STUDIO LEGALE
PADOVAN

International Litigation

October 2024

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NEWS

International Case Law and Practice

Restrictive measures against the Russian Federation and legal advisory services

General Court of the European Union, October 2, 2024, Ordre néerlandais des avocats du barreau de Bruxelles and Others, Joined Cases T-797/22, T-928/22, and T-828/22

In a recent ruling on October 2, 2024, the EU General Court ruled on the ban on technical assistance to legal persons established in Russia, finding that the right of defense was not violated in the context of the EU restrictive measures against Russia.

Indeed, under Article 1 of Council of the European Union Reg. (EU) 2022/1904, the EU restrictive measures that followed the unlawful invasion perpetrated by the Russian Federation against Ukraine include a ban on the provision of legal advice and technical defense services in the territory of the EU to the Russian government and legal persons established in Russia. The provision then stipulates that this prohibition may be waived by the competent authorities of each member State under certain conditions identified by the same regulation.

In this issue, *inter alia*:

News

- UKSC's *anti-suit injunction* in favor of an arbitral tribunal based in Paris
- Overriding mandatory provisions regarding the law applicable to non-contractual obligations
- Jurisdiction in relation to a software supply contract

Insights

- Recent developments in the consumer forum field: an overview
- Annulment of an arbitral award by the Russian Supreme Court based on the Ukrainian nationality of a member of the arbitral tribunal

In light of this provision, a number of bar associations (including the Brussels and Paris Bar Associations), brought a number of actions in annulment under Article 263 TFEU against the aforementioned prohibition before the General Court of the EU. The appellants alleged that Article 1 Reg. (EU) 2022/1904 *(i)* violated the right to a fair hearing and that *(ii)* the exceptions to the prohibition established by the provision constituted an interference with the protection of the lawyer's professional secrecy.

The appeals, on which the court ruled in the present judgment, were dismissed. The EU court first recalled that Article 47 of the EU Charter of Fundamental Rights (which, it should be recalled, has the same legal value as the founding Treaties under Article 6 TEU) any natural or legal person "shall have the right to be advised, defended and represented" by an legal representative. However, the Tribunal continued, this right is not called into question by Article 1 Reg. (EU) 2022/1904, given that the prohibition on legal advice applies only to services that have no connection with court proceedings. This means that the rule of secondary legislation analyzed here does not cover services provided to legal persons established in Russia in connection with judicial, administrative or arbitration proceedings.

Hence, it followed that the second ground of the legal complaint, pertaining to the protection of the attorney-client privilege, was also rejected. In fact, the EU General Court ruled that the prohibition at issue - as it does not apply to legal advisory services that have a connection with a court proceeding - does not entail any interference with the lawyer's independence. Moreover, the independence guaranteed to the lawyer may be subject to justified and proportionate restrictions without resulting in an infringement of the rule of law. In the present case, the EU General Court ruled, the contested prohibition pursues objectives of general interest without undermining the substance of the fundamental role of lawyers in a democratic society and is therefore consistent with EU law.

Overriding mandatory provisions and applicable law to non-contractual obligations

CJEU, September 5, 2024, E.N.I. and Y.K.I. v. HUK-COBURG, C-86/23

In a recent decision dated Sept. 5, 2024, the Court of Justice ruled that a Bulgarian law's provision establishing that compensation for non-pecuniary damage is to be determined according to equity does not constitute an overriding mandatory provision within the meaning of Article 16 Reg. (EC) 864/2007 (the so-called Rome II Reg.), *i.e,* a rule of the forum State (in the present case, Bulgaria) which shall be applied regardless of the law applicable to the dispute, as it is regarded as crucial by the forum State considering the scope and the object of such disposition.

In the present ruling, following a car accident in which a German individual insured with an insurance company established in Germany (*HUK-COBURG*) had caused the death of a Bulgarian citizen, her parents (E.N.I and Y.K.I.) acted before the Sofia Court in order to obtain compensation for the alleged non-economic damage.

