D.C. Circuit Gives with One Hand and Takes with the Other: A Mixed Ruling on EU Award Enforcement Prospects in the U.S.

October 8, 2024

On August 16, 2024, the U.S. Court of Appeals for the District of Columbia Circuit released its much-anticipated opinion in the consolidated appeal of three award enforcement actions against Spain (*NextEra v. Spain*, *9REN v. Spain*, and *Blasket v. Spain*) involving challenges to federal court jurisdiction under the Foreign Sovereign Immunity Act ("FSIA").[1] The D.C. Circuit held that district courts have jurisdiction under the FSIA's arbitration exception, 28 U.S.C. § 1605(a)(6), to enforce the intra-European Union ("EU") investor-State awards under the Energy Charter Treaty ("ECT"), rejecting Spain's objection to jurisdiction based on the Court of Justice of the European Union's *Achmea* and *Komstroy* judgments.[2]

Additionally, the D.C. Circuit vacated two anti-anti-suit injunctions against litigation that Spain initiated in Europe to stall the U.S. enforcement proceedings. The Circuit found that, based on principles of international comity, anti-suit injunctions should rarely be issued against foreign sovereigns, even where their purpose is to protect U.S. courts' jurisdiction to enforce ICSID Convention awards.

The D.C. Circuit's decision rejecting *Achmea*-based jurisdictional objections is a positive development for investors seeking to enforce intra-EU awards in the U.S. But the decision did not address the merits of *Achmea*-based challenges to arbitrability, and left investors exposed to the risk of respondent States commencing anti-suit proceedings in favorable foreign jurisdictions.

U.S. Courts' Enforcement of Intra-EU Awards Post-*Achmea*. Since the landmark *Achmea* decision in 2018, courts in several EU Member States have set aside and refused to enforce intra-EU awards (as we reported here, here, here, and here).[3] This practice,

---

1 2024 WL 3837484 (D.C. Cir. 2024) (consolidated appeal).

2 *Slowakische Republik v Achmea BV*, ECLI:EU:C:2018:158 (Mar. 6, 2018) (*Achmea*); *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2021:655 (Sept. 2, 2021) (*Komstroy*).

3 *See, e.g.*, Svea Hovrätt [HovR] [Court of Appeals] [RH] 2023-12-20, T 12646-21 (Swed.) (*Festorino Investment*); Svea Hovrätt [HovR] [Court of Appeals] [RH] 2024-03-27, T 15200-22 (Swed.) (*Triodos*); Cour de cassation du Grand-Duché de Luxembourg [Court of Cassation of the Grand Duchy of Luxembourg], No. 116/2022, 14 July 2022 (*Micula*); Paris Court of Appeal (Chamber 5-16), April 19, 2022, No. 20-13085 (*Strabag and Raiffeisen Centrobank*) and Paris Court of Appeal

however, has mostly been limited to EU Member States. Courts in the United Kingdom and Australia have thus far upheld the enforcement of such awards notwithstanding *Achmea*-based objections.[4] And arbitral tribunals have almost unanimously rejected analogous jurisdictional objections,[5] with just one exception.[6]

The approach of U.S. courts to this question has, prior to the D.C Circuit's decision, been less straightforward. D.C. district courts were initially cautious, frequently opting to stay proceedings pending decisions on set-aside or annulment. Then in 2019, the D.C. district court declined to stay proceedings in *Micula v. Romania*, and enforced the intra-EU ICSID award against Romania's objection that there was no valid intra-EU arbitration agreement post-*Achmea*, and thus no jurisdiction under the FSIA's arbitration exception.[7] The district court's decision, which was affirmed on appeal, found that *Achmea* did not apply because the parties' dispute predated Romania's accession to the EU.[8] More recently, in May 2024, the D.C. Circuit upheld the enforcement of the *Micula* award for a second time against a Rule 60(b) challenge on largely the same grounds.[9]

Thus, while favorable to investors, *Micula* ultimately did not fully resolve the question of *Achmea*'s impact on FSIA jurisdiction for award enforcement given its focus on the effect of Romania's accession to the EU.

(Chamber 5-16), April 19, 2022, No. 20-14581 (*CEC Praha and Slot Group*); Oberlandesgericht Köln [OLG] [Higher Regional Court of Cologne] 1 September 2022, 19 SchH 14/21 [BGHZ] (*Uniper*); Oberlandesgericht Köln [OLG] [Higher Regional Court of Cologne] 1 September 2022, 19 SchH 15/21 [BGHZ] (*RWE AG and RWE Eemshaven Holding II BV*).

