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NEWS

Italian Case-law

Jurisdiction and damage caused by drugs

Italian Supreme Court, 19 September 2024, No. 25153

In a judgment dated 19 September 2024, the Italian Supreme Court addressed the request for a preliminary ruling on jurisdiction filed by the German company Grünenthal GmbH (the 'Company'), headquartered in Aachen, Germany, against order No. 4002/23 dated 21 September 2023, with which the Court of Milan had declared its territorial jurisdiction in relation to a claim for compensation brought by several claimants.

The plaintiffs claimed that they had suffered damages following the intake by their mothers, while pregnant (*i.e.*, between 1958 and 1964), of an unspecified drug produced by the Company. They therefore sued Grünenthal Italia S.r.l., as the alleged 'Italian branch' of the Company. The latter Company appeared before the Court of Milan, objecting that the Court lacked territorial jurisdiction over the case. Addressing the objection raised by the Company, the Court of Milan declared its jurisdiction over the case, asserting that the seat of the Company's branch Grünenthal Italia S.r.l. was located within the district of Milan.

In this issue, *inter alia*:

The Company then filed a request for a preliminary ruling on jurisdiction with the Supreme Court based on the ground that the Court of Milan was incompetent in accordance with Articles 4 and 7 of EU Regulation No. 1215/2012 (Brussels I-*bis* Regulation).

The Company pointed out that, since it did not have any Italian/Milan branches, the Court of Milan did not have territorial jurisdiction to decide on the claim for compensation made against it, said Court being neither the forum of the place where the Company has its registered office nor the forum of the place where the damage occurred. The territorially competent court, on the other hand, should be identified in accordance with Articles 4 and 7 of Reg. (EU) No. 1215/2012 (the so-called Brussels I-bis Regulation), according to which - in the case of a dispute brought in a member state against a person domiciled in another state (Art. 4) - jurisdiction in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur (Art. 7).

The Supreme Court agreed with the reasoning provided by the Company and concluded that, since the Company did not have an Italian/Milan branch (Grünenthal Italia S.r.l. being a separate and controlled company) the Brussels I-*bis* Regulation should apply. It then identified the competent courts as those of the districts in which the places of birth of each of the plaintiffs (as place of where the harmful event occurred) indicated by them in the deed of summons.

Parallel proceedings between an ordinary action and an international arbitration proceeding

Italian Supreme Court, Joint Sessions, 17 September 2024, No. 26600

On 17 September 2024, the Italian Supreme Court issued a ruling on international arbitration. The Court declined the jurisdiction of the Italian judicial authorities, based on the existence of an arbitration clause contained in the share purchase agreement concluded between the parties to the proceedings in 2016.

In 2016 the applicants, A.A. and B.B. sold 40% of their shares in X S.p.A. to the company Y S.p.A. Subsequently, on 29 November 2017 X merged into Y and the latter became universal successor of the fist. Y was then involved in a criminal proceeding in Milan and was found guilty of international corruption.

In February 2022, X, as successor of Y, established an arbitration proceeding against the applicants before the International Chamber of Commerce ('ICC'), invoking the indemnification obligations assumed by A.A. and B.B. in the share purchase agreement and claiming damages deriving from the abovementioned criminal conviction. In September 2022, the applicants sued X and its directors before the Court of Milan, challenging the 2021 financial statements, which they considered to be misleading and null, and claiming damages.

Given the ongoing parallel proceedings, in January 2024, the applicants filed a request before the Italian Supreme Court to settle the conflict of jurisdiction between the Court of Milan and the arbitral tribunal.

The Italian Supreme Court declined its jurisdiction, stating that (*a*) the foreign arbitration clause set forth in the share purchase agreement implied that the Italian Courts did not have jurisdiction over a dispute, unless the jurisdiction by the arbitral tribunal was expressly challenged, a circumstance that had not occurred in the case at issue and; (*b*) when the proceedings were initiated in Italy, an arbitration proceeding before the ICC in London was already pending, and in said proceeding the petitioners had made a counterclaim against X for the payment of the agreed price for the transfer of shares.

Therefore, the initiation of the arbitration proceeding precluded any complaints before the national judge regarding the invalidity or ineffectiveness of the arbitration clause, as such decisions had been entrusted to the arbitrators, and could be challenged through the remedies provided by law for the recognition of a foreign award. The Italian Supreme Court hence ordered the petitioners to reimburse X for the expenses incurred in the proceedings and declared the appeal as inadmissible.

