the working conditions and the characteristics of the job. On the other side, the potential employer can assess the worker's skills and capabilities. This "practice" takes place in actual conditions and is without cost.

B. Overview of the Greek Legal Framework: Former and Current

Since 1990, there has been an increasing tendency for legislative intervention to make the Greek labor market more flexible whilst at the same time improving public policies and the effectiveness of public labor market institutions, and offering compensations to the flexible workforce in the form of better employment protection.[14] Although work through temporary employment agencies has existed in Greece at least for the last two decades, it has never been the object of specific regulations until recently, contrary to other European

13. STORRIE, *supra* note 5, at 38, 34.

14. Law No. 1892/1990 (Greece) "on modernisation and development" introduced part-time work, the fourth shift (weekend shift), the rearrangement of working time (nine hours per day and forty-eight hours per week), and the linking of wages with productivity. Economic actors and academic researchers considered this law too general and rapidly and prematurely introduced, leaving many crucial issues open, and thus unable to shape new structures and institutions. Yet it constituted a first step toward the direction of bringing the Greek labor market legislation in line with legislation already in place in most European countries. Law No. 2639/1998 (Greece) "on the regulation of labour relations and the establishment of a Labour Inspectorate" is perhaps the most serious attempt to modernize the system after lengthy negotiations with the social partners and long experience with flexible labor forms in a period of increasing unemployment and a new economic model. The most important provisions include: Annualization of working time in agreement with the union; the introduction of part-time work in the ancillary public sector jobs; the introduction of regulations regarding interim and alternate work; regulation of fixed-term work, contract work, and teleworking; the creation of a Labour Inspectorate, which is a reinforced pre-existing organization; the permission for the operation of private employment agencies. Law No. 2874/2000 (Greece) "on stimulation of the employment" was adopted in an effort to eliminate disincentives for new job creation. Its main provisions include: the annualization of working time in agreement with the union, combined with a reduction of the average statutory working week by two hours (from forty to thirty-eight hours) with no loss in pay; the reduction of legal overtime work by five hours per week and an increase in overtime pay, in order to encourage firms to hire new labor; the reduction of indirect labor costs for low paid workers by 2%; the increase in remuneration by 7.5% of small part-time jobs (less than twenty hours a week); the possibility for long-term unemployed persons to take up a part-time job and continue to receive one-third of unemployment benefits; the rationalization of the threshold for collective dismissals for medium-sized firms; the upgrading of the Labour Inspectorate. Lena Tsipouri et al., *Flexibility and Competitiveness: Labour Market Flexibility, Innovation and Organisational Performance (Flex-Com)*, *available at* http://www.flexcom.org (last updated Feb. 26, 2002).

countries (i.e., Germany and France) where this form of employment has been recognized and regulated by specific legislative acts ("Arbeitnehmerüberlassungsgesetz" and "Loi sur le travail temporaire") since 1972.[15] In most countries, the adoption and appliance of specific rules concerning temporary agency work occurred in the late 1980s in Austria, Belgium, and Portugal; early- and mid-1990s in Luxembourg, Spain, and Sweden; and in the past few years in Italy, the Netherlands, and Norway. The area of temporary agency work has undergone significant deregulation in recent years, being officially permitted for the first time in Italy in 1998, in Norway in 1999 (in general terms), and in Sweden in 1991.[16]

In Greece, an employment contract only existed between the worker and the temporary work agency who leased labor to the user company. Companies that availed themselves of leased labor through temporary employment agencies were fulfilling their staffing needs without taking on the trouble or responsibility of labor administration (e.g., hiring staff, notifying public authorities, deducting and paying social insurance contributions, etc.). On the other hand, the lack of a special institutional framework for this type of employment left workers vulnerable to unequal treatment and unfavorable conditions in comparison to permanent employees of the user firm.[17]

The first substantial step toward the direction of adopting specific rules regulating temporary agency employment was the promulgation of Law No. 2639/98 (and the Presidential Decree No. 160/1999) that has established Private Labour Consulting Bureaus, whose task is to find, on behalf of the employer, workers (Greeks and foreigners) to fill vacancies in certain job categories. These bureaus act as intermediaries in finding jobs mainly for artists in the audio-visual media, supervisory and management staff, accountants, cleaners, builders, technicians, tourist guides, models, private nurses, caregivers for the elderly, and domestic staff. Law No. 2639/98 did not directly address temporary employment agencies, because the law recognized only private intermediation in finding work, which was formerly regarded as illegal. However, there is no presumption of a labor relationship between the worker and the temporary employment agency, which acts as the middleman in helping companies finding employees under a fixed-fee agreement, rather than engaging

15. In Germany and France, the temporary agency regulations are termed Arbeitnehemerüberlassungsgesetz and Loi sur le Travail Temporaire, respectively.

16. Michon, *supra* note 4.

17. Giannis Kouzis, INE/GSEE/ADEDY, *Temporary Agency Work and Industrial Relations; Greece*, *available at* http://www.eiro.eurofound.eu.int/1999/01/word/gr9812100s.doc.

employees for the purpose of hiring them out. Nevertheless, Law No. 2639/98 was a precedent for the creation of an institutional framework for temporary agency work.

During the negotiations for the conclusion of National General Collective Agreement of 2000, the Greek General Confederation of Labour (G.S.E.E.)[18] included in its proposals a section for temporary agency workers. It has recognized that the large number of persons placed in enterprises by temporary agencies is large and rapidly growing and the lack of legislative regulations in this area in Greece has resulted in the deregulation of such employment relationships and the indirect offense of the collective labor law framework. Therefore G.S.E.E. demanded that temporary agency workers shall receive at least equal payment, compared to their permanent counterparts in the user enterprise, if there is not a comparable worker in the user enterprise they shall receive at least as much equal payment as if user company was their permanent employer. It also demanded the prohibition of other economic activities by temporary employment agencies, written contracts for temporary agency staff, including the terms of leasing, etc.

Law No. 2956/2001 adopted the following proposals of trade unions: the observation of strict preconditions concerning the establishment and operation of temporary agencies; the protection of temporary agency workers as far as their salary and social insurance rights are concerned; the implementation of the most favorable collective bargaining agreement providing minimum level of wages, in case there is a differentiation between temporary agency and user company in this matter; the restrictions concerning the maximum period of hiring-out; the transformation of the employment relationship into an open-ended contract between the placed worker and the user company under certain preconditions; the prohibition of hiring-out in case of strikers' replacements; or in case the user company had carried out collective dismissals.

