* Higher Regional Court Berlin – GCPR Section 1032 (2)
(Order of 3 September 2024 – 12 SchH 2/24)

1. An application for a declaration of admissibility of arbitration proceedings pursuant to Section 1032 (2) GCPR is in principle permissible even if the place of arbitration is abroad and foreign substantive law applies to the contract at issue. A need for legal protection arises for applicant companies with their registered seat in Germany because they are threatened with potential domestic enforcement (paras. 2, 14, 18).

2. Serving a Russian party by way of public notice is permissible if informal notice of the party's authorised representative by email remains without response and where formal service in Russia currently does not promise success based on the individual circumstances of the case pursuant to Section 185 No. 3 GCPR (paras. 6, 19).

3. Arbitration proceedings in Switzerland are not impracticable because a party might be subject to sanctions due to the Russian war of aggression against Ukraine. The respective sanction regimes in Switzerland and the EU uphold the right of defence in judicial and arbitration proceedings also vis-à-vis sanctioned parties (para. 26).

(head note by Dr. *Boris Kasolowsky* and Dr. *Karsten Wendler,* Frankfurt a.M.)

Reasons:

[1] I. The applicant seeks a declaration of the admissibility of arbitration proceedings pursuant to Section 1032 (2) German Civil Procedure Rules (GCPR).

[2] In a contract […], the applicant undertook to […] the defendant. […] The parties agreed that the substantive law of Switzerland would apply. According to […], all disputes were to be settled by way of arbitration in accordance with the UNCITRAL Arbitration Rules with the place of arbitration in Zurich […]. Reference is made to […] for details of the contractual provisions.

[3] In […], the applicant [correctly: defendant] initiated proceedings against the applicant before a state court in Moscow and requested repayment of the remaining advance payment in the amount of […], citing a rule in Art. 248 of the APO (*Arbitrazh* – Commercial – Procedure Code of the Russian Federation), according to which a state court could decide despite the arbitration agreement. In […], the defendant withdrew from arbitration proceedings also initiated by the defendant (Notice of Arbitration dated […]) with a declaration to the applicant. The defendant conducted both proceedings through its authorised representative, lawyer […]. The State *Arbitrazh* Commercial Court of the City of Moscow upheld the defendant's claim, rejecting the applicant's objection to jurisdiction, in a ruling dated […]. Reference is made to the reasons of the judgment, which are available in English translation as […]. By judgment of […], the applicant's appeal against the judgment was dismissed […].

[4] In […], the applicant initiated arbitration proceedings against the defendant to declare the arbitration agreement effective and to claim damages (request for arbitration dated […]), the filing of which was confirmed by the defendant's authorised representative in a letter dated […].

[5] With the application received by the Berlin Court of Appeal […], the applicant applied for a declaration that the arbitration proceedings be declared admissible. At that time, an arbitration tribunal had not yet been constituted.

[6] By order dated […], the Senate ordered public service of the application after informal notification of the defendant's authorised representative by email remained without response and formal service abroad pursuant to Section 185 No. 3 GCPR did not promise any success. Reference is made to the reasoning of the order authorising public service. The statement of claim and exhibits as well as the orders for public service and the appointment of an authorised representative pursuant to Section 184 GCPR were sent to the defendant informally by ordinary mail, as was the request for comments, and the defendant's authorised representative was informed of the transmission by email. Public service was deemed to have been effected on […], as confirmed by the clerk of the court registry.

[7] The applicant considers arbitration proceedings to be admissible. The arbitration agreement, which is clear in its wording, is enforceable despite the sanctions against Russian companies and is neither invalid nor inoperative. The recourse to the state court in Moscow does not prevent the arbitration proceedings; rather, it establishes a need for legal protection for the application for declaratory relief before the German state courts.

[8] The applicant requests,

to declare that the parties' dispute regarding […] is subject to arbitration proceedings […], excluding recourse to the ordinary courts of law.

[9] The defendant did not comment on the proceedings.

[10] Reference is made to the applicant's further submissions and exhibits.

[11] II. The application is admissible and well-founded on the merits. Pursuant to Section 1032 (2) GCPR, it must be determined at the request of the applicant that arbitration proceedings are admissible.

[12] 1. The application is admissible.