The Bulgarian court of second-instance held that the dispute was governed by German law under Article 4(1) Rome II Reg. and that it was not proved – as required by German law – that the alleged suffering had caused "pathological damage". Bulgarian law, on the other hand, provides that compensation for non-economic damage is determined by the court in equity, without specifically requiring proof of the damage. In any case, it is worth noting that the German framework also stipulates that once proof of the damage is provided, the amount of compensation is determined according to equity.

An appeal was therefore brought before the Supreme Court of Bulgaria, which raised a request for preliminary ruling under Article 267 TFEU, asking the EU Courts whether the Bulgarian legislation on compensation for non-economic damage could be qualified as an overriding mandatory provision under Article 16 Rome Reg. II.

The EU Court first recalled that Article 16 Rome Reg. II, insofar as it constitutes and exception to the conflict of law rules on non-contractual obligations, must be interpreted restrictively. That said, it pointed out that in order for the mentioned provisions of Bulgarian law to justify recourse to Article 16, it is necessary for the case to have particularly close connections with the forum state. In the present case, it appeared that - although the claimants were Bulgarian citizens domiciled in that member State - *(i)* the accident had occurred in Germany; *(ii)* the author of the accident was insured with an insurance company established in Germany; and *(iii)* both the author and the victim were Bulgarian citizens established in Germany.

Furthermore, interpreting Art. 16 Reg. Rome II in light of the similar provision on the law applicable to contractual obligations (Art. 9 Reg. (EC) 593/2008 so-called Rome I Reg.), the CJEU emphasized that a provision, in order to be considered an overriding mandatory one, shall be considered crucial to safeguard an interest of the member State and shall have a systematic relevance. These circumstances have to be verified in light of the context and scope of the provision. In the present case, the German law - while requiring proof of pathological injury - provides for the possibility of obtaining "fair compensation," being based, therefore, as the Bulgarian law, on the principle of equity. Therefore, the goals and objectives pursued by Bulgarian law can also be pursued through the application of German law.

From the foregoing, in view of the fact that *(a)* the case did not have particularly close connections with Bulgaria and *(b)* through the application of the German law, Bulgaria's essential interests had not been undermined, the Court of Justice concluded that the Bulgarian legislation did not represent in the present case an overriding mandatory provision within the meaning of Article 16 Reg. Rome II.

Cross-border insolvency and the notion of principal place of business

CJEU, September 19, 2024, D.L. v. Land Berlin, C-501/23

On Sept. 19, 2024, the Court of Justice of the European Union ruled on the interpretation of the notion of the "principal place of business" of a natural person engaged in a business activity in the context of Reg. (EU) 2015/848 on cross-border insolvency proceedings ('Insolvency Reg.').

Article 3(1) Insolvency Reg. stipulates that the courts having jurisdiction to open an insolvency proceeding are those of the member State in whose territory the debtor's centre of main interests are located. Presumptively, for natural persons engaged in a business activity, this place is *(i)* the principal place of business, if they are engaged in an independent business or professional activity or *(ii)* the habitual of residence of the natural person. Pursuant to Article 2 No. 10 Insolvency Reg. "Establishment" (which in other linguistic versions of the regulation is named "Dependency") means any place of operations where a debtor carries out on or has carried out in the 3-months period prior to the request to open an insolvency proceedings an economic activity with human means and assets.

The ruling clarified the inexistence of a relationship between the mentioned notions in the context of a main proceeding aimed at determining the principal place of business of D.L., a natural person, chairman of the supervisory board of *Landbell AG*, domiciled in Berlin, Munich, Los Angeles and on the Island of Saint-Barthélemy (in this regard, it should be noted that domicile is determined in light of the law of each State, as there is no autonomous notion under EU law).

After the filing an application for the opening of D.L.'s insolvency proceedings before the bankruptcy court in Berlin, questions then arose as to the local jurisdiction of that court due to difficulties in determining D.L.'s principal place of business. Therefore, having reached the issue before the German Supreme Court (the *Bundesgerichtshof*), the latter raised request for a preliminary ruling to the Court of Justice of the EU, asking *(a)* whether the notion of establishment/dependence in Article 2 No. 10 Insolvency Reg. is relevant for the purpose of determining the center of the debtor's main interests exercising an independent business activity and; *(b)* whether the authority in which the debtor has its principal place of business is competent to hear insolvency proceedings under Art. 3(1) Insolvency Reg., despite the fact that it does not engage in any economic activity with any human means and assets there.

