

Crossing Legal Frontiers?

German *Kammergericht* Binds Russian Company to Arbitration Agreement

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Companies from Western countries increasingly find that their (sanctioned) contractual partners from Russia are trying to circumvent arbitration clauses by resorting to Russian courts. In an order of 1 June 2023 (12 SchH 5/22), the *Kammergericht* (i.e., the Higher Regional Court of Berlin) shed light on topics surrounding these issues, affirming the admissibility of arbitral proceedings even though the Russian company had already lodged a claim in Russia. In addition, the *Kammergericht* provided clarifications on the service of legal documents when Russian authorities refuse to serve documents under international conventions. Important conclusions can be drawn from this decision for future proceedings, both for procedural and substantive issues.

In a dispute with a Russian contracting party, German company turns to the *Kammergericht*

The dispute underlying the decision was related to a contract between a German and a Russian company that contains an arbitration clause. That clause provides for dispute settlement pursuant to the Vienna International Arbitral Centre's Rules of Arbitration (so-called Vienna Rules) and declares Vienna as the place of arbitration.

After the illegal Russian invasion of Ukraine and the subsequent imposition of EU sanctions, the German company terminated the contract invoking a sanctions clause. The Russian company objected and sought remedy before the Saint Petersburg and the Moscow Arbitrazh Courts. The Russian Arbitration Procedure Code (*RAPC*) allows Russian persons or companies, who are subject to foreign sanctions, to bring an action before the Russian Arbitrazh Courts in order to prohibit the other party from bringing an action before a foreign court or arbitration tribunal. Despite the similarity in names, these Arbitrazh Courts are no arbitral tribunals or courts specialised in arbitration but comparable to state commercial courts.

The German company turned to the *Kammergericht* and requested a determination that the disputes arising from the contract were subject to arbitral proceedings according to the Vienna Rules and not to court proceedings (in Russia). Such an application is possible under Section 1032 (2) of the German Code of Civil Procedure (*Zivilprozessordnung* – *ZPO*) which provides that, until an arbitral tribunal has been formed, a request may be filed with the court to have it determine the (in)admissibility of arbitral proceedings.

***Kammergericht* affirms jurisdiction and determines admissibility of arbitral proceedings**

The claimant's application turned out successful. First of all, the *Kammergericht* assumed its competence even though Vienna was the chosen place of arbitration. It held that it was competent for applications for determining the (in)admissibility of arbitral proceedings, even if the place of arbitration is located abroad.

Next, the *Kammergericht* had to overcome difficulties regarding the service of legal documents to the Russian respondent. It had attempted to transmit the documents according to the Hague Service Convention via the Russian Ministry of Justice which had forwarded the documents to the Moscow Arbitrazh Court. The latter, however, had declined to transmit the documents to the respondent. In turn, the *Kammergericht* pinned the relevant documents to its own bulletin board and, after a month had passed, considered the service as duly effected, in the form of a service by publication (Sections 185-188 ZPO).

Regarding the merits of the case, the *Kammergericht* declared that arbitration proceedings are admissible for disputes arising from the contract between the German claimant and the Russian respondent, to the exclusion of state courts, such as the Russian Arbitrazh Courts seized by the Russian company. This applied to all contractual disputes, including those that are already pending before state courts.

Decision could foreshadow what future court proceedings with Russian counterparties may look like

In principle, respondents are not obliged to participate in German court proceedings. However, the aim of dispute resolution becomes a lot more difficult if one of the parties to the dispute declines to cooperate. This recent decision shows what kinds of procedural issues can arise when a Russian party decides to refrain from court proceedings in another country.

For example, considering the difficulties that the *Kammergericht* already had with trying to transmit the court documents to the Russian respondent, issues with gathering evidence in Russia or from Russian parties are to be expected. Taking evidence involves much more cooperation between authorities than the comparably simpler service of documents. If Russian authorities already declined to transmit documents, it can be expected that they will also decline to cooperate in other regards.

***Kammergericht* does not issue anti-suit injunctions**

The decision by the *Kammergericht* in the present case should not be confused with an anti-suit injunction. German civil procedural law only allows a party to file a request with the court to have it determine the (in-)admissibility of arbitral proceedings. The court will then assess whether the arbitration clause is valid and enforceable and if the subject

matter of the arbitration falls within the subject matter of the arbitration clause.

While this mechanism as well as anti-suit injunctions ultimately aim at upholding the parties' agreement to arbitrate, German courts usually do not grant anti-suit injunctions in the context of arbitral proceedings. In their view, such injunctions could infringe on the jurisdiction and sovereignty of foreign courts. Moreover, anti-suit injunctions are generally considered a violation of the Brussels I Regulation under EU law.

