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A Commentary

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A. General remarks

I. Introduction

- 1 It is a fact that overall very few cases relating to the protection of CD's have been brought before Greek courts, thus, inevitably, relevant case-law is quite poor compared to that relating to CTM's. Regardless of that, CD cases heard in Greek courts face a considerably prolonged trial length. To this respect Greece holds one of the last ranks internationally¹, while efforts to improve matters have still to produce the desirable results. Currently, a respective bill is under public consultation – which aims to reform the code of civil procedure. Its main objective is precisely to accelerate the administra-

¹ OECD (2013), 'What makes civil justice effective?', OECD Economics Department Policy Notes, No. 18 June 2013.

tion of justice. It should however be pointed out that delay in administration of justice does not result in bad judgments. Indeed judgments rendered by Greek courts demonstrate good quality of justice.

II. Costs

In the Greek jurisdiction, a party shall incur costs comprising mainly of lawyer's fees 2 and judicial expenses. Such costs will vary significantly, however in average a CD dispute will incur costs between EUR 7,000 – EUR 10,000 while in notably complex cases costs might rise to as much as EUR 50,000 or even higher depending on the particular circumstances.

Lawyer's fees are in principal agreed upon in writing either as a lump sum or by 3 hourly charge.

Judicial expenses are equal to approximately 1 % on the amount claimed by the 4 action, while additional (usually minor) expenses will be incurred regarding for instance process server fees and translation costs.

III. Duration

CD proceedings in the first degree will normally last approximately 18 months. More 5 specifically, upon filing of an action, a hearing date is set after approximately 8 months and the court is obliged to render its ruling within 8 or in exceptional cases 10 months. However trial length might be significantly prolonged in case the hearing is postponed (upon request of either of the parties) or cancelled (due to a strike of the court's secretariat or even lawyers). It is noted that pursuant to the Greek code of civil procedure, a hearing may be postponed only once upon the request of either party, but such a postponement is usually granted. Finally, appellate proceedings before the court of appeals or the supreme court will more or less require an equal amount of time.

IV. Forum shopping

1. Territorial jurisdiction

Overall, forum shopping is not an option within the jurisdiction. In accordance with 6 the law², territorial jurisdiction has been exclusively divided between the two nominated Greek CD courts. These courts are:

- (a) The Athens court of first instance and the Athens court of appeals (17th Chamber³), the jurisdiction of which is extended to the regions of the Court of Appeals of Athens, the Aegean, the Dodecanese, Corfu, Crete, Lamia, Nafplio, Patras and Piraeus.
- (b) The Thessaloniki Court of First Instance and the Thessaloniki Court of Appeals, the jurisdiction of which is extended to the regions of the Court of Appeals of Thessaloniki, Western Macedonia, Thrace, Ioannina and Larisa.

In case a CD related action is filed before a court other than the above, the case shall 7 be referred to the competent court, something that will significantly prolong the duration of the proceedings.

² Combined reading of Artt. 7 and 9 of L. 2943/2001.

³ Decision 4151/2011 of the Athens Court of Appeals.

2. Material jurisdiction

- 8 According to the general provisions of the code of civil procedure, the court having material jurisdiction to hear CD cases is the multi-member court of first instance of either Athens or Thessaloniki respectively⁴.

B. Enforcement of CD rights in Greece

I. Out of Court/Judicially ratified settlements

1. Introduction

- 9 Greek jurisdiction has not established any mandatory out of court procedure before parties resolve to litigation. Of course, a dispute may be settled out of court by the initiative of the parties involved either before or after an action is filed. However, out of court settlement is a rare exception in the Greek jurisdiction, a fact which significantly contributes to the prolonged duration of proceedings.

2. Pre action settlement

- 10 The aggrieved party may address an extrajudicial notice to the infringer, summoning the latter to cease the infringement while reserving the right to initiate litigation and claim compensation. Compliance with the aforementioned notice from the infringer's part entails the settlement of the dispute. However, particular attention is required when drafting such notices given that respective statements will be considered as acknowledgments if the case is referred to court.
- 11 Moreover, the offended party may request the amicable settlement of the dispute from the court prior to the action's filing, by addressing a respective request to the local magistrate judge. Furthermore, the parties may even seek recourse to judicial mediation⁵. However, these possibilities are rarely (if at all) applied in practice.

