

Litigation - Cyprus

No state immunity in commercial agreements targeting contraband cigarettes

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On March 18 2015 the Supreme Court examined Appeal 109/2009 against a decision made by the Limassol District Court to set aside orders obtained by Tlais Enterprises Limited to seal and serve an action in the district court against Her Majesty's Revenue and Customs (HMRC), the UK tax and customs authority.⁽¹⁾

Background

From 2002 to 2005 Tlais was the exclusive agent in Cyprus of Gallaher International Limited, a major UK-based multinational tobacco company now owned by Japan Tobacco. Their relationship, particularly its termination, had already been the subject of litigation in the English courts.⁽²⁾

Tlais, Gallaher and Her Majesty's Customs and Excise – which was subsequently absorbed into HMRC – were also parties to a separate tripartite agreement intended to reduce import of contraband cigarettes into the United Kingdom via Cyprus or Dubai. The tripartite agreement was based on Her Majesty's Customs and Excise's red and yellow card procedure, described in the judgment on the English proceedings, by which it alerted manufacturers in respect of customers about whom it had serious concerns, usually based on the proportion of the customer's total purchases which found their way back to the United Kingdom.

In the case of a red card, Her Majesty's Customs & Excise invited the manufacturer to consider taking action against the customer. The range of actions to be considered included:

- cessation of supply;
- reduction of supply;
- restrictions on certain brands;
- delivery of product directly to the intended markets;
- ending the practice of delivering to free ports;
- a review of export policy;
- contractual provisions regarding the behaviour of distributors in relation to the destination of their products;
- conducting an audit of distributors; and
- agreeing a system for tracing sales.

A customer subject to a yellow card would be one about whom Her Majesty's Customs and Excise had some concerns and about whom it would expect the manufacturer to make further inquiries.

As noted in the Supreme Court judgment, the tripartite agreement ended with the following paragraph:

"It was agreed that, in the event of seizure of Gallaher cigarettes, HMC&E [Her Majesty's Customs and Excise] would provide the fullest available details, to Gallaher and Mr. Tlais in order that, so far as Gallaher and Mr. Tlais are able, tracing of the shipment back to the culpable customer can occur and the necessary sanctions can be applied. While HMC&E [Her Majesty's Customs and Excise] were minded to ask Mr. Tlais to apply the yellow card/red card system, Mr. Tlais indicated that in the event he found any TEL customer involved in product diversion, he would terminate supply immediately without further warning, as he was not prepared to accept any potential damage to his reputation or his business as a result of the bad practice of others."

Tlais alleged that even though it had implemented the yellow card/red card system and had imposed a red card on its agent in Syria following the diversion of cigarettes, HMRC had imposed a red card on Tlais itself, without cause or explanation.

The red card effectively excluded the merchant from the tobacco market as no one would be willing to cooperate with it. Gallaher subsequently initiated legal proceedings in the United Kingdom against Tlais on the basis of the exclusive distribution agreement.

In turn, Tlais filed an action against HMRC in the Limassol District Court seeking a declaration that HMRC had breached the tripartite agreement, together with damages for causing Gallaher to terminate the exclusive distribution agreement.

Legislation

The modern restrictive approach on state immunity relies on the distinction between the state's public acts of government and its private acts of management (ie, *acta jure imperii* and *acta jure gestionis*). In *Concerning the Application of the Attorney General (2004) 1 AAD 730*, the Supreme Court referred to what Lord Wilberforce had indicated in *Claim against the Empire of Iran (1963) 45 ILR 57*, where it was said:

"As a means for determining the distinction between acts jure imperii and jure gestionis one should rather refer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity. It thus depends on whether the foreign State has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law."

In this latest judgment the Supreme Court examined a series of cases and material on state immunity. It once again made reference to the distinction between acts *jure gestionis* and *jure imperii* and to Chapter 7 of the *Manual of Public International Law* (ie, "Organs of States in their External Relations: Immunities and Privileges of State Organs and of the State"), particularly paragraph 7-25, which reads as follows:

"The question of the extent to which state agencies and other instrumentalities are entitled to immunity arises in several types of cases. When the agency in question clearly constitutes a ministry or department engaged in public activity, immunity will be granted (Piascik n. British Ministry of War Transport, 54 F. Suppl. 487 (1943); AD, 1943-5, Case No. 22). Often, however, there may be some question as to whether an entity is in fact an integral part of governmental machinery; in those instances courts have usually given great weight to the views of the foreign state, ... When the Soviet news agency, Tass, was sued in the United Kingdom for alleged libel, the Court of Appeal recognised its immunity, giving sufficient weight to the Soviet ambassador's certificate that Tass constituted a "department of the Soviet State" (Krajina v. Tass Agency (1949) 2 All E.R. 274; also Baccus S.R.L. v. Servicio Nacional Del Trigo (1957) 1 Q.B. 438 below; and an earlier French case in which the United States Department of State attested to the governmental status of the defendant agency, Lahalle et Lavard v. American Battle Monuments Commission, AD, 1935-7, Case No. 88."

The Supreme Court also referred to the following passage from *Suchariktul: State Immunities and Trading Activities in International Law*: "trading activities are invariably included among State acts over which the local courts may exercise jurisdiction."

Decision

The Supreme Court approved the appeal and held that the district court was wrong to decide at an interim stage that the tripartite agreement concerned the exercise of state power. On the contrary, the Supreme Court stated that the tripartite agreement appeared to be a commercial agreement, but acknowledged that the matter should be examined in detail at the full trial of the dispute in the Limassol District Court.

The unlawful inducement to breach of contract is expressly recognised as a civil wrong in Cyprus. Section 34 (1) of the Civil Wrongs Law Cap 148 provides that: "Any person who ... knowingly and without sufficient justification, causes any other person to breach a contract with a third party commits a civil wrong against the third party".

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Endnotes

- (1) HMRC is the tax authority of the United Kingdom. It is the successor to the Inland Revenue, which administered income tax and similar taxes, and HM Customs & Excise, which administered value added tax and customs duties.
- (2) [2008] EWHC 804 (Comm).

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