Kluwer Arbitration Blog

Berlin Court Holds Arbitration Admissible to the Exclusion of (Russian) State Courts

Anna Masser, Tino Schneider, Holger Jacobs (A&O Shearman) · Wednesday, October 2nd, 2024

Against the backdrop of the ongoing war in Ukraine, numerous commercial disputes have arisen. In a (further) significant ruling dated 1 June 2023, the Higher Regional Court Berlin (*Kammergericht* or the "Court") reinforced the integrity of arbitration by confirming the admissibility of arbitration to the exclusion of (Russian) state courts (Case No. 12 SchH 5/22). This decision, that the present post analyses, was rendered "against" Russian parties approaching Russian Arbitrazh Courts in spite of arbitration agreements. It offers a strategic option for non-Russian parties to affirm the exclusivity of arbitration, even when the seat of arbitration lies outside of Germany.

Underlying International Context

The geopolitical tensions arising from the conflict in Ukraine have led to a surge in commercial disputes between Russian and non-Russian entities. These disputes frequently culminate in arbitration proceedings, with Russian parties often concurrently resorting to domestic Russian courts despite existing arbitration agreements.

This trend is rooted in legislative amendments to the Russian *Arbitrazh* (Commercial) Procedure Code ("APC") enacted in 2020, which empower Russian entities subject to sanctions to seek adjudication from Russian *Arbitrazh* Courts in certain circumstances, even if the dispute falls within the scope of an arbitration agreement. The explicit purpose already at the time was to shield Russian companies from the consequences of foreign (i.e., EU and US) sanctions. These amendments also authorize the issuance of anti-arbitration injunctions and the imposition of fines on foreign parties who proceed with arbitration, with fines potentially mirroring the disputed amount in arbitration. Russian parties turn to Russian courts in particular when a non-Russian party has terminated an agreement relying on sanctions but also as a counter-measure to parties initiating arbitrations to claim damages, e.g. for shortfalls of gas.

In the international legal arena, parties have sought to counteract the Russian courts' interference by pursuing legal remedies, including anti-suit injunctions from English courts, which seek to protect the sanctity of arbitration agreements.

Background of the Case

German law offers the possibility to request a court to declare an arbitration admissible or inadmissible under section 1032(2) of the German Code of Civil Procedure ("ZPO"), provided that the procedure is initiated before the arbitral tribunal has been constituted. This norm was the basis for the discussed decision of the *Kammergericht* dated 1 June 2023.

The case involved a German party and a Russian party who had entered into a contract containing an arbitration clause providing for arbitration in Vienna under the VIAC Rules and German law as the substantive law. The Russian party initiated proceedings before the Russian *Arbitrazh* Court, relying on the APC to invoke the exclusive jurisdiction of the Russian courts. The German party sought a declaration from the *Kammergericht* under section 1032(2) ZPO that arbitration was admissible.

Decision of the Higher Regional Court of Berlin

The *Kammergericht* declared arbitration admissible to the exclusion of state courts, after overcoming several procedural and substantive hurdles.

First, as the Russian authorities refused to serve the documents initiating the procedure under section 1032(2) ZPO on the Russian party in accordance with the Hague Service Convention, the *Kammergericht* employed the procedure for public notice under section 185 *et seq*. ZPO (*öffentliche Zustellung*). An unjustified refusal by the requested authority to assist with service is among the exceptional cases where this procedure is available.

Second, the Court affirmed its jurisdiction based on sections 1025(2) and 1062(2) ZPO, which establish the global competence of German courts to decide on the admissibility of arbitration. The Court acknowledged that this jurisdiction was subject to the requirement of a need for judicial protection (*Rechtsschutzbedürfnis*), which could limit the access to section 1032(2) ZPO proceedings. However, the Court found that the German party had a sufficient legal interest in obtaining a declaration, as the dispute had a potential adverse financial impact on it in Germany. The Court also suggested that the presence or likelihood of assets in Germany that could serve as targets for enforcement would also create a sufficient nexus for jurisdiction. Indeed, in a subsequent decision, the *Kammergericht* affirmed its willingness to entertain jurisdiction based on assets that may serve as targets for enforcement within Germany (KG Berlin, decision dated 6.11.2023 – 12 SchH 9/22).

