

The following Decision [translated in Greek] has been published in the Law Review "BUSINESS AND COMPANY LAW" (2014, Published by NOMIKI BIBLIOTHIKI SA, p. 335 - 337), in the Section "Case Law - COMMERCIAL AND ECONOMIC LAW - General Part of commercial law / Intellectual property / Competition".

We acted for the "CTM Proprietor" before the Office for Harmonization in the Internal Market (Alicante, Spain) - Language of Proceedings: **ENGLISH**



TABLE OF CONTENTS

BCL 4/2014 (Vol. 20) V

BUSINESS AND COMPANY LAW

A monthly review
for legislation, study and jurisprudence of the economic, labour and tax law

Publisher: NOMIKI BIBLIOTHIKI S.A.
Editor: Prof. Leonidas Georgakopoulos (1995-2007)
Prof. E. Perakis

Commercial - Economic Law: Prof. E. Perakis
Economic Civil Law: Prof. J. Karakostas
Labour Law: Prof. J. Lixouriotis
Taxation Law: Dr. J. Fotopoulos

Table of Contents

LEGISLATION

I. Laws - Presidential Decrees - Decisions	289
II. Acts of the Bank of Greece	289
III. Circulars of the Minister of Finance	289
IV. Collective Labour Agreements - Arbitration Decisions	290
V. Expected legislation	290

LEGAL OPINIONS - ARTICLES

D. Avgitidis, Pre-insolvency rescue procedure: An interim evaluation	291
<i>Summary*: The present study constitutes an effort to evaluate the application of the pre-insolvency rescue procedure which was enacted by virtue of law n. 4013/2011, and replaced the conciliation procedure only four years after the latter entered into force. The evaluation is based on the description of the main characteristics of the procedure, on the positions taken in case law as well as on empirical data related to the application of the procedure. It emerges that the usual two-tier procedure lacks effectiveness since it fails to lead to business rescue. On the contrary, it seems that the direct version of the procedure, consisting only of the stage of judicial validation of the agreement ("pre-oack"), might constitute a very useful vehicle to cope with commercial insolvency, especially in times of general economic instability.</i>	
M. Zoulovits/K. Choussou, E-invoices and judicial practice regarding the payment order procedure	303
<i>Summary*: The paper deals with the payment order procedure based on e-invoices. To this end, the e-invoice should be issued</i>	

pursuant to the legal requirements concerning its content and bear the advanced e-signature of its issuer.

Ch. Triantafyllidis, Provisional measures in bank contracts 312

Summary: Provisional measures are a significant aspect of judicial protection, especially with respect to bank contracts. This article explores the issue both from the point of view of the debtor/borrower and of the Banks and covers the individual interim measures (of protection), which may be introduced in any particular case as well as in the case of an application for suspension (of enforcement). Within the framework of the aforementioned application for suspension (of enforcement) the respective grounds for objection (to enforcement) are also examined, since they have to be considered to surmise in order to grant the suspension of both the enforceability of the payment order and the enforcement procedure in general.*

A.-A. Katsouni, The enforcement of unilateral job rotation (system) in public utility institutions 326

Summary: The implementation of the provision of art. 38 of Law 1892/1990 in Public Utility Institutions. The meaning of the «activity restriction» when the employer is a Public Utility Institution. The constitutionality of the provision and the development of the institution.*

CASE LAW

I. Commercial - Economic Law

■ General part of commercial law/ Intellectual property/Competition Trademark	335
---	-----

* English text provided by the author.



CANCELLATION No 7788 C (INVALIDITY)

....., Barcelona, Spain (applicant), represented by **C. Hernandez, Olten Patentes y Marcas, C/ Entença 332-334, 08029 Barcelona, Spain** (professional representative)

a g a i n s t

....., , Athens, Greece (CTM proprietor) represented by **Theodoros Zacharopoulos, Pindarou 11, 10673 Athens, Greece** (professional representative).

On 16/12/2013, the Cancellation Division takes the following

DECISION

1. The application for a declaration of invalidity is rejected in its entirety.
2. The applicant bears the costs, fixed at EUR 450.

REASONS

[...]

PROOF OF USE

According to Article 57(2) and (3) CTMR, if the CTM proprietor so requests, the applicant must submit proof that, during the period of five years preceding the date of the application for a declaration of invalidity, the earlier trade mark has been genuinely used in the territories in which it is protected and for the goods or services for which it is registered and which it cites as justification for its application, or that there are proper reasons for non-use. If, at the date on which the contested CTM application was published, the earlier mark had been registered for not less than five years, the applicant must submit proof that, in addition, the conditions contained in Article 42(2) CTMR were satisfied at that date. According to the same provision, in the absence of such proof the application for a declaration of invalidity will be rejected. [...]

According to Rule 40(6) in conjunction with Rule 22(3) CTMIR, the evidence of use must indicate the place, time, extent and nature of use of the earlier mark for the goods and services for which it is registered and on which the application is based.

On 29/07/2013 the applicant submitted evidence as proof of use. The Cancellation Division finds that the abovementioned evidence proves that the earlier trade mark has been genuinely used in the course of trade. Some of the documents are not dated, such as the pictures and catalogues. However, the information contained in the invoices and advertisements sufficiently indicates use in the two relevant time periods. The evidence as a whole provides sufficient indications to conclude that the earlier trade mark was genuinely used in Spain, namely the language of the

invoices and advertisements is Spanish. Although the invoices do not contain the name and address of its customers, the invoices are in Spanish and they bear client numbers and the address in Spain of the applicant company. As such, it shows that the goods were sold from Spain, whether to clients in Spain or for export purposes, it is clear that the goods were being sold in Spain. The invoices do not specifically mention the mark, but the Cancellation Division concludes that the evidence as a whole can be cross referenced and it is clear that the goods which are described in the invoices coincide with the photos, packaging and advertisements of the goods. [...]

