Upstream national legal protection possible against intra-EU investor-State ICSID arbitral proceedings on the basis of the Energy Charter Treaty

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Decisions of 27 July 2023 - I ZB 43/22, I ZB 74/22 and I ZB 75/22

The First Civil Panel of the Federal Court of Justice (BGH, Bundesgerichtshof), competent, among other matters, for legal disputes concerning arbitration agreements, has ruled in three cases that European Union (EU) Member States are allowed to use upstream national judicial protection against arbitral proceedings initiated by investors from other Member States on the basis of the Energy Charter Treaty at the International Centre for Settlement of Investment Disputes (ICSID) under the ICSID Convention of 18 March 1965.

Facts and Circumstances and Previous Proceedings in case I ZB 43/22
The applicant is an EU Member State that has amended its legislation in the field of wind and solar energy. As a result, the respondents, who belong to a group of companies in another Member State, see this as damaging their relevant investments in the EU Member State to the amount of a three-digit million figure. They therefore initiated investor-State arbitral proceedings with the ICSID on the basis of the arbitration clause contained in Article 26 of the Energy Charter Treaty. The applicant thereupon addressed a request to Berlin Higher Regional Court to determine the inadmissibility of these arbitral proceedings.

Berlin Higher Regional Court denied the request under section 1032 (2) of the Code of Civil Procedure (Zivilprozessordnung, ZPO) as inadmissible. It held that the norm was not applicable to arbitral proceedings under the ICSID Convention, which was a closed system of rules.

Facts and Circumstances and Previous Proceedings in the parallel cases I ZB 74/22 and I ZB 75/22
The applicant in both proceedings is the same EU Member State. It decided to phase out electricity generation from coal by 2030. As a result, the respondent in proceedings I ZB 74/22 and the respondent in proceedings I ZB 75/22, which have their seat in another

Member State, both saw damage to their investments in a coal-fired power station located in the EU Member State amounting to a three-digit million figure (in case I ZB 74/22) and a one-digit billion figure (in case I ZB 75/22). Each of them therefore initiated investor-State arbitral proceedings with the ICSID on the basis of the arbitration clause contained in Article 26 of the Energy Charter Treaty. The applicant in each case thereupon submitted a request to Cologne Higher Regional Court to determine the inadmissibility of these arbitral proceedings (application under no. 1) and of any arbitral proceedings between the respective parties on the basis of the arbitration clause in the Energy Charter Treaty (application under no. 2).

Cologne Higher Regional Court admitted the requests. In particular, contrary to the legal opinion of Berlin Higher Regional Court, Cologne Higher Regional Court held that they were admissible, taking into account overriding EU law. The requests also had merit. According to the case law of the Court of Justice of the European Union, in particular in Achmea (C-284/16) and Komstroy (C-741/19), the arbitration clause is ineffective in intra-EU investment disputes under Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU). In case I ZB 74/22, the respondent limited its legal complaint to the rejection, after a partial withdrawal, of the application under no. 2.

Ruling of the Federal Court of Justice
The Federal Court of Justice set aside the decision of Berlin Higher Regional Court in case I ZB 43/22 and established the inadmissibility of the ICSID arbitral proceedings initiated by the respondents. In case I ZB 75/22, the Federal Court of Justice confirmed the determination of the inadmissibility of the ICSID arbitral proceedings initiated by the respondent (application under no. 1). In contrast, the Federal Court of Justice set aside the ruling of Cologne Higher Regional Court in cases I ZB 74/22 and I ZB 75/22 with regard to the application under no. 2 and rejected this application as inadmissible in each case.

In essence, the Federal Court of Justice substantiated its rulings as follows:
The German courts have international jurisdiction for arbitral proceedings which - as in the present three cases under the ICSID Convention - do not have a place of arbitration, for a request under section 1032 (2) ZPO by analogous application of section 1025 (2) ZPO.