3. Post action settlement

- 12 After an action is filed, the parties may, under certain conditions, come to a compromise before a final judgment is rendered by the court⁶. Such compromise is set out in a respective court minute which is signed by the parties and details the terms and conditions stipulated between the same. Thereafter, the minute is ratified by the court and constitutes an enforceable title.

III. Litigation

1. Introduction

- 13 The aggrieved party will in most cases resolve to litigation. Within this framework, such party may institute an application for injunction proceedings in order to secure

⁴ As far as CTM's are concerned, the law explicitly provides that material jurisdiction lies with the single member court of first instance. To the contrary, material jurisdiction in CD (as well as patents) cases is found on the basis of general provisions of the code of civil procedure.

⁵ Artt. 209 and 214 B of the Greek code of civil procedure.

⁶ Art. 214 A of the Greek code of civil procedure.

immediate provisional relief (injunction proceedings) as well as an action to be tried according to the ordinary (main) proceedings.

2. Injunction

a) **Provisional orders.** As from the moment the offended party becomes aware of the infringement, it may file an application for injunction, which shall also include a request for the issuance of a provisional order. Upon filing the application before the court of first instance, the hearing of the provisional order will take place within the following 48 hours.

In general, the claimant is obliged to notify the defendant by any means necessary to appear at the hearing of the provisional order. In rare occasions where the court will find that there is imminent danger for the applicant to suffer irreversible damage, the provisional order may be granted ex parte. Following the hearing, the respective ruling is rendered on the same or the next day.

b) **Procedure.** The application for injunction is filed either before the single-member court of first instance or before the multi-member court of first instance. Nevertheless, if main proceedings have already been initiated before the multi-member court of first instance, injunction proceedings should also be addressed to the same.

The hearing date of the application for injunction depends upon whether or not a provisional order has been granted. In the former case, the hearing takes place within the following 20–30 days, while in the latter case the hearing will take place within a period of approximately 6 months. The law indeed provides for the possibility of granting injunctions ex parte however this is never applied in practice. The court will always order that the defendant is notified at least 10–20 days prior to the hearing.

The court will find the application well- or ill-founded based on two main criteria. The first one refers to whether the alleged rights will be found probable by the court, i. e. whether the court finds probable that the applicant is the beneficiary of the infringed CD. The second one refers to whether such rights are under immediate threat or if overall matters warrant the urgent intervention of the court. As already implied, in the framework of injunction proceedings it is not necessary for the claimant to fully prove his allegations but it is sufficient for the court to determine that such allegations are probable.

The judgment rendered by the court cannot be appealed. However, such judgment may be revoked primarily in case new evidence is made available after the hearing of the application. Exceptionally, if the application for injunction is founded on unfair competition provisions⁷, then an appeal may be lodged against the judgment within 10 days as from service thereof. If not annulled or revoked as per above, the injunctions remain in full force until a final judgment is rendered on the action. Finally, in the event that injunctions have been ordered before the filing of the action for the main proceedings, then the applicant has to file the same within 30 days from publication of the injunction judgment, otherwise the latter becomes inoperative.

c) **Injunctive remedies.** In order to restrain the CD infringement, the claimant in his application for injunction may put forth the following requests:

- (aa) Provisional lifting of the infringement and refraining there-from in the future;
- (bb) Banning the defendant from producing and/or marketing respective products;
- (cc) Publishing the respective judgment in one or more newspapers at the defendant's expense;

⁷ Law 146/1914.

- (dd) Threatening the defendant with a fine of up to EUR 10,000 for each day of infringement (however, courts usually threaten a fine of EUR 1,000).
- 21 Furthermore, available remedies include conservative attachment of the infringers' assets as well as the conservative attachment of the means used for executing the infringement.
- 22 In his defence, the defendant may raise an objection concerning the invalidity of the CD. As already mentioned, whether such an objection will be successful in the framework of these proceedings depends on whether the court will find its grounds to be probable.

