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RWE and Uniper: (German) Courts Rule on the Admissibility of ECT-based ICSID Arbitrations in Intra-EU Investor-State Disputes

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On 1 September 2022, the Higher Regional Court of Cologne ("HRC Cologne") issued two much-awaited decisions granting the Netherlands' requests (see our report here) to have the German claimants', *RWE* and *Uniper*, ECT-based ICSID arbitrations declared inadmissible pursuant to section 1032(2) of the German Code of Civil Procedure ("ZPO") due to their intra-EU nature. As we reported, section 1032(2) of the ZPO allows German courts to make an early determination on the admissibility of an arbitral proceeding before a tribunal is constituted. The question of whether a section 1032(2) application can also be made in ICSID proceedings has been controversial, particularly since it affects the broader systemic issue of whether EU law can trump a state's international law obligations under the ICSID Convention. This post contrasts the HRC Cologne's reasoning with an earlier diverging order by a Berlin court, and assesses how the issue of intra-EU arbitration will develop in the near future.

HRC Cologne Grants the Netherlands' Anti-arbitration Requests

In the first week of October 2022, the HRC Cologne's two largely identical decisions in *RWE* and *Uniper*, rendered in German, became public. Foreshadowed by a 8 September 2022 press release, the HRC Cologne declared *RWE* and *Uniper*'s intra-EU ICSID arbitrations inadmissible and found that such ECT-based arbitrations were, in principle, prohibited. Essentially, the HRC Cologne considered that it was its duty to apply section 1032(2) in light of the rulings of the Court of Justice of the European Union ("CJEU") on the validity of an arbitration clause in intra-EU investment disputes, and to interpret German law so as to give full effect to EU law. Thus, in case of conflict, EU law would have to prevail over Germany's international law obligations in intra-EU disputes.

The HRC Cologne first observed that the applications had been properly made before the German "ordinary" civil courts. This was because the arbitrations concerned a claim for damages based on an international treaty, rather than a public law contract for which the administrative courts would be competent. Article 26(5)(b) of the ECT (and its reference to Article I of the 1958 New York Convention) was considered as clarifying that an ECT-arbitration constitutes a commercial dispute. Next, the HRC Cologne ruled that it had territorial jurisdiction under section 1062(2) of the ZPO. The section designates the court of the respondent's seat as the default court. Both *RWE* and *Uniper* have their seats in the federal state of North Rhine-Westphalia, for which jurisdiction is

concentrated at the HRC Cologne.

Turning to the admissibility of the section 1032(2) application, the HRC Cologne acknowledged that section 1025 of the ZPO applies to arbitrations with a German, foreign, or undefined seat, and that ICSID arbitrations merely have a place of hearings (but not a seat). The court nevertheless felt compelled to interpret the ambit of section 1032(2) in such a way as to give full effect to the primacy of EU law – for which the HRC Cologne (in a somewhat circular manner) referenced its findings on the merits. The HRC Cologne also denied that the ICSID framework could bar the Netherlands from relying on section 1032(2). It acknowledged that ICSID tribunals are competent to conclusively decide on their own jurisdiction and the validity of an arbitration clause ('*Kompetenz-Kompetenz*'). However, to the HRC Cologne, its task was to determine the existence of a valid arbitration agreement under Article 26 of the ECT (which it considered to be part of EU law). Despite acknowledging complexities surrounding the tension between international and EU law, as well as domestic courts' limited power of scrutiny in ICSID proceedings and the lack of precedent on the issue, the HRC Cologne denied such validity, finding particular comfort in:

- the EU Member States' and German Federal Court of Justice's ("*Bundesgerichtshof*", or "BGH") acceptance of the primacy of EU law even when there are countervailing public international law obligations;
- section 1032(2)'s purpose of enhancing procedural economy, which the HRC Cologne saw strengthened by its early finding of the invalidity of the arbitration agreement; and
- the BGH upholding the ruling of the Higher Regional Court of Frankfurt am Main, which had declared Austrian *Raiffeisen Bank*'s UNCITRAL arbitration against Croatia inadmissible under section 1032(2) of the ZPO (see here and here). The HRC Cologne did not regard as relevant the differences between UNCITRAL and ICSID arbitrations, considering that the BGH had not distinguished between a BIT and the ECT. [1)]

On the merits, the HRC Cologne found that the CJEU rulings in *Achmea*, *Komstroy* and *PL Holdings*, as well as the CJEU's 2022 appeal ruling in *Micula (I)*, confirmed that the arbitration clause in Article 26 of the ECT was incompatible with EU law and could not serve as a valid basis in an intra-EU arbitration. On 25 January 2022, the CJEU had reversed the General Court's decision in *Micula (I)* and held that EU state aid law prevented Romania from complying with the 2013 ICSID award (see here). Likewise, in September 2021, the CJEU had sided with Advocate General Szpunar's earlier opinion in the *Komstroy* case and ruled in an *obiter dictum* that intra-EU arbitrations under the ECT were EU law incompatible (see here and here). A month later, the CJEU expanded the "*Achmea* objection" to *ad hoc* arbitration agreements in relation to *PL Holdings* (reported here; for a general overview, see here.).

In the HRC Cologne's view, ICSID tribunals are unable to sufficiently guarantee the principle of EU law autonomy and the CJEU's judicial monopoly in EU law matters. The HRC Cologne considered that unlike Article 8.31(2) of CETA, which preserves such monopoly, the ICSID Convention contains no similar clause. [2)] Notably, to the HRC Cologne, granting the final say on EU law matters to ICSID tribunals would leave awards unverified with respect to EU law, particularly because ICSID tribunals, unlike EU Member State courts, are not able to call on the CJEU for a preliminary ruling.

