

GAD No.	GAD 2024, 1	Decision date	1 June 2023	Res judicata: Yes
Court	Higher Regional Court of Berlin (Kammergericht, KG)			
Case No.	12 SchH 5/22			
Keywords	Contract termination, Russian sanctions, Russian Code of Commercial Procedure, declaration of admissibility of arbitral proceedings, anti-suit injunction, Hague Service Convention, public service			
Key legal provisions	Section 1032(2) German Code of Civil Procedure (ZPO)			

Berlin court confirms binding nature of arbitration agreement in sanctions-related dispute with Russian party

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On 1 June 2023, the Higher Regional Court of Berlin (KG) confirmed the admissibility of arbitral proceedings in circumstances where a sanctioned Russian party had breached the arbitration agreement by instituting proceedings before the Russian courts. The court also held that Russian parties can be served by public notice in Germany, as Russian courts currently refuse notice under the Hague Service Convention.

Facts

The applicant, a German company, entered into a contract with a Russian company, the respondent, that provided for the maintenance and repair of electrical equipment. The contract included a clause entitling the applicant to terminate the contract in case of sanctions. The contract also contained an arbitration clause providing for VIAC arbitration seated in Vienna, Austria; and a choice of German law (excluding the CISG) as the governing law.

When sanctions were imposed following Russia's invasion of Ukraine, the applicant terminated the contract. The respondent opposed the termination and instituted proceedings before the Russian courts. The St Petersburg Arbitrazh (i.e., Commercial) Court provided interim relief, ordering the applicant to continue its services. The respondent also applied to the Moscow Arbitrazh Court to obtain an anti-suit injunction, preventing the applicant from pursuing arbitral proceedings under the contract's arbitration agreement.

In response, the applicant sought an order from the Bavarian Supreme Court (BayObLG) under Section 1032(2) of the German Code of Civil Procedure (ZPO), declaring the arbitration agreement valid and arbitral proceedings admissible. The BayObLG denied its local jurisdiction and transferred the case to the Higher Regional Court of Berlin (KG).

The KG attempted to serve the respondent with the BayObLG's jurisdictional decision and the applicant's application by means of the Hague Service Convention. The Russian Ministry of Justice transferred the request to the Moscow Arbitrazh Court, which refused service. The KG therefore resorted to public service

by publishing the court documents on its local notice board. The respondent did not participate in the proceedings before the KG.

Key Findings

The KG granted the application based on Section 1032(2) ZPO and declared arbitral proceedings under the contract's arbitration agreement admissible.

Section 1032(2) ZPO is a unique provision of German arbitration law that is not based on the UNCITRAL Model Law. It provides that “[u]ntil 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.” The KG assumed jurisdiction and applied this provision although both the respondent and the seat of the (prospective) arbitration were abroad.

As a matter of jurisdiction, the KG applied Sections 1025(2), 1062(2) ZPO. Pursuant to these rules, the KG is the default court competent in arbitral matters if neither the seat nor the respondent is based in Germany. The KG also confirmed the applicant's need for legal protection (“Rechtsschutzbedürfnis”), as it considered that the Russian court proceedings affected the applicant's financial position in Germany.

On substance, the KG confirmed that the arbitration agreement (i) was valid and enforceable; and (ii) covered the subject matter of the dispute. With respect to validity, the KG mentioned a novel rule in the Russian Code of Commercial Procedure, according to which sanctioned Russian parties can unilaterally renounce arbitration agreements. However, the KG did not apply this rule as the respondent had not invoked it and the KG considered that it was for the arbitral tribunal to determine the rule's relevance. The KG also confirmed that the arbitration agreement was capable of being performed (“durchführbar”) despite the imposition of sanctions on the respondent, noting that VIAC had published guidelines on arbitrations involving sanctioned parties. The KG did not determine whether the Russian court proceedings (including the requested anti-suit injunction) impacted potential arbitral proceedings, as it considered that this was question for the (prospective) arbitral tribunal.

Comment

The KG's decision serves as a welcome reminder that Section 1032(2) ZPO contains what is in effect the German answer to an anti-suit injunction. It allows parties to seek confirmation of the validity, enforceability and scope of arbitration agreements before arbitral proceedings are instituted. This can be a useful countermeasure against parties ignoring valid arbitration agreements. The KG also confirmed the extra-territorial application of Section 1032(2) ZPO in circumstances where both the seat and the respondent were based abroad. The KG considered it sufficient that the applicant had its place of business and assets in Germany.

The decision is particularly welcome to parties facing Russian counterparties who invoke sanctions imposed on them as a basis to avoid an arbitration agreement (see also Kasolowsky/Wendler, IPRax 2024, 363, 365; Gerl, SchiedsVZ 2024, 218). The KG confirmed that the existence of sanctions does not generally make an arbitration agreement inoperative, and held that the Russian rule entitling parties to renounce arbitration agreements had no application. The decision could however have been better supported with respect to why the Russian rule did not affect the validity of the arbitration agreement. The KG's reference to the choice of a German *lex contractus* is not in itself sufficient to determine the law governing the validity of an arbitration agreement (see BGH, SchiedsVZ 2021, 97, at para. 53; Scherer/Jensen, IPRax 2021, 177, 185 f.).

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Finally, the KG addressed a question of considerable practical importance when it confirmed that Russian courts currently refuse service under the Hague Service Convention. Court documents can therefore be served on Russian parties by way of public notice in Germany (Section 185 No 3 ZPO).