VAN BAEL & BELLIS

Cologne Court Diverges from Berlin Court Judgment on the Admissibility of Intra-EU ICSID Arbitration Proceedings

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In a judgment handed down on 1 September 2022 (and made public in October 2022), a German Court, namely the *Oberlandesgericht Köln* or Higher Regional Court of Cologne **("Cologne Court")**, held that ICSID arbitration proceedings based on the Energy Charter Treaty ("**ECT**") and brought by RWE, a German energy company, against an EU Member State (**"intra-EU arbitration"**) are inadmissible under section 1032(2) of the German Code of Civil Procedure ("ZPO"). In doing so, the Cologne Court sought to apply the case-law of the Court of Justice of the European Union (**"CJEU")** (Cases C-284/16 Achmea, C-741/19, *Komstroy* and C-109/20 *PL Holdings*) which holds that an intra-EU arbitration agreement is incompatible with EU law and therefore invalid. The Cologne Court's decision diverges from an April 2022 judgment of the Kammergericht or Court of Appeal of Berlin (**"Berlin Court"**) which had denied an anti-arbitration application, concluding that section 1032(2) ZPO is inapplicable to ICSID arbitration proceedings.

BACKGROUND

In 2021, *RWE,* a German energy company, initiated ICSID arbitration proceedings against the Netherlands under the ECT (see ICSID ARB/21/4). RWE claimed that the Netherlands' decision to phase out electricity generation from coal by 2030 was a violation of the Netherlands' obligations under the ECT and sought to obtain compensation for their investments made in coal-fired power stations in the Netherlands.

In response to this investment claim, the Netherlands applied to the Cologne Court, pursuant to section 1032(2) ZPO, for a declaration that the arbitration proceedings are intra-EU arbitration proceedings and as such inadmissible. Section 1032(2) ZPO provides that an applicant may apply to the German Courts before a tribunal is constituted for an early determination as to whether arbitration proceedings are admissible. A similar procedural application under section 1032(2) ZPO had been made previously by Croatia and Raiffeisen Bank's investment arbitration was declared inadmissible by the Higher Regional Court of Frankfurt (with the decision upheld

Intra-EU Arbitration Proceedings are Inadmissible in accordance with EU Law

On the main question regarding the admissibility of RWE's intra-EU arbitration, the Cologne Court ruled in favour of the Netherlands. Relying on the CJEU's judgments in *Achmea, Komstroy* and *PL Holdings*, the Cologne Court held that there was no legal basis for RWE's arbitration proceedings since the CJEU in these cases had found the arbitration provision in Article 26(2)(c) ECT together with Article 26(3) and (4) of the ECT was incompatible with EU law insofar as intra-EU disputes are concerned. The Cologne Court noted the extensive reach of this caselaw, referring to the fact that even a Stockholm SCC Tribunal declined jurisdiction based on the CJEU's caselaw (see our previous client alert here). Moreover, the Cologne Court expressly rejected the argument that the CJEU caselaw only applied to arbitration proceedings before a tribunal seated in the EU.

The Court did not accept that section 1032(2) ZPO was inapplicable to ICSID arbitration proceedings or that Germany's international law obligations should trump EU law. Notwithstanding the nature of the ICSID arbitration system and principles of *Kompetenz-Kompetenz*, it was for the German Court (having accepted jurisdiction) to determine the admissibility of the arbitration proceedings based upon the validity or invalidity of the arbitration agreement under Article 26 ECT

Conclusion

Although the judgment of the Cologne Court may yet be appealed to the German Federal Court of Justice and may be reversed on appeal, the Cologne Court's 1 September judgment stands in strong contrast to the earlier judgment of the Berlin Court. In April 2022, the Berlin Court denied Germany's request, pursuant to Section 1032(2) ZPO, to declare Mainstream's ICSID arbitration proceedings against Germany inadmissible based on the intra-EU jurisdictional objection (see here for our earlier Client Alert).

For the Berlin Court in the Mainstream case, Germany's ratification of the ICSID Convention in 1969 committed it to international law obligations under the Convention, including the right of ICSID tribunals to determine their own jurisdiction and the exclusivity of ICSID proceedings. For the Berlin Court, neither section 1032(2) ZPO or the recent Achmea jurisprudence could undermine Germany's international law commitments under the ICSID Convention. Moreover, the decisions in the Raiffeisen case could be distinguished because they did not relate to an ICSID arbitration.

Since Germany has already appealed the Berlin Court's decision in Mainstream, the question of the applicability or non-applicability of section 1032(2) ZPO to ICSID arbitration proceedings is likely to be soon settled by the German Federal Court of Justice. Yet regardless of the ultimate outcome on this question of German procedural law, the Cologne Court's decision is further evidence that national courts in EU Member States generally consider themselves bound to follow and apply the CJEU's Achmea ruling and subsequent caselaw. Whilst arbitral tribunals (including those established under the ECT) will not necessarily decline jurisdiction based on the intra-EU jurisdictional objection (see our client alert on the ICSID tribunal's decision in Infracapital v. Kingdom of Spain here) or necessarily respect an anti-arbitration injunction issued by a national court, the general approach of national courts in EU Member States cannot in practice be ignored, particularly if it is likely that enforcement of any arbitral award will be sought within the EU.

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