Supreme Court Decision Number 1665/2009 *(Areios Pagos)*

Civil Chamber D'

Composed by the Judges: Georgios Petrakis, Vice President of the Supreme Court, Athanassios Polizogopoulos, Eleftherios Mallios, Georgia Lalousi and Vasiliki Thanou-Christofilou, Supreme Court Judges.

Held a public session on the 10th of October 2008 in the presence of Georgio Fistouri, the Secretary, in order to rule [on the dispute] between:

The appellant: A Limited Liability Company under the trade name "[…]", having its registered office in […] and herein legally and duly represented by the attorneys […]. [The Limited Liability Company] has submitted a Motion.

The appellee: A Company under the trade name "[…]", having its registered office in […] and herein legally and duly represented by the attorneys […]. [The Company] has submitted a Motion.

The legal dispute began when the appellee submitted its application on 16/02/2006 and when the appellant submitted its intervention on 23/03/2006 to the One-Member Court of First Instance of Thessaloniki. [They were] judged jointly. The [following] decisions were rendered: final [decision] 22616/2006 of the same Court and final [decision] 1207/2007 of the Court of Appeal of Thessaloniki. The appellant requests the *cassation* of the latter decision via its application dated 2/10/2007.

As noted above, the parties appeared at the hearing held in connection with this application announced by the docket. The Judge *Rapporteur* […] read her Report dated 2/10/2008 and recommended that the *cassation* be declared admissible on its first and third grounds. The appellants' attorneys requested that the *cassation* application be declared admissible, while the attorneys of the appellees requested its rejection, and each party [requested that] the opposite

party be condemned to bear the judicial costs and expenses.

REASONED IN ACCORDANCE WITH THE LAW

I. According to article 5 paragraph 2 (b) of the New York Convention "*on the recognition and enforcement of foreign arbitral awards*" dated 10.06.1958, which is herein applicable and which was ratified by art. 1 of Presidential Decree (hereinafter p.d.) 4220/1961, the recognition and enforcement of a foreign arbitral award may be refused if, *inter alia,* the competent authority in the country where recognition and enforcement is sought finds that this recognition and enforcement would be contrary to the public policy of the country in question. One can deduce from the wording of this provision that there is a negative requirement for the recognition of a foreign award in Greece: the foreign award should not be contrary to domestic public policy. [The term] "domestic public policy" is interpreted within the meaning of article 33 of the Greek Civil Code (hereinafter GCC), which refers to international (in prevailing terminology) public policy. This international public policy consists of fundamental rules and principles, which prevail at a given time in a country and which reflect the social, economic, civic, political, religious, moral and other perceptions that govern its standard of living and constitute a barrier to the applicability of foreign rules within the domestic territory when this applicability may disrupt the above-mentioned prevailing standard of living in this country which is governed by the said principles. The provisions reflecting the above fundamental principles and governing a country's standard of living also express the concept of public policy. Therefore, [a decision] that enforces a foreign arbitral award in the domestic territory and resolves a case in a manner contrary to the above principles is not permitted, since this would result in partially or completely disrupting the domestic legal order of the state.

The above provisions also include the provisions of article 81 paragraph 1 of the Treaty of the European Communities (hereinafter TEC), which forbids any agreements or concerted practices between undertakings that distort competition within the Community, the provisions of article 1 of Law 703/1977 regarding restrictions of competition in the Greek market, the provisions of art. 4 par. 1 of the Constitution and 14 of the EHCR [European Convention on Human Rights] regarding the protection of a person's property, which according to article 1 of the First Protocol of ECHR includes his clientele, and community provisions that concern the compensation of

agents with regard to their clientele, the agents being considered financially weaker in their relationships with the entrepreneurs (Directive 86/653 EC, article 9 of Presidential decree 219/1991), and that also apply to exclusive distributors (Supreme Court 139/2006). The Court of Appeal, while judging the appeal submitted by the appellant company against the decision of the Court of First Instance that declared the foreign company's application (i.e. the appellee) as being admissible and arbitral award number 50181T0089204/6-9-2005 of the International Arbitral Tribunal of the Arbitral Organization of the USA as being enforceable in Greece, accepted that:

"On 1-1-1998 the foreign company under the trade name "[…]" and the defendant [the domestic company] concluded a distribution agreement according to which the latter assigned to the former the distribution of its products (medical equipment) in Greece. The said agreement contained an arbitral clause (clause 7.5), according to which any dispute, contestation or claim whether based on the agreement, on tort or on any other legal cause should be submitted to arbitration under the rules of the American Organization for Arbitration currently in force. During the period of implementation of the said agreement, differences regarding the parties' rights and obligations arose. In order to resolve these differences, the contracting parties referred them to the International Arbitral Tribunal of the above Organization. Specifically, the above foreign company (claimant) submitted an application before the aforementioned Arbitral Tribunal, which has its registered office in the city of […] and the state of […] in […], and turned against the resident company (defendant) by claiming the adjudication of the amount of 1.062.665, 33 USA dollars, plus interests, costs and expenses, for unpaid invoices for commodities (see the request in writing dated 29/10/2004 that was transmitted to the resident company).