4 *Micula and others (Respondents/Cross-Appellants) v. Romania (Appellant/Cross-Respondent)*, [2020] UKSC 5 (*Micula*), 29 February 2020; *Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l.* [2021] FCAFC 3, 1 February 2021 (*here*); *Infrastructure Services Luxembourg S.A.R.L v. Kingdom of Spain* [2021] FCAFC 112, 25 June 2021 (here).

5 *See, e.g.*, *Encavis AG and others v. Italian Republic*, ICSID Case No. ARB/20/39, Award, 11 March 2024, ¶¶ 395-495 (*Encavis*); *Adria Group B.V. and Adria Group Holding B.V. v. Republic of Croatia*, ICSID Case No. ARB/20/6, Decision on Intra-EU Jurisdictional Objection, 31 October 2023 (*Adria Group*); *ESPF Beteiligungs et al. v. Italian Republic*, ICSID Case No. ARB/16/5, Decision on Annulment, 31 July 2023, ¶¶ 219-265 (*ESPF Beteiligungs*); *Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Spain*, ICSID Case No. ARB/16/18, Decision on Respondent's Second Request for Reconsideration, 19 August 2022, ¶¶ 39–48 (*Infracapital*); *Cavalum SGPS v. Spain,* ICSID Case No. ARB/15/34, Procedural Order No. 6 on the Kingdom of Spain's Request for Reconsideration of the Tribunal's Decisions on Jurisdiction of 31 August 2020 and 10 January 2022, 7 September 2022, ¶¶ 51–58 (*Cavalum SGPS*).

6 *Green Power v. Spain*, SCC Case No. V 2016/135, 16 June 2022, ¶¶ 331-478 (unanimously finding no jurisdiction to hear the investors' claims against Spain, on the basis that intra-EU ECT arbitration is incompatible with EU law) (*Green Power*).

7 *Micula v. Gov't of Romania*, 404 F. Supp. 3d 265 (D.D.C. 2019) (*Micula*), *aff'd*, 805 Fed. App'x 1 (D.C. Cir. 2020).

8 *Id.*

9 *Micula v. Gov't of Romania*, 101 F.4th 47 (D.C. Cir. 2024) (*Micula*).

The *NextEra/9REN/Blasket* Consolidated Appeal. The D.C. Circuit's consolidated appeal in *NextEra/9REN/Blasket* resulted from three conflicting D.C. district court decisions reached in early 2023. On one side of the split, on February 15, 2023, the district court in *9REN* and *NextEra* upheld jurisdiction to enforce two intra-EU ICSID awards.[10] The district court rejected Spain's argument that *Achmea* and *Komstroy* had voided Spain's consent to arbitrate under the ECT, reasoning that the challenge was not to the "fact" of the arbitration agreement in the ECT, but rather to the arbitrability of the dispute, which is left to the merits of the enforcement action.[11] On the other side of the split, on 29 March 2023, the district court in *Blasket Renewables* accepted Spain's *Achmea* arguments, finding no jurisdiction under the FSIA to enforce an UNCITRAL ECT award on the basis that *Achmea* retroactively vitiated Spain's agreement to arbitrate.[12]

The district court in *9REN* and *NextEra* also entered anti-anti-suit injunctions at the request of the award creditors against Spain in response to litigation Spain initiated in Luxembourg and The Netherlands to thwart the U.S. enforcement proceedings.

ECT Arbitral Awards Fall Within the FSIA's Arbitration Exception. On appeal, the D.C. Circuit upheld jurisdiction to enforce the intra-EU awards, finding that the ECT provided the relevant agreement to arbitrate. According to the Circuit, the arbitration exception in § 1605(a)(6) requires "an agreement made by [a] foreign state" either "with" *or* "for the benefit" of a private party. Because Spain had made an agreement to arbitrate "for the benefit" of at least some investors under the ECT, it was unnecessary to also consider whether they had made that agreement "with" these specific investors.

