Kluwer Arbitration Blog

Application to Have Arbitration Declared (In)Admissible – A German Torpedo to Arbitral Proceedings?

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In 1999 Germany adopted the UNCITRAL Model law on International Commercial Arbitration ("ML"), but with a material addition: German law stipulates that prior to the constitution of the arbitral tribunal an application can be made to a German court to determine whether or not arbitration proceedings are admissible (s. 1032(2) German Code of Civil Procedure ("ZPO").[1)]

This has become a popular tool in Germany. The idea is to foster procedural economy by giving the parties the opportunity to obtain a decision on the admissibility of arbitration proceedings as early as possible.[2)] Both potential claimants and potential respondents in arbitration proceedings might benefit from pursuing such an application. The decision by the German court can give the parties and the arbitral tribunal comfort that arbitration proceedings are admissible whilst eliminating potential for obstruction. To the same extent, it can save the parties an onerous arbitration which will result in an unenforceable decision.

What is most surprising about the provision is that an application to have arbitration proceedings declared (in)admissible does not appear to be limited to arbitrations seated in Germany. S. 1025(2) ZPO states that the remedy is also available "if the place of arbitration is situated outside Germany or has not been determined yet." The wording[3)] raises the question of whether German courts could take upon themselves a global jurisdiction to decide on the admissibility of arbitration proceedings.

We consider this and other related points below:

What effect does an application have on arbitral proceedings?

From a legal perspective, the mere filing of an application has no immediate legal effect on an arbitration proceeding seated i*n Germany*. In fact, it is expressly provided for in German law that irrespective of the application to the German court, arbitral proceedings can nevertheless be initiated or continued, and an award can be rendered (s. 1032(3) ZPO).[4)] In practice, however, there is a tendency amongst arbitral tribunals to stay the arbitration and await the decision from the state court.

If the arbitral tribunal is seated *outside of Germany* the situation is different: The arbitration is governed by the law of the seat. The law of the seat, therefore, will decide which effects an application to the German court has on arbitral proceedings outside Germany.

What is the scope of review by the German courts?

When faced with an application pursuant to s. 1032(2) ZPO, German courts will ascertain whether the arbitration agreement is valid and operable as well as whether the subject matter in question falls under the arbitration agreement. This level of scrutiny is in line with Art. 8 ML and largely the same as that which a state court would adopt if a party invoked the arbitration defence before it. This means that the court will not rule on the question as to whether further requirements to initiate arbitration proceedings are met (e.g. a cooling-off period has lapsed). Nor will it rule on the substance of the underlying dispute. Those issues are reserved for the arbitral tribunal. A separate question, however, is which law a German court would apply when scrutinizing the arbitration agreement. German courts would, absent an express agreement by the parties on the law applicable to the arbitration agreement, apply German conflict of law rules. This will often lead to the law of the seat of arbitration.

What are the effects of a decision by the German court?

Like the application to the court, a decision by the German court has no immediate legal effect on *arbitration proceedings seated in Germany*. In fact, an arbitral tribunal seated in Germany is arguably not even bound by the decision of the German court on the admissibility of arbitration.

However, the court decision will definitely become relevant when it comes to enforcement in Germany: If *either German-seated or foreign-seated* arbitration proceedings have been declared inadmissible, any award rendered nonetheless will not be enforceable *in Germany*. If arbitration proceedings have been declared admissible, this decision would also bind any German court seized with proceedings to have the award declared enforceable. This does not exclude a challenge of the award on different grounds.

If a German court has found the *German-seated* arbitration proceedings to be inadmissible, recognition and enforcement of the award *outside of Germany* may also be difficult. This is because under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, recognition and enforcement of a foreign arbitral award may be refused if the arbitration agreement is not valid under the laws of the seat of arbitration (Art. V(1)(a) New York Convention) and if recognition and enforcement would be contrary to the public policy of the country were enforcement is sought (Art. V(2)(b) New York Convention). The finding of a German court that the German-seated arbitral proceedings are inadmissible may potentially provide justification to refuse enforcement under either ground.