Third, the Court examined the validity, operability and scope of the arbitration agreement. It determined that German law was applicable to the validity of the arbitration agreement, as the parties had chosen German law for the main contract. The Court dismissed the relevance of the APC. This result appears to be correct as Russian law was not the law governing the arbitration agreement and the APC does not make it impossible for Russian parties to participate in arbitration. The Court also held that the arbitration agreement covered the matters in dispute specified in the German party's application, as arbitration clauses should be interpreted broadly.

Finally, the Court granted the declaratory relief sought by the German party, ruling not only on the admissibility of arbitration, but also on the inadmissibility of state court proceedings. This approach appears to be unprecedented and arguably goes beyond the scope of section 1032(2)

ZPO. However, the Court's ruling affirms the exclusivity of arbitration under the parties' agreement and precludes the jurisdiction of the Russian courts.

Key Takeaways

The decision of the *Kammergericht* highlights the expansive purview of section 1032(2) ZPO and its utility for international parties confronted with Russian *Arbitrazh* Court proceedings in violation of arbitration agreements. The Court's affirmation of its competence, irrespective of the arbitration's seat or the governing law of the arbitration agreement, exemplifies the uniqueness of the remedy. Although these declarations may not possess the deterrent power of anti-suit injunctions traditionally issued by UK courts – which carry the threat of severe contempt sanctions – they also offer advantages. The remedy is accessible in situations where there may be an insufficient connection to England, such as when the arbitration's seat is outside of England and English law does not apply to the arbitration agreement.

Furthermore, in most cases, the only material requirement for obtaining a declaration under section 1032(2) ZPO is the existence of a valid arbitration agreement, a threshold arguably less onerous than the considerations regarding the suitability of the forum that may inform the issuance of anti-suit injunctions. Moreover, the remedy is less likely to encounter resistance in recognition proceedings within jurisdictions that view anti-suit injunctions as contrary to sovereignty principles, as it is only declaratory and not injunctive in nature.

However, the remedy also has its limitations. It must be sought before the constitution of an arbitral tribunal, which imposes a temporal constraint on the parties. Furthermore, the remedy's impact is circumscribed by the realities of international legal recognition. It is improbable that Russian courts would acknowledge a foreign court's declaration that Russian state court proceedings are inadmissible. Outside of Russia, the effectiveness of such declarations depends on their recognition under the national law of the state where enforcement by the Russian party is sought. Nevertheless, even absent formal recognition, the existence of a section 1032(2) ZPO decision may serve as a persuasive authority, compelling the enforcing court to thoroughly examine the legitimacy of the decisions in question.

Finally, the implications of section 1032(2) ZPO extend beyond the realm of commercial disputes. Its applicability in both commercial and investment arbitration contexts is noteworthy, as is its utility in seeking declarations on the inadmissibility of an arbitration. This was exemplified in a set of judgments by the German Federal Court of Justice in 2023, which deemed several intra-EU ICSID arbitrations under the Energy Charter Treaty inadmissible upon request by the European Member States (a constitutional complaint against one of these decisions is still pending).

Whether employed to fortify the integrity of arbitrations or to contest their admissibility, the relevance of section 1032(2) ZPO in the international legal landscape is undeniable.

The above is an abbreviated version of an article published in the SchiedsVZ | German Arbitration Journal, Vol. 22, No. 4 (2024), which is also included on Kluwer Arbitration. See here for more information on and other contributions to the Journal.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Wednesday, October 2nd, 2024 at 8:01 am and is filed under Anti-arbitration Injunction, Germany, Russia
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.