The above mentioned law has regulated for the first time the legislative framework regarding the establishment and operation of temporary employment agencies and the employment rights of the staff they employ. The late adoption of specific provisions concerning

18. G.S.E.E. is the leading national employee organization. It is the only union that can sign the national general collective agreement with the Federation of Greek Industries and General Confederation of Greek Small Businesses and Trades, the latter two being national employer organizations. G.S.E.E consists of approximately sixty sectoral federations and approximately seventy-five local labor centers. It also represents about 2,400 primary level unions, and negotiates the annual National General Collective Agreement with the Federation of Greek Industries and General Confederation of Greek Small Businesses and Trades.

this form of employment resulted in the implementation of the general provisions of the Greek Civil Code, which were not enough to safeguard the employment rights of the temporary agency workers.[19]

The term used by Greek literature to describe this kind of employment relationship is "non-genuine secondment of workers." There is a "non-genuine secondment of workers" because the worker is not obligated to perform work to the employer that employed him or her, rather the worker is obligated to the user firm determined by the initial employer. The non-genuine secondment of workers is also called "professional secondment," because the initial employer is a company whose business is to place its employees at the disposition of other (user) companies for profit.[20]

On the other side, as "genuine secondment of workers"[21] (also called "casual secondment") is considered an employment relationship where the worker regularly provides his or her services to a specific employer but he or she is temporarily placed at the disposal of another employer (usually to cover the employer's temporary needs); such a situation is a common practice in Group Companies.[22] Both situations are deemed by Greek literature and caselaw as expressions of the general tripartite employment relationship of "secondment of workers";[23] their main similarity is that the worker employed by a specific company with an open ended or a fixed-term employment contract agrees (either at the time the employment contract is concluded or afterward) to provide his or her services to another company without having any contractual obligation directly to that company. In both situations the worker involved belongs to

19. A positive step toward ensuring minimum labor and social insurance rights for temporary agency workers was the implementation of the European Council Directive 96/71 (Official Journal of the European Communities L 18/1 (21.1.1997) (concerning the posting of workers within the framework of the transnational provision of services) by Presidential Decree No. 219/2000 ("on measures for the protection of workers posted to perform temporary work in Greek territory, in the context of international provision of services") that was issued on Aug. 31, 2000.

20. Georgios Leventis, *Daneismos Ergazomenon* [*Secondment of Workers*], 54 DELTIO ERGATIKIS NOMOTHESIAS [BULLETIN OF LABOR LEGISLATION] 1392, 1393 (1998).

21. The theory of secondment was mainly developed in Germany.

22. Georgios Leventis, *O kat' epaggema Daniesmos Ergazomenon kai oi Etaireies Prosorinis Apasholisis kata to N. 2956/2001* [*Professional Secondment of Workers and Temporary Agencies Under Law No. 2956/2001*], 57 DELTIO ERGATIKIS NOMOTHESIAS [BULLETIN OF LABOR LEGISLATION] 1501, 1505 (2001).

23. Under Greek Civil Code and caselaw, the obligation of work performance is generally non-transferable unless otherwise provided by the employment contract or other conditions. CIVIL CODE [hereinafter CIV. C.] art. 651 (Greece). Therefore, an agreement providing the temporary assignment of one or more workers of one company to another company (the "indirect employer") is lawful if the worker consents to this assignment, because the agreement is based on the common consent of the three parties. Supreme Court [hereinafter Sup. Ct.] No.1245/2002; Sup. Ct. No. 1371/1990; Court of Appeal No. 3366/2001.

the staff of the company that hired him or her (initial employer) and not to the staff of the user company (indirect employer), because there is only a contractual relationship between the initial employer and the seconded worker.

The difference between genuine and non-genuine secondment of workers is that, in the first situation, the worker is employed by the initial employer for the purpose to provide his or her services to the initial employer, he or she is occupied mainly in the initial employer's facilities and only occasionally and temporarily placed to perform work to a third (secondee) employer when there is a case of staff deficiency or other temporary need by the secondee employer. On the contrary, in the second situation, the (initial) employer (a temporary agency with business form of a joint-stock company, according to recent law) employs a worker not to use the worker's services but exclusively to assign the worker to work for other employers for short or long time periods (depending on their needs and the agreement between the two companies); this assignment is included in the business activities of the initial employer namely for direct or indirect profit purposes.[24]

Recent legal provisions[25] provide specific regulations and restrictions concerning the operation of temporary agencies and the protection of the employment rights of the workers that will be placed by temporary agencies with user companies.[26] These regulations protect employees of all specialties but for the private sector only. The reason is that employees in the public sector cannot be selected by temporary agencies, since the public sector employment procedure, irrespective of the employment's duration, is ruled by special legislation, which does not allow private companies to be involved in the selection of public sector of employees.

In fact, Law No. 2956/2001[27] (Articles 20–26), which has legalized and regulated this form of employment, includes for the first time definitions for agency work and temporary agencies. "Temporary agency work" is defined as the work provided by workers associated

24. Athens Court of Appeal [hereinafter Athens Ct. App.] No. 968/1990, 46 DELTIO ERGATIKIS NOMOTHESIAS [BULLETIN OF LABOR LEGISLATION] 723, 723 (1990).

25. The recent Law No. 2956/2001 does not adopt or mention the term "secondment."

26. It should be noted that Law No. 2956/2001 is not applicable to genuine secondment of workers, which is still not especially regulated in Greece, except for the posting of workers into the frameworks of transnational provision of services according to European Council Directive 71/96 that is implemented by the Presidential Decree No. 219/2000.

27. Given that, at the time the recent law was promulgated, there were several mainly multinational companies already activating in the area of temporary agency employment, the law has also provided strict transitional clauses for their adjustment to the new circumstances.

with their employer (the direct employer) under fixed-term or open-ended employment contracts, to another employer (the indirect employer) for a limited period of time. Temporary employment agencies are defined as the companies whose business scope is the provision of labor by their employees to other employers (called as "indirect employers") in the form of temporary employment. Such companies retain the rights and obligations of the regular employer but they are not allowed to carry on any other activity, except for mediation in finding jobs, for when they may be granted special permission, and carrying out staff evaluation or training, provided they meet the requirements of the law as regards this kind of activities. A temporary employment agency may be established only in the form of a joint-stock company with share capital of at least €176,083. In order to establish and operate a temporary employment agency, a special license is required that is granted by the Ministry of Labour, following an opinion from the Temporary Employment Control Commission. Furthermore, every agency is obliged to submit two banking indemnity bonds as financial guarantees in order to obtain an operating license. The first bond is submitted to the Ministry of Labour and Social Protection to safeguard the temporary agency workers' wages and the second bond is submitted to the Social Security Institution to safeguard their social security contributions. The amounts of the indemnity bonds shall be readjusted every two years by decision of the Ministry of Labour and Social Protection depending on the number of the temporary agency workers employed by the temporary agency. In this case, the agencies must submit supplementary indemnity bonds within three months, otherwise their operation licenses will be revoked by the Minister of Labour and Social Protection.

The lawful provision of labor in the form of temporary agency work requires a prior written fixed-term or open-ended employment contract between the temporary employment agency (the direct employer) and the worker. The placement of a worker with an indirect employer is allowed only after the conclusion of this employment contract.

Such a contract must mention the following data: the terms and length of employment, the terms of work assignment to the indirect employer or employers (user company), the terms and conditions of the employee's wages and social insurance, any other data concerning the employee's work performance that the worker must be aware of in good faith and under the circumstances. The amount of employee's wages must be also determined in the above mentioned employment

contract. This amount cannot be lower than the minimum limit of wages provided by the (departmental, professional, or business) collective bargaining agreements applicable to the personnel of indirect (user) employer. In any case, the wage cannot be lower than the minimum limits provided by the existing National General Collective Agreement. While the worker is not assigned to an indirect employer, his or her wages cannot be lower than the minimum limits provided by the National General Collective Agreement. If at the time the employment contract is concluded it is not possible to refer to the worker's assigned indirect employer or determine the assignment duration, the contract must mention the framework of terms and conditions concerning the temporary assignment of the employee to an indirect employer, with which the employee must agree. It should be noted that any financial charge against the employee with regard to his or her assignment to an indirect employer is absolutely prohibited.