EU and International case-law

Public procurement and treatment of non-EU operators

CJEU, 22 October, 2024, C-652/22, Kolin

In a recent ruling published on 22 October 2024, the CJEU addressed the issue of the treatment of non-EU economic operators in the context of public procurement.

The EU Court ruled that non-EU economic operators cannot invoke the provisions of the 2014/25/EU Directive on procurement by entities operating in the water, energy, transport and postal services sectors (the 'Directive') in order to be treated equally to EU operators, unless their country has concluded an international agreement on public procurement with the EU.

Although the judgment was delivered in relation to a procurement contract, it has a substantial impact on the relationship between EU law and international investment law.

The case regarded an EU contracting entity which opened a public tender procedure for the realization of a railway in Croatia. The project was awarded to an EU company. Since the public tender procedure provided a preferential treatment for EU-companies, a Turkish-based company challenged the decision to award the public contract to the EU company before the Croatian judicial authority, which in turn requested the CJEU to clarify the circumstances under which, after the expiry of the deadline for the submission of tenders, contracting authorities are entitled, pursuant to the Directive, to ask tenderers to make corrections or to clarify their initial tender.

The Court, on the assumption that the participation of companies based in third countries to public tender procedures falls within the exclusive competence of the EU, stated that (*a*) Member States do not retain any competence in the matter and, consequently, (*b*) Member States shall not apply the Directive to third countries which have not concluded an international agreement with the EU providing for the application of the provisions set out in said Directive.

The judgment has important implications in the international investment law field. In particular, since in the public procurement sector falls within the exclusive competence of the EU and therefore it has to be regulated by way of international agreements concluded between the EU and third countries, Member States cannot apply to third-country operators standards or conditions contained in a Bilateral Investment Treaties (BITs) concluded with the non-EU State (such as, the most favored nation clause). Such reasoning may be extended to any sector falling within the exclusive competence of the EU, thus significatively impairing the effectiveness of BITs concluded by EU Member States.

Following the well-known Achmea judgment (with which the ECJ declared the unenforceability of an arbitral award deriving from a bilateral or multilateral investment treaty within the EU), the Kolin judgment further widens the gap between EU law and International Investment Law.

Scope of application of Brussels I-*bis* Regulation

CGUE, 4 October 2024, C-494/23, Mahà

On 4 October 2024, the CJEU issued a ruling which further clarifies the material scope of Brussels I-*bis* Regulation.

Article 1 of Brussels I-*bis* Regulation provides that the Regulation shall apply in civil and commercial matters. In this regard, the CJEU had previously stated that the civil and commercial nature of a dispute shall be ascertained on a case-by-case basis[1].

The facts underlying the ruling are quite complex. Two Czech residents purchased a vehicle in Germany which was subsequently confiscated from the Czech police, since it might have been object of a theft performed in France. The Czech residents filed an application to have their vehicle returned. In the meantime, the property of the same vehicle was also claimed by two French residents in the criminal proceeding concerning the theft.

Under Czech criminal procedural law, a vehicle may be returned from the custody of the police only if all the persons who claimed property rights over it express their consent to it. However, the two French residents, notified of the application of the Czech residents to have their vehicle returned, did not reply (which under Czech law is equivalent to denying consent to have the vehicle returned). Consequently, the Czech residents initiated an incidental action before the Czech judicial authorities aimed at replacing themselves to the French residents in expressing their consent in order to have their vehicle returned.

The Czech court, having doubts concerning its jurisdiction on the matter, asked the CJEU whether the Brussels I-*bis* Regulation was applicable to the action and, if not, which judicial authority was competent to adjudicate the proceeding at issue.

The EU Court recalled that the notion of civil and commercial matters mentioned in the Brussels I-bis Regulation is to be determined concretely based on the object of the dispute. In the case at issue, the action filed by the Czech residents was an incidental proceeding which took place for the purpose of releasing of the vehicle from the custody, in the context of the relevant criminal proceeding. Consequently, the competent court over the action could not be determined based on the Brussels I-bis Regulation, since the object matter of the dispute (the release of the vehicle) fell outside the material scope of application of such Regulation.

