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OLG Koblenz denies the extension of arbitration clauses to third parties

Dr. Nils Schmidt-Ahrendts and Viktoria Schneider, MJur (Oxford)

On 31 March 2022, the Higher Regional Court of Koblenz (OLG Koblenz) denied the recognition and enforcement of a EUR 49 million award rendered by an ad-hoc tribunal seated in Moscow in the notorious Hartmann v. Eckes-Granini saga. The same award is subject to recognition and enforcement proceedings in various other European courts.

Background

The case arises from a dispute between Mr Axel Hartmann, a German businessman, and the Eckes-Granini group, a German juice producer. In the early 2000s, the Eckes-Granini group sought to expand its business in Russia. To that end, it pursued a cooperation with Mr Hartmann's companies. After extensive negotiations, in 2007, Mr Hartmann and his businesses entered into a series of contracts with an Eckes-Granini holding company (EG1) and its Russian subsidiary (EG2), in which they formalized their past and future business relations.

The cooperation failed and ended in the insolvency and liquidation of EG2. In 2016, Mr Hartmann initiated arbitration proceedings against four Eckes-Granini companies, including EG1, and three of their managers, seeking damages for 'existence-destroying intervention' (*Existenzvernichtungshaftung*) in the business of EG2.

From the outset, the respondents objected to the competence of the arbitral tribunal arguing, amongst others, that only EG1 had signed the arbitration clause.

The majority of the arbitral tribunal found that it had jurisdiction over the non-signatory respondents. It held that in exceptional cases the applicable German law extends arbitration clauses to non-signatories and that such an exceptional case existed here as all respondents were part of the same group structure and colluded to inflict damages on Mr Hartmann and his businesses.

The respondents' efforts to set the award aside in the Russian courts were unsuccessful.

Facing enforcement proceedings in several European countries, four of the Eckes-Granini companies applied to the OLG Koblenz seeking to pre-emptively challenge the recognition and enforcement of the award. In reaction to this pre-emptive challenge, Mr Hartmann filed a request for recognition and enforcement of the award.

Key Findings

In a first step, the OLG Koblenz **rejected the pre-emptive challenge of the recognition and enforcement of the award** by the Eckes-Granini companies.

The OLG Koblenz held that German civil procedure law only allows the (at least partially) successful party to an international arbitration to seek recognition and enforcement. The court recognized that the losing party may have an 'understandable interest' for a pre-emptive challenge to minimize or at least clarify the risk of enforcement, but noted that the current German civil procedure law simply does not foresee such a remedy – also not by analogy.

The OLG Koblenz then went on to decide on Mr. Hartmann's application for the recognition and enforcement of the award and rejected it. In particular, it **rejected the extension of the arbitration clause to the non-signatory companies** based on two considerations:

First, the OLG Koblenz held that the majority of the arbitral tribunal had failed to render a decision based on the law (*Rechtsentscheid*). Rather, anticipating its ultimate finding on the merits, the majority had explicitly denounced the primacy of the law and applied (subjective) equity considerations (*Billigkeitsbetrachtungen*), such as good faith (*Treu und Glauben*), reason (*Vernunft*) and justice (*Gerechtigkeit*), instead. In the court's view, however, the arbitration clause did not authorize the arbitral tribunal to do so.

Second, the OLG Koblenz emphasized that as a general rule, German law does not allow for the extension of arbitration agreements to non-signatories but protects the constitutional right of access to state courts (*Recht auf den gesetzlichen Richter*).

In particular, the OLG Koblenz held that there is no *group of companies doctrine* under German law. In the OLG's understanding, the *group of companies doctrine* in international arbitration allows for an extension of arbitration agreements to non-signatory group companies only based on their participation in the negotiations or performance of the contract. The OLG Koblenz held that such a doctrine is not compatible with the relativity of the arbitration clause (*Relativität der Schiedsvereinbarung*) and the distinct legal identity of each group company (*Trennungsprinzip*). The court emphasized that the extension of the arbitration agreement to non-signatories must be assessed before and separately from the potential liability of the non-signatories on the merits because it is a purely procedural issue, which the tribunal had failed to do.

The OLG Koblenz clarified that an extension of the arbitration clause to a non-signatory is possible under German law under specific circumstances. However, a decision extending an arbitration agreement to non-signatories had to be based on different considerations such as the parties' good faith (*Treu- und Glauben*), their legitimate expectations (*Vertrauensschuz*) or the appearance of legality (*Rechtsschein*), which in the court's view, were not given in the case at hand.

The OLG Koblenz went on to hold that the arbitral tribunal had also overstepped its mandate by deciding on claims which were not covered by the (substantive scope of the) arbitration agreement. It specifically held that the arbitral tribunal had wrongly understood

and interpreted the overall contractual arrangement between the Eckes-Granini and Hartmann companies.

Commentary

The OLG Koblenz is now the second German higher regional court to express a critical view on the validity of the *group of companies doctrine* under German Law. The first to do so was the Higher Regional Court of Braunschweig, which held that the *group of companies doctrine* violated the German *ordre public* (Decision of 31 October 2012 – 2 U 59/11). Both the Koblenz and Braunschweig courts emphasized the principle of the distinct legal identity of corporate entities (*Trennungsprinzip*). At the same time, neither court has engaged in a detailed analysis of the precise requirements of the doctrine, let alone a review of the existing jurisprudence of other courts, in particular of French courts. For example, the OLG Koblenz did not address the fact that the *group of companies doctrine* does not permit an extension of the arbitration agreement, if there is no consent of the non-signatory. Under the *group of companies doctrine*, French courts have typically assessed the intention of the non-signatory to be bound by an arbitration agreement in light of objective behaviour of the non-signatory, in particular its role in the conclusion, performance, or termination of the contract. The OLG Koblenz also failed to discuss whether and how considerations such as good faith (*Treu- und Glauben*), legitimate expectations (*Vertrauensschutz*) and the appearance of legality (*Rechtsschein*), are different from the considerations deemed relevant under the *group of companies doctrine* or from the reasoning applied by the arbitral tribunal (which the OLG Koblenz qualified as 'non-legal').

The case has now been brought to the German Federal Court of Justice (BGH), which will have the delicate task of clarifying the *group of companies doctrine* under German law. It will also have to decide on the OLG Koblenz's rejection of the pre-emptive recognition and enforcement challenge, which deserves attention given that the court's decision is at odds with leading legal commentaries. So, stay tuned!

Authors

Dr. Nils Schmidt-Ahrendts
Partner

Hamburg
+49 40 1804 8293 0
schmidt-ahrendts@hanefeld-legal.com

Viktoria Schneider, MJur (Oxford)
Associate

Hamburg
+49 40 1804 8293 0
schneider@hanefeld-legal.com