The manner of the temporary agency worker's remuneration and social insurance for the period the worker is assigned to work for the indirect employer shall be determined in a contract concluded in writing between the temporary agency and the indirect employer. Before the beginning of the assignment, the indirect employer must define the necessary vocational qualifications or skills, any special medical care, and the particular characteristics associated with the specific job to be filled as well as any major or particular risks related to it. The workers involved must be informed of the above details. The temporary employment agency and the indirect employer are jointly and severally liable against the assigned worker with regard to his or her wages and the prompt payment of social security contributions. In case the contract concluded between the two employers makes the agency liable for the payment of the workers' wages and the social security contributions, the indirect employer's liability is suspended provided that the rights of the temporary employee regarding payments and social insurance contributions may be met by forfeiture of the temporary employment agency's "indemnity bonds" (with subsidiary liability of the indirect employer). The workers employed under temporary agency employment contracts must enjoy the same level of protection as provided to the permanent staff of indirect employer with regard to health and safety at work. The indirect employer is liable for the employment conditions in which the temporarily assigned worker is performing his or her work as well as for any labor accident, unless cumulative

liability of the temporary agency is provided in the contract concluded between the two employers.

The main restriction provided by Law No. 2956/2001 concerns the permitted length of time the worker is assigned to work for an indirect employer; it shall not exceed eight months. A written renewal of the assignment to the specific indirect employer is permitted under the precondition that the total length of the renewal does not exceed eight months. Nevertheless, in case the indirect employer continues to make use of the employee's work for more than two months after expiration of the assignment's main duration or the duration of its renewal (if any), the employment contract with the temporary work agency shall be deemed as converted ipso facto into an open-ended employment contract between the employee and the indirect employer.[28] Any clause prohibiting or hampering the possibility of permanent employment of the temporary agency worker is considered null and void, and thus it does not entail any legal consequence for the employee or the indirect employer. In addition, any clause directly or indirectly hampering the trade union rights of the worker or prejudicing his or her social insurance rights shall be considered to be null and void as well. The provisions regarding the social insurance of the indirect employer's staff with similar qualifications shall also apply to the assigned worker.

To be noted that hiring-out is not permitted if its aim is the replacement of workers exercising their right to strike or if the indirect employer had carried out collective dismissals of workers with the same duties in the previous year. The penalty for every violation of the regulations regarding temporary agency work is a fine on the violator imposed by the competent authority of the Ministry of Labour and Social Protection (Labour Inspectorate), the amount of which varies between €2,936 and €29,360 (depending on the severity of the violation). The penalty for the illegal operation of an unlicensed temporary employment agency is the "sealing" and the permanent discontinuance of its operation executed by the competent police authority. Moreover, the penalty for every person operating an

28. The literature has castigated this provision as totally inconsistent with the Greek Constitution. According to this argument, the provision should be inapplicable because it results in unacceptable compulsory employment relationships, which is prohibited because it violates the principle of individual and trade freedom. Besides that, there is no provision in the law concerning the existing employment relationship between the agency and the worker. Lixouriotis, *supra* note 11, at 50; Antonios Vagias, *Efkairiaki Parahorisi Ergasias kai Prosorini Apasholisi* [*Occasional Work Provision and Temporary Employment*], 60 EPITHEORISI ERGATIKOU DIKAIOU [LABOR LAW REVIEW] 951, 959 (2001).

unlicensed temporary employment agency is imprisonment for two years and a monetary sanction.

Another very important issue is that the temporary agency worker is deemed as an employee of the temporary agency and not of the indirect employer; therefore he or she is not entitled to participate in the trade union of the user company and he or she is not included (registered) into the staff of the user company. Nevertheless, the provisions of internal regulations of the user company (e.g., bylaws, health and safety regulations at work) are applicable to the temporary worker, because their application shall be indiscrete for all employees working in its facilities (permanent or not).[29]

With regard to extra payments that may be required by the worker for additional or overtime work, for work at night, or on holidays, etc. that he or she has performed at the period he or she was placed to work for an indirect employer, the recourse to general principles as have been formed by caselaw in cases of genuine secondment seems to be necessary. Therefore, it is recognized[30] that obligations and rights arising at the beginning of placement to an indirect employer and not from the employment contract between the initial employer (in this case the temporary agency) and the worker involved, shall only engage the indirect employer. This is valid if there is no agreement between the two employers and the employee regarding these issues. The reason is obvious; during the secondment (or hiring-out) period, the indirect employer is exercising the managerial right and also receives the benefit from the additional work performance, thus it is also responsible for paying the additional wages to the seconded (or temporary agency) worker for work performed outside the legal limits of working hours, because this work provision was based on his or her instructions. Of course it is allowed

29. Leventis, *supra* note 22, at 1513. Compare Vagias' statement that:

> [T]emporary workers are not released from the current each time By-laws with contractual force which are applicable in the direct employer's company, except in case of opposite provisions . . . the role of the temporary agency worker in the user company is to cover specific needs. . . . The indirect employer is entitled to determine the time, the place and the manner of the work provision translating the by-laws to orders. . . . Disciplinary power is also exercised by the direct employer. Same is valid in case the misdemeanour takes place in the indirect employer's company as long it is provided and punished by the direct employer's by-laws.

Vargias, *supra* note 28, at 957.

29. *Id.* ("[T]he temporary worker is not released from the current each time By-laws with contractual force which are applicable in the direct employer's company, except in case of opposite provisions.").

30. Sup. Ct. No. 1371/1990, 50 EPITHEORISI ERGATIKOU DIKAIOU [LABOR LAW REVIEW] 888, 888 (1991); Thrace Court of Appeal [hereinafter Thrace Ct. App.] No. 290/1995, 55 EPITHEORISI ERGATIKOU DIKAIOU [LABOR LAW REVIEW] 500, 500 (1996); Athens Ct. App. No. 10178/1991, 49 EPITHEORISI ERGATIKOU DIKAIOU [LABOR LAW REVIEW] 330, 330 (1990).

for the direct-initial employer to take responsibility for such payments.