On the same day, the resident company replied to this request in writing and accepted the arbitral proceedings. Furthermore, it denied the foreign company's claims and submitted a counterclaim for compensation due to breach of the exclusive distribution agreement and due to the (foreign company's) unfair and misleading acts and practices, thus violating the obligation to act *bona fide*, the trade usages as well as the consumer protection act of the State of Washington. The [resident company] thus suffered damages of 1.000.000 to 5.000.000 USA dollars, as during the above period, the exact amount of damage had not yet been estimated but would be proven

during the arbitral proceedings.

The proceedings in question subsequently took place and in particular, during the period between 15/08/2005 and 19/8/2005. Both parties attended the proceedings and were legally represented, namely the above foreign company (which had in the meantime changed its trade name, a change that was accepted by the Arbitral Tribunal via the 14-7-2005 decision of the Arbitrator Louis Peterson) and the resident company. Both parties submitted their allegations, evidence, witness statements and expert witness statements as can be shown by the decision dated 6-9-2005, [which was rendered] by the above officially appointed Arbitrator and which has been invoked and submitted. Following a review of the foreign arbitral award, the ratification of which and the recognition of its enforceability in Greece has been requested, the [following observations can be made]: 1) having studied and fully examined the case and having reasoned in accordance with the facts and the law, the judge has concluded that: (a) the claim of the foreign company due to the above cause amounts to 1.182.633 USA dollars, plus interest till the hearing of the action that amounts to 547.097 USA dollars, i.e 1.756.739 dollars in total, b) that the counterclaim of the resident company for compensation due to breach of the distribution agreement amounts to 619.613 dollars, c) that the counterclaims of the resident company for discriminatory tariff treatment pursuant to the consumer protection laws, for breach of the obligation to act *bona fide*, for breach of the general framework agreement and of Community Directive 86/653 EEC should be rejected by a “final” decision in accordance with the translated text invoked and submitted by the foreign company, and “without prejudice” in accordance with the translated text invoked and submitted by the resident company 2) that the amount payable by the resident company to the foreign company, following an off-set of the respective above mentioned claims and adding the legal interest on late payment since 1-9-2005, amounts to 1.137.117 USA dollars, 3) that the decision “constitutes a full and final settlement of all claims and counterclaims submitted to arbitration and that the said “final” decision was awarded in the city of […] of the state […] in […] on 6-9-2005. Furthermore, as arises from the affidavit dated 28-2-2006 of the Vice President of the International Centre for Dispute Resolution of the American Arbitration Organization based in New York, Thomas Ventrone, taken before the Notary of New York Jeffrey Kriegsam, the parties mutually accepted that a hearing regarding their dispute [be held] before an Arbitrator and that the said arbitration be subjected to the Regulations of the Organization, as amended and as in force since 1/6/2003. Finally, the affidavit of the attorney Roger J. Kindley (who is a legal

