HANEFELD Arbitration Blog
Published 28 July 2023
BGH, Order of 27 July 2023 – I ZB 43/22, I ZB 74/22 and I ZB 75/22

The German Federal Supreme Court decides that intra-EU ICSID arbitrations may be declared inadmissible under the German Code of Civil Procedure

Charlotte Matthews

The German Federal Supreme Court (BGH) found on 27 July 2023 in cases I ZB 43/22, I ZB 74/22 and I ZB 75/22 that German courts may decide over applications made under Section 1032(2) of the German Code of Civil Procedure (ZPO) to declare arbitration proceedings brought under the ICSID Convention inadmissible. It further decided that the Energy Charter Treaty (ECT) agreements to arbitrate at issue are invalid.

Background

The cases before the BGH all relate to ECT claims made before ICSID tribunals by European investors (Irish, German, and Dutch nationals respectively) against EU Member States (Germany and the Netherlands respectively).

Those cases are *Mainstream Renewable Power Ltd and others v. Federal Republic of Germany* (ICSID Case No. ARB/21/26), *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands* (ICSID Case No. ARB/21/4), and *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands* (ICSID Case No. ARB/21/22).

Shortly after the registration of those cases at ICSID but before the constitution of the respective tribunals, the respondent States filed applications before German courts to request that the ICSID proceedings be declared inadmissible on the basis of Section 1032(2) ZPO.

The purpose of Section 1032(2) ZPO

Section 1032(2) ZPO provides that "*until the arbitral tribunal has been formed, a request may be filed with the court to have it determine the admissibility or inadmissibility of arbitral proceedings*." This provision serves procedural economy as it provides parties with the opportunity to obtain legal certainty on their arbitration agreement at the outset of their dispute.

One of the key issues before the German courts was whether this provision was applicable in the context of ICSID disputes, despite the fact that the ICSID Convention provides for a self-contained regime.

The split between the higher regional courts of Berlin and Cologne

Two higher regional courts reached opposing conclusions on this issue.

In the *Mainstream* case, the **Berlin higher regional court** rejected Germany's application. The court found that Section 1032(2) ZPO does not apply in arbitral proceedings under the rules of the ICSID Convention, which provide for a self-contained regime. The court further held that the tribunal seized under the ICSID Convention should itself conclusively decide on its jurisdiction and the validity of an arbitration agreement.

In the *RWE* and the *Uniper* cases, the **Cologne higher regional court** granted the Netherlands' application to declare the arbitrations inadmissible under Section 1032(2) ZPO as well as its application to declare any arbitral proceedings between the respective parties on the basis of the arbitration clause in the ECT inadmissible. The court granted the applications *inter alia* in light the rulings of the Court of Justice of the European Union (CJEU) concerning intra-EU investment disputes (in particular Achmea (C-284/16) and Komstroy (C-741/19)).

Key findings of the BGH

The BGH's decision resolves the split between the higher regional courts.

While the full decision of the BGH has yet to be published, its publicly available press release make available its key findings, including *inter alia*:

- German courts have international jurisdiction to decide on a request under Section 1032(2) ZPO, even in the case of arbitrations which do not have a place of arbitration, as is the case for ICSID proceedings.
- The BGH recognized that, in principle, an application under Section 1032(2) ZPO is not admissible from the moment an ICSID proceeding is registered on the basis of the competence-competence principle enshrined in Article 41(1) of the ICSID Convention.
- By way of exception, such an application may be made in the case of intra-EU investor-State arbitrations under the ICSID Convention because of the primacy of EU law.
- According to the BGH, in the intra-EU context, in accordance with EU law, a downstream judicial review of ICSID awards is necessary. The BGH notes that such a review may be pre-empted through Section 1032(2) ZPO. The determination of inadmissibility of the arbitral proceedings under Section 1032(2) ZPO prevents a future declaration of enforceability of ICSID arbitral proceedings in Germany due to the binding effect of such ruling on German courts.
- The BGH concluded that the respective applications by Germany and the Netherlands before the Berlin and Cologne courts respectively have merit.
- According to the BGH, the arbitration proceedings at issue are inadmissible due to the lack of a valid arbitration agreement. Pursuant to the case law of the CJEU, the offer to arbitrate contained in Article 26(2)(c), (3) and (4) of the ECT violates Articles 267 and 344 of the Treaty on the Functioning of the European Union as far as intra-EU investor-State arbitrations are concerned, precluding the conclusion of a valid arbitration agreement.

- The BGH further decided that it did not have to refer the matter to the CJEU on the basis that the CJEU has clearly decided on the incompatibility with EU law of intra-EU ICSID investment arbitrations. The BGH further found that the CJEU did not act *ultra vires* in its rulings.
- With respect to the Netherlands' application before the Cologne higher regional court seeking to declare inadmissible any arbitral proceedings between the respective parties on the basis of the arbitration clause in the ECT, the BGH clarified that an applicant cannot preemptively seek clarification about a potential arbitration agreement under Section 1032(2) ZPO.

To read the BGH's press release: English |German

Author

Charlotte Matthews
Associate

Paris
+33 1 73 44 56 32
matthews@hanefeld-legal.com