It is true that a request under section 1032 (2) ZPO to determine the inadmissibility of arbitral proceedings is not admissible in principle at least from the time of registration of ICSID arbitral proceedings on account of the overriding competence of the arbitral tribunal to be the judge of its own competence under Article 41 (1) of the ICSID Convention.

Exceptionally, however, this blocking effect of ICSID arbitral proceedings regarding proceedings before national courts does not preclude the admissibility of an application under section 1032 (2) ZPO in the special constellation in this case of intra-EU investor-State arbitral proceedings under the ICSID Convention on account of the primacy of application of European Union law - also vis-à-vis international law - taking into account the principle of effectiveness.

In an intra-EU context, a downstream review of an ICSID arbitral ruling by a national court is mandatory in accordance with the case law of the Court of Justice of the European Union for reasons provided for in EU law and contrary to the system of rules of the ICSID Convention. In an intra-EU context, such a review may be pre-empted bindingly by an upstream national court review facilitated by the German legislature in section 1032 (2) ZPO. Determination of inadmissibility of the arbitral proceedings under section 1032 (2) ZPO prevents the (later) declaration of enforceability of ICSID arbitral proceedings in Germany due to the binding effect of this ruling.

The application (under no. 1) in accordance with section 1032 (2) ZPO also has merit. The respective arbitral proceedings are inadmissible due to the lack of an effective arbitration agreement. According to the case law of the Court of Justice of the European Union, the arbitration clause contained in Article 26 (2) (c), (3) and (4) of the Energy Charter Treaty violates EU law for intra-EU investor-State arbitration, precluding the conclusion of an effective arbitration agreement. Due to its incompatibility in particular with Articles 267 and 344 TFEU, there is a lack of effective consent, and thus of an offer by the applicant EU Member States to conclude an arbitration agreement.

A reference to the Court of Justice of the European Union under Article 267 (3) TFEU is not required. The Court's rulings clearly indicate that its case law concerning the incompatibility with EU law of the possibility to seize an arbitral tribunal opened in investment protection agreements between Member States is also applicable to arbitral proceedings under the ICSID Convention. With its rulings on the ineffectiveness of arbitral proceedings in bilateral and multilateral investment protection agreements, the Court has also not acted ultra vires.

The application submitted under no. 2 in the proceedings before Cologne Higher Regional Court to determine the inadmissibility of arbitral proceedings of any kind between the parties on the basis of Article 26 (3) and (4) of the Energy Charter Treaty is inadmissible. Insofar as the applicant pre-emptively wishes clarification that the respondent cannot bring about an effective arbitration agreement by a possible future acceptance of its "standing offer" in accordance with Article 26 (3) of the Energy Charter Treaty, this question does not concern a specific arbitration agreement potentially resulting in arbitral proceedings, but only a potential arbitration agreement and is therefore not covered by the review of a request under section 1032 (2) ZPO.

Lower Court in case I ZB 43/22

Berlin Higher Regional Court – Decision of 28 April 2022 - 12 SchH 6/21

and

Lower Court in case I ZB 74/22

Cologne Higher Regional Court – Decision of 1 September 2022 - 19 SchH 14/21

and

Lower Court in case I ZB 75/22

Cologne Higher Regional Court - Decision of 1 September 2022 - 19 SchH 15/21

Relevant legal provisions:

Section 1025 (2) ZPO

The provisions of sections 1032, 1033 and 1050 are to be applied also in those cases in which the place of arbitration is located abroad or has not yet been determined.

Section 1032 (2) ZPO

Until 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.

Article 26 of the Energy Charter Treaty

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
a) to the courts or administrative tribunals of the Contracting Party to the dispute;
b) in accordance with any applicable, previously agreed dispute settlement procedure, or
c) in accordance with the following paragraphs of this Article.
(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article. ...
(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:
a) i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nations of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the “ICSID Convention“), if the Contracting Part of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; ...
(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:
i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules; ...
(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law. ...

Article 41 (1) of the ICSID Convention
The Tribunal shall be the judge of its own competence.

Article 267(1) TFEU

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

Article 344 TFEU

Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

Karlsruhe, 27. July 2023