[1] *Ex multis*, CJEC, 16 December, 1980, C-814/79, *Ruffer*, para. 14; CJEU: 27 October, 2009, C-115/08, *CEZ*, para. 22; 18 October, 2011, C-406/09, *Realchemie* para. 39.

International arbitration practice

Immunity of States and ICSID Arbitral Tribunal Jurisdiction

Joined cases 'Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. v. Spain' and 'Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Zimbabwe' [2024] EWCA Civ 1257

On 22 October 2024, the Court of Appeal of England and Wales (EWCA) confirmed that a State cannot invoke its immunity from civil jurisdiction to challenge the registration of an ICSID arbitral award. In the joined cases 'Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. v. Spain' and 'Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Zimbabwe', the EWCA rejected the opposition to the registration of two arbitral awards which rejected Spain's and Zimbabwe's claims.

The mentioned opposition relied on the fact, according to Spain and Zimbabwe, that neither the ICSID Convention nor the UK Arbitration Act of 1966 deprived sovereign States of their right to immunity from jurisdiction before UK's national courts pursuant to Art. 1(1) of UK State Immunity Act of 1978 (and, generally, international customary law). Furthermore, the two States argued that Art. 54 of the ICSID Convention (which provides that each Contracting State shall recognize an ICSID arbitral award) does not constitute a waiver of States' right to immunity from civil jurisdiction pursuant to Art. 2 of UK State Immunity Act.

The EWCA dismissed the abovesaid opposition. The court held that, although the registration of an award falls within the concept of civil jurisdiction, Art. 54 of the ICSID Convention represents an explicit waiver of States' right to immunity from civil jurisdiction set forth in Art. 2 of the UK State Immunity Act. The Court added that, according to Art. 17(2) of the UK State Immunity Act, an agreement to waive immunity may also be provided in a clause of a treaty or of another international agreement.

Scope of application of BIT *ratione temporis*

French Court the Cassation, 22 October 2022

The French Supreme Court has recently issued a judgment concerning the circulation of arbitral awards issued pursuant to a Bilateral Investment Agreement (BIT).

The Paris Court of Appeal had recognized an ICC award between the Turkish company Etrak and the state of Libya (ICC Case No. 22236/ZF/AYZ). Said award, which was issued on the basis of the Turkey-Libya BIT of 2011, concerned the compensation requested by Etrak to Libya for the non-execution of a settlement concluded in 2013 with respect to a previous judgment of 2012 (a settlement, moreover, later voided by the Libyan courts).

The ICC award had declared that Libya had breached art. 2(2) of the BIT by not granting the Turkish investor a fair and equitable treatment, ordering the State to pay a certain amount to the investor. The award was recognized in France. Libya then appealed against the exequatur granted by the Paris Court of Appeal to the Court of Cassation.

With decision dated 9 October 2024, the Court of Cassation explained that the arbitral tribunal had found the BIT in question to apply to disputes arising after its adoption (2011), and therefore also to the settlement concluded between the parties in 2013. The arbitral tribunal’s reasoning was that, although the dispute concerned investments made in the 80s - i.e. long before the entry into force of the BIT - the source of Etrak's pecuniary claim and contained mutual concessions (as well as compensation for damages) was the settlement concluded in 2013, so that its non-execution gave rise to a new dispute between the parties arising after the entry into force of the BIT.

However, the Supreme Court noted that the Judge of the exequatur had not drawn the right conclusions from this situation. In fact, the receivables subject to the settlement could be considered 'investments' within the meaning of the BIT only if they were directly linked to the original investment of the Turkish company (which, however, would not have benefited from the protection of the BIT *ratione temporis*). However, since the arbitral tribunal had ruled that the 2013 settlement was 'independent' of the investment (thus bringing the claim within the temporal scope of application of the BIT), this entailed that the claim for compensation of the damages deriving from the non-execution of the 2013 settlement was 'extraneous' to the objective perimeter of the BIT, as said claim did not derive directly from an investment protected under said bilateral treaty.

In essence, the French Supreme Court noted that, while the 'novative' effect of the 2013 settlement had potentially made the Turkish company's claim for compensation fall within the temporal scope of application of the BIT, it had also led to the claim’s exclusion from the bilateral treaty’s objective scope of application, since it could no longer be considered an investment protected under the BIT.