The *relevance to a foreign court* of a finding by the German courts that a *foreign-seated arbitral proceeding* is inadmissible is far less certain.

What are the requirements for an application before the German courts?

The application can be made “prior to the constitution of the arbitral tribunal” only. Receipt of the application by the court suffices to meet this requirement. The applicant has to have a legitimate interest in obtaining legal protection. To that end, arbitration proceedings need not yet have been commenced. However, if the admissibility of arbitration is entirely undisputed between the parties,

there is no room for an application to the courts.[5)] Further, an application pursuant to s. 1032(2) ZPO is not permitted if ordinary court proceedings are pending in which the applicant can invoke the arbitration agreement.[6)] Likewise, a party cannot invoke an arbitration agreement in state court proceedings and, once arbitration proceedings have been initiated, lodge a separate application to the state court in order to have arbitration proceedings declared inadmissible.[7)]

Do German courts have a global competence to rule on the admissibility of arbitral proceedings?

As indicated at the start of this blog, the plain wording of the relevant German provision suggests that in any case where the place of arbitration is outside of Germany or has yet not been determined, a German court can rule on the admissibility of arbitration proceedings. This, of course, leads one to ask whether the German courts can have a global competence to decide on arbitration agreements regardless of a connection to Germany. This has been a subject of some debate amongst scholars and commentators.

To date the German courts have not addressed this specific question. However, drawing on a decision by the Berlin Court of Appeals[8)] on a separate but parallel issue it seems most likely that the German courts would follow a different approach. In that case, the Berlin court was faced with an application to declare enforceable a foreign arbitral award. The place of arbitration was outside Germany, the parties' company seats were not in Germany and none of the parties had any property or assets in Germany. The court refused to declare the award enforceable because, in particular, it could not find that the award might ever be enforced in Germany or that there was any other connection to Germany. As a consequence, the applicant had no legitimate interest in pursuing the application in Germany.

If one were to adopt this approach to the application to have foreign arbitral proceedings declared (in)admissible, a link to Germany would equally be required. It will be interesting to see whether the courts will go down that road.

Conclusion: It can be a useful tool – but it is not a torpedo to arbitration

In sum, the initial question can be answered as follows:

– The application to have an arbitration declared admissible or inadmissible can be a useful tool for potential claimants and respondents. It provides the parties with legal certainty at a very early stage. If the application is brought by a potential claimant, it may save the trouble of arguing the admissibility of arbitration before the arbitral tribunal and at the enforcement stage.
– In particular, for arbitrations seated in Germany, a finding of admissibility or, indeed, inadmissibility by the German courts could have considerable importance at the enforcement stage either in Germany or elsewhere.
– The application to have arbitration declared admissible or inadmissible is not, however, a torpedo to arbitration in the standard sense. It does not hinder the commencement or conduct of arbitral proceedings. Even if the arbitral proceedings are stayed during the court proceedings, this usually does not lead to a considerable delay. In the majority of the cases, German courts decide on application to have arbitration declared admissible within 6 months.[9)]
– While at first glance the provision appears to offer scope for parties to approach the German courts for a ruling on admissibility even where the arbitration has no nexus with Germany, we

consider it unlikely that the German courts would adopt an interpretation which would give it such broad and unfettered powers.

References

?1 There are comparable provisions in place in England, Italy and Sweden.

?2 Bundestagsdrucksache 13/5274, p. 38.

?3 Section 1025(2) in conjunction with section 1062(2) ZPO.

?4 Under Art. VI(3) of the European Convention on International Commercial Arbitration of 1961 the situation differs: where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter shall generally stay their ruling on the arbitrator's jurisdiction until the arbitral award is made.

?5 Higher Regional Court Frankfurt, docket no. 26 SchH 2/14, decision of 10.06.2014.

?6 Higher Regional Court Munich, docket no. 34 SchH 03/11, decision of 22.06.2011.

?7 German Federal Court of Justice, docket no. III ZB 91/07, decision of 30.04.2007.

?8 KG Berlin, docket no. 20 Sch 7/04, decision of 10.08.2006

?9 Schlosser, SchiedsVZ 2009, 129 (135).

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