The National Committee for Human Rights (NCHR) has expressed serious doubts[31] about the legality of the new institution and the way the national government has handled its relevant regulatory framework. Although NCHR has recognized the necessity of temporary agency work as a practice relieving employers of the time-consuming process of the search "without guarantees" for staff, it has stated between others that despite the guarantees given by relevant articles of Law No. 2956/2001 regarding the labor, insurance, and trade union rights of the personnel leased, these regulations are not applicable in practice, because of the weaknesses of the state monitoring mechanisms (Institute of Labour Inspectors), but mainly because of the nature of this form of employment, which does not enable the workers leased to claim their lawful rights due to their absolute dependence on the "indirect employer." The "direct" employer selects, on the basis of the management of their personal data, which is collected immediately on their engagement, whom of his employees is to be leased, when, and to what enterprises he or she will send on loan. The dismissal of an employee loaned in this way is now called termination of the lease and his or her "direct employer" can transfer him or her from one "indirect employer" to another, perhaps with worse remuneration and working conditions, without a unilateral change for the worse for the employee being able to be presumed. Concerning the collective bargaining rights of temporary agency workers, NCHR objected that there is no provision in Law No. 2956/2001 for those employed for leasing with temporary employment companies to be able to form their own special unions or branch federations. Moreover, they are not able to exercise their constitutional rights to engage in trade union activity, because the temporary worker is usually precluded from joining the permanent employees' unions, because of the high-handedness of the employer and a threat of being blacklisted, the danger that the employment contract will not be renewed, or because the prohibitions in union articles that allow membership only for permanent employees. It concludes that the "business activity" of "temporary employment companies" operates counter to basic human rights which stem from Article 23, and arguably from Article 4, of the Universal Declaration of Human Rights and that this form of employment is a blatant

31. Dimitrios Stratoulis, *Paratiriseis gia tin Praktiki tis Enoikiasis Ergazomenon* [*Observations on the Practice of the Leasing of Employees*], *available at* http://www.nchr.gr.

affront to the personality of the employees who are leased in each instance and is contrary to the Greek Constitution as regards its provisions on the protection of the personality and of labor.

The provisions of recent Law No. 2956/2001 are insufficient to regulate all aspects and problematic areas of this kind of employment relationship. For example, Law No. 2956/2001 provides restrictions on the assignment period length but it does not provide any restrictions on the length of the contractual relationship between worker and the temporary agency. As mentioned above, the employment contract between a temporary agency and a worker can be either open-ended or fixed-term. According to the literature, such a "freedom" would actually result only in the conclusion of fixed-term employment contracts between temporary agencies and workers and thus a possible substitution of regular work with occasional. The reason is that it is permitted for a temporary agency to conclude fixed-term employment contracts with workers who will be assigned to work for a user company for a definite period of time (i.e., for sixteen months) and after the expiration of this period, the agency would be able to replace them with other workers also associated with it with fixed-term contracts. Theoretically, it is also possible for a temporary agency to rehire the same workers after the expiration of the above mentioned permitted period of hiring-out through new fixed-tem employment contracts in order to set them at the disposal of the same user company.[32] In fact, Law No. 2956/2001 provides an exemption from the "traditional" regulations of Law No. 2112/1920 on "obligatory termination of employment contracts for private sector employees" (article 8, paragraph 3 as interpreted by the local caselaw provides that setting a fixed term in an employment contract should be warranted by the nature, the type, and the purpose of the work, as well as the duration of the work, which is dictated by reasons mainly traceable to the particular conditions of operation of the undertaking). However, in the event that setting a fixed term is not warranted by the nature of the contract or the needs of the undertaking (as is the case when the work performed meets standing, regular needs of the undertaking), successive fixed-term contracts are regarded as a single open-ended employment contract. Also, the "Preamble" of European Union Directive 77/1999 (regarding the framework agreement for fixed-term contracts concluded by the European-level social partners CES, UNICE, and CEEP) states that, "This agreement applies to fixed-term workers with the exception of

32. Leventis, *supra* note 22, at 1509.

those placed by a temporary work agency at the disposition of a user enterprise. It is the intention of the parties to consider the need for a similar agreement relating to temporary agency work." Thus, successive fixed-term contracts between a temporary work agency and a worker are permitted without justification by the nature, type, and purpose of the work or the employer's needs.

The European Commission on the other side seems to approve of this form of employment. According to the Explanatory Memorandum of Proposal Directive on working conditions for temporary workers (COM(2002) 149 final)

> The knowledge-based economy is founded on innovation and human capital and requires undertakings and workers to be able to adapt to change more readily. In order to make a success of the transition towards this economy, the cooperation of the social partners must be enlisted in a bid to promote more flexible forms of work organisation and reform the regulatory, contractual and legal environment so as to better reconcile flexibility and job security and create more and better jobs. It is with this in mind that the 2001 employment guidelines[33] and the broad economic policy guidelines for 2001[34] recommend developing various flexible forms of employment and employment contracts.[35]

C. Final Remarks

According to a recent report released by one of the largest temporary agencies operating in Greece (Adecco Hellas) on the characteristics of temporary agency work in Greece, around 77% of the workers that the temporary agency placed in temporary employment were unemployed before placement. The findings of this study, in conjunction with data from the National Statistical Service of Greece might substantiate the hypothesis that temporary agency work helps unemployed people, and in particular unemployed young people, to enter the labor market, at least on a temporary basis. This does not mean of course that casual employment can be a meaningful answer to the problem of unemployment, especially when temporary employment contracts are of an extremely short duration. The report draws the same conclusion, and states that the temporary agency work market in Greece has much room for growth in the future. Data from the Ministry of Labour and Social Protection show that in May 2003 a

33. European Council Decision of 19 January 2001, O.J. of 24 January 2001.

34. Council Recommendation of 15 June 2001 on the broad guidelines of the economic policies of the Member States and the Community, 2001 O.J. (L 179) 1–45 (2001/483/EC).

35. Explanatory Memorandum of Proposal Directive on Working Conditions for Temporary Workers (COM(2002) 149 final).

total of seventy-two decisions were issued regarding applications to establish and operate temporary employment agencies and branches of agencies, of which only twenty were refused.[36]

Therefore, despite the negative reactions by literature, local trade unions, etc., the development of temporary agency work (even it is a relatively new phenomenon in Greece) seems to be rapid, following other European countries. Its current legal framework cannot be deemed as complete given that it has been recently adopted; moreover, the local caselaw has not yet provided any interpretation of its rules. It should also be noted that the first temporary agency obtained the required operation license on March 2003 (Law No. 2956/2001 was promulgated in October 2001)! We are not able to comment on the long-term success or not of this new form of employment; it is too soon for such conclusions. Nevertheless, we should not disregard that temporary agency employment has been part of Greek reality for the last two decades (even as a de facto situation). Its growth seems to be rapid mainly because of the companies' demands on flexibility and their need to reduce labor costs while achieving the best productive results using specialized and cheap workforces, available whenever needed.

III. "LOCK-OUT": A TRANSPLANT THAT FAILED TO TAKE ROOT

A. Introduction

The term "lock-out" means a collective and conflictive refusal by the employer to accept employees' work performance. Its purpose is to press workers into agreeing with employment terms and conditions suitable to the employer's interests.[37]

According to the liberal economic views, lock-out is considered equal to the strike at least concerning its legal results and it is considered as a lawful employer's right. On the contrary, under the socialistic views, lock-out cannot be considered as an employer's right, it is an impermissible action that offends the worker's right to strike and is also constitutionally prohibited in countries where only the right to strike is protected. Professor Durand notes that there is a basic sociological difference between the two actions (strike and lock-out): Strike has a moral value, because the workers participating in

36. Leftheris Kretsos, *Study Examines Temporary Agency Work* (2004), *available at* http://www.eiro.eurofound.eu.int/2004/06/feature/gr0406103f.html.