Insights

Violation of an EU provision on fundamental rights as a public policy ground of refusal of enforcement of a judicial decision

In the Real Madrid c. Le Monde judgment, the Court of Justice of the EU held that a Spanish judgment in violation of freedom of expression and information pursuant to the Charter of Fundamental Rights of the European Union may not be enforced as it violates public policy of other Member States.

1. Introduction

On 4 October 2024, the CJEU delivered a long-awaited judgment (the 'Judgment') concerning the circulation within the EU of a Spanish judgment which had found that the French sport newspaper *Le Monde* defamed the Spanish football club Real Madrid (together with one of its employees) (the 'Spanish Decision').

In the Judgment, the CJEU attempted to strike a balance between (*i*) the prohibition of reviewing the substance of the Spanish Decision to be enforced under Art. 36 of Reg. (CE) No. 44/2001 (Brussels Regulation), especially in the light of Art. 11 of the Charter of Fundamental Rights of the European Union (the "Charter"), which is applicable in the whole territory of the EU and (*ii*) the mutual trust between Member States. Furthermore, the Judgment is relevant in order to compare the private international law issues related to the journalists' protection arising from the Judgment and the ones coming from the recently adopted (but not still transposed) EU Directive 2024/1069 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation') (SLAPPs Directive)[2].

The mentioned profiles are further analyzed below, following a brief summary of the facts of the case and the ruling of the CJEU.

2. Background of the dispute

The dispute concerned an article published by the French newspaper *Le Monde* in 2006 which reported that two Spanish football clubs, F.C. Barcelona and Real Madrid, cooperated with a doctor who had been involved in doping scandals.

As a consequence, Real Madrid and AE (an individual of the football club's medical team) filed a claim for defamation against the French newspaper before the Court of First Instance of Madrid in order to restore the harm caused to their honor and reputation. In 2014 the Spanish Decision granted by the Tribunal Supremo (Spanish Supreme Court) ordered Le Monde to pay EUR 300.000,00 plus interest to Real Madrid, and EUR 30.000,00 plus interest to AE.

Real Madrid then tried to enforce the Spanish Decision before French judicial authorities, since the majority of *Le Monde*'s assets were located in France. The issue of the enforceability of the Spanish Decision was brought before the French Supreme Court, which on 28 September 2022 made a request for a preliminary ruling to the CJEU under Art. 267 TFEU, asking whether, and if so, under what circumstances, the enforcement of a judgment ordering a newspaper publishing house and one of its journalists to compensate the non-material damages suffered by a sports club and a member of its medical team as a result of the publication of information about them must be refused.

3. The Judgment of the CJEU

The CJEU, extensively adopting the Opinion of Advocate General Szpunar, (*a*) analysed the public policy exception under Art. 34 Brussels I Regulation (which was applicable r*atione temporis*[3]), (*b*) dealt with the scope of Art. 11 of the Charter and (*c*) stated that the provision protecting freedom of expression and information set forth in Art. 11 of the Charter may fall within the public policy exception set forth in the Brussels I Regulation.

[2] See Studio Legale Padovan, *International Litigation*, No. 2, July 2024, pag. 12 and ff.

[3] In any case, the public policy exception is still present in Art. 45 of the subsequent Reg. (EU) No. 1215/2012 (so-called Brussels I-*bis*) and the arguments made by the Court in the Judgment are nevertheless valid under Brussels I-*bis* Regulation.

The Court reaffirmed – in conformity with its settled case law – that the public policy exception shall not be interpreted extensively, and may prevent the circulation of a Member State's judgment only when its enforcement would result in a manifest breach of a fundamental legal norm of an EU Member State or of the EU. According to the Court, the public policy exception may be envisaged only when the enforcement of a decision would be contrary, to an unacceptable degree, to the legal order of the Member State in which enforcement is sought inasmuch as it would infringe a fundamental principle[4].

Referring to the protection of freedom of expression and information under Art. 11 of the Charter, the CJEU stressed the relevance of journalists and publishers' freedom of expression and information in safeguarding the rule of law. In other terms, the CJEU, recalling the jurisprudence of the ECHtR[5], emphasized the role of 'public watchdog' played by the press within a democratic society[6].

On these bases, the CJEU stated that it was up to the French Supreme Court to determine whether the Spanish Decision breached France's public policy. However, the CJEU issued certain criteria based on which the national courts shall perform such an assessment. In particular, the CJEU affirmed that, if the judgment against journalists and the press is capable of determining a deterrent effect in the press sector, it may be regarded as violating the public policy of other Member States.

