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Enforcing Arbitral Awards Against Sovereigns in the United States: Recent DC Circuit Court Decision Limits a State's Defense of Sovereign Immunity

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Executive Summary

- Under US law, a foreign state's sovereign immunity is restricted: one of the important exceptions in the Foreign Sovereign Immunities Act ("FSIA") is the state's consent to private arbitration.
- On August 16, 2024, in *NextEra Energy v. Spain*, the Court of Appeals for the DC Circuit found that, by consenting to arbitrate disputes brought under the Energy Charter Treaty (a multilateral treaty protecting investments made in the energy sector), Spain had waived its sovereign immunity from suit.
- By way of background, many European states have given consent to arbitrate disputes with qualified foreign investors in bilateral or multilateral treaties, including the Energy Charter Treaty. But the Court of Justice of the European Union ("CJEU") held in 2018 that such consents by European states to arbitrate disputes arising under those treaties are invalid if the counterparties to the treaties are other European states.
- Both before and after the CJEU's ruling, many European investors have been bringing arbitration claims against Spain (as well as Italy and Romania) under such treaties regarding their investments in the renewable energy sector in those countries. And they have been winning significant awards notwithstanding Spain's objection that its consent to arbitrate was found invalid by the CJEU in the course of the proceedings. These arbitral awards, by and large, have withstood Spain's attempts at annulling or setting them aside. To date, Spain owes more than $1.3 billion to investors across 16 unpaid investor-state arbitral awards.[1]
- The award-creditors in three of these cases – NextEra Energy Global Holdings B.V. ("NextEra"), 9Ren Holding S.A.R.L. ("9Ren"), and Blasket Renewable Investments LLC ("Blasket") – brought enforcement actions before the DC Circuit court. Relying on the same line of argument, Spain claimed that US courts lacked jurisdiction to enforce the awards on the basis of its sovereign immunity. The DC Circuit Court rejected Spain's argument, holding that the district courts have jurisdiction to enforce the awards under the FSIA's arbitration exception contained in 28 U.S.C. § 1605(a)(6).

[1] *See* N. Lavranos, Report on Compliance with Investment Treaty Arbitration Awards 2023 ("Compliance Report"), available at https://www.internationallawcompliance.com/wp-content/uploads/2023/10/FULL-Report-2023-DEF-25-OCT-.pdf

- But the Court clarified that its ruling is premised on the issue of validity of Spain's consent to arbitrate disputes with European investors being a merits question, not a jurisdictional question. That is because Spain challenged the scope of its consent to arbitrate—i.e., whether it extends to European investors—not its existence.
- Accordingly, although the District Court was found to have jurisdiction to hear the investors' enforcement actions, enforcement could ultimately be denied on the merits. Defenses to enforcement of awards in the United States are limited, however, particularly in the case of awards in ICSID arbitrations (which is the case of *NextEra* and *9Ren*).
- The ruling of the DC Circuit may pave the way to more enforcement actions in the District of Columbia. Having a foreign arbitral award recognized and enforced in the United States notably provides a significant advantage to award-creditors, as they gain the ability to seek broad discovery of information regarding the award-debtor's (here, Spain's) extra-territorial assets world-wide.

Background

A major advantage offered by international arbitration when compared to court litigation is the relative ease with which arbitral awards can be enforced around the world. Foreign arbitral awards are deemed enforceable in any jurisdiction located in a state that ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). To date, 172 states, including the United States, are parties to the New York Convention.[2] The New York Convention specifies few exceptions where enforcement may be denied, and none relate to a review of the award on the merits. Accordingly, an enforcement court's scrutiny of a foreign arbitral award is limited.

Arbitrations brought by investors against sovereign states routinely are conducted under the International Centre for the Settlement of Investment Disputes Convention ("ICSID Convention"). The ICSID Convention, which has been ratified by 158 Contracting States to date,[3] provides that Contracting States shall recognize ICSID Convention awards as binding and shall enforce an ICSID Convention award within their territories as if it were a final judgment of a court in that State.