37. Term "lock out" can be found *at* http://www.eurofound.eu.int/emire/GREECE/LOCKOUT-GR.html.

the industrial dispute are accepting the loss of the wages necessary for their survival, in order to upgrade their status. On the other side, lock-out is decided by the possessor of economic power for the purpose of protecting his or her financial interests. In any case, it is a permitted action that entails different outcomes than strike, which can be termination of the employment relationship or invitation for conclusion of a new employment contract under new terms.[38]

The employer's refusal to accept the employees' work performance is not deemed as termination of their employment contracts but as a temporary suspension of them at least as far as the main obligations of the parties are concerned (work provision/wages payment). Lawful lock-out results in the employer's temporary release from his or her obligation to pay the salary to workers involved and thus excluded from their normal work performance, regardless of whether or not they are members of the striking union. It must be noted that an employer is not entitled to exclude only some specific employees from their work performance; in case of a lock-out this kind of employee exclusion from work should be collective for all the workers involved in the specific labor fight or at least for a category of them.

On the other side, an illegal or abusive lock-out cannot result ipso facto to the termination of the employment contracts of the workers involved. The workers' salary is due by the employer for the duration of such a lock-out; as a prerequisite is deemed of course the workers' intention to be at the employer's disposal, as it is expressed by the fact that they are actually regularly providing their contractual duties however without any acceptance by the employer's side.

The right to lock-out can be exercised by employers afflicted from strike or by employers' trade unions. It shall take place in a non-abusive manner and as a "last resort" for the employer's defense. The most crucial factor is the extent of the necessity of such a defense each time (i.e., a lock-out may be abusive in cases where it is used as a measure of "response" against a partial strike, provided that such an industrial action is not blocking significantly the normal operation of the enterprise). Third party's interests and the protection of the general interest are limits to the proper exercise of the right to lock-out.[39]

38. CHRISTOS AGALLOPOULOS, ERGATIKON DIKAION, SHESEIS ERGASIAS [LABOR LAW, LABOR RELATIONSHIPS] 101 (1958).

39. ALEXANDROS KARAKATSANIS, SYLLOGIKO ERGATIKO DIKAIO [COLLECTIVE LABOR LAW] 281–82 (3d ed. 1992).

B. Overview of the Greek Legal Framework: Former and Current

Under the Law No. 1264/1982 article 22, paragraph 2, lock-out is prohibited in general; it is indifferent whether it is used as an aggressive measure or for defensive purposes. The Greek Constitution does not include provisions for lock-out, but only for strike, which is recognized explicitly as a constitutional right. In particular according to article 23, paragraph 1 of the Greek Constitution, the state shall take all the appropriate measures within the limits of law for safeguarding the freedom of association and for the unhampered exercise of all relevant rights against every offence. Strike is an employees' right, thus it shall exercised by legally-established trade unions for the scopes of protection and promotion of the financial and general labor interests of working people.

1. Extent of the Prohibition

Despite the total prohibition of lock-outs, some employers keep shutting down their enterprises during a strike. Consequently, the employers do not accept the work performance of even non-striking workers. A lock-out can take place in many different ways; their common point is the employer's refusal to allow all or part of the workers to perform with the aim of forcing the workers to withdraw their claims or imposing their own employment terms and conditions. It is usually exercised through temporary shutdown of a company or its unit operations (so that the workers not participating in the strike would be excluded from work performance as well). Moreover, it is also exercised through the employer's refusal to provide the workers, who are not participating in the strike with tools and materials that are necessary for their work performance. A lock-out is often used against the strikers as well as non-striking workers, even after the expiration of the strike, such as a short-term sit-down strike where the employer totally refuses work performance to all or part of the workforce. Lock-outs can be also exercised in a "covert" manner, i.e., the employer decides to adopt special measures such as suspending or terminating employment contracts or imposing disciplinary sanctions to his or her workers in case they refuse to accept employment conditions unilaterally imposed. The above mentioned situations are considered lock-outs if the measures adopted or declared by the employer can be deemed collective and their scope is either to bring pressure to workers to waive their claims and abstain from fighting actions (either participating in a strike or not) or to make the

employer's bargaining position more powerful concerning the determination of the employee's wages and working conditions.

Nevertheless, we shall mention that often a company shuts down due to reasons irrelevant to the employees' working conditions. In particular in the case of technical troubles or feedstock deficiencies or also in case of force major situations such (i.e., destruction of company's plants because of fire or war) that have precluded company's operation; such situations cannot be deemed as lock-out. However it shall be examined whether such justifications are real each time and not just a disguise covering actual lock-out actions, provided that all kinds of lock-out are considered illegal according to Law No. 1264/1982 article 22, paragraph 2. On this basis, lock-out is not allowed even if exercised as a countermeasure against an illegal strike, given that the Law provides other measures for the employer's defense that do not offend the rights of non-striking workers.[40] It is generally recognized and accepted that using an illegal action as remedy against another illegal action is not allowed.

The freedom of collective bargaining with employers' trade unions is a guarantee for the employer's effective defense against the workers' claims in the area of collective bargaining. Although article 23, paragraph 1 of the Greek Constitution allows the different treatment between workers and employers concerning the protection of their collective actions and fighting measures, such differentiation cannot result in a total prohibition of their defense against workers.[41] Employers can deny work performance by their employees or to terminate their employment contracts under certain conditions.

In particular, the prohibition of lock-out has not affected the general clauses of the Greek Civil Code, which provides that the employer is entitled to refuse the work performance of employees under certain preconditions. In particular, under Article 656 of the Greek Civil Code, if the acceptance of the employees' work performance is impossible for the employer due to reasons referring to them (such as a strike), the employer is not considered a default debtor, and therefore is not required to pay any overdue wages to the workers. The crucial prerequisite in this circumstance is whether the employer is objectively unable to accept work performance. Put

40. Leonidas Dasios, *Ergatiko Dikonomiko Dikaio—Apergia kai Dikastiki Epilysi Diaforon* [*Procedural Labor Law—Strike and Judicial Settlement of Disputes*], B/II ATHENS 1004, 1004 (1984).

41. Georgios Leventis, *I Apagoreusi tis Antapergias apo Syntagmatiki Skopia* [*The Prohibition of Lock-Out From Constitutional Viewpoint*], 38 DELTIO ERGATIKIS NOMOTHESIAS [BULLETIN OF LABOR LEGISLATION] 409, 412 (1982).

differently, whether a partial strike taking place in a specific part of the company actually blocks to total operation of the company. On the contrary, there is no objective incapability by the employer to accept workers' performance in case it is used solely as a covert measure to injure the employer's interests (in such cases Article 656 of the Greek Civil Code is not applicable).[42] Article 656 of the Greek Civil Code is also inapplicable when the employer is able to accept the work performance, but does not because it may injure the employer's interests.

Other measures that can be used as employer's defense against a strike include: the temporary suspension (garden leave) of workers (a three month maximum) after the expiration of the strike if the company faces a financial deduction,[43] the partial shut down of the company to avoid financial reduction, the so-called "collective alterative termination" of the employment contracts, in other words, the attempted alteration of the employment terms by the employer that, if not accepted by the workers, their employment contracts are terminated.[44]

It is a fact that, for example, a sit-down strike can continue for long time, because the workers participating in it are sacrificing a small part of their financial resources (proportionate to hours they have not worked). On the other side, this kind of strike can greatly damage the society and the employer as well, especially in cases of a longer than average duration. Such a situation could irreparably harm the standing and the future of the company involved and the employer does not have a countermeasure to defend himself against such strikes.