[13] Pursuant to Section 1062 (1) No. 2 GCPR, an application for a declaration of admissibility of arbitration proceedings pursuant to Section 1032 (2) GCPR may be filed with the Higher Regional Court.

[14] The Court of Appeal as the Higher Regional Court in Berlin has territorial jurisdiction pursuant to Sections 1062 (2), 1025 (2) GCPR. Pursuant to Section 1025 (2) GCPR, Section 1032 GCPR also applies if the place of arbitration is abroad. This is the case here because the parties have agreed on Zurich as the place of arbitration in the arbitration clause […]. In the absence of other links, the Court of Appeal is the locally competent court in accordance with the subsidiary jurisdiction provided for in Section 1062 (2) GCPR.

[15] An arbitral tribunal had not yet been constituted at the time the application was received on […]. The *Arbitrazh* Courts seized in the Russian Federation have not been seized and acted as arbitral tribunals, but as state courts.

[16] The applicant also has a legal interest in the requested decision. As a rule, the need for legal protection already arises from the potential party status in the arbitration proceedings; it does not cease to exist due to a subsequent formation of the arbitration tribunal, but rather the law in Section 1032 (2) and (3) GCPR assumes a subsequent coexistence of the state and arbitration proceedings in the event of a permissible application filed before the arbitration tribunal is formed. (German Federal Court of Justice (FCJ), order of 27.7.2023, I ZB 43/22, juris para. 88).

[17] The need for legal protection also does not cease to exist due to the state court decisions already issued against the applicant in the Russian Federation. These proceedings concerned a different subject matter than the request for relief pursued by the applicant in the arbitration proceedings for declaratory relief regarding the validity of the arbitration agreement and compensation for damages due to breaches of obligations by the defendant. However, even if the subject matter of the dispute were identical, the interest in legal protection would continue to exist, as the decision on the admissibility of arbitration proceedings pursuant to Section 1032 (2) GCPR is not a statement as to the admissibil-

* See *Kasolowsky/Wendler,* German Courts confirm Anti-Suit Remedy against Sanctioned Russian Parties breaching Arbitration Agreements pursuant to Section 1032(2) GCPR, IPRax 2025, 35. For the original German version of this order see IPRax 2025, 64. This order was translated into English by Dr. *Leane Meyer.*

ity and merits of an arbitral claim (see OLG Cologne, order of 1.10.2011, 19 SchH 7/11, juris para. 30; *Schlosser* in: Stein/Jonas, GCPR, 23rd edition 2014, Section 1032 para. 21). Rather, a complaint of other *lis pendens* or conflicting *res judicata* would have to be examined by the arbitral tribunal in the arbitration proceedings within its own jurisdiction.

[18] In addition, the applicant is also impacted by the proceedings against it in the Russian Federation at her registered seat in Germany because the applicant is threatened with potential enforcement in Germany and the decision on the admissibility of arbitration proceedings would have to be taken into account in the context of enforcement. A final decision on an application pursuant to Section 1032 (2) GCPR is binding on the (domestic) state courts in subsequent court proceedings, in particular in proceedings for the setting aside or declaration of enforceability of an arbitration award pursuant to Sections 1059 to 1061 GCPR and in proceedings pursuant to Section 1032 (1) GCPR; the legal remedy of Section 1032 (2) GCPR offers the parties an opportunity to save time and expenses if, for example, the arbitration proceedings are not initiated at all or not continued if inadmissibility is established, the arbitral tribunal is convinced of the inadmissibility or, in any case, the subsequent judicial proceedings are simplified and accelerated by the outcome (FCJ, order of 27.7.2023, I ZB 43/22, juris para. 77). Accordingly, it is at least possible that a necessary state decision on the enforcement of the decision of a foreign state court in Germany can also be influenced by the decision pursuant to Section 1032 (2) GCPR.

[19] The defendant's right to be heard has been sufficiently safeguarded. Public service has been validly decided and executed. The requirements pursuant to Section 185 No. 3 GCPR were met […]. The defendant was also informed of the court proceedings by means of emails to its authorised representative, lawyer […], and the sending of the procedural documents by ordinary post to her address […].

[20] 2. The application is well-founded on the merits.

[21] Pursuant to Section 1032 (2) GCPR, arbitration proceedings between the parties for disputes arising from […] are admissible.