Enforcement of arbitral awards can become more complex in cases where a sovereign state is the respondent party. Sovereign states presumptively enjoy sovereign immunity from lawsuits and enforcement actions. But such sovereign immunity is not absolute. In the United States, sovereign immunity is circumscribed by statute, namely, the Foreign Sovereign Immunities Act. But whether enforcing an arbitral award against a sovereign under the New York Convention or the ICSID Convention, the threshold question that the enforcing court must address is whether the defendant state can rely on the doctrine of sovereign immunity to deny the enforcing court's jurisdiction. In three related cases against Spain, the DC Circuit recently confirmed that when states make a standing offer to arbitrate their disputes with foreign investors under a treaty, the state cannot raise immunity as a jurisdictional defense under the FSIA.

Sovereign Immunity as a Defense to Enforcement of Arbitral Awards

Under US law, a general principle is that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States."[4] Exceptions to this principle exist, however, such as when "the foreign state has waived its immunity either explicitly or by implication" [5] or if "the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship… or to confirm an award made pursuant to such an agreement to arbitrate."[6]

[2] The New York Convention is implemented in the United States through 9 US Code § 201 et seq.
[3] The ICSID Convention is implemented in the United States through 22 US Code § 1650a.
[4] FSIA, Section 1604.
[5] FSIA, Section 1605(a)(1)
[6] FSIA, Section 1605(a)(6).

US courts have consistently recognized the express arbitration exception of Section 1605(a)(6) as foreclosing a state's ability to raise its immunity from suit.[7] In *Blue Ridge Investments, LLC v. Republic of Argentina*, the US Court of Appeals for the Second Circuit not only relied on the arbitral award exception of the FSIA but also on the implicit waiver exception of Section 1605(a)(1) to deny Argentina's defense of sovereign immunity.

It is against this backdrop that, on August 16, 2024, the DC Circuit addressed the consolidated enforcement actions brought by award-creditors NextEra, 9Ren and Blasket against Spain. The three cases stem from Spain's reversal of its policy of subsidizing its renewable energy sector launched right before the turn of the century. In 1999, Spain implemented a feed-in tariff system pursuant to which operators of renewable energy plants were guaranteed fixed above-market rates for the supply of energy into the Spanish grid. Spain reneged on that commitment during the global financial crisis of 2007-8. This led to a slew of arbitrations brought by disgruntled foreign investors that had invested significant capital in the renewable energy sector with the expectation of receiving the rates promised by Spain. This avenue was open to investors because Spain has provided advance consent in treaties concluded with these investors' home states to arbitrate disputes arising thereunder. These include 59 bilateral investment treaties currently in force and other multilateral agreements such as the Energy Charter Treaty ("ECT"), which protects investments made in the energy sector of nearly 50 countries, including the European Union ("EU") and EU countries.[8]

Many of the investors who commenced arbitration proceedings against Spain hailed from other European countries, such as Dutch company NextEra, Luxembourgish company 9Ren, and Dutch company AES (which claim was later acquired by the US company Blasket). All three claims were brought under the ECT, with NextEra and 9Ren choosing to submit their claims to ICSID arbitration while AES chose to submit its claims to UNCITRAL arbitration instead.[9]

While these arbitral proceedings were ongoing, the CJEU issued a decision that arbitrations brought under treaties concluded by and between European states are invalid. In the 2018 *Achmea* case,[10] the CJEU ruled for the first time that arbitration clauses in investment treaties between EU member states are incompatible with European law to the extent that they place questions of interpretation of European law outside of the EU judicial system. The CJEU later confirmed this position in 2021 in the *Komstroy* case.[11] Consequently, EU member states terminated all intra-EU investment treaties and some European courts invalidated intra-EU arbitrations.[12]

Spain unsuccessfully relied on *Achmea* in the arbitrations, claiming that the tribunals had no jurisdiction to adjudicate the underlying disputes. After it lost to each of these three claimants in arbitration, Spain attempted to have the awards in the ICSID cases annulled by various ICSID annulment committees, and the award in the UNCITRAL arbitration set aside by the courts of the seat of that arbitration, i.e., Switzerland. Spain's petitions were all rejected.