In reaching this conclusion, the Circuit rejected Spain's argument that the ECT was made for the benefit of only non-EU investors, reasoning that that argument pertained merely to the "scope" of the ECT, not the fact of its "existence." According to the Circuit, "existence" questions may instead concern such matters as whether a government minister had the authority to enter into an agreement at all.[13]

By finding *Achmea*-based objections non-jurisdictional under the FSIA, the D.C. Circuit has effectively closed the door to threshold-stage *Achmea* challenges, bringing the

---

[10] *9REN Holding S.A.R.L. v. Kingdom of Spain*, No. 19-cv-1871, 2023 WL 2016933 (D.D.C. Feb. 15, 2023) (*9REN*); *NextEra v. Spain*, 656 F. Supp. 3d 201 (D.D.C. Feb. 15, 2023) (*NextEra*).

[11] *Nextera Energy Glob. Holdings B.V. v. Kingdom of Spain*, 656 F. Supp. 3d 201, 213 (D.D.C. 2023). Shortly after these cases, another D.C. district court magistrate adhered to this approach. *See Cube Infrastructure Fund SICAV v. Kingdom of Spain*, 2023 WL 2914472 (D.D.C. Mar. 31, 2023).

[12] *Blasket Renewable Invs., LLC v. Kingdom of Spain*, 665 F. Supp. 3d 1 (D.D.C. 2023) (*Blasket*).

[13] *See, e.g.*, *Belize Social Development Limited v. Gov't of Belize*, 794 F.3d 99 (D.C. Cir. 2015) (*Belize Social*).

United States in line with similar holdings reached by the U.K. High Court[14] and the High Court of Australia.[15] At the same time, the D.C. Circuit was careful to emphasize that it was not passing judgment on the merits of *Achmea*-based challenges to arbitrability, which will be the next issue for district courts to consider.

Anti-Anti-Suit Injunctions against Foreign Sovereigns Unlikely in Enforcement Proceedings. In a second holding—on which the panel divided—the majority held that even if the district court's anti-anti-suit injunctions were "defensive" and intended to preserve U.S. court jurisdiction—in contrast to Spain's own "offensive" or jurisdiction-defeating injunctions—they were nonetheless "virtually unprecedented" and improper.

When considering anti-suit injunctions, district courts must weigh (*1*) "whether an action in the foreign jurisdiction prevents United States jurisdiction or threatens a vital United States policy," and (*2*) "whether the domestic interests outweigh concerns of international comity." According to the majority, the fact that the district court's injunctions targeted a foreign sovereign put comity concerns "near their peak," particularly because Spain sought resolution in European courts of an issue of EU law. By comparison, the interest of the United States in upholding its obligations under the ICSID Convention was minimal. In this regard, the majority took the view that the ICSID Convention does not require U.S. courts to "remove obstacles in other countries that might make it harder for foreign investors to find their way to our courts."

In her dissent, Judge Pan disagreed, emphasizing that the decision to vacate the anti-anti-suit injunctions may render the investors' U.S. enforcement actions entirely for "naught" and the U.S. "an inhospitable forum for enforcing ICSID awards." In her view, the majority gave insufficient weight to the strong interests of the United States in upholding its ICSID obligations, and overlooked Spain's own lack of comity in seeking "foreign injunctions that plainly are intended to disrupt and hamper the cases before the district court."

Going forward, investors should expect more foreign sovereigns to seek anti-suit injunctions to halt U.S. enforcement proceedings, including from their own courts, which will in turn hamper their efforts to enforce intra-EU awards within the U.S.

* * *

[14] *Infrastructure Servs. Luxembourg S.À.R.L v. Kingdom of Spain*, [2023] EWHC 1226 (Comm). (*Infrastructure S.à.r.l.*).

[15] *Kingdom of Spain v. Infrastructure S.à.r.l.* [2023] HCA 11 ¶ 79 (*Infrastructure S.à.r.l.*).

Please do not hesitate to contact us with any questions.

Catherine Amirfar
Partner, New York
+1 212 909 7423
camirfar@debevoise.com

Mark W. Friedman
Partner, New York
+1 212 909 6034
mwfriedman@debevoise.com

Natalie L. Reid
Partner, New York
+1 212 909 6154
nlreid@debevoise.com

Jeffrey Sullivan KC
Partner, London
+44 20 7786 9050
jsullivan@debevoise.com

William H. Taft V
Partner, New York
+1 212 909 6877
whtaft@debevoise.com

Patrick Taylor
Partner, London
+44 20 7786 9033
ptaylor@debevoise.com

Christel Y. Tham
Associate, New York
+1 212 909 6008
cytham@debevoise.com

Beatrice A. Walton
Associate, New York
+1 212 909 6558
bawalton@debevoise.com