According to Greek caselaw[45] if the workers' presence in the workplace, beyond the sit-down strike, cannot be used productively or it is injurious for the employer (e.g., if a product needs continuous process for certain hours and the workers participating in a sit-down strike are not working during them), any workers' remuneration claim for hours worked outside the sit-down strike will be rejected as abusive. Moreover, in accordance with the Article 316 of the Greek Civil Code ("the debtor is not entitled to partial fulfilment of its obligations"), in case the workers who have participated to a sit-down

42. Georgios Leventis, *Zitimata Apergias-Antapergias* [*Issues of Strike and Lock-Out*], 41 DELTIO ERGATIKIS NOMOTHESIAS [BULLETIN OF LABOR LEGISLATION] 369, 372–74 (1985).

43. Law No. 3198/1955 art. 10.

44. GEORGIOS LEVENTIS, COLLECTIVE LABOUR LAW 571 (1996).

45. Athens Court of First Instance No. 1067/1985, 41 EPITHEORISI ERGATIKOU DIKAIOU [LABOR LAW REVIEW] 385, 389–90 (1985).

strike claim the acceptance of their work performance for the time beyond its duration, such a demand would be rejected because they are not entitled to partially fulfill their obligations arising from their employment contracts (and of course the employer would not be considered a default debtor). Moreover, the employer cannot be deemed a default debtor in such cases, if he refuses the work they offer, because it is not the work due the employer.[46]

During the parliamentary session concerning the promulgation of Law No. 1264/1982, the then Minister of Labour stated:

> [T]he prohibition of lock-out does not mean that the employer should suffer the injurious consequences of his/her delinquency and accept the work offered by the workers even if he/she is not liable for this delinquency. Art.656 of the Greek Civil Code provides that. . . . The recognition of the prohibition of lock-out does not cancel this regulation which remains in force. The reason is that there are two different institutions based on different legal aims. Lock-out and strike as well are considered as pressure measures in the frame of collective bargaining. . . . On the contrary the scope of the provision of article 656 of the Greek Civil Code is different. It is not a pressure measure for collective bargaining. . . The scope of article 656 of the Greek Civil Code is to protect the employer from the severe consequences of his delinquency in case it is not due to his/hers liability. It is namely a matter of a fair distribution of the risk arisen from a non liable delinquency.[47]

2. Sanctions

Lock-outs that occur despite the general prohibition are void under Greek Civil Code Article 174.[48] Every action invented by the employer for the purpose of infringing on the prohibitive provision of Law No. 1264/1982 article 22, paragraph 2 is void even if the actions are quasi-lawful (e.g., mass suspension of workers, leisure of workers because of disciplinary sanctions). Consequently, lock-outs exercised in spite of the general prohibition cannot suspend individual employment relationships. On the contrary, the employer is still deemed a delinquent debtor, and thus obliged to pay the workers' wages in full.[49]

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46. Dimitrios Papastavrou, *Axiosi gia Apodohi Asymphoris Ergasias* [*Claim for Acceptance of an Inexpedient Work Performance*], 41 DELTIO ERGATIKIS NOMOTHESIAS [BULLETIN OF LABOR LEGISLATION] 273, 275 (1985).

47. *Id.*

48. Article 174 of the Greek Civil Code, which is a public order provision, provides that, "A legal act contravening prohibitive legislative regulations is void if nothing else is concluded."

49. Sup. Ct. No. 377/1974, 22 NOMIKO VIMA [LEGAL PODIUM] 1367, 1367 (1974); Dasios, *supra* note 40, at 1004.

No criminal sanctions are provided by the Law No. 1264/1982 for breaching the prohibition of lock-out. However, because the lock-out infringes the exercise of the workers' association rights, including the right to strike, the general provisions of Article 14, paragraphs 2 and 23[50] are applicable (imprisonment or monetary sanction for those offending the workers' freedom for exercising their association rights).[51]

3. Former Situation

The concept of a lock-out was a legal transplant mainly arising from the German legal regime based on the German principle of "equality of bargaining power."[52] It was first recognized by Greek caselaw and literature and later by legislation as a lawful action exercised by employers or employer's trade unions. The equality of bargaining power principle provided a legal basis for the idea that employer freedom of association in the absence of a special legislative regulation includes their right to lock-out.[53] The theory of "equality of bargaining power" holds that, in case of an industrial conflict, equal weapons shall be available to employers and trade unions respectively. In its more developed form, it endeavors to focus on effective equality by ensuring the lawful availability of equal means of bringing pressure to bear, even taking due account of socioeconomic factors to the two opposing sides.[54]

Former legislation recognized the lock-out as a lawful industrial action.[55] These regulations made no distinction between aggressive and defensive lock-outs, although the literature regards the former as unlawful and caselaw eventually followed this position.[56] The purpose of aggressive lock-out was the modification of the employment terms and conditions in a way that injures employees, even if there is no strike taking place. Although it is rarely used, the aggressive lock-out could be useful during periods of economic depression, when the alteration of the employment terms and conditions could financially

50. Law No. 1264/1982.
51. Dasios, *supra* note 40, at 1005.
52. *Id.* at 1000, bibliographic note No. 27.
53. Dasios, *supra* note 40, at 998.
54. *See* http://www.eurofound.eu.int/emire/GREECE/BALANCEOFBARGAINING POWER-GR.html.
55. Law No. 2151/1920 art. 8, par. 2; Law No. 3239/1955 art. 18 par. 2, 3; Law No. 330/1976 art.32 par.3.
56. Sup. Ct. No. 387/1964, 23 EPITHEORISI ERGATIKOU DIKAIOU [LABOR LAW REVIEW] 719, 719 (1975); Sup. Ct. No. 1740/1980, 40 EPITHEORISI ERGATIKOU DIKAIOU [LABOR LAW REVIEW] 209, 210 (1981); LEVENTIS, *supra* note 44.

save the company.[57] Finally, courts and academics recognize the lawfulness of the defensive lock-out in accordance with modern theories that have not accepted the theory of equality of bargaining power.[58]

A defensive lock-out is not exercised by employers in an abusive way either as a sanction against a partial strike or as a reaction to other forms of strike (such as sit-in strike, work stoppage for some working hours) that totally disorganize the enterprise.[59] The concept of the defensive lock-out has generated confusion and argument between labor law specialists, because it is not clear whether it is a measure only against the striking workers or against all workers.

