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Recognition and Enforcement of Foreign Court Decisions and Arbitral Awards in Greece: Is There a New Trend Towards a More Relaxed Application of the Public Policy Exception to Punitive Damages?

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A recent court judgment confirms enforceability in Greece of a US judgment awarding USD 10 million in punitive damages

The Judgment no. 722 of 2019 of the Single Member Civil Court of Piraeus paves the way to a more permissive approach as regards the enforceability of foreign court judgments and arbitral awards on punitive damages in Greece. This is a breakthrough case law development compared to previous, long standing, jurisprudence of the Greek courts, which have generally relied on the public policy doctrine to resist enforcement of foreign court judgments and arbitral awarding punitive damages by finding them excessive or disproportionate compared to the actual loss suffered. While it consistently applies the criteria already set by previously established case law for the assessment of awards on punitive damages in light of the public policy exception, the recent ruling is novel in that it engages in a holistic, *ad hoc* assessment of the legal and factual matters of the case at hand in a pragmatic manner, without limiting its review to the amount of the punitive damages award, as previous case law has done.

Legal Background

In Greece, as in most jurisdictions, the recognition and enforcement of foreign court judgments and arbitral awards can be resisted, *inter alia*, on the grounds of public policy considerations. The test applied by Greek courts in this respect is premised on the notion of public policy defined as the most fundamental civil, moral, social, legal and economic considerations prevailing in the country. In a nutshell, the scope of the public policy standard of review is both (i) *narrow* (in the sense that it comprises a very limited group of fundamental rules and not all mandatory provisions of Greek law) and (ii) *dynamic* (meaning that the perimeter of such fundamental rules varies from time to time depending on the prevailing liberal or conservative approach adopted in the country, as ascertained by Greek courts).

Greek courts have examined on various occasions whether foreign court judgments and arbitral awards ordering punitive damages are enforceable in Greece in light of the public policy exception and the general principles on damages applicable under Greek law. The common law concept of

punitive damages is not recognized as such under Greek law, as it contravenes the general principle that any award of damages should be of a compensatory rather than punitive nature. Exceptionally, certain punitive-like statutory remedies are provided for in special legislation – for example, in case of violation of intellectual property rights the claimant may, under certain conditions, bring a claim for damages without being required to quantify actual loss. On the other hand, Greek law does not reject the concept of contractual penalties of sanctionary nature. Although the common law concept of liquidated damages is alien to Greek law, parties are allowed to agree on monetary penalties for contractual breaches. Such penalties are generally upheld by Greek courts, provided that they are not deemed excessive or out of proportion to the relevant circumstances.¹⁾ In fact, parties are not allowed to waive the judicial review of the legality (reasonableness/proportionality) of such contractual clauses, as this is a mandatory rule (*ius cogens*).

The Public Policy Test

Against this legal background and in line with its rulings on the aforementioned narrow and dynamic scope of international public policy rules, the Greek Supreme Court²⁾ has consistently set the applicable standard for the assessment of the enforceability of punitive damages or similar contractual penalties awarded by foreign courts and arbitral tribunals as follows:

(1) the award of punitive damages does not contravene *per se* the Greek public policy norms;

(2) the enforcement in Greece of a court judgment or arbitral award ordering punitive damages is permitted under condition that the enforcement court has assessed and confirmed, by means of an *in concreto* analysis, that the punitive damages awarded are not excessive or disproportional in light of the given circumstances.

Namely, although the Greek courts are not allowed to review the foreign court judgment or arbitral award on its merits, they must actively examine the given factual background against which the award on punitive damages was issued and conclude whether the amount of such punitive damages is within acceptable limits, *i.e.* not excessive or disproportional.

Past Case Law: Reserved Position Towards Punitive Damages Awards

When applying the test, Greek courts have in the past resisted recognition and enforcement of foreign court judgments and arbitral awards ordering punitive damages, either on the basis that the enforcement court did not perform at all the required *in concreto* analysis or on the basis that the punitive damages awarded were considered excessive or disproportional in light of circumstances, such as the nature and significance of the violation or breach by the debtor, the intensity and measure of the debtor's fault, the creditor's legitimate interests, the moral and financial status of the parties and any other special circumstances.³⁾

The past approach of Greek courts in assessing similar cases was rather conservative and confined in two aspects: (1) the *amount* of punitive damages or penalties awarded and (2) their *ratio vis-à-vis* the principal claim for actual loss suffered. Notably, the *Supreme Court judgment no. 1260 of 2002* ruled that punitive damages awarded in the amount of USD 60,000 were disproportionately

high compared to the principal amount due of USD 100,000. In the same vein, the *Athens Court of Appeals judgment no. 4332 of 2011* had found that a penalty for a 5-month contractual delay which corresponded to two thirds of the principal amount was excessive.

New Court Ruling: Towards a More Flexible and Pragmatic Approach?

Yet, there are signs that Greek courts are gradually adopting a more flexible approach. In a newly issued judgment, the *Piraeus First Instance Court in its ruling no. 722 of 2019* upheld the enforceability in Greece of a US court judgment awarding the significant amount of USD 10 million in punitive damages. Furthermore, it did so notwithstanding that the amount of punitive damages materially exceeded the amount of positive damages awarded (ca. USD 7.8 million). This breakthrough decision is important in view of its reasoning: While it endorses and consistently applies the criteria already set by previously established case law as regards the assessment of awards on punitive damages in light of the public policy exception, it does not confine its assessment to the amount of punitive damages as a proportion of the principal claim, as previous case law has done. Conversely, the court in the subject case engages in a holistic, *ad hoc* assessment of the legal and factual matters of the case at hand in a pragmatic manner, focusing on the particular circumstances of the case, such as the gravity of the fraud perpetrated, the malicious intention of the defendant and the severe adverse impact on the reputation, and the continuation of the business of the claimant as a going concern.

Furthermore, contrary to previous case law, the court does not consider as an obstacle to enforcement the fact that the amount of punitive damages awarded exceeded the amount awarded for actual loss. On the contrary, while not disregarding the importance of the quantum as one (of the many) relevant criteria, the court in essence reverses the previously held presumption that punitive damages should be considerably lower than the actual loss in order to be acceptable under the public policy test, by invoking as a pro enforcement argument that the punitive damages awarded were not significantly higher than the amount of actual loss. Thus, the party seeking enforcement does not need to demonstrate that the amount of punitive damages awarded is considerably *lower* than the actual loss (*positive condition*) but merely that it is not significantly *higher* than the actual loss (*negative condition*), therefore materially enlarging the scope of enforceable awards on punitive damages.

Conclusion

The newly issued court judgment appears to mark a noteworthy shift on case law, paving the way to a more permissive approach as regards the enforceability of foreign court judgments and arbitral awards on punitive damages – and, perhaps, a first step towards the relaxation of the public policy exception on recognition and enforcement in general. It remains to be seen whether future jurisprudence of Greek courts, especially at the Supreme Court level, will confirm and further elaborate on the pragmatic and flexible approach adopted by the first instance court.


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References

- ?1 See Supreme Court judgment no. 2049 of 2017, dealing with the distinction between liquidated damages and penalty clause.
- ?2 See Supreme Court judgment no. 17 of 1999.
See Supreme Court judgment no. 6 of 1990; Supreme Court judgment no. 17 of 1999; Supreme Court judgment no. 1260 of 2002; Athens Court of Appeals judgment no. 4332 of 2011; First
- ?3 Instance Court of Thessaloniki judgment no. 13432 of 2012. For a more liberal approach on recognition of enforceability of punitive damages, see First Instance Court of Thiva judgment no. 160 of 2010.

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