GAD No.:	GAD 2024, 7	**Decision date:**	6 November 2023	**Res judicata:** Yes
Court:	Higher Regional Court of Berlin (Kammergericht, KG)			
Case No. :	12 SchH 9/22			
Keywords:	Inadmissibility of intra-EU investment arbitration, declaration on the admissibility of arbitration by German courts, scope of application of Section 1032(2) German Code of Civil Procedure (ZPO)			
Key legal provisions:	Section 1032(2) German Code of Civil Procedure (ZPO) Section 1025(2) German Code of Civil Procedure (ZPO) Article 26 Energy Charter Treaty (ECT) Article 41(1) ICSID Convention Article 351 Treaty on the Functioning of the European Union (TFEU)			

Higher Regional Court of Berlin (KG) confirms inadmissibility of intra-EU arbitration proceedings under the Energy Charter Treaty and broad scope of application of Section 1032(2) German Code of Civil Procedure (ZPO)

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On 6 November 2023, the Higher Regional Court of Berlin (KG) declared an ICSID arbitration initiated by several German and Spanish investors against Spain within the context of the Energy Charter Treaty (ECT) inadmissible. In reliance on the European Court of Justice's (ECJ) decisions in *Achmea* and *Komstroy*, the court found that the arbitration was inadmissible because there was no valid arbitration agreement, as the arbitration clause contained in the ECT cannot be applied in an intra-EU context.

The court held that the applicant could rely on Section 1032(2) ZPO to seek a declaration of inadmissibility (even though both the applicant and several of the respondents were not domiciled in Germany) because assets in Germany could serve as targets for the enforcement of a potential (cost) award. In deviation from its previous case law – and in line with the case law of the Federal Court of Justice (BGH) –, the court found that a declaration under Section 1032(2) ZPO can also be sought with respect to an ICSID arbitration, if it concerns an intra-EU investment arbitration.

Facts

On 9 March 2022, the respondents filed a request for arbitration against the applicant, Spain, based on Article 26 ECT. With their request of arbitration the respondents sought damages under Article 10 ECT arguing that the applicant, Spain, set incentives for investments into the Spanish energy market, but then, through a sudden reform of the Spanish Energy Act, significantly curtailed the expected feed-in tariffs.

Before the constitution of the arbitral tribunal, the applicant filed an application for a declaration of inadmissibility before the Higher Regional Court of Berlin (KG).

In response to the applicant's application, the respondents filed an application to the arbitral tribunal asking it to interdict the applicant's application. In line with Article 47 of the ICSID Convention, the arbitral tribunal recommended that the applicant withdraw or discontinue its application before the Higher Regional Court of Berlin (KG).

Key findings

The court held that the applicant's application under Section 1032(2) ZPO was admissible and had merit.

The court held that it had international jurisdiction to decide on the application pursuant to Section 1025(2) ZPO. The court held that even though the provision could not be applied directly to the case, as ICSID arbitrations are delocalised arbitrations with no specific place of arbitration, the provision must be applied by way of an analogy in accordance with the BGH's decision of 23 July 2023 (I ZB 43/22, juris).

The court found that Article 41 of the ICSID Convention does not stand in the way of it deciding on the admissibility of the arbitration. Pursuant to Article 41(1) of the ICSID Convention, the arbitral tribunal itself is entitled to make the final call on whether it has jurisdiction, which generally stands in the way of state courts rendering decisions on the jurisdiction of the arbitral tribunal. However, the court held that because of the primacy of EU law, the provision cannot be applied within the context of an intra-EU arbitration, and that – by contrast – Section 1032(2) ZPO must be applied in order to ensure the proper application of EU law at the earliest possibility, in line with the principle of "effet utile".

Finally, the court also found that the applicant had a legitimate interest ("Rechtsschutzbedürfnis") in obtaining a declaration of inadmissibility under Section 1032(2) ZPO. According to the court, such a legitimate interest in principle already exists simply because the applicant is a party in the arbitration, which it seeks to have declared inadmissible. The court left the question of whether or not a further connection to Germany ("Inlandsbezug") is necessary open, holding that such a nexus was in any case given. The court argued that as some of the respondents were based in Germany, the applicant could try to enforce a potential (cost) decision rendered in its favour in Germany. The court held that because the arbitration was launched jointly by the German and Spanish respondents through one joint request for arbitration, Spain as the defendant had an interest in having the question of the admissibility of this arbitration decided jointly for all respondents. Finally, as in any case, the court argued that a sufficient nexus was also given with respect to Spanish respondents, because it could not be excluded that if the respondents were to ultimately prevail in the arbitration, they would attempt to enforce an arbitral award by targeting Spanish assets in Germany.

Last but not least, the court found that the application also had merit and that the arbitration was indeed inadmissible because the arbitration agreement contained in Article 26 ECT could not be applied in an intra-EU context. In line with the ECJ's findings in *Achmea* and *Komstroy*, the court held that Articles 273, 344 of the Treaty on the Functioning of the European Union (TFEU) stand in the way of the validity of such an arbitration agreement within the context of an intra-EU investor-state dispute.

Comment

The decision has confirmed German courts' willingness to serve as a forum for parties, in particular States, seeking an up-front declaration that an intra-EU investment provision is inadmissible. German courts' broad interpretation of the scope of application of Section 1032(2) ZPO makes the provision an interesting tactical tool for parties faced with an arbitration which they deem to be inadmissible, even if the dispute has only a limited nexus to Germany.