advisor) dated 8-3-2006 before the Notary of the state of Washington, Dawn L.Fisher, reveals that the Arbitrator of the above foreign company applied the Law of the State of Washington, as stipulated in the parties' agreement, and that the resident company was entitled to ask for an annulment, amendment or correction of the above arbitral award within three months from the date of issuance and that no such action was taken within the prescribed period. We should mention that the arbitration agreement and the above issued arbitral award, the enforceability of which has been requested in Greece, were submitted to the Court during the hearing of the case before the Court of First Instance, and that the defendant resident company had raised arguments, which will constitute, if proven and in accordance with the legal reasoning previously developed, impediments to the recognition and enforcement of arbitral awards on the basis of the provisions of art. 5 par. 1c of the above International Convention, according to which the recognition and enforcement of a foreign award can be refused where (the award) refers to a dispute "not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration". In particular, it put forward the allegation that the lack of reasoning in the above arbitral award constitutes a violation of the above mentioned provision, despite the relevant agreement between the parties contained in the arbitral clause of the exclusive distribution agreement entered into between the parties. However, by reviewing the text of the arbitral award, one can deduce that [the award] includes the relevant reasoning and thus fulfils the contractual clause in question; taking into account the fact that specific reasoning in the award was not required pursuant to the alleged agreement. Besides, even if we were to assume that the relevant agreement had been breached, it cannot be considered as referring to a dispute "not falling within the terms of the submission to arbitration, or that it contains decisions on matters beyond the scope of the submission to arbitration", and thus does not fulfil the prerequisites for the applicability of the above provision as the defendant groundlessly claims. It has also been alleged that the application to refer the dispute to arbitration was submitted by another company and not by the company that concluded the agreement, which contains the arbitration clause, and this fact therefore constitutes a violation of the above provision. However, as we have already mentioned, the legal nature of the company with which the respondent had concluded the agreement containing the arbitration clause has not changed. Only the company's trade name has been modified and this was change was accepted by the aforementioned judge in the arbitral proceedings. In any event, this fact

cannot be deemed to be an infringement of the above provision, as the defendant groundlessly claims, since the above prerequisites for the applicability of the provision have not been fulfilled.

Therefore, the defendant's allegations should be dismissed as unfounded. Furthermore, during the proceedings before the Court of First Instance, the defendant made allegations based on the negative prerequisite of par. 2b of article 5 of the above International Convention, namely that the recognition and enforcement in Greece of the above arbitral award is contrary to domestic and international public policy, because 1) Article 81 of the TEC had not been applied. This forbids the discretionary tariff treatment of the defendant by the claimant, namely the sale of goods (by the latter) to a competitor in Greece, at lower prices than those charged to the defendant, in a systematic effort to displace the defendant from the market and to benefit from the clientele that it has created, 2) the provisions of directive number 86/653 of the TEC and Presidential decree 219/1991 were violated, which protect the entitlement to an indemnity for [loss] of clientele and which also apply to exclusive distributors, 3) the arbitral award lacks reasoning 4) a company other than the one, which had concluded the distribution agreement containing the arbitral clause, submitted the dispute to arbitration. However, as the content of the arbitral award has made clear, the Arbitrator who rendered it did take into consideration the above provisions and did not exclude their applicability. The arbitrator dismissed the defendant's relevant claims, as in part not proven, and deemed that the defendant was entitled to a compensation amounting to 619.613 dollars as the claimant had been in breach of the exclusive distribution agreement. [The arbitrator] subsequently set off [this amount of money] with the claimant's biggest claim.

Therefore, the respondent's allegations under items 1 and 2 rely on unfounded prerequisites and should be rejected as the applicability of the above provisions was by no means excluded. One cannot consider that public policy has been violated pursuant to the last part of the legal reasoning presented previously. Moreover, the lack of reasoning of the arbitral award does not constitute a reason for forbidding to declare it enforceable in Greece, in accordance with the above, and one cannot deduce that this lack of reasoning, even if we were to assume that it did exist, entails a hidden violation of the respondent's right of defence or a violation of the right for a substantial settlement of the dispute between the parties, so as to be deemed as contrary to

public policy, as the defendant groundlessly claims in its allegation under item 3 above.

Further, the defendant's allegation under item 4 should be rejected because it is based upon a prerequisite that cannot be fulfilled, since, according to the above, there was only a change in the claimant's trade name and not a change of its legal nature. Finally, the intervention submitted by the defendant before the court of First Instance is rejected as being inadmissible, since the defendant had been summoned to the hearing concerning the discussion of the application before the court of First Instance, pursuant to Article 748 par.3 of the (Greek) Code of Civil Procedure (hereinafter GCCP), and had therefore become a party to the proceedings and had participated in the hearing before the Court of First Instance. Under the above admissions, the Court of Appeal rejected the appeal submitted by the appellant in the present trial - defendant as far as the application is concerned, as well as the additional grounds submitted with this appeal and upheld the decision of the Court of First Instance, according to which the above arbitral award was declared enforceable in Greece. According to the arbitral award, the appellant in the present trial (defendant - as far as the application is concerned) was obliged to pay to the appellee (claimant – as far as the application is concerned) the amount of 1.137.117 U.S.A. dollars. The appellant alleges, in the first and third grounds of appeal and on the basis of article 559 number 1, 19 and 8 GCCP, that the Court of Appeal directly and indirectly violated the aforementioned provisions (art. 5 par. 2 of the New York Convention, art. 33 GCC, art. 81 TEC, art. 14 ECHR and 1 of the Additional Protocol of the ECHR) because, despite the fact that it had accepted that the reasoning of the award of the foreign Arbitral Tribunal was inadequate, as far as the partial rejection of the appellant's counterclaims was concerned and the request for set-off with the claims of the appellee, it nevertheless failed to examine whether the arbitral tribunal had applied the aforementioned provisions pursuant to article 5 par. 2 of the New York Convention. The Court of Appeal failed to examine whether the consequences of the enforcement were contrary to Greek public policy, and the Court of Appeal did not take into consideration substantial allegations relevant to the above counter-claims in accordance with art. 33 GCC. According to the Court's majority opinion, these grounds are inadmissible and need to be rejected because the grounds invoked in the writ of cassation do not refer to the claimant's claim, which became admissible via the foreign arbitral award and which concern the enforcement of this award in Greece, but (these reasons) refer to the defendant's counterclaim, which was rejected by the