The Luxembourg Court (i.e., the CJEU) have ruled that the notion of the center of the debtor's main interests (as well as that of independent business activity, which is relevant for the purpose of establishing the center of main interests) and the notion of establishment/dependence should be kept separate. In fact, as it is clear from reading articles 23, 24, 37 and 38 of the Insolvency Reg., the notion of "establishment" is not relevant for the purposes of the insolvency proceedings under consideration but in relation to other provisions of the Insolvency Reg.

Concerning the second issue – implicitly subject to the existence of some form of interpretative connection between Article 3(1) and Article 2 No. 10 Insolvency Reg. (refuted by the EU court) – the Court of Justice first recalled that the notion of the center of main interests in Article 3(1) Insolvency Reg. must be determined at the outcome of an overall assessment of the set of objective criteria verifiable by third parties. Accordingly, the presumption that the center of main interests of a natural person engaged in an independent business activity coincides with the principal place of business of that person cannot be per se overcome by the fact that the person does not engage in a dependent economic activity within the meaning of Article 2(10) Insolvency Reg. (*i.e.*, does not require any property or human resources in the performance of that activity), as the notion of dependence has no impact on the determination of the center of main interests of a natural person.

Software supply contract and international jurisdiction

Opinion of Advocate General J. R. De la Tour in Case C-526/23 VariusSystems., September 5, 2024

On September 5, 2024, Advocate General ('AG') De La Tours delivered his Opinion in the *VariusSystem* case, stating that the forum for contractual obligations contained in Article 7 No. 1 Reg. (EU) 1215/2012 (so-called Brussels I-*bis* Reg.) must be interpreted as meaning that the place where the online supply of a software takes place is the place where the customer is using it.

Pursuant to Article 7 No. 1 Brussels I-*bis* Reg., disputes concerning contractual obligations are devolved to the jurisdiction of the court located in the place of performance of the obligation in question, which is, *(i)* in the case of the sale and sale of goods, the place in a member State, where, under the contract, the goods were or should have been delivered under the contract (Art. 7 No. 1 let. b, first indent Brussels I-*bis* Reg.), *(ii)* in the case of the provision of services, the place in a member State, where the services were or should have been provided under the contract (Art. 7 No. 1 let. b, second indent Brussels I-*bis* Reg.).

Concerning the factual background, *VariusSystems*, a company headquartered in Austria, entered into a contract with G.R. (owner of a company headquartered in Germany) for the development and operation of Covid-19 test analysis software. Following G.R.'s failure to pay for contractual services (due to alleged defects in the supplied software), *VariusSystems* acted before the Austrian courts to obtain the payment of the contractual fees.

In the proceeding, the jurisdiction of the Austrian courts was questioned by the defendant (who argued that the German courts were competent). Accordingly, the Austrian Supreme Court issued a request for a preliminary ruling to the Court of Justice concerning the interpretation of the *forum contractus* in relation to an obligation arising from the contract concluded between parties.

The AG firstly qualifies the obligation alleged in the judgment as an obligation to provide a service, consequently determining that the preliminary question concerns the determination of where the software development and delivery service was to be provided.

Subsequently, in determining the competent court under Article 7 no. 1 let. b) second indent, the AG considers the place where the services was been provided is located in the place where G.R. actually accessed the online service, *i.e.*, in Germany, the country where the defendant exercises his professional activity.

Such an interpretive result is reached on the basis of several considerations. Firstly, the AG stated that the wording of Article 7 no. 1 let. (b) second indent, by stating that the court "[of] the place [...] where the services were [...] rendered" has jurisdiction, indicates that the performance of a service must be distinguished from its realization. Secondly, the AG argued that the characteristic obligation of the contract at issue does not consist in the design and programming of the software, but rather in its distribution, since it makes the service effective for the client. In the present case, the place of distribution of the service is located where G.R. had access to the software.