Some literature argues that such a defensive action should only be exercised to counteract workers participating in a trade dispute. According to this view, a lock-out should not be exercised against workers not participating in a strike; their employment contracts should remain in force (without any suspension), thus the employer remains obliged to pay any overdue wages to them.[60] However, according to the dominating opinion, the nature of a non-abusive lock-out, which is exercised with good faith, shall be deemed defensive even if it is turned against to non-strikers as well, because the actual scope of lock-out is to repel the strike.[61] Therefore, the consequences of a lock-out, under former legislation, were the same for workers not participating in the strike as well as for workers who were not even members of the trade union that declared the strike. In such cases, all employment relationships were suspended and the employers were released from their obligation to pay the workers' wages, even in cases where the company could operate partially (unless lock-out was illegal or abusive).[62]

Former Law No. 330/1976 has recognized the right to lock-out as equal to the right to strike (specifically according to the provision of article 32 paragraph 3: "the regulations of the present chapter (right

57. LEVENTIS, *supra* note 44, at 566.

58. LEVENTIS, *supra* note 44, at 567.

59. Dasios, *supra* note 40, at 999.

60. Leonidas Dasios, *Paratiriseis sti Dikastiki Apofasi No. 1740/1980 tou Areiou Pagou* [*Remarks on the Judicial Decision N. 1740/1980 of the Supreme Court*], 40 EPITHEORISI ERGATIKOU DIKAIOU [LABOR LAW REVIEW] 197, 212–13 (1981); Dimitrios Travlos-Tzanetatos, 40 EPITHEORISI ERGATIKOU DIKAIOU [LABOR LAW REVIEW] 197, 213, 218 (1981).

61. Athens Ct. App. No. 1320/1978; Dasios, *supra* note 40, at 999; KARAKATSANIS, *supra* note 39, at 273.

62. Sup. Ct. No. 55/1969, 25 DELTIO ERGATIKIS NOMOTHESIAS [BULLETIN OF LABOR LEGISLATION] 257, 257 (1969); Sup. Ct. No. 387/1964, *supra* note 56; Athens Ct. App. No. 1320/1978, 37 EPITHEORISI ERGATIKOU DIKAIOU [LABOR LAW REVIEW] 787, 787 (1978); KARAKATSANIS, *supra* note 39, at 279; LEVENTIS, *supra* note 44, at 565.

to strike) are proportionately applicable in case of lock-out declared by employers or employers' unions"). However caselaw has continued to recognize lock-out only as a defensive sanction.[63]

Two noticeable court decisions were issued few years before the total prohibition of lock-out: Magistrate Court No. 3785/1979[64] and Magistrate Court No. 4571/1979.[65] The following remarks on the above mentioned decisions are based on the main points noted by Prof. Dimitrios Travlos-Tzanetatos.[66] These two court decisions have examined the legal questions arising from the same facts, but their judgments were based on totally different viewpoints, therefore their purviews were contradictory.

More specifically: Both cases concerned claims of workers—members of a specific trade union—against their employer for overdue payments due to a lock-out that was declared as counteraction to twenty-four hour chain-strikes that took place every five days between November 11, 1978 and January 18, 1979. The strike aimed to achieve several working and financial demands: taking protective measures for the avoidance of labor accidents, improvement of working conditions, protection of working environment, re-hiring dismissed workers, raise of the allowance for nocturnal work, raise of the annual leave's allowance. The first judicial decision repeated the dominant theories and rejected the worker's claims by mentioning that the specific lock-out was defensive and thus not abusive. On the contrary, the second judicial decision held in favor of the workers, judging that a lock-out, similar to the one addressed in the first case, was aggressive and therefore abusive. It was the first court decision that dared to bring into question the accepted notion that lock-out is the necessary counterbalance to the strike.

According to the ratio of the first decision: a) lock-out (that is, the exclusion of workers from their working place as the employer's refusal to provide them the necessary tools for their work performance; it is used as a measure of defense against a declared strike or as a measure through which the employer is attempting to achieve his or her own interests) is recognized as a lawful employers'

63. The same position was adopted also by the then Minister of Labour. Editorial, *Parliament Minutes*, 35 EPITHEORISI ERGATIKOU DIKAIOU [LABOR LAW REVIEW] 496, 499 (1976).

64. 39 EPITHEORISI ERGATIKOU DIKAIOU [LABOR LAW REVIEW] 71, 71 (1980).

65. 39 EPITHEORISI ERGATIKOU DIKAIOU [LABOR LAW REVIEW] 397, 397 (1980).

66. The analysis and review can be found in Dimitrios Traulos-Tzanettatos, *Provlimata Apergias kai Ergatikou Agona* [*Questions of Lock-Out and Industrial Disputes*], 39 EPITHEORISI ERGATIKOU DIKAIOU [LABOR LAW REVIEW] 369, 369 (1980).

right although it is not constitutionally protected, like the right to strike; b) individual lock-out is permitted by the limits set by the Law No. 330/1976 article 33, paragraph 3; c) provided that a lock-out is the final resort, it cannot demand a judicial protection.

The remarks concerning the above mentioned points are correspondingly the following: 1) the already known definition for lock-out that includes as self-evident its aggressive form is repeated in this court-decision, in order to be clear that the right to lock-out is still general as it has been formulated under the former legal situation. Although the support of such an opinion is fair, the simple reference to older or new perceptions without critical review is not enough. Furthermore, the attempted establishment of a proportion between strike and lock-out based on the general remark that "lock-out is recognized as a lawful right, although it is not constitutionally protected," cannot be deemed as satisfactory; this "silence" of the constitutional lawmaker should have resulted in a critical review concerning the examination of possible discordance between lock-out and strike being explicitly protected by the Constitution. The implied opinion that lock-out is indirectly protected by the Constitution should have been based on the interpretation of the relevant constitutional clauses. 2) The recognition of the so-called "individual lock-out" (that is, a lock-out exercised by an employer who is not member of a trade union or has not acted according to a special declaration or consent by the employers' union in which he or she is a member) has to be examined with due consideration. The attempt to use the provision of Law No. 330/1976 article 32, paragraph 2, which provides that the clauses referring to strike are proportionately implemented also to employers' or employer unions' lock-outs as an argument, is implausible, given that the proportionate implementation, i.e., of the clause providing that spontaneous strikes are not allowed, would actually result in the opposite outcome that is the proportionate prohibition of the individual lock-outs as well.

On the contrary, the second decision has stated among others that: 1) a lock-out is recognized as an employer's right against a present strike and for defensive purposes only. 2) The basis of the right to lock-out is the principle of the equality of bargaining power. The concept of this principle is not the recognition of a typical equality between strike and lock-out, but the recognition of a substantial equality of both social partners regarding the negotiating pressure (power) and the possibilities of losses and dangers.

The remarks concerning the above mentioned points of the second decision are correspondingly the following: First, the currently

dominant position that strike and lock-out are totally corresponding actions is rejected; on the contrary it only recognized lock-out in its defensive expression. Aggressive lock-out is not only illegal but also anti-constitutional, because it declines the established frame of collective autonomy, the normal application of which is based on the safeguard of a minimum level of bargaining and fighting balance in the competitive relationship between capital and work. Such a balance cannot be achieved without reinforcement of the weaker party's position; this reinforcement is reached through the legal recognition of the workers' rights on collective organization, action, and fighting assertion of their own interests. Any aggressive action by the employer's side against the collective regulatory framework on working conditions, which has been established through a strike, should not be recognized, because the "weapon" of strike and therefore the system of collective self-regulation would lose its ability to be used as a remedy to the capital-work relationship in favor of the weaker party (workers).