3. Main/Substantive proceedings

- 23 a) **Introduction.** The following passages will deal with matters concerning the filling of an action and limitations thereof, the procedure before the court of first instance and the remedies available as regards its judgment as well as respective costs.
- 24 b) **Commencement and limitation.** Claims arising from the infringement of a CD are prescribed after the lapse of 5 years from the moment the offended party is informed of the infringement and the party committing the same. In any case, the respective claims are prescribed after the lapse of 20 years following the respective infringement.
- 25 c) **Procedure.** As already noted, the multi member court of first instance is competent to hear CD infringement cases. The procedure before this court typically consists of the following steps.
- 26 aa) **Filing and service of the law suit.** As per the code of civil procedure, the action is filed with the secretariat of the court and a hearing is set. The action must be served to the defendant through a bailiff at least 60 or 90 days before the hearing, depending on whether the defendant domiciles in Greece or abroad.
- 27 bb) **Counterclaim.** It is common for the defendant to file a counterclaim for invalidity of the CD. Such counterclaim is in principal filed at least 30 full days prior to the hearing. In case the counterclaim is in the form of an objection⁸, it can be brought forth with the pleadings filed 20 days prior to the hearing (see below).
- 28 cc) **Pleadings.** Pleadings are submitted 20 full days prior to the hearing. Together with the pleadings the parties must submit all available evidence as well as up to 3 affidavits. Affidavits may be executed before a Notary Public in Greece or abroad, the local magistrate judge or even before a Greek Consul abroad, following a notification to the other party to attend.
- 29 As mentioned above, the defendant has the possibility of raising an objection concerning the invalidity of the CD with his pleadings. This possibility is granted only if respective claims are grounded on rights derived by a prior national design.
- 30 dd) **Counter pleadings.** Counter pleadings in reply to the opponent's pleadings are submitted 15 full days prior to the hearing.
- 31 ee) **Hearing.** The hearing mainly consists of the examination and cross-examination of the parties' witnesses. As per the code of civil procedure, at least one witness must be examined from each side. As per practise, courts rarely (if ever) hear a second witness for each party.

⁸ Article 25 (1) (d) CDR

ff) **Evaluation.** Comments on the hearing are submitted by 12:00 of the 8th working day after the hearing and mainly concern the evaluation of the witnesses testimonies. 32

gg) **Experts.** Whether experts will produce a respective report lies with the discretion of the court and if appointed their task will be to assist it in forming its opinion. If they are appointed, the procedure will be concluded upon the filling of their report and the parties' comments on the same. 33

hh) **Appeal.** The decision of the court of first instance may be appealed within 30 or 60 days form service depending on whether the appellant domiciles in Greece or abroad or within 3 years if the decision is not served. Furthermore, the decision of the court of appeals may be appealed before the Supreme Court within 30 or 90 days as per above or within 3 years if the decision is not served. 34

d) **Remedies.** CD's enjoy the same level of protection as national designs. As a result the claimant is entitled to the same remedies provided under national law. Thus, in case of infringement or threatened infringement of a CD, the claimant may request the lifting of the same and more specifically the removal or destruction of respective products and means used for manufacturing. Furthermore, the claimant may request that the infringer is threatened with a penalty of up to EUR 10,000 in favour of the claimant, for each infringing act committed in the future. Finally and upon the claimant's request, the court may order the publication of the whole or a part of the judgment in the media at the defendant's expenses. 35

e) **Damages.** Under Greek law and as per the provisions regulating patents, which apply by analogy, the claimant is also entitled to compensation for all actual damages suffered in case the infringement was executed by intent or gross negligence. More specifically, the court will determine compensation after considering all relevant matters and will award either compensation of any and all damages suffered or any benefit enjoyed by the infringer deriving from the unauthorized exploitation of the CD. Alternatively, the court may determine compensation, which will at minimum be equal with any fees and royalties that the claimant would have collected for granting a respective license. Moral damages can also be awarded, the height of which will depend on the particulars of the infringement and the financial standing of the parties. 36

f) **Judicial Costs.** Pursuant to the code of civil procedure, the defeated litigant is ordered to pay the judicial costs of the prevailing party. The court will determine judicial costs to an amount equal to 3 % of the amounts claimed with the respective action. However a party may request a specific amount for the costs incurred. The court may further decide to apportion the judicial costs amongst the parties if the same partially won and were partially defeated. Finally, when awarding costs, the court will also take into consideration the complexity of the legal issues involved in the proceedings and might even refrain form awarding any costs if it finds that the interpretation of the applicable rules of law were particularly complex. 37