The Conclusions at stake are quite relevant in the context of international trade, and, should they be upheld by the EU Court, they would clarify an issue that has so far never came before the Court of Justice of the European Union.

Case Law and arbitration practice

Anti-suit injunction issued by English judges in favor of a Paris-based arbitration tribunal

UK Supreme Court, April 23, 2024, UniCredit Bank GmbH v RusChemAlliance LLC

On Sept. 18, 2024, the Supreme Court of the United Kingdom filed an unanimous decision on April 23, 2024 in relation to its decision granting *UniCredit Bank* GmbH ('UniCredit') an anti-suit injunction ordering the Russian company *RusChemAlliance LLC* ('RusChem') not to pursue a lawsuit initiated in Russia against UniCredit.

These are the facts underlying the decision: RusChem (a Gazprom Group company) concluded a series of contracts with a German-registered company in 2021 under which the latter undertook to build a series of natural gas processing plants in Russia. Within transaction, a series of bonds were issued by UniCredit to cover the advance payments realised by RusChem. The bonds were governed by English law and provided that all disputes arising from them were to be settled before an arbitration tribunal based in Paris and administered by the ICC. Following the sanctions imposed by the European Union against the Russian Federation, the German company announced that it could not fulfill its contractual obligations and, as a consequence, RusChem attempted to enforce the bonds. UniCredit refused to pay the sums covered by the bonds, stating that it was precluded from doing so by Article 11 of Reg. (EU) 833/2014. In order to obtain payment of the guarantees, RusChem then sued UniCredit before the St. Petersburg Court, which ruled in favor of its jurisdiction on the basis of Article 248.1(2)(1) of the Arbitration Procedure Code of the Russian Federation.

UniCredit acted before the Commercial Court of London in order to obtain an anti-suit injunction against RusChem that would sanction the unlawfulness of the Russian company's conduct as infringing on the arbitration clause in the contracts and prevent it from pursuing the Russian lawsuit. In the first instance, UniCredit's application was dismissed, while the Court of Appeal granted the credit institution’s application.

As the dispute reached the UK Supreme Court, it was called upon to determine *(i)* whether the arbitration clause was governed by English law and *(ii)* whether England was the appropriate forum to enforce UniCredit's claim for an anti-suit injunction.

With regard to the first question, the Supreme Court clarified that under Article 11, bonds contained in contracts are expressly governed by English law. Therefore, on the basis of the English rules of interpretation of contractual clauses as well as English case law, the choice to subject the guarantees to English law implies that the arbitration clause attached to them shall is also subject to English law, considering the fact that the seat of arbitration being located in France is not a sufficient element to apply a different law (in this case, French law).

On the other hand, concerning the second question, the Supreme Court applied Section 37(1) of the Senior Courts Acts of 1981 under which English courts have the power to issue an anti-suit injunction "in all cases where it appears just and proper to the court." Specifically, the Supreme Court upheld the anti-suit injunction issued on appeal by invoking *(a)* the principle on the basis of *pacta sunt servanda* (*i.e.*, agreements must be respected); *(b)* the substantive link between the dispute and the English courts, given that the contractual clauses of which UniCredit is seeking compliance are governed by English law; *(c)* the fact that France and the French courts express a certain favor towards arbitration (and consequently the fact that the French courts would have come to the same conclusion as the English courts), which, however, would not be competent to issue an anti-suit injunction in this case; *(d)* the inefficiency of an anti-suit injunction granted by an arbitral tribunal.

Immunity of States from enforcement of an ICSID award

Repùblica de Colombia, Corte Suprema de Justicia, June 20, 2024, SC 1453-2024

On June 20, 2024, the Supreme Court of the Republic of Colombia rejected an application for recognition of an ICSID award issued against the Republic of Venezuela under the 2006 ICSID Additional Facility Arbitration Rules ('Additional Rules').

The ruling stems from an arbitration award issued in 2016 (the 'Award') which had condemned the Republic of Venezuela to pay USD 966.5 million to the Canadian company *Rusoro Mining Ltd.* ('Rusoro'), as the former expropriated investments and mining contracts of the latter without providing for compensation and in violation of the Bilateral Investment Treaty concluded between Venezuela and Canada (the 'BIT'). Following the Award, on November 11, 2022 Rusoro acted before the Colombian Supreme Court for its recognition.