In addition, their implications differ considerably: breaching an anti-suit injunction can lead to the sequestration of assets, heavy fines or even prison time. On the contrary, if a party disregards a German court's determination that arbitral proceedings are admissible, they do not have to fear immediate consequences. The determination "only" has an effect in later judicial proceedings, especially in annulment proceedings based on the invalidity of the arbitration agreement.

Anti-suit injunctions in Russia involving sanctioned persons are on the rise

The picture in Russia is very different. Article 248 RAPC allows sanctioned Russian persons and companies to bring an action before the Arbitrazh Courts to prohibit the other party from initiating litigation or arbitration. While this rule was already introduced in 2020, there has been a noticeable increase in proceedings in Russian Arbitrazh Courts since February 2022.

As soon as a Russian sanctioned person is involved, the Arbitrazh Court will assume jurisdiction, regardless of the existence of an arbitration agreement and of the law governing the arbitration clause or the contract in question. Many of these applications have been successful, with the Arbitrazh Courts finding that Western sanctions automatically obstruct Russian parties' access to justice in foreign jurisdictions. Usually, the Arbitrazh Courts have also set penalties for breaching such injunctions. Accordingly, non-Russian companies are facing enormous penalties. Although these penalties can only be enforced in Russia, several Western companies still have considerable assets there. Among these are certain Western banks such as Deutsche Bank or UniCredit, which have recently hit the news when Russian courts froze their assets.

14th Package of Russia Sanctions Includes Responses to Article 248 RAPC

The EU has responded to this situation with the 14th sanctions package of 24 June 2024 in two respects: First, amending Regulation (EU) 2024/1745 introduced a new Article 5ab to Regulation (EU) No 833/2014, which creates a threat to Russian individuals or entities that initiate claims in Russian courts under Article 248 RAPC or similar laws in connection with any contract or transaction that was affected by EU sanctions: The Council of the

EU may decide to list these persons in Annex XLIII to Regulation (EU) No 833/2014, subjecting them to a broad transaction ban, thus excluding them from any business with the EU. Currently, that Annex, however, is still empty.

Second, the newly included Article 11a of amended Regulation (EU) No 833/2014 allows EU persons and entities to seek compensation in EU member state courts for any damages, including legal costs, incurred due to claims filed in foreign courts. This applies to cases related to contracts or transactions affected by the Russia Sanctions, provided that the affected EU individuals lack effective legal recourse in the foreign jurisdiction. Without explicitly referring to the cases before the Arbitrazh Courts, the new Article 11a seems to specifically address these proceedings.

Anti-anti suit injunctions as the future to enforce arbitration agreements?

The *Kammergericht* decision clearly shows that even a globalised world with cross-border contracts and international dispute resolution mechanisms can come up against (national) borders. This raises the question of how to deal with Russian contractual partner that no longer honour arbitration agreements. Admittedly, German courts cannot prevent obstacles being placed in the way of the settlement of transnational disputes by the Arbitrazh Courts. However, they have tools at their disposal that can help with promoting the effective enforcement of arbitration agreements. In addition to the declaratory proceedings initiated in this case pursuant to Section 1032(2) ZPO, they can also grant so-called anti-anti-suit injunctions.

As the name implies, this is an injunction obtained by a court in interim proceedings that is directed against an anti-suit injunction. The first of these injunctions was ordered by the Munich Higher Regional Court in a patent law case (judgment of 2 October 2019, case no. 21 O 9333/19) and based on principles of torts law: According to the Court, an anti-suit injunction could potentially infringe on the claimant's property-like rights to the patents in that case. Accordingly, the infringer was ordered to cease applying for an anti-suit injunction in the US. It is quite possible that a German court might come to the same conclusions in a case where one of the contracting parties tries to obtain an anti-suit or an anti-arbitration injunction from the Russian courts as this could also potentially infringe on the German counterparty's rights. It remains to be seen if and when German courts are called upon to deliver these injunctions.

The longer the sanctions against Russia last and the more business relationships are broken as a result, the more court and arbitration proceedings are likely to arise. The decision of the *Kammergericht* is an example of some of the procedural and substantive hurdles that can arise in these situations. We continuously monitor the developments in EU sanctions law. BLOMSTEIN is at your disposal at any time to answer questions on their content and implications for dispute resolution through arbitration and litigation. Please do not hesitate to contact [Christopher Wolters](#) or [Tobias Ackermann](#) in case of queries.
