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Berlin Court Finds that ICSID Arbitrations Are Immune from Achmea and Komstroy – At Least While They Are Ongoing

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Germany found itself as the hotseat of the "battle" between EU law and investment arbitration in May 2016 when the Federal Court of Justice (Bundesgerichtshof) referred questions relating to the compatibility of EU law with the arbitration clause in the Slovakia-Netherlands BIT to the Court of Justice of the European Union ("**ECJ**") in *Slovakia v. Achmea BV*. Now the Higher Regional Court Berlin has entered the ring by issuing a legally sound but politically surprising judgment finding that neither local courts in EU members states, nor the ECJ, have any supervisory authority over arbitrations administered by the International Centre for the Settlement of Investment Disputes ("**ICSID**").

The court declined on 28 April 2022 Germany's request to declare that the Respondents' (Mainstream Renewable Power Ltd. and five of its subsidiaries, the claimants in ICSID Case No. ARB/21/26, "**Mainstream et al**") claim against Germany under Article 26 of the Energy Charter Treaty ("**ECT**") was inadmissible as it concerns an intra-EU dispute (KG Berlin, Decision 12 SchH 6/21 of 28 April 2022).

Germany has appealed the decision to the *Bundesgerichtshof* (BGH I ZB 43/22), the highest court in Germany. A decision can be expected in the spring or summer of 2023.

1. Basis of the Application

Mainstream et al submitted their Request for Arbitration with ICSID on 30 April 2021 after having invested in wind and solar energy in Germany. Mainstream itself and two of its subsidiaries are incorporated in Ireland. One of these subsidiaries holds 100% of the shares in the other three claimants, which all have their seats in Berlin.

Germany invoked Section 1032 para. 2 of the German Code of Civil Procedure ("**ZPO**"), which allows a request to be filed in court to determine the admissibility of arbitral proceedings.

Section 1032 is part of Book 10 of the ZPO governing arbitral proceedings. Book 10 applies if the place of arbitration is located in Germany according to Section 1025 para. 1 ZPO. Section 1032 ZPO is included in a sub-chapter on the arbitration agreement.

Germany argued that it should be allowed to exhaust all legal remedies in order to avoid an

initiation of infringement proceedings by the European Commission. A request under Section 1032 para. 2 ZPO is not barred by the ICSID Convention, Germany submitted (for a fuller account of the findings of the court as a matter of German law see here).

2. Decision of the Higher Regional Court of Berlin

The court first established its competence to decide requests under Section 1032 para. 2 ZPO in general. The link of the case to Berlin was established by three of the claimants in the arbitration having their seat in Berlin, and a fourth one owning them (KG decision, p. 5, para. 2).

The court then turned to consider the relevance of the ICSID framework and whether Germany's request was admissible. The court found that Section 1032 para. 2 ZPO is not applicable in an ICSID arbitration.

a. The ICSID Convention Sets Up a Closed System of Procedural Rules Precluding Other Legal Remedies

The court first established that the ICSID Convention was applicable to the arbitration, as both Germany and Ireland are contracting states. The court then considered the particular features of the ICSID system, citing Articles 25, 26, 41, 53 and 54 of the ICSID Convention (KG decision, p. 6, para. 3 a).

The court further considered the InvStreitÜbkG, the law implementing the obligations arising from the ICSID Convention in Germany, which only references the German ZPO regarding requests for declarations of enforceability. According to the court, the special character of ICSID arbitrations also manifests itself in the lack of court decisions on ICSID arbitral awards and arbitrations in Germany. In the only decisions cited, German courts had refused to intervene procedurally in ICSID arbitrations (KG decision, p. 8, para. 3 a).

