

GERMAN ARBITRATION DIGEST

GAD No.:	GAD 2024, 5	Decision date:	17 June 2024	Res judicata: Yes
Court:	Higher Regional Court of Düsseldorf (OLG Düsseldorf)			
Case No. :	I-26 W 7/24 Case No. other instances: 9 O 133/24 (Regional Court of Düsseldorf, LG Düsseldorf)			
Keywords:	Anti-anti-suit-injunction, Russian court's anti-suit-injunction, international jurisdiction, access to justice			
Key legal provisions:	Sections 32, 1025(2), 1033 German Code of Civil Procedure (ZPO)			

No German anti-anti-suit injunction to protect foreign arbitration proceedings or assets abroad

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On 17 June 2024, the Higher Regional Court of Düsseldorf (OLG Düsseldorf) in preliminary injunction proceedings held that the foreign (Russian) court's anti-arbitration injunction related to non-German arbitration proceedings does not violate the German applicants' access to justice. Due to the principles of territoriality and state sovereignty, German courts are not competent to issue an anti-anti-suit injunction to protect foreign arbitral proceedings or assets abroad.

Facts

The dispute relates to a long-term gas supply contract between parties seated in Germany (applicants) and Russia (respondent). The place of performance is in Germany. The contract is governed by Swiss law and contains an arbitration clause. The arbitration clause stipulates that disputes are to be decided by an arbitral tribunal based in Stockholm, Sweden. Respondent stopped supplying gas in August 2022. In November 2022, the German applicants initiated arbitral proceedings in Stockholm.

On 13 March 2024, upon respondent's request, a Russian court rendered an anti-arbitration injunction prohibiting the applicants from continuing the arbitral proceedings. The injunction immediately was enforceable, irrespective of the applicants' appeal. Therefore, the applicants requested the Regional Court of Düsseldorf (LG Düsseldorf) to issue a worldwide anti-suit injunction against respondent. The applicants argued that they intend to pursue the arbitration proceedings despite the Russian anti-arbitration injunction. The applicants were concerned by the potential risk that the respondent's anti-arbitration injunction were to be recognized and enforced against the applicants in other countries.

On 17 May 2024, the LG Düsseldorf dismissed the application. The court held that German courts lack international jurisdiction and it lacked local jurisdiction. The applicants submitted an appeal against the decision to the OLG Düsseldorf.

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Key findings

The OLG Düsseldorf dismissed the appeal. Contrary to the LG Düsseldorf, the court confirmed international and local jurisdiction pursuant to Section 32 German Code of Civil Procedure (ZPO). It noted that the arbitration agreement does not provide for exclusive jurisdiction of the arbitral tribunal for interim measures. In order to safeguard the parties' interest of legal protection, applicants can seek interim measure from the state courts in parallel. The court further held that by virtue of Section 32 ZPO, German courts have international jurisdiction. As Section 32 ZPO governs tort claims, the court's jurisdiction was limited to hear claims of such nature. The court had no jurisdiction to examine contractual claims. Sections 1033, 1025(2) ZPO did not establish any additional jurisdiction of the German courts in Düsseldorf because the contractual place of performance has been in Weiden/Oberpfalz.

The OLG Düsseldorf questioned the applicants' need for legal protection, an admissibility criterion for the legal dispute. To date, German courts had issued protective orders related to foreign litigation limited to cases where material claims for interim measures had been affected. However, the court did not rule on this question as the applicants' request was in any case unfounded for other reasons.

The OLG Düsseldorf left open the question of whether an anti-suit injunction can be issued at all under German law. An anti-suit injunction is generally inadmissible under German and European law. In any case, the applicants were not entitled to interim measures regarding worldwide prohibition of litigation or enforcement. The court held that the Russian court's anti-suit injunction did not violate the applicants' rights protected by Section 823 German Civil Code (BGB).

So far, anti-anti-suit injunctions had only been considered admissible to protect parties' interest in two constellations: (i) in patent infringement cases, and (ii) to prevent potential violations of access to justice. In the present case, the OLG Düsseldorf could not find a violation of said principles. Contrary to a decision of the Higher Regional Court of Hamm (OLG Hamm) regarding a violation of access to justice, the court argued that access to justice is only guaranteed in relation to official state institutions. The Russian court's anti-suit injunction did not affect any German state court proceedings. In consequence, the court rejected violation of access to justice.

Finally, the court held that it would be contrary to the principle of territoriality and state sovereignty if German courts were to rule on foreign proceedings or regarding the protection of assets located in another state.

Comment

The decision should not be misunderstood as a decision against the protection of arbitral proceedings. There is no (positive or negative) hint in the decision that the OLG Düsseldorf does not acknowledge the arbitration agreement between the parties or that this agreement might be threatened by the Russian court's anti-suit injunction. The decision solely states that German courts cannot issue a worldwide cease and desist order regarding the protection of arbitral proceedings or a possible enforcement against assets situated in a foreign country.

The decision is convincing. However desirable any German court's anti-anti-suit injunction might be, the protection of arbitral proceedings and assets against enforcement measures is a matter for the state concerned. Even if that means that multiple court proceedings in several different states might be necessary, a German court's injunction regarding worldwide measures of the opponent would not provide effective

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protection anyway. This applies in particular to the states envisaged by the applicants at hand, i.e. countries that entered into recognition and enforcement agreements with the Russian Federation.