However, the Colombian Supreme Court denied said claim. First, the Colombian Supreme Court referred to Articles 54 and 55 of the Convention for the Settlement of Investment Disputes between States and Nationals of Other States (the so-called 'ICSID Convention'), which stipulate, respectively, that each Contracting State shall recognize as binding judgments rendered in accordance with this Convention and that *"no provision of Article 54 may be construed as an exception to the law, in force in a contracting State, concerning immunity from execution for said State or for another."*

The Supreme Court recalled that while the customary rule regarding the immunity of States from jurisdiction is subject to a number of limitations, immunity from execution, on the other hand, has a more pervasive in nature. Therefore, it is possible that even when a State has waived immunity from jurisdiction, it may nevertheless assert immunity from execution. In addition, in Colombia the concept of immunity of States from execution appears to be particularly strong, not allowing the enforcement of the Award under Article 55 ICSID Convention.

In any case, the Colombian ruling presents a number of issues. Two are worth mentioning here. First, the Supreme Court of Colombia invoked the ICSID Convention although the Award was issued under the Additional Rules, which – although related to the ICSID Convention – do not allow for the direct application of the ICSID Convention pursuant to Article 3. Therefore, recognition of the Award should have been assessed under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and not under Article 55 ICSID Convention. In addition, the Supreme Court refers to the immunity of States from enforcement, although in the present case Rusoro had acted to obtain recognition of the Award (an institution provided for and regulated separately from enforcement by Colombian law).

Insights

Recent case law developments regarding jurisdiction over consumer contracts

Brief notes on the competent court in consumer-trader disputes in the light of some recent rulings made by the Italian Supreme Court and the Court of Justice of the EU [1]

1. Introduction

The issue of jurisdiction in cross-border disputes concerning a contract concluded between a consumer and a professional is of pressing relevance. In recent months, in fact, both the Court of Justice of the European Union and the Italian Supreme Court have repeatedly expressed their views on the subject, better clarifying the regime for determining the competent court in disputes involving a contract concluded by a consumer with a professional [2] .

After brief considerations in relation to the consumer protection regime, these decisions will then be analyzed in order to clarify the most recent case law approaches on the matter.

2. The comprehensive protective regime in consumer contracts

I Contracts concluded by consumers with a professional are subject to a special regime for determining the competent court contained in Articles 17, 18 and 19 of the Brussels I-*bis* Reg. (the 'Regulation'). The protection regime has two main features. Firstly, it applies to disputes between parties with different contractual power (the professional is typically 'stronger' than the consumer). Consequently, the consumer, in the event of a dispute with the professional, may sue the professional before the court of his or her domicile, even if the consumer is the applicant.

Secondly, it is an exhaustive and self-sufficient regime: situations falling within its scope of application are subject, with specific exceptions, only to the rules contained therein. Therefore, the jurisdictional rules established by artt. 17, 18 and 19 of the Regulation supersede the other forums established by Brussels I-bis Reg. (*e.g.*, forum of the defendant's domicile, forum in matters of contractual obligations). In addition, the rules of the protective regime are not subject to Art. 5 Brussels I-*bis*, which regulates the scope of application of the Regulation *ratione personae* by stating that the defendant shall be domiciled in a member State and the dispute shall be cross-border in nature.

This analysis will therefore focus on some of the aspects of the consumer protection regime under the Regulation. First, it will be analyzed the personal scope of the protective regime in the light of the Court of Justice's recent ruling in the *FTI Touristik* case, in which it held that a given dispute can be qualified as cross-border even if the trader and the consumer are domiciled in the same member State if it presents cross-border element.

Then the analysis will focus on the conditions for the applicability of the protective regime set forth in Article 17 Brussels I-*bis* Reg. in the light of which the contract under legal scrutiny needs to be concluded between a consumer and a professional; on this point, the burden of proof relating to the status of consumer was analyzed in Italian Supreme Court, June 3, 2024, No. 15364.