In order to determine the deterrent character of the judgment *a quo*, the Court *ad quem* (the French Court) shall take into account the proportionality of the damages awarded. Said proportionality shall be assessed based on the amounts awarded in similar cases in the Member State where the judgment must be enforced, the severity of the fault, the defendant's financial means.

If the damages awarded exceed the material and immaterial damage, or if they are significant compared to the resources of the defendant, the judgment *a quo* may be deemed to have a deterrent effect.

4. Mutual trust and review of the merits

The provisions on the circulation of judicial decisions within the EU set forth in the Brussels I and I-*bis* Regulations are based on mutual trust between Member States (cfr. Recitals 16 and 17 of Brussels I Regulation; Recital 26 of Brussels I-*bis* Regulation), i.e., on the fact that Member States of the EU are so closely integrated that – except under certain circumstances – a judgment rendered in one Member State may be recognized and enforced also in the others.

It follows that (*i*) the recognition and enforcement of a judicial decision issued in a Member State can be refused exclusively relying on the grounds of refusal of recognition and enforcement set out, respectively, in Art. 34 of Brussels I and Art. 45 of Brussels I-*bis* Regulation and; (*ii*) pursuant to Art. 36 Brussels I and Art. 52 Brussels I-*bis* Regulation, the court *ad quem* (in this case, the French court) cannot review the merits of the judgment *a quo* (the Spanish Decision), since the European integration process is so significant that it is not necessary (and it is even prohibited) for the judicial authority of a Member State to review the logical-juridical process realized by another trustworthy court of an EU Member State.

However, in the case at stake, the public policy principle in question is a uniform norm applicable both in Spain and in France, Art. 11 of the Charter. The uniform character of Art. 11 of the Charter makes it difficult to determine the content of the public policy of a Member State without reviewing the merits of a judgment issued in another Member State.

Indeed, the criteria set out by the CJEU in order to determine whether the Spanish Decision was in breach of French public policy took into consideration the differences in the application of the law between Member States, which pertain to the merits. On the other side, it emerges from the Judgment that the CJEU, considering the pivotal role of the press in order to maintain democracy and the Rule of law, wanted to emphasize that judicial decisions deterring the press from performing its activities shall not circulate within the EU.

(4) Judgment, para. 37; CJEU, 28 April 2009, C-420/07, *Apostolides*, para. 59; and 25 May 2016, C-559/14, *Meroni*, para. 42.
(5) ECtHR, 23 September 1994, *Jersild v. Denmark*, para. 31; ECtHR, 21 January 1999, *Fressoz and Roire v. France*, para. 45; and 16 June 2015, *Delfi AS v. Estonia*, para. 132.
(6) Judgment, par. 55.

In the present case, it seems that the problematic issue is that the Spanish Decision awarded excessive damages to the French newspaper. Accordingly, prior to issuing the Spanish Decision, the Spanish Court should have made a request for a preliminary ruling to the CJEU, asking whether, under Art. 11 of the Charter, it could apply the domestic provision on which the Spanish Decision is based.

5. The Judgment and the SLAPPs Directive

The Judgment at issue and the recently adopted SLAPPs Directive pursue the same objective, *i.e.*, the protection of freedom of expression and information.

However, even if the SLAPPs Directive had been already transposed by Member States (which is not the case, since, pursuant to Art. 22 of the SLAPPs Directive, Member States shall transpose the Directive by 7 May 2026), it would not have had a relevant impact in the present case.

The SLAPPs Directive contains, in a nutshell, (*a*) provisions aimed at realizing an early dismissal of manifestly unfounded claims and (*b*) safeguards against the enforcement within the EU of judicial decisions rendered in non-EU countries sanctioning journalists and persons active in public participation.

Therefore, since the action filed by Real Madrid was not manifestly unfounded (and, thus, resulted in a judgment condemning the newspaper) and the judgment was rendered in Spain, the SLAPPs Directive would have had no impact in the present case. The Real Madrid case illustrates that, although the SLAPPs Directive could be quite useful in preserving freedom of expression and information within the EU, its very limited scope of application could reduce the consistency of such objective.

Violation of EU Competition Law in the context of Sport law in the recent jurisprudence of the Court of Justice of the EU

In the last months, the impact of the main international football federations has been consistently addressed by EU Courts. The following insight provides some comments on the two main rulings on the matter issued since December 2023.