The HRC Cologne found it unnecessary to refer the dispute to the CJEU because it considered the

issues to be sufficiently clear (*acte clair* principle) – despite the contrary decision issued by the Higher Regional Court of Berlin (referred to as '*Kammergericht*', or "KG Berlin") in the *Mainstream* case which has been appealed to the BGH. Accordingly, the HRC Cologne concluded that the *RWE* and *Uniper* ICSID claims were inadmissible.

The HRC Cologne's orders can be appealed to the BGH. It remains to be seen whether *RWE* and *Uniper* will make use of this legal remedy and whether, and if so how, the *RWE* and *Uniper* ICSID tribunals will opine on the HRC Cologne's reasoning. This is particularly unclear with regard to *Uniper*'s arbitration, which is currently suspended until January 2023 following the German Government's agreement in September 2022 to bail out *Uniper* subject to it withdrawing its ICSID claim.

KG Berlin Dismisses Germany's Inadmissibility Application

The HRC Cologne's ruling is not uncontested. In April 2022, the KG Berlin made headlines by finding that section 1032(2) of the ZPO was inapplicable to ICSID disputes and thus dismissing a similar section 1032(2) application Germany had filed in connection with another ECT-based intra-EU ICSID arbitration initiated by Irish company *Mainstream* and five affiliates (see here).

Like the HRC Cologne, the KG Berlin accepted jurisdiction to determine the case as the default competent German court. It has been reported that, the KG Berlin's decision was primarily based on considerations which the HRC Cologne acknowledged, i.e., ICSID tribunals' *Kompetenz-Kompetenz* and power to conclusively determine the validity of an arbitration clause (Articles 25 and 41 of the ICSID Convention), ICSID's exclusivity precluding parallel domestic court proceedings (Article 26), the binding nature and enforceability of ICSID awards (Articles 53-54) and the limited role of domestic courts which could only refuse enforcement insofar as an ICSID award had been revised or annulled by an *ad hoc Committee* (Articles 51-52). To the KG Berlin, by ratifying the ICSID Convention, Germany and Ireland had committed to these international law obligations. Germany's 1969 law ratifying the ICSID Convention was considered to support this conclusion. The existence of section 1032(2) (in deviation from the UNCITRAL Model Law which does not foresee such provision) was of no bearing as it was merely aimed at procedural efficiency. Neither would the CJEU's jurisprudence change this fact, particularly, considering that ICSID tribunals were empowered to interpret and apply EU law via Article 26(6) of the ECT and Articles 41 and 42 of the ICSID Convention.

Contrary to the HRC Cologne, the KG Berlin distinguished the *Raiffeisen Bank* case precisely for its characteristics as a BIT-based UNCITRAL arbitration. Similarly, it found that the Paris Court of Appeal's setting aside decisions in two intra-EU arbitrations against Poland, one *ad hoc* (*Strabag*) and one UNCITRAL (*Slot Group*), were irrelevant and concerned no section 1032(2)-equivalent provisions.

Germany has appealed the KG Berlin's decision; a final ruling by the BGH is expected in 2023. Meanwhile, the *Mainstream* arbitration remains pending (see here).

Outlook

While awaiting the BGH's last word (at least in relation to *Mainstream*), the German courts' decisions are a proof of the existing divide and battle between legal orders, with one side stressing the procedural specificities of the ICSID framework, and thus favouring a public international law view, and the other emphasising the increasing entrenchment of the primacy of EU law, at least via the EU Member States and the CJEU.[3)] So far, arbitral tribunals (including in *RWE/Uniper*) continue to withstand the CJEU's *Achmea* ruling, with the only known exception of *Green Power*, a non-ICSID (namely, SCC) ECT-based dispute, in which the tribunal upheld Spain's intra-EU objection.

The resulting uncertainty is unfortunate, and only defers the problem to the stage of enforcement. This development is becoming increasingly noticeable, not least in the *Micula (I)* saga where the claimants are attempting enforcement in various non-EU jurisdictions. Having said that, the issue of intra-EU ECT arbitrations will likely become moot should the reformed ECT enters into force. In June 2022, the Energy Charter Secretariat announced the ECT Contracting States' agreement-in-principle on a modernised treaty, expressly carving out intra-EU investment arbitrations. Nevertheless, considering the various pending proceedings, intra-EU ECT arbitration will likely stay a newsworthy topic for the foreseeable future.

References

?1 See Order of the HRC Cologne, 1 September 2022, 19 SchH 14/21, paras. 40-41; Order of the HRC Cologne, 1 September 2022, 19 SchH 15/21, paras. 38-39.

?2 See Order of the HRC Cologne, 1 September 2022, 19 SchH 14/21, para. 53; Order of the HRC Cologne, 1 September 2022, 19 SchH 15/21, para. 51.

?3 See more on the debate: German commentary to the ZPO, *Wilske/Markert*, BeckOK ZPO, Vorwerk/Wolf, 46th edn., 1 September 2022, ZPO §1062, para. 2.4 (referring to *Tietje/Ruff/Schmitt*, Beiträge zum Transnationalen Wirtschaftsrecht, Vol. 177, January 2022, vs. *Steinbrück/Krahé*, EuZW 2022, 357; *Rusche*, IPPrax 2021, 494 arguing from an EU law perspective).

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