

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mainstream Renewable Power Ltd and others

v.

Federal Republic of Germany

(ICSID Case No. ARB/21/26)

PROCEDURAL ORDER NO. 2

Members of the Tribunal

Ms. Wendy Miles QC, President of the Tribunal

Mr. Antolín Fernández Antuña, Arbitrator

Dr. Charles Poncet, M.C.L., Arbitrator

Secretary of the Tribunal

Ms. Martina Polasek

1 June 2022

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I. BACKGROUND

1. Pursuant to the agreed procedural calendar, on 25 March 2022, the Respondent filed a Memorial on Jurisdiction and Request for Bifurcation (the “**Respondent’s Memorial**”), together with supporting documentation.
2. On 6 May 2022, the Claimants filed a Memorial on Jurisdiction and Response to the Request for Bifurcation (the “**Claimants’ Memorial**”), together with supporting documentation. The Claimants’ Memorial refers, *inter alia*, to a 28 April 2022 decision of the Higher Regional Court of Berlin regarding the Respondent’s application under Sec. 1032(2) of the German Code of Civil Procedure to rule on the admissibility of the arbitral proceedings (the “**Berlin Court Decision**”).
3. On 23 May 2022, the Respondent wrote to the Tribunal informing that it intends to appeal the Berlin Court Decision and requesting that the Tribunal stay this proceeding until the German Federal Court of Justice has decided on the Respondent’s appeal (the “**Respondent’s Application for Stay**”).
4. Upon invitation from the Tribunal, on 25 May 2022, the Claimants provided comments on the Application for Stay (the “**Claimants’ Response**”), arguing that it be dismissed. The Claimants also requested that the Tribunal order the Respondent to “pay all legal fees, costs and expenses incurred by the Claimants with regard to the request to stay this arbitration”.
5. On 30 May 2022, the Respondent objected to the Claimants’ request for the Tribunal to make a decision on costs.
6. Also on 30 May 2022, the Claimants clarified that the Respondent had already filed its appeal against the Berlin Court Decision, on 20 May 2022, and copied the appeal document to the Tribunal.

II. THE PARTIES' POSITIONS

A. THE RESPONDENT'S APPLICATION

7. The Respondent requests that the Tribunal take into account its recent appeal concerning the Berlin Court Decision rejecting the Respondent's application under Sec. 1032(2) of the German Code of Civil Procedure to rule on the admissibility of the arbitral proceedings. According to the Respondent, the Berlin Court had rejected the application on the grounds that the invalidity of an arbitration agreement in favour of ICSID arbitration could not be raised in proceedings pursuant to Sec. 1032(2) of the German Code of Civil Procedure.¹
8. The Respondent submits that the Court's reasoning is wrong and under appeal. It requests that “[c]onsidering that the Arbitral Tribunal is bound by EU law, that the arbitration agreement is invalid under EU law and that German courts have jurisdiction to examine the admissibility of the proceedings”, the Tribunal stay the proceeding pending the outcome of the appeal.²
9. The Respondent further submits that it “does not consider it necessary or appropriate for the Tribunal to make a decision on costs at this stage of the proceedings” because they are “still in their early stages”.³

B. THE CLAIMANTS' RESPONSE

10. The Claimants submit that the Tribunal should reject the Application for Stay as “*untimely and unfounded*”,⁴ as well as being “*contrary to the exclusive jurisdiction of the Tribunal under Article 41 of the ICSID Convention to determine its own competence*”.⁵
11. The Claimants submit that the Respondent makes “*no attempt to outline the Tribunal's power to order a stay or the parameters within which that power should be exercised*”.⁶ They further

¹ Respondent's Application for Stay (“**Application**”), p. 1.

² Application, p. 3.

³ Respondent's letter of 30 May 2022.

⁴ Claimants' Response (“**Response**”), para. 1.

⁵ Response, para. 3.

⁶ Response, para. 4.

accuse the Respondent of using the Application for Stay as a “*funnel through which the Respondent has made its unsolicited submissions on the [Berlin Court Decision]*”.⁷

12. The Claimants further seek legal fees in relation to the Application for Stay.⁸
13. The Claimants subsequently clarified to the Tribunal that the date of the Respondent’s appeal of the Berlin Court Decision was 20 May 2022. The Claimants provided the Tribunal with a German language copy of the appeal. The Tribunal has not received an English language translation.

III. THE TRIBUNAL’S ANALYSIS

14. The Respondent does not provide any basis for its Application for Stay pursuant to the ICSID Convention and/or the ICSID Rules. It simply makes the conclusory statement that:

Considering that the Arbitral Tribunal is bound by EU law, that the arbitration agreement is invalid under EU law and that German courts have jurisdiction to examine the admissibility of the proceedings, Respondent respectfully requests that the Tribunal

Stays the arbitral proceedings until the German Federal Court of Justice has decided upon Respondent’s appeal in the proceedings under Sec. 1032(2) German Code of Civil Procedure with the Berlin Court file number 12 SchH 6/21.⁹

15. In the absence of any articulated basis upon which the Tribunal may exercise its power to stay the proceedings as requested, the Tribunal is unable to take any further steps in respect of the Application for Stay. It is not clear if it is intended as an application for provisional measures pursuant to the ICSID Convention Article 47, or something else.
16. As there is no clear basis upon which the Tribunal is requested to act, it is difficult for it to consider the Application for Stay against any legal or procedural standard. The Tribunal observes that if ongoing ICSID proceedings were stayed every time a party commenced or appealed in related national court proceedings, the ICSID procedure would become

⁷ Response, para. 4.

⁸ Response, para. 13.

⁹ Application, p. 3.

unworkable. That cannot be what was intended by the drafters of and parties to the ICSID Convention. Article 26 of the ICSID Convention specifically addresses the exclusivity of ICSID proceedings, unless the State party to the dispute has required the exhaustion of local remedies as a condition of its consent to arbitration. The Respondent has not indicated any such requirement in this case.

17. There is of course provision for stay of enforcement of an award in certain circumstances. As there is no award in these proceedings at this time, those provisions are not applicable.
18. The Tribunal does not accept the Claimants' contention that the Application for Stay is merely a "*funnel*" through which the Respondent might make a further submission out of time in relation to bifurcation. The Tribunal has dealt with the Application for Stay as a separate decision, accordingly.
19. The Tribunal does not consider it appropriate to make a separate order for costs in respect of the Application for Stay. The submissions were minimal and the additional costs incurred should be limited. There is no compelling reason to make a separate order for costs in respect of this Application at this time.

IV. DECISION

20. Based on the foregoing, the Tribunal decides as follows:
 - a. to reject the Respondent's request for stay; and
 - b. to reserve costs.

On behalf of the Tribunal,

[signed]

Ms. Wendy Miles QC
President of the Tribunal
Date: 1 June 2022