above arbitral award, and hence is in part not enforceable.

However, according to one of the members of the Court, namely the Judge of the Supreme Court […], these grounds should be examined as follows: The lack of reasoning in the arbitral award is not in itself contrary to the fundamental political, social or moral perceptions of the Greek legal order, in the sense that it does not conflict with the international legal order within the meaning of Article 33 GCC, unless the lack (of reasoning) conceals a violation of the fundamental right of defence or a substantial settlement of the dispute contrary to public policy (Supreme Court 1134/1975).

If the foreign arbitral award lacks reasoning with regard to the rejection of claims based on a violation of the above provisions, in order to determine whether [the award] is contrary to them or not [the provisions], as regulating the case contrary to the above provisions, the Court, without engaging in forbidden considerations or re-trying the case, has to examine the claim submitted and founded on the above provisions, in the same manner that a domestic court would have examined the claim had it been submitted before it, in view of determining *in concreto* whether [the award] is contrary to domestic international public policy. This is due to the fact that it is impossible to determine the issue at stake by any other means, namely the issue of whether the foreign arbitral award, the recognition of enforceability of which has been requested and which rejected the above claim, has infringed the above provisions and is therefore contrary to domestic public policy within the meaning of article 33 GCC (see plenary session of the Supreme Court 17/1999).

Failing to do so, the Court does not directly infringe the provisions of article 5 par. 2 of the New York Convention and article 33 GCC. However, the Court infringes them indirectly by omission and by failing to take into account the facts, which are necessary in order to determine whether the regulation by the foreign court is contrary or not to the above mentioned fundamental provisions that form part of public policy, within the meaning of article 33 GCC.

In this case, with regard to the allegation invoked (before the foreign arbitral tribunal) concerning the existence of claims raised by the appellant company, [the following should be

mentioned]: [the above claims] amounted to the sum [of money]. Considering also the amount awarded to the appellee in error pursuant to the arbitral award, if the appellant's claim had been declared admissible, the claim of the appellee in error company would have been entirely rejected by the arbitral tribunal by way of set-off. Despite the fact that the Court of Appeal accepted in its appellate decision that as far as these claims were concerned the foreign award rejecting them did not contain any reasoning, it nevertheless failed to examine the above claims as explained above and merely ruled that the foreign court took into account the above provisions "as it did not explicitly exclude their applicability".

By accepting the above, the Court of Appeal did not directly violate the provisions of articles 5 par. 2b of the New York Convention and 33 GCC but violated them indirectly and thus deprived its decision of any legal basis. Therefore, the first (only one part of it) and third grounds of cassation (only one part of it), which concern a direct violation of the above provisions pursuant to article 559 nr.1 GCCP, are rejected as unfounded. However, the same (first and third) grounds for cassation are admissible as to their second part, in accordance with article 559 number 19 GCCP regarding an indirect violation of these provisions.

According to article 559 number 8 GCCP, the first ground for cassation as to its third part, which is based on the fact that the Court of Appeal failed to take into consideration the appellant's "factual" allegations that substantially influenced the outcome of the trial and that stipulated that the enforcement of the foreign decision was contrary to Greek public policy on the basis of the facts of the case, is rejected as unfounded. [It is rejected as unfounded] because the Court of Appeal did take into consideration the said allegations and rejected them, as can be deduced from the appellate decision.