Finally, under the Regulation, the protective regime is applicable only if the contract has been concluded with a professional whose commercial or professional activities are carried out in the member State where the consumer is domiciled or are directed, by any means, to that member State. This requirement will be analyzed in light of the recent ruling of Italian Supreme Court, July 2, 2024, No. 18092.

3. CJEU, July 29, 2024, FTI Touristik, C-774/22 and the scope of the protective regime

In the case at hand, the CJEU clarified the material scope of the protective jurisdictional regime in favor of consumers under Sec. 4 of Title II Reg. Brussels I-*bis,* ruling, prompted by the Regional Court of Nuremberg, on the existence of cross-border in a case in which a person domiciled in Nuremberg, Germany, had concluded a contract relating to tourist services with the

[1] These decisions have been reported in the 'News' section in previous issues of this Newsletter: see Italian Supreme Court, June 3, 2024, no. 15364, in Studio Legale Padovan, *International Litigation*, No. 1, June 2024, p. 1; Italian Supreme Court July 2, 2024, No. 18092 in Studio Legale Padovan, *International Litigation*, No. 2, July 2024, p. 1; CJEU, July 29, 2024, *FTI Touristik*, C-774/22, in Studio Legale Padovan, *International Litigation*, No. 3, September 2024, pp. 1-2.

[2] Italian Supreme Court, June 3, 2024, No. 15364; Italian Supreme Court, July 2, 2024, No. 18092; CJEU, July 29, 2024, *FTI Touristik*, C-774/22.

German company *FTI Touristik*, in which the destination of the trip referred to in the contract was located outside Germany. Having become aware of certain violations of the mentioned contract by the professional and not being able to base the jurisdiction of the court at his domicile on the relevant procedural-civil law provisions of German law, the consumer brought an action for damages before the court in Nuremberg (place where he was domiciled) under Article 18 of Brussels Reg. I-*bis*.

The Court of Justice, whose intervention was requested upon Art. 267 TFEU, firstly recalled that neither the Brussels I-bis Reg. nor the regulations that preceded it (Brussels Convention and Reg. (EC) 44/2001, the so-called Brussels I Reg.) contain a definition of cross-border element, and that the definition of a cross-border element contained in other EU regulations (e.g. Reg. (EC) No. 1896/2006) could not be transposed within the Brussels I-*bis* Reg. That being said, the Luxembourg Court ruled that while the domicile of the parties must be taken into account for the purpose of the existence of the requirement at issue (in the present case, both parties appear to be domiciled in Germany), however, the cross-border character of the dispute may also result from a number of additional elements pertaining to the substance of the dispute.

Accordingly, the Court inferred that cross-border elements subsist in a dispute concerning contractual obligations that are to be fulfilled in a State other than the one in which both parties reside, and therefore the Brussels I-bis Reg. and, in the present case, the rules on consumer contracts in Articles 17 ff.

4. Italian Supreme Court, June 3, 2024, No. 15364 and the consumer status

In the case at issue, the Italian Supreme Court clarifies within what procedural and time limits the lack of jurisdiction of a court of a member State (in this case, Italy) can be pleaded by reason of the protective regime set out at Section 4 of Title II of Brussels I-bis Reg.

The provisions of the protective regime, in fact, are procedural in nature and therefore are interconnected with the civil procedural law of the member States. It follows that the competence of a court may be challenged within the limits of the preclusions by the Code of Civil Procedure of each member State (in this case, Italy).

In the case at hand, a consumer domiciled in Germany who was sued in Italy by two professionals challenged the jurisdiction of the Italian authorities pending the irst instance proceeding. Only before the Court of Appeal, f the consumer argued that the Italian judge lacked of jurisdiction on the basis of the protective regime, *i.e.*, of his own status of consumer and the fact that the professionals' activities were directed to Germany.

The Supreme Court stated the Italian judicial authorities lacked jurisdiction. First, the Supreme Court ruled that, when jurisdiction is challenged, reference to the protective regime under Brussels Reg. I-bis does not constitute a new exception subject to preclusion on appeal under Article 345 Italian Civil Procedure Code.
In addition, the Supreme Court ruled on the burden of proof regarding consumer status, stating that – also in light of the CJEU's *Wurth Automotive* ruling of March 9, 2023 – it must be determined in light of all the information available to the court seized including, possibly but not exclusively, the defendant's allegations.