Second, the position of the second decision is remarkable, for the court unanimously held that the equality of bargaining power is a legitimate basis for lock-outs. The use of the weapons of strike and lock-out shall generate equiponderant damages to the "adversary party" (employer or workers). This position supports the necessity of equivalent safeguards between employers and workers regarding their ability to exert pressure and influence the outcome of industrial action (i.e., content of the collective bargaining agreement.) A correct evaluation of the generated damage must be correlated with all the dangers and losses connected to the specific industrial action. During a strike, the participating workers are losing their wages (and therefore the indispensable sources of their family are constricted) is considered pressure against them and thus a factor restraining the strike's effectiveness. Therefore, the practice of waiting for the strike's degradation in combination with maintenance, as much as possible, of the company's productive operation is an effective countermeasure, making a lock-out unnecessary. The loss of wages due to a strike is a substantial factor for the outcome of an industrial action, especially in countries like Greece, where the institution of strike-funds financially supporting the striking workers is not developed.[67]

67. In Germany, the members of trade unions participating in a legal strike receive special funds established for this special purpose, the amount (Steikgeld) is equal to the lost wages during the strike. Wolfgang Zoelner, *Lock-Out in Federal Democracy of Germany*, 38 EPITHEORISI ERGATIKOU DIKAIOU [LABOR LAW REVIEW] 217, 223 (1979).

C. International Law Aspects and Constitutional Issues

A significant part of Greek labor law literature expresses serious doubts about the legality of the general prohibition of lock-outs given that, before the promulgation of Law No. 1264/1982, defensive lock-outs were not totally prohibited. Greek caselaw has demonstrated a reluctance to assimilate this prohibition, and has frequently reproduced the spirit of earlier framework, which accepted the balance of bargaining power principle, that the lock-out is the counterpart of the right to strike.

The doubts concerning the lawfulness of the general lock-out prohibition focuses on the prohibition of defensive lock-outs, especially when free collective negotiations are outweighed by a strike. Such a situation exists mainly when the employer became exhausted from the negative consequences of the strike. Moreover, there is a danger of enormous damages or even the enterprise's total destruction. In such cases, the employer actually loses a big part of his or her bargaining power and freedom; therefore the workers' right to strike may exceede the permitted limits.[68]

An important issue is whether the general prohibition of lock-out is compatible to the rules of International Labour Convention No. 87/1948 on "Freedom of Association and Protection of the Right to Organise."[69] The answer is not simple, given that Law No. 1264/1982 also prohibits the employment of strike-breakers. The main argument is that the scope of the above mentioned Convention is to safeguard the freedom of association for employees as well as for employers without distinction. For example, article 3 provides that workers' and employers' organizations shall have the right to organize their administration and activities and to formulate their programs; the right to carry out collective labor fights is included into the concept of the above mentioned clause and undoubtedly it concerns both employers and employees. On the other side, Law No. 1264/1982 is applied with reservation of the ratified International Conventions in force (the above mentioned Convention is one of them).

Most doubts have been expressed especially regarding the compatibility of the general prohibition to lock-out in the area of the Greek Constitution. In Germany, constitutional regulations concerning the freedom of association are considered equally applicable to both social partners (workers and employers).[70]

68. KARAKATSANIS, *supra* note 39, at 280.
69. *Id.* at 279.
70. BVerfG, Urteil vom 26.6.1991-BVL 779/85

Therefore the right to strike and the right to lock-out shall be protected equally as expressions of the same constitutional freedom. Both sides shall be able to attend to an industrial action having equal rights; therefore the employers' unions shall be allowed to declare industrial action as well. On this basis, lock-out is safeguarded as a defensive and aggressive employer strategy against its staff. However, collective bargaining agreements are valid only if both sides have equal bargaining opportunities.[71]

This theory could be used as an argument for similarly interpreting Article 23 paragraph 1 of the Greek Constitution. It could be argued that the concept of the above constitutional article does not only include the right to strike, but also the right to lock-out, given that there is no freedom of association without the ability of taking relative trade action. Nevertheless, the German Constitution does not particularly protect the right to strike. That specific right is considered as part of the general freedom of association, unlike the Greek Constitution, which provides special protection for the right to strike. This main difference between the two countries' Constitutions means that the German approach is not appropriate for the Greek context. The Greek Constitution does not subsume the right to strike under the general principle of freedom of association, but protects the right by special provisions. Therefore, a lock-out is not considered in Greece an expression of the constitutionally-safeguarded freedom of association, because the Greek Constitution does not include special provisions for its protection like it does for the right to strike. The reason for this exemption is that the constitutional lawmakers aimed at the protection of the workers, who are considered the weak party of a trade dispute with regard to their ability to assert the promotion of their financial and social position. Therefore, in case the employers had similar, constitutionally-provided protection, the right to strike would actually be nullified. It should also be mentioned that, contrary to Greece, trade unions in Germany are able to deal with any employers' industrial action because of their power and significant financial status, so lock-outs are not considered such an important incident for them. It is a fact that employers' trade unionism is considered a countermeasure against the development of workers' industrial movement in Greece that has occasionally resulted in the workers' supremacy against the sole employer. However, the scope of the constitutional article 23, paragraph 1 is not to allow employers to worsen the employment terms of their workers and improve their

71. Zoelner, *supra* note 67, at 220.

professional interests through their trade actions, because such an interpretation of the Constitution would be inconsistent with the general scope of trade freedom.[72]

The theory of "equality of bargaining power" was used as an argument supporting the opinion that the prohibition of lock-out is anti-constitutional. Nevertheless, this theory has fallen into disuse, even in Germany. The reason is that the equality of weapons presupposes equivalent social "competitors." Strikes are used as weapons against the financial advantage of the employer giving him or her the ability to determine the employment terms. If the employer can adopt the lock-out, the employer's supremacy will be retained and the balance of bargaining power between the social partners would be disturbed. As a result, workers would lose their ability to assert their demands concerning the improvement of their financial and social standing and the employer would impose employment terms and conditions. The principle of unequal treatment by the Law is not typological but substantial. Different treatments for different categories of citizens is permitted if justified by special reasons relating to the public interest of the service of special interests with a social scope.[73]

The prohibition of lock-outs is constitutional because its purpose is maintaining the balance of power and preserving equivocal positions during the bargaining process, thus fairly distributing national income and improving labor conditions. Even from a sociological point of view, a lock-out is not accepted.[74] An enterprise is a combination of the production mediums of investments and work capital. According to modern theories, it cannot be used in a way that offends individual rights and the rights arising from it shall not be exercised against the general interest. Therefore, the employer, as the carrier of the production mediums (capital), shall not offend the rights of the employer's colleagues in the production procedure (workers), who deserve the same rights as the employer. Furthermore, the employer cannot offend the public interest by refusing to operate the enterprise in order to pursue a lock-out for selfish or personal reasons.[75]

72. Dasios, *supra* note 40, at 1001; Leventis, *supra* note 41, at 411.

73. LEVENTIS, *supra* note 44, at 568.

74. Dasios, *supra* note 40, at 1002; Michael Sofos, *I Apergia i Antapergia kai ta Oria Auton* [*Strike, Lock-Out and Their Limits*], 25 NOMIKO VIMA [LEGAL PODIUM] 1063, 1070 (1977).

75. Dasios, *supra* note 40, at 1003.