Significant decision concerning arbitration clauses and foreign governing law clauses

The Athens Court of Appeals recently issued a very “English” decision in a case handled by our dispute resolution team, led by Senior Partner, Gregory Pelecanos.

Arbitration clauses and foreign governing law clauses, which have been negotiated and agreed to by reasonably experienced businesses, must be respected even if the combination would result in the negation of a right which may be understood as a “mandatory right” as per Art. 9 Rome I.

Any lawyer who has dealt with English law is aware that English courts evaluate commercial contract clauses between businesses rather restrictively. They do not look kindly on arguments based on the principle of “good faith” or that clauses in B2B contracts are otherwise “unfair” or “unreasonable”. Probably the most decisive factor of all is whether both parties have been properly advised legally, are of equal bargaining power and are equally skilled technically and commercially, so that they should have been capable of adequately assessing the risks and rewards they were undertaking in the transactions and of producing a contract document which properly reflected this. Other jurisdictions, including Greece, tend to interpret commercial contracts liberally to accommodate the weaker parties, and are more susceptible to arguments of “unfairness”.

In a dispute concerning “goodwill indemnity”, between a Greek exclusive distributor (plaintiff) and her Italian supplier (defendant), the Athens Court of Appeals upheld the validity of an arbitration clause which stated that all disputes were to be resolved by arbitration (ICC Rules) in Venice, and of a governing law clause which stated that Italian law governed the contract. The plaintiff had sought to by-pass the arbitration clause and establish the jurisdiction of Greek courts, arguing that the arbitration clause was invalid and Greek law should be applied. Plaintiff’s grounds were that since the ECJ Judgment in Ingmar had ruled that goodwill indemnity is mandatory law under Dir. 86/653/EC and part of European public policy and Greek law, which implements said Directive and further directly extends its application through legislative enactment to “exclusive distributors” (and, by analogy through case law, to “other forms of distributors who are in a similar legal and factual situation as commercial agents”), similarly rendered goodwill indemnity a mandatory rule, the right to “goodwill indemnity” is a mandatory right of direct effect as per Art.9, Rome I. Given that Italian law does not extend goodwill indemnity to distributors, the application of the ICC arbitration clause combined with Italian governing law would result in the Greek distributor being denied its mandatory right to goodwill indemnity.

The Athens Court of Appeals first established that the arbitration clause was an independent agreement, that the parties had intended it to be governed by Italian law and was valid under Italian law. Having established the validity of the arbitration clause, in a similar vein, the Court deduced that the governing law clause had also been validly agreed. It stated that there was no evidence of any circumstance which would allow it to conclude that anything improper had occurred during the negotiation of the clauses, as both parties were experienced businesses and, indeed, had cooperated in the past on the same grounds. There was, therefore, no reason to conclude that the clauses were anything but fair.

With regard to the argument that the combined effect of arbitration and Italian law would negate the Greek distributor's right to claim goodwill indemnity, the Court of Appeals acknowledged that even if case law qualifies the right to claim "goodwill indemnity" as a mandatory right of direct effect under Greek law, this was insufficient to negate the effect of the arbitration clause and the Italian governing law clause.

In particular, the Court stated that "… *the combination of an arbitration clause where the seat of arbitration is Venice and Italian law as the applicable substantive law, does not render the arbitration clause invalid as abusive, because the subjection of the contract to Italian law did not aim to avoid Greek law and, in particular, the provision of Art.9 PD 219//91 which applies by analogy to exclusive distributors which has been adjudged by case law as a rule of direct effect … given that during the negotiations there was no negotiation deficit or abusive exploitation of a superior position… since the chosen substantive law was the law of the country of the suppliers' seat… Therefore, the fact that (the parties) chose Italian law, even if that law doesn't recognize rights to claim goodwill indemnity to exclusive distributors, does not render the venue clause invalid…In any event, the argument actually refers solely to the applicable law, a matter that is to be reviewed by the court of substance which has jurisdiction to adjudicate the disputed matter… who can, in accordance with Art 7.1 (now Art. 9) Rome I, give effect to the rules of direct effect of article 9 PD 219/91*."

Ballas Pelecanos Law acted for the defendant. Gregory Pelecanos, Senior Partner and George Moukas, Senior Associate, argued for the defendant. For more information about our Dispute Resolution practice group or this particular case, please contact Gregory.Pelecanos@balpel.gr