5.Italian Supreme Court, July 2, 2024, No. 18092 and the notion of activities directed toward a member State

On July 2, 2024, the Italian Supreme Court clarified under what circumstances the activity provided by a professional on a web platform can be considered "directed to a member State" within the meaning of Article 17(c) Brussels I-*bis* Reg.

In the present case, a consumer domiciled in Austria was sued before the Italian courts by an Italian professional for services rendered by the latter through its website accessible in two languages (Italian and English).

Firstly, the Supreme Court ruled that the mere fact that a professional's activity is carried out through the Internet does not in per se imply that it is directed to all member States in which the digital content is accessible (in fact, since the Internet website is by its nature accessible in all member States, it would be possible to trigger the protective regime in favor of consumers whenever a consumer wished to take action against a trader operating through the Internet). Hence, the Supreme Court stated that for the protective regime to operate, it is necessary for the professional to have manifested an intention to establish professional or commercial relations with consumers domiciled in a given member State.

There is no such circumstance in the present case, since *(i)* operating through the Internet does not meet the requirements of Article 17 Brussels I-bis Reg. for the reasons stated above, and *(ii)* the fact that the website is accessible in English and not in the language used in the country in which Mr. B.M. is domiciled, does not express an intention of the professional to direct his business to Austria.

The Supreme Court of the Russian Federation in Case No. A45-19015/2023

The Russian Supreme Court rejected a request for enforcement of an award issued by a London panel alleging that the Ukrainian nationality of one of the members of the arbitration panel deprived it of the requirements of impartiality and independence

1. Factual background

On July 26, 2024, the Supreme Court of the Russian Federation – contrary to what the Russian courts had ruled in the previous instances – refused to recognize and enforce an arbitration award issued by the Federation of Oils, Seeds and Fats Associations Ltd in London ('FOSFA') in connection with a dispute arising from the imposition of sanctions against Russia by the European Union and the United Kingdom.

The case stems from the conclusion, in 2020, of a contract for the supply of flaxseed between the Russian supplying company *Novosibirskkhleboprodukt*, and the German purchasing company *C. Thywissen GmbH*. The contract, governed by English law, provided under Article 9 that the parties could claim compensation only for direct losses resulting from contractual breaches. In addition, the contract contained an arbitration clause under which the resolution of any dispute arising between the parties in relation to the contract (including its interpretation and execution) would be referred to an arbitration tribunal established at FOSFA. The arbitration tribunal would be composed of three arbitrators, two appointed by each party and the third appointed by FOSFA.

A few months after the conclusion of the contract, the Russian supplier, invoking *force majeure* related to a period of drought, asked the buyer for an extension of the delivery time. The German company, however, objected the extension and, relying on Article 9 of the contract, initiated the arbitration proceedings before FOSFA, seeking compensation for the damages suffered, allegedly equal to the difference between the contract price stipulated by the parties and the market price of the goods at the time of the breach of obligation.

2. The arbitration process and the award

Following the dissolution of a first arbitration tribunal due to an irregularity in the appointment of two of the three arbitrators, a second arbitration tribunal was established. Pursuant to the arbitral clause, the German company appointed a first arbitrator.

However, as the Russian company did not provide for the appointment of the second arbitrator, in compliance with paragraphs 2(c) and 2(b) of the Arbitration Rules , FOSFA proceeded to appoint that arbitrator as well, designating a person of Ukrainian nationality (the other arbitrators had British and Danish nationalities). The arbitration, duly instituted in December 2021, was concluded by Decision No. 4760 in November 2022, awarding the German company compensation in the amount of $600,000 for damages suffered, plus accrued interest.

Ultimately, since the Russian counterpart did not voluntarily execute the arbitration award, the German company appealed to the Russian courts for recognition and enforcement of the arbitral decision in the Russian Federation. The instance of recognition and enforcement was granted in the first and second instance. Following the above, the Russian company appealed to the Russian Supreme Court, arguing that (*inter alia*) the recognition and enforcement of the arbitral award conflicted with Russian public policy rules.