General considerations

In recent times, the application of EU Competition Law in the Sport Law field has acquired an increasing relevance in the jurisprudence of the Court of Justice of the European Union. Since 2023, two important rulings of the CJEU have addressed the issue, significantly affecting the competitive regulation of international football.

On 21 December 2023, the Court established that Union of European Football Associations (UEFA) and *Federation internàtionale and football association's* (FIFA) decisions to prohibit the realization of the so-called Superleague between certain European football clubs constituted both *(i)* a decision by an association of undertakings restricting competition within the internal market and (*ii*) an abuse of dominant position (the 'Superleague Judgment').

In addition, in the recently-adopted ruling L. Diarra v. FIFA of 4 October 2024, the CJEU declared the incompatibility with EU competition law and the free movement of workers of FIFA's rules concerning the transfer of professional football players (the 'FIFA Judgment').

FIFA and UEFA are, respectively, the global football regulator and one of the confederations recognized by the FIFA. The latter is composed of national federations, which in turn are made up of leagues and clubs, to which the athletes are affiliated[7]. Both UEFA and FIFA require prior approval of matches involving teams that are members of the federations and may sanction clubs and players who compete in non-authorized events or matches[8].

1. EU competition law in the sport law context

In the cases at issue, the CJEU had to determine whether EU Competition Law (and in particular, Articles 101 and 102 TFEU) were applicable within the sport context.

In its Opinion rendered in the Superleague Judgment, Advocate General Rantos relied on Art. 165 TFEU (which attributes a supporting competence to the EU in Sports matters, highlighting the social and educational function of sport within the EU) to affirm that EU Competition Law should be applied in toto in the sport law context[9].

The CJEU, however, departed from the Advocate General's view by stating that (a) in so far as it constitutes an economic activity, sport is subject to the provisions of EU law applicable to such activity () and; (b) the rules adopted by sports associations fall within the scope of the competition law provisions of the TFEU[10].

Based on the above considerations, the Court declared that Art. 165 TFEU merely establishes a supportive competence in sports matter[11] while it does not attribute a 'constitutional value' to the EU sports model, not granting sports a special status which may consist in the non-application of EU Competition Law [12].

2. The Superleague Judgment

In the Superleague Judgment the CJEU stated that FIFA and UEFA's decision to deny clubs the right to participate in the Superleague constitutes both a decision of an association of undertakings restricting competition in breach of Art. 101 TFUE and an abuse of dominant position in contrast with Art. 102 TFEU.

The ruling was originated by the decision of a group of 12 European football clubs, acting through the Spanish undertaking European Superleague Company SL, to set up a new football competition project – the Superleague – without the consent of FIFA and UEFA. The confederations objected to the project, threatening to impose sanctions on clubs and players who might decide to take part in the Superleague. As a consequence, the European Superleague Company brought an action against FIFA and UEFA before the

(7) G. MONTI, *EU Competition Law after the Grand Chamber's December 2023 Sports Trilogy: European Super League, International Skate Union and Antwerp FC*, in *Revista de Derecho Comunitario Europeo*, Vol. 77, 2024, pag.13.

(8) CJEU, 21 December 2023, C-333/21, *European Superleague Company*, para. 121.

(9) Opinion of Advocate General Rantos in C-333/21, *European Superleague Company*, para. 30.

(10) CJEU, 4 October 2024, C-650/22, *FIFA*, paras 75-76; *Superleague Judgment*, para. 83; CJEU, 12 December 1974,, C-36/74, *Walrave and Koch*, par. 4; 16 marzo 2010, C-325/08, *Olympique Lyonnais*, par.27.

(11) FIFA Judgment, para. 78; Superleague Judgment, para. 87.

(12) F. FERRARO, *Evoluzione o involuzione del diritto della concorrenza nella sentenza Superleague*, in *Quaderni AISDUE*, 2024, pag. 5.

Commercial Court of Madrid, arguing that their rules on the approval of competitions and the exploitation of media rights are contrary to EU law.