The Higher Regional Court of Berlin concluded that, as the ICSID Convention itself provides in Article 41 that the tribunal has the "Kompetenz-Kompetenz" to decide on its jurisdiction, Section 1032 para. 2 ZPO is not applicable to ICSID arbitrations (KG decision, p. 11, para. 3 c).

b. Prior Decisions of the ECJ or Domestic Courts Do Not Influence the Question of Admissibility of A Request Under Sec. 1032 para. 2 ZPO

After re-iterating the ECJ's decisions in *Achmea* and *Komstroy*, the court also referenced the ECJ's decision in *Micula* from January 2022. Yet the court held that these decisions do not deal with the procedural rules of the ZPO and their applicability in ICSID arbitrations. The question whether the expressions of consent are valid in an intra-EU investment dispute are to be determined by the arbitral tribunal according to Article 41 of the ICSID Convention.

The court further found that the non-application of Section 1032 para. 2 ZPO to an ICSID arbitration does not violate EU law as the decision on the admissibility of Germany's request does

not require an appraisal of the ECJ's case law. Section 1032 para. 2 ZPO is exclusive to German law. Section 1040 ZPO, giving German courts the power to overrule an arbitral tribunal's decision on its jurisdiction, does not apply to ICSID arbitrations (KG decision, p. 11).

The Court did not address the question of whether EU case law could be sufficiently considered in potential annulment proceedings if an ICSID tribunal fails to correctly take into account EU case law as part of the law binding both parties to the arbitration.

Finally, the court declared recent domestic court rulings based on the ECJ decisions in *Achmea* and *Komstroy* irrelevant, as they did not concern ICSID arbitrations and were thus subject to the supervisory jurisdiction of the court of the seat (KG decision, p. 11, para. 3 c). First, two decisions of the *Cour d'Appel de Paris* of 19 April 2022, setting aside arbitral awards obtained by (a) Cec Praha and Slot Group; and (b) Strabag and Raiffeisen Centrobank against Poland. Secondly, the *Bundesgerichtshof*'s decision on 17 November 2021 in an investment case between Raiffeisen Bank and Croatia under Section 1032 para. 2 ZPO (commented on here).

3. Conclusion

The Higher Regional Court of Berlin will not have the last word on this issue. The *Bundesgerichtshof* may refer the matter to the ECJ, which is likely to disagree with the findings of the Berlin court. Not because there is anything legally unsound with that court's analysis, but because of precedent: German courts in *Achmea* (discussed in more detail here), French courts in *Komstroy* (discussed in more detail here) and Swedish courts in *PL Holdings* (discussed in more detail here) all found investment law and EU law to be compatible until they were told by the ECJ that they were wrong.

The most interesting comparison with the present case is provided by *Micula*. As an ICSID arbitration, the case had proceeded without judicial oversight. Because Romania had set off the damages awarded to the claimants against the tax debt some of them owed to the state treasury, the matter ended up before EU courts once the European Commission ruled this to be illegal state aid and ordered Romania to recover it. The ECJ had no hesitation in finding that *Achmea* applied to the case and appeared to consider the fact that the arbitration had been conducted within the ICSID system irrelevant or worse: the ICSID award not being subject to oversight of (EU member state) domestic courts was given as an additional reason for the court to find that *Achmea* applied to it (paragraph 142). The Higher Regional Court of Berlin focused on German procedural law to ground its decision, but it will not be difficult for the ECJ (or indeed the *Bundesgerichtshof*) to ignore or dismiss this, if it so wishes. The distinction did not appear to be relevant for the *Bundesgerichtshof* in *Raiffeisen Bank* when it approved Croatia's application under Section 1032 para. 2 ZPO.

The Berlin court's decision finds itself in the middle of a Venn diagram where on the one side is a circle in which reside decisions on procedural issues relating to the supervision of arbitration proceedings. On the other side is a circle for ICSID arbitrations. Only where these two circles overlap does an investor have a chance of escaping the impact of *Achmea* and *Komstroy* before an EU member state court.

Where decisions on enforcement of ICSID awards fall in this diagram is open to debate. The UK Supreme Court's decision on the Micula claimants' application to enforce the ICSID award

(discussed here) suggests that the question may be determined by the date on which the enforcement state became party to the ICSID Convention – creating yet another fine distinction to make this area of law more complex.

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