3. Russian Supreme Court decision

La The Russian company filed the appeal with the Russian Supreme Court in relation to *(i)* the lack of independence and impartiality of the three members of the arbitral tribunal and *(ii)* its own inability to defend itself. In the appellant's view, these circumstances would render the award contrary to Russian public policy and would preclude its recognition and enforcement under Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1957, as well as in Articles 234 and 244 of the Code of Arbitration Procedure of the Russian Federation, which establishes the possibility for the Russian court to refuse to recognize and enforce a foreign judicial judgment or award if it is contrary to the public policy of the Russian Federation.

Relying on these principles, the Russian company therefore opposed the recognition of the award, arguing that the onset of the restrictive measures against the Russian Federation by the European Union and the United Kingdom due to the conflict with Ukraine had undermined the impartiality and independence of the judges, undermining the procedural guarantees of the arbitration proceeding. This reasoning was based on the fact that one of the judges was a Ukrainian national, and therefore, could not be able to judge the case in question in an impartial manner.

Second, the impartiality of the arbitration panel was challenged, by the Russian company alleging that the appointment of the first arbitrator by the German company had occurred in violation of the Arbitration Rules. In support of this argument, as indicated in the ruling by the Russian Supreme Court, the Russian company had already argued before FOSFA that the lack of independence and impartiality of the first arbitrator could be inferred from the fact that the latter, as well as the German company's supervisor, were members of the same FOSFA committees.

Finally, the Russian company referred to the impossibility to obtain legal aid in the UK, as the restrictive measures imposed against the Russian Federation prevented Russian citizens from paying court fees as well as necessary representation services. In the appellant's view, this would have led to a violation of the right to defense. In fact, the Russian counterparty pointed out the Russian courts of first and second instance did not take into consideration the existence of restrictive measures imposed on the Russian Federation and and difficulties that the Russian company faced in providing sums in order to get a proper technical defence before the Arbitral Tribunal. In addition, the company argued that it had not received any explanation or guidance regarding the procedures and manner of recourse to the FOSFA arbitration award.

The Russian Supreme Court therefore upheld the appellant's grounds of grievance, finding that *(i)* the award was contrary to Russian public policy, as well as that *(ii)* under Article 291 of the Code of Arbitration Procedure of the Russian Federation, the lack of recognition was justified due to the violation of substantive law and procedural law norms.

The court therefore denied the enforceability of the award in Russia, remanding the case to the Russian court of first instance for the latter to consider the legal position of the Russian company in light of the current geopolitical context.

In this regard, it is worth briefly noting that the Russian Supreme Court's arguments raise a number of questions. Indeed, it should be recalled that the parties, at the time of the conclusion of the contract, had agreed to resolve any dispute through the establishment of an arbitration tribunal composed of three arbitrators, two of whom were chosen by the parties. The Russian company, prior to the imposition of restrictive measures against the Russian Federation, had not exercised its right to appoint a member of the arbitration tribunal and, therefore, in accordance with the FOSFA arbitration rules, the appointment was made by the arbitration administrative structure.

In addition, as also emphasized by the case law of the European Court of Human Rights [3] shows that, in order for the objective impartiality of a judge to be questioned, objective evidences of the absence of impartiality may subsist and that the personal impartiality of the judge is presumed until proven otherwise. From what emerges from examined decision, however, contrary evidence were in no way considered within the Russian Supreme Court assessment.

Lastly, concerning the alleged infringement of the right of defense, it suffices to point out that – in circumstances such as those at issue – it is possible to obtain an authorization from the UK Office of Financial Sanctions Implementation (OFSI) in order to be able to allow payment by a Russian to a British legal representative by reason of the representation provided.

([3]) ECHtR: Aug 7, 1996, *Ferrantelli e Santangelo* v. *Italy*, para. 58; Feb 26, 1993, *Padovani v. Italy*, para.27; Dec 15, 2005, *Kyprianou v. Cyprus [GC]*, para. 119; May 24, 1989, *Hauschildt v. Denmark*, para. 47.