The CJEU, ruling pursuant to Art. 267 TFEU, stated that UEFA and FIFA held a dominant position pursuant to Art. 102 TFEU as they have the power to determine the conditions under which potentially competing undertakings may access the market or to make determinations in that regard on a case-by-case basis, through a decision granting prior authorization or refusing such access (and in practice, it is impossible to viably set up a competition outside UEFA's/FIFA's system)[13]. In cases falling under the scope of Art. 102 TFEU, undertaking in a dominant position must exercise its power within a framework of transparent, non-discriminatory and detailed procedural rules relating, inter alia, to the time limits applicable to the submission of an application for prior approval and the adoption of a decision thereon[14]. In the case at stake, the CJEU found that the rules on approval, control and sanctions of new football competitions were arbitrary in nature and constituted an unjustified restriction on competition within the EU internal market.

The Luxembourg Judges also held that the arbitrary non-approval of the Superleague project constituted a decision of an association of undertakings restricting competition pursuant to Art. 101 TFEU[15].

3. The FIFA Judgment

In the FIFA Judgment the CJEU examined the compatibility of FIFA's rules on contracts concluded between football clubs and their athletes with the provisions of EU law on competition and the freedom of movement of workers.

In the case at issue, a former professional footballer challenged before the Belgian judicial authorities the rules of the FIFA Regulations on the Status and Transfer of Players ('RSTP'). The RSTP, provided, *inter alia*, that if a club considers that one of its players has terminated his employment contract without "just cause" before the normal term of said contract, the player and any club wishing to employ him are jointly and severally liable for any compensation due to the former club.

Moreover, the new club may, in certain cases, be subject to the sporting sanction of being banned from registering any new players for a given period. Lastly, the national association to which the player's former club belongs must refuse to issue an International Transfer Certificate to the association where the new club is registered as long as a dispute between the former club and the player concerning the termination of the contract is pending.

The CJEU held that the mentioned rules are contrary to the EU provisions on freedom of movement as they impose sporting and financial risks on athletes and the football clubs wishing to employ them. Such risks are capable of reducing the free movement of workers within the EU[16](both of EU and non-EU citizens[17]).

In addition, the EU Court stated that the RSTP rules have a direct impact in the composition of teams, which is one of the essential parameters in which professional football teams (which shall be regarded as undertakings for the application of EU Competition Law[18]) compete within the relevant market. It follows that, the RSTP rules – which constitute a decision of an association of undertakings – have as their object the restriction, and even prevention, of cross-border competition and are incompatible with Art. 101 TFEU.

The impact on competition law of the conduct and the regulations of international football federations has an increasing importance, both on an EU and a national level (in this regard, see for example Italian Competition Authority, 18 July 2024, Measure A562, FIGC). Such rulings, however, only address the (in)compatibility of the rules or of a behavior of a football federation with existing EU law. In other terms, they state a certain football legislation is in contrast with EU Competition Law, while they do not provide a new set of dispositions to regulate international football.

While *pars destruens* was assessed by the CJEU (and other relevant national authorities and courts), *pars costruens* is still to be written. In the next months, FIFA, UEFA and the other relevant actors are expected to deal with important components of football regulation in the context crucial economic sector (for instance, FIFA announced that it will modify the relevant RTSP provisions[19]). Much is yet to come.

(13) Superleague Judgment, paras. 135 e 149.
(14) Superleague Judgment, para. 136.
(15) Superleague Judgment, para. 179.
(16) FIFA Judgment, para. 114.
(17) *Cfr. per analogiam* CJEU, 5 June 2018, C-673/16, *Coman.*
(18) *FIFA Judgment, para. 118.*
(19) FIFA Chief Legal & Compliance Officer Emilio García Silvero explains FIFA's position on Diarra case.

Anti-suit injunctions nella recente giurisprudenza arbitrale

The following insight provides a brief comparative examination of three judgments dealing with the issuance of anti-suit injunctions. In particular, it is analyzed the difficulty in determining uniform and consistent standard with regard to the determination of competence of a national court to issue an anti-suit injunction.

1. Preliminary remarks

In the past weeks, various judicial authorities addressed the possibility for a national court to issue an anti-suit injunction, also – but not only – with regard to Russian entities sanctioned by the EU. This article aims at determining what are the current threads – if any – in the granting of an anti-suit injunction.

