Freshfields Bruckhaus Deringer

Sanctioned Russian parties breaching arbitration agreements: German courts confirm availability of extra-territorial anti-suit relief

I. Introduction

On 3 September 2024, the Berlin Higher Regional Court (the ***Berlin Court***) afforded a German subsidiary of a European industrial company a novel remedy against a Russian sanctioned party, which had obtained a judgement from the Russian courts in breach of an arbitration agreement. In its decision (currently still confidential), the Berlin Court upheld the parties' agreement and found that arbitration is the sole, proper forum for the dispute between the parties. Furthermore, it reaffirmed that arbitration agreements are enforceable and exclude recourse to the ordinary courts of law, including the Russian courts – even in situations to entities subject to EU and Swiss sanctions.

The decision is in line with the Berlin Court's earlier ruling of June 2023 (case no 12 SchH 5/22) – the first ever German court decision to use the declaratory relief mechanism in Section 1032(2) of the German arbitration law as a shield against sanctioned Russian parties trying to pursue claims notwithstanding the fact that they are bound by arbitration agreements. Such declaratory relief can thus serve as an important defence against the enforcement of Russian judgments that are issued in disregard of the arbitration agreement – at least outside Russia itself.

The latest ruling also goes a significant and important step further than the initial 2023 decision with respect to service in Russia: In its new decision, the Berlin Court permitted service via public notice (ie publication of the application form on a public notices board at the courts). It dispensed with the Hague Service Convention on account of the fact that the Convention route is no longer legally effective as concerns Russian parties. By contrast, in the previous decision, the Berlin Court had only allowed service via public notice after the Russian authorities had refused service under the Hague Service Convention.

II. The facts underlying the new decision of the Berlin Court

The dispute between the parties arose out of a contract governed by Swiss law and containing an arbitration agreement with the seat in Zurich and under the Swiss Arbitration Rules. In breach of the arbitration agreement, the Russian company initiated proceedings before the Arbitrazh State Court in Moscow (a type of state commercial court). In order to establish jurisdiction of the state courts, the Russian entity invoked Section 248.1 of the Russian Arbitrazh State Court Procedural Code. Under this Russian provision, sanctioned Russians entities who allegedly face "*obstacles to access to justice*" before foreign arbitral tribunals are supposedly not bound by arbitration agreements. Thus, as a matter of Russian law, such allegedly disadvantaged Russian parties are not bound by their arbitration agreement and may pursue their claims before the Russian Arbitrazh State Courts. In addition, the Russian party may also apply to the Russian courts to restrain arbitration proceedings abroad via Russian anti-suit injunctions. Such injunctions mean (if they are granted) that the Russian courts are permitted to impose sanctions and penalties on the German applicant if it proceeds with the arbitration.

III. The key aspects of the new decision of the Berlin Court

In its decision, the Berlin Court held that arbitration is the (sole) proper forum, excluding the jurisdiction of state courts. This decision confirms – in line with the June 2023 ruling – the extra-territorial reach of Section 1032(2) of the German arbitration law (**1.**) and the enforceability of arbitration agreements against sanctioned Russian parties (**2.**). In addition, the Berlin Court also permitted service via public notice in Germany, thus recognising that the Hague Service Convention is no longer effective as against Russian parties (**3.**).

1. Extra-territorial jurisdiction

The decision confirmed the unique extra-territorial reach of the declaratory relief mechanism under Section 1032(2) of the German arbitration law. It reiterated that the German courts may have jurisdiction even where the seat of the arbitration is located outside Germany. In its ruling, the Berlin Court found a sufficient nexus to Germany to be present despite the seat of the arbitration being Zurich and the choice of Swiss substantive law. The Berlin Court based this on the following considerations: The applicant entity was a German company and it is potentially affected by the Russian proceedings due to the enforcement risks at its registered seat in Germany.

The Berlin Court did not express any opinion as to what else may constitute a sufficient nexus to Germany for purposes of establishing jurisdiction over the application.

2. Enforceability of arbitration agreements against sanctioned Russian party

The Berlin Court also ruled that *"[a]s a matter of principle, the parties' right of access to arbitration must be ensured despite sanctions*". Siding with the applicant's arguments, the Berlin Court reiterated that EU and Swiss Sanctions allow sanctioned parties access to the (legal) services necessary to enable them to participate effectively in arbitration proceedings.