The earlier mark is registered for *electric and electronical devices for swimming pools*, in class 9. However, the evidence does not show genuine use of the trade mark for this general category but specifically for electrodes and nuts used in electric and electronic devices for swimming pools. According to Article 57(2) CTMR, if the earlier trade mark has been used for only some of the goods or services for which it is registered it will, for the purposes of the examination of the application for a declaration of invalidity, be deemed to be registered only for those goods or services. According to case-law, when applying the abovementioned provision the following should be considered: "... if a trade mark has been registered for a category of goods or services which is sufficiently broad for it to be possible to identify within it a number of subcategories capable of being viewed independently, proof that the mark has been put to genuine use in relation to a part of those goods or services affords protection, in opposition proceedings, only for the subcategory or subcategories to which the goods or services for which the trade mark has actually been used belong. However, if a trade mark has been registered for goods or services defined so precisely and narrowly that it is not possible to make any significant sub-divisions within the category concerned, then the proof of genuine use of the mark for the goods or services necessarily covers the entire category for the purposes of the opposition. Although the principle of partial use operates to ensure that trade marks which have not been used for a given category of goods are not rendered unavailable, it must not, however, result in the proprietor of the earlier trade mark being stripped of all protection for goods which, although not strictly identical to those in respect of which he has succeeded in proving genuine use, are not in essence different from them and belong to a single group which cannot be divided other than in an arbitrary manner. The Court observes in that regard that in practice it is impossible for the proprietor of a trade mark to prove that the mark has been used for all conceivable variations of the goods concerned by the registration. Consequently, the concept of 'part of the goods or services' cannot be taken to mean all the commercial variations of similar goods or services but merely goods or services which are sufficiently distinct to constitute coherent categories or sub-categories." (See judgment of 14/07/2005, T-126/03, 'ALADIN')

In the present case, the evidence proves use only for electrodes and nuts used in the electric and electronic devices for swimming pools. These goods can be considered to form an objective subcategory of *electric and electronical devices for swimming pools*, in class 9. Therefore, the Cancellation Division considers that the evidence shows genuine use of the trade mark only for the following goods: *electric and electronical devices for swimming pools, specifically electrodes and nuts*, in class 9. Taking into account the evidence in its entirety, the Cancellation Division finds that although the evidence is not exhaustive, it does reach the minimum level necessary to establish genuine use during the relevant period in the relevant territory and in relation to the above mentioned goods.

The CTM proprietor argues that the applicant not only had to prove use of the goods for which the earlier mark is registered but also for all of the contested goods. However, this is clearly not the case as the applicant cannot be expected to prove the use of goods for which the earlier mark is not registered. As such, this argument is rejected. The CTM proprietor also challenges the evidence provided individually and claims the application should be rejected. However, the evidence must be examined as a whole and not individually. The evidence when read globally is sufficient to prove the genuine use of the earlier mark for the above mentioned subcategory of goods. [...]

LIKELIHOOD OF CONFUSION – ARTICLE 53(1)(a) CTMR IN CONNECTION WITH ARTICLE 8(1)(b) CTMR

A likelihood of confusion exists if there is a risk that the public might believe that the goods or services in question, under the assumption that they bear the marks in question, come from the same undertaking or, as the case may be, from economically-linked undertakings. Whether a likelihood of confusion exists depends on the appreciation in a global assessment of several factors, which are interdependent. These factors include the similarity of the signs, the

similarity of the goods and services, the distinctiveness of the earlier mark, the distinctive and dominant elements of the conflicting signs and the relevant public.

The goods

The relevant factors relating to the comparison of the goods or services include, inter alia, the nature and purpose of the goods or services, the distribution channels, the sales outlets, the producers, the method of use and whether they are in competition with each other or complementary to each other.

The goods on which the application is based are, after the examination of the proof of use, the following:

Class 9: *Electronical devices for swimming pools, specifically electrodes and nuts.*

The contested goods and services are the following:

Class 1: *Water purifying preparations.*

Class 11: *Water softening apparatus; water distribution installations; water softening installations; water purification installations; water distribution installations; water purifying apparatus and machines; water filtering apparatus; water intake apparatus; water filters.*

Class 40: *Water treatment.*

Firstly it is necessary to examine the specification of the goods of the earlier mark after the examination of the evidence of use. The goods which have been accepted are *electronical devices for swimming pools, specifically electrodes and nuts*. The term 'specifically' here infers that the goods are limited or restricted to types of electrodes and nuts as the applicant has not shown use in relation to any other goods. Therefore, the comparison of the goods will be made in light of this.

Conclusion

Article 8(1)(b) CTMR states that 'the trade mark applied for shall not be registered: if because of its identity with or similarity to the earlier trade mark **and** the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; the likelihood of confusion includes the likelihood of association with the earlier trade mark' (emphasis added). According to Article 8(1)(b) CTMR, the similarity of the goods or services is a condition for a finding of likelihood of confusion. Since the goods and services are dissimilar, one of the necessary conditions of Article 8(1)(b) CTMR is not fulfilled, and the application must be rejected.



The Cancellation Division

Vanessa PAGE

Nicole CLARKE

Ingeborg Alme RASBERG

If you require additional information regarding legal matters related to the above case or to our litigation and dispute practice, please contact [Mr Theodoros Z. Zacharopoulos](#) |T| [+302103613864](#) |F| [+302103616315](#) |E| tz@zcslaw.com.