[22] In the context of an application pursuant to Section 1032 (2) GCPR, the state court examines whether an effective arbitration agreement exists, whether it is enforceable and whether the subject matter of the arbitration proceedings is subject to the arbitration agreement (see FCJ, order of 19.9.2019, I ZB 4/19, juris para. 10; FCJ, order of 19.7.2012, III ZB 66/11, juris para. 4). These requirements are met, so that the admissibility of the arbitration proceedings for all disputes arising from […] is declared.

[23] a. An effective arbitration agreement exists between the parties. Pursuant to the provision under […] and the arbitration clause […], all disputes arising from the agreement shall be subject to arbitration to the exclusion of state jurisdiction. The parties have subjected their entire agreement to Swiss law, so that Swiss law also governs the validity of the arbitration agreement. There are no indications that the law applicable to the arbitration agreement should be regulated differently; moreover, the law at the place of arbitration would also be decisive in the absence of an agreement. According to Art. 177 of the Swiss Federal Act on Private International Law (SFAPIL in the version of 1.2.2021), any commercial claim can be the subject matter of arbitration proceedings; the written agreement of the parties also complies with the written form required under Art. 178 SFAPIL. Accordingly, the parties agreed in accordance with […] to submit their disputes to arbitration.

[24] b. The subject matter of the arbitration proceedings is also covered by the arbitration agreement. In principle, an arbitration clause is to be interpreted broadly and generally refers to all disputes in connection with the contractual relationship, i.e. both the conclusion and termination of the contract as well as all obligations during and after the termination of the contractual relationship. With the […] agreement, the parties have made it clear that […] should also be subject to the arbitration agreement […].

[25] c. The arbitration agreement is also enforceable. The parties have agreed in the arbitration clause that the UNCITRAL Rules for International Arbitration shall apply. In the absence of an agreement to the contrary, the rules in the currently valid version of 2021 shall apply in accordance with Art. 1 (2) of the Arbitration Rules.

[26] Arbitration proceedings in Switzerland are not impracticable because the defendant might be subject to sanctions due to the Russian war of aggression against Ukraine. In principle, the right of the parties to access to ordinary courts and arbitration tribunals must be upheld despite the sanctions due to the generally recognised right to justice. This already follows from the applicable right to fair trial and the right of individuals to be able to defend themselves in proceedings. It is also expressly confirmed by the Swiss Arbitration Association in the "Note to Parties, Arbitrators and Mediators on Sanctions" (available at swissarbitration.org keyword Arbitration Rules). In Switzerland, the EU sanctions regulations have been incorporated into the law applicable by respective decisions of the Federal Council (see the communication of the Federal Council of Switzerland, available at ad-min.ch/gov/en/start/suchergebnisseite.htm, keyword sanctions Ukraine), according to the EU Regulation No. 833/2014 of July 2022 (available at eur-lex.euro-pa.eu/legal-content/DE/TXT/?uri=CELEX:32022R1269; see also Council Decision 2022/1909 of 6.10.2022 at eur-lex.europa.eu/legal-content/DE/TXT/?uri=CELEX:32022D1909&qid=1725356809110), the right of defence in judicial and arbitration proceedings also applies to sanctioned parties and the prohibition of (legal) services is expressly not applicable in the context of the provision of services that are strictly necessary to ensure access to judicial, administrative and arbitration proceedings.

[27] Nor is it relevant that, due to an amendment to the APO (*Arbitrazh* (Commercial) Procedure Code), it is now supposed to be possible for companies domiciled in the Russian Federation to unilaterally distance themselves from an arbitration agreement, which the defendant obviously asserted in the legal proceedings in the Russian Federation. Apart from the fact that the defendant did not even make a statement in the present proceedings, although it had the burden of proof with regard to the invalidity of the arbitration agreement, the question if a renunciation of the arbitration agreement would be effective and would preclude the admissibility of an arbitration claim would only have to be clarified in the arbitration proceedings. In addition, the applicable Swiss law expressly provides under Art. 177 sentence 2 SFAPIL that a state-owned or state-controlled company – such as the defendant – is prohibited by law from invoking its own law to question its capacity as a party to the arbitration proceedings or the arbitrability of a dispute that is the subject of the arbitration agreement. This also means that the admissibility of the arbitration proceedings cannot be denied in the proceedings pursuant to Section 1032 (2) GCPR.

Decision on costs:

[…]