In addition, the Berlin Court also referred to Article 177(2) of the Swiss Private International Law Act. This provision expressly stipulates that a state-owned or state-controlled company – such as the defendant – cannot rely on its own law to challenge its capacity to enter into arbitration agreements and participate in arbitration proceedings. There is therefore no excuse for sanctioned Russian entities to renounce arbitration agreements.

3. Service via public notice

The Berlin Court is also remarkable in another respect. It accepted that the Hague Service Convention is no longer effective when it comes to serving Russian parties. In particular, it held that attempting service under the Convention could be dispensed with *"[i]n view of the anyway lengthy processing times for a request for service [in Russia] of over a year and the specific risk of a refusal of service"* as *"it cannot be expected that formal delivery [under the Hague Convention] will be successful within a reasonably acceptable period for the applicant."* The Berlin Court further took into account that the Russian counterparty had already issued an application in Russia to restrain arbitration proceedings abroad and that the Russian authorities had refused to effect service on Russian parties in similar previous cases.

Against that background, the Berlin Court allowed for service of the application form on the Russian party to be effected via public notice. Service was thus deemed to have been effected after the application form had been physically displayed on the Berlin Court's public notices board for one month. The Berlin Court thus provided practical protection against current obstacles to effect service to a Russian party in accordance with the Hague Service Convention.

IV. Outlook

The declaratory relief granted by the Berlin Court opens up a new avenue for parties who are threatened with or facing state court proceedings in breach of arbitration agreements. As the Berlin Court has established that a German company has a sufficient nexus for it to exercise its jurisdiction, the next cases will likely be concerned with whether non-German entities also have a sufficient nexus. This avenue will be of particular interest to parties who cannot resort to anti-suit injunctions from common law jurisdictions (as in the Berlin Courts decision due to the lack of a UK nexus).

The Freshfields team making the application on behalf of the applicant to the Berlin Court was led by

Freshfields Bruckhaus Deringer

Frankfurt International Arbitration partners **Boris Kasolowsky** and **Carsten Wendler** with associates **Leane Meyer** and **Hager Sameh**.

Freshfields Bruckhaus Deringer

CONTACTS

Boris Kasolowsky
Partner, Frankfurt
T +49 69 27 30 87 47
E boris.kasolowsky@freshfields.com

Carsten Wendler
Partner, Frankfurt
T +49 69 27 30 82 07
E carsten.wendler@freshfields.com

Daniel Schnabl
Partner, Frankfurt
T +49 69 27 30 87 97
E daniel.schnabl@freshfields.com

Mijke Sinninghe Damsté
Partner, Amsterdam
T +31 20 485 7291
E mijke.sinninghedamste@freshfields.com

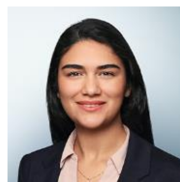
Noah Rubins KC
Partner, Paris
T +33 1 44 56 29 12
E noah.rubins@freshfields.com

Eric Leikin
Partner, Vienna
T +43 1 515 15 520
E eric.leikin@freshfields.com

Igor Gerber
Partner, Frankfurt
T +49 69 27 30 86 86
E igor.gerber@freshfields.com

Alison Kirby-Harris
Partner, London
T +44 20 7716 4227
E alison.kirby-harris@freshfields.com

Leane Meyer
Associate, Frankfurt
T +49 69 27 30 82 71
E leane.meyer@freshfields.com



Hager Sameh
Associate, Frankfurt
T +49 69 27 30 85 90
E hager.sameh@freshfields.com

freshfields.com

This material is provided by the international law firm Freshfields Bruckhaus Deringer LLP (a limited liability partnership organised under the laws of England and Wales authorised and regulated by the Solicitors Regulation Authority (SRA no. 484861)) and associated entities and undertakings carrying on business under, or including, the name Freshfields Bruckhaus Deringer in a number of jurisdictions, together referred to in the material as 'Freshfields'. For further regulatory information please refer to www.freshfields.com/support/legal-notice.

Freshfields Bruckhaus Deringer has offices in Austria, Bahrain, Belgium, China, England, France, Germany, Hong Kong, Italy, Japan, the Netherlands, Russia, Singapore, Spain, the United Arab Emirates, the United States of America and Vietnam.

This material is for general information only and is not intended to provide legal advice.

© Freshfields Bruckhaus Deringer LLP 2024