In this regard, it will analyse the similarities and differences between two recent rulings held by the English Courts which, respectively, (*i*) issued an anti-suit injunction prohibiting a Russian entity to continue the proceeding against an EU Bank before a Russian Court in violation of an arbitration agreement which established the jurisdiction of an Arbitral Tribunal seated in France (UniCredit GmbH v. RusChemAlliance LLC, 'RusChem Judgment'[20]) and; (*ii*) they refused such an injunction in respect of the request to bar the commencement of a trial in Liberia despite the presence of an arbitration agreement establishing the jurisdiction of an arbitral tribunal whose seat was not in the United Kingdom (Investment Global Limited v. PLC Investment Limited et al., 'Investment Global Judgment', jointly referred to as the 'UK Judgments').

In addition, the standards set out in the UK Judgments will be compared with those set out in a decision rendered from the High Court of Hong Kong granting an anti-suit injunction in a proceeding involving an EU bank and its controlling entity, a Russian bank subject to EU sanctions (Bank A v. Bank B, the 'Hong Kong Judgment').

2. The UK Judgments, looking for consistency

The UK Judgments provide two different solutions in assessing two requests for an anti-suit injunction.

In the RusChem Judgment, the UK Supreme Court granted an anti-suit injunction to UniCredit GmbH, requiring the Russian EU-sanctioned entity to withdraw the proceeding it had commenced before Russian Courts.

The dispute arose in relation to the payment of a series of guarantees issued by UniCredit and governed by English law. In the guarantee contracts, the arbitration clause in favor of an arbitral tribunal established in France did not expressly provide that English law also governed the arbitration clause.

In the case at stake, the UK Supreme Court granted an anti-suit injunction to UniCredit, ordering the Russian entity subject to EU sanctions not to pursue the proceedings it had initiated before the Russian courts. In particular, it was firstly stated that the arbitration clause was governed by English law and then that this established a link suitable to determine the jurisdiction of English courts.

Subsequently, the Supreme Court assessed whether - given UK jurisdiction - the conditions of section 37(1) of the 1981 Senior Court Acts, under which English courts have the power to issue an anti-suit injunction "in all cases where this appears to the court to be right and proper". Specifically, the Supreme Court upheld the anti-suit injunction issued on appeal by invoking (*a*) the principle of *pacta sunt servanda* (*i.e.*, agreements must be respected); (*b*) the substantive link between the dispute and the English courts, given that the arbitral clauses of which UniCredit is seeking were governed by English law; (*c*) the fact that France and the French courts - which, however, would not be competent to issue an anti-suit injunction in this case - 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); (*d*) the inefficiency of an anti-suit injunction granted by an arbitral tribunal.

[20] *Cfr*. Studio Legale Padovan, *International Litigation*, n. 4, ottobre 2024, pag. 6.

In the Investment Global judgment, UK courts were asked to issue an anti-suit injunction in relation to a contract containing a Liberian-law arbitration clause in favor of an arbitral tribunal. Firstly, the English courts had granted the injunction on the assumption (later proved incorrect) that the arbitration panel was based in London. Then such injunction was revoked when the seat of the arbitration was determined in Toronto. In light of the above, the High Court of England and Wales rejected the application for an anti-suit injunction on the grounds that, as the seat of the arbitral tribunal was outside the United Kingdom, the English courts had no jurisdiction to rule.

The High Court then applied the same *ratio decidendi* as it did in its RusCHem judgment by seeking (but not identifying) a 'jurisdictional link' to the UK law neither of the applicable law to the arbitration clause nor of the seat of the arbitral tribunal. Therefore, the High Court did not proceed to verify the fulfilment of the conditions set out in Art. 37(1) of the Senior Court Acts.

3. The Hong Kong Judgment, convergent and divergent trends with the UK Judgments

On 24 September 2024 the High Court of Hong Kong issued a ruling granting an anti-suit injunction in favor of a German Bank (Bank A), prohibiting the former controlling entity of Bank A (a Russian bank sanctioned from the EU, the Bank B) to prosecute a judicial proceeding before the Russian Courts, stating that the contractual document on which the dispute between the two banks was based contained an arbitration clause – subject to English Law – providing for any dispute to be resolved before the Hong Kong International Arbitration Centre ('HKIAC').

In the case at issue, unlike the UK judgments, the Hong Kong High Court had to decide whether the court of the seat of the court could issue an anti-suit injunction in this case.

Therefore, without considering the merits of the dispute, the Hong Kong High Court limited itself to determining "whether there was a valid and binding arbitration agreement covering the scope of the dispute and not violating its own public policy". Having established the above, the High Court granted an anti-suit injunction.

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