II. According to article 5 par. 1 case c of the International Convention of New York, as applicable in the present case, the recognition and enforcement of a foreign arbitral award may be refused if, *inter alia*, the competent authority in the country where recognition and enforcement is sought finds that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. For the purpose of the above provision, whose content is identical to the concept of excess of power/authority as contained in article 897 par. 4

GCCP (which constitutes substantive and not procedural law, as it refers to the content of the decision on the merits of the case - Supreme Court 295/1999), there has been no excess of power and the arbitral tribunal has not decided on matters beyond the scope of the deed that contains the arbitration clause or of the arbitration clause itself. The arbitral tribunal simply did not include any reasoning or a specific reasoning, despite the fact that this had been agreed upon in the arbitration deed (plenary session of the Supreme Court 13/1995). The Court of Appeal, therefore, ruled via its supplementary reasoning that if the foreign arbitral award had indeed led to a breach of the parties' agreement for reasoning of the arbitral award, this cannot be considered as referring to a dispute not contemplated by or not falling within the terms of the submission to arbitration and thus does not fulfil the prerequisites for the applicability of article 5 par. 1c of the International Convention of New York. The Court of Appeal did not therefore directly infringe this provision and the second ground for cassation as to its second part pursuant to article 559 number 1 GCCP and alleging the opposite is unfounded. The same [second ground for cassation] as to its first part and pursuant to article 559 number 1 and 19 GCCP, is founded on the allegation of a direct or an indirect violation by the Court of Appeal of the substantive law provisions of articles 173 and 200 GC. Despite the fact that the Court of Appeal accepted in its main reasoning, with regard to the above issue of a violation of a clause of the arbitration deed and as far as the reasoning of the arbitral award is concerned, that this clause of the agreement was unambiguous, it nevertheless invoked an argument in order to support its ruling and therefore indirectly interpreted this clause. In addition to the above, it has been alleged that Court of Appeal in interpreting [the clause] did not implement the provisions of articles 173 and 200 GCC or implemented them incorrectly. However, having rejected the above ground for cassation concerning the subsidiary reasoning of the contested decision, which independently supports its final disposition, the above (second ground for cassation) as to its first part and the part that concerns the main reasoning of the decision, is rejected as being ineffective.

III. According to the fourth ground for cassation based upon article 559 number 1 and 19 GCCP, a direct and indirect violation of articles 4 par. 1b and 5 par. 1c of the New York Convention has occurred because the foreign arbitral award refers to a dispute not contemplated in the terms of the arbitration deed or in the arbitration clause, since the arbitration agreement was not concluded with a company other than the one for the benefit of which the arbitral award was issued and since this issue has been inadequately motivated. The Court of Appeal accepted, with

regard to this subject-matter, that the legal nature of the company with which the appellant had concluded the arbitration agreement had not changed and that only its trade name had changed. In any case, this fact cannot be considered as an infringement of the above provision and the appellant's allegation is rejected. In view of the above, the Court of Appeal did not directly infringe the above provisions and its ruling contains clear and sufficient reasoning, thus rendering it possible for the cassation review to address the issue of whether these provisions have been implemented correctly or not. Moreover, the alleged additional omissions refer to the entire reasoning of the probative findings and the documentary evidence and the relevant allegations are inadmissible.

The above ground for cassation must therefore be rejected.

IV. Only a third person and not a party to the trial is entitled to submit an action for intervention [a principal one or a subsidiary one (articles 79, 80 GCCP)]. A person who is summoned and who participates in the first-instance trial acquires the status [of a party to a trial] during the hearing held under the voluntary jurisdiction in accordance with article 748 par. 3 GCCP. Consequently and in view of the above, an intervention submitted by a party to the trial should be rejected as being inadmissible. The Court of Appeal accepted and ruled in this regard and rejected a ground for appeal against the first instance decision, which had refused the principal intervention of the appellant. This was refused on the grounds that the appellant had been summoned and had participated in the trial before the Court of First Instance and had thus had become a party to the trial. Thus, the Court of Appeal did not falsely rule upon the issue of inadmissibility. The fifth ground for cassation based upon article 559 number 14 GCCP is therefore rejected as being inadmissible.

V. Following the above, the cassation must be rejected and the defeated appellant has been condemned to bear the judicial costs and expenses of the appellee.

FOR THESE REASONS

It rejects the application of company […] dated 2-1-2007 [requesting] the cassation of the 1207/2007 decision of the Court of Appeal of Thessaloniki.

It condemns the appellant to bear the judicial (expenses) of the appellee, which amounts to €…

Considered and decided/adjudicated in Athens on the 28th of May 2009. Published in Athens during a public and open court session on the 30th of June 2009.