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[7] In *Cargill Int'l S.A. v. M/T Pavel Dybenko* (991 F.2d 1012, 1018 (2d Cir. 1993)), the Second Circuit Court of Appeals held that "If the alleged arbitration agreement exists, it satisfies the requirements for subject matter jurisdiction under the [New York] Convention and FSIA." In *Creighton Ltd. v. Government of the State of Qatar* (181 F.3d 118 (DC Cir. 1999)), the plaintiff obtained an ICC arbitral award against Qatar which it sought to enforce in DC's district court. The court found that it had jurisdiction under the arbitration exception in section 1605(a)(6) of the FSIA (even though Qatar was not signatory to the New York Convention on recognition and enforcement of foreign arbitral awards). In *Blue Ridge Investments, LLC v. Republic of Argentina* (Docket No. 12–4139–cv., August 19, 2013 - US 2nd Circuit), the US Court of Appeals for the Second Circuit confirmed the District Court's conclusion that "Argentina waived its sovereign immunity pursuant to the arbitral award exception." Other court decisions reached the same conclusion with respect to ICSID arbitral award (See *Cont'l Cas. Co. v. Argentine Republic*, 893 F. Supp. 2d 747, 751 (E.D. Va. 2012); *Funnekotter v. Republic of Zimbabwe*, No. 09 Civ. 8168(CM), 2011 WL 666227 at *2 (S.D.N.Y. Feb. 10, 2011); *Siag v. Arab Republic of Egypt*, No. M-82, 2009 WL 1834562 (S.D.N.Y. June 19, 2009)).

[8] The European Union, as well as several EU member states, have announced their withdrawal from the ECT. Although the withdrawal becomes effective one year from the date of announcement, investors' ability to commence arbitration proceedings survives for another 20 years following withdrawal.

[9] Article 26(4) of the ECT provides several options as arbitral forum where the investors may submit their claims.

[10] *Slovak Republic v. Achmea B.V.* (Case C-284/16).

[11] *Republic of Moldova v. Komstroy LLC* (Case C-741/19).

[12] *E.g.*, the German Federal Court of Justice has held that investment treaty claims lodged by German energy companies (RWE and Uniper) against the Netherlands were inadmissible. *See* Press release regarding Decisions of the German Federal Court of Justice (Bundesgerichtshof), July 27, 2023 in Cases no. I ZB 74/22 and I ZB 75/22. The Svea Court of Appeal also declared invalid awards won by Danish investors against Italy in *Athena Investments A/S v. Italy* (T 3229-19).

In the three enforcement actions at hand before the DC courts, Spain relied once more on the CJEU's jurisprudence to resist enforcement. Spain argued that it lacked capacity to consent to arbitration, given that arbitration clauses in intra-EU treaties were found to be incompatible with European law. Thus, having not (validly) consented to arbitrate intra-EU disputes, Spain claimed it was immune from enforcement under the FSIA. While Judge Chutkan of the District Court for the DC Circuit rejected Spain's defense in the *NextEra*[13] and *9Ren*[14] cases, another member of the District Court, Judge Leon, accepted it in the *Blasket*[15] case.

DC Circuit Rules that State Consent to Arbitrate Disputes Under Treaties Falls Within an Immunity Exception

On appeal, the DC Circuit was asked whether the FSIA's waiver exception under Section 1605(a)(1) and/or the arbitration exception under Section 1605(a)(6) applied. The DC Circuit declined to decide whether the waiver exception applied, finding sufficient its determination that the district courts had jurisdiction under the FSIA's arbitration exception of Section 1605(a)(6).

The DC Circuit reasoned that the existence of Spain's unconditional consent to arbitrate in the ECT is uncontested. The only point of contention is the scope of that consent—i.e., whether or not Spain's consent to arbitrate disputes under the investment treaties extends to disputes against European investors. Having made that distinction, the DC Circuit held that Spain cannot raise sovereign immunity to deny the enforcing courts' jurisdiction.

An important caveat is that the DC Circuit emphasized it did not "address the merits question whether that Treaty's arbitration provision extends to EU nationals and thus whether Spain ultimately entered into legally valid agreements with the companies." In other words, the DC Circuit found that the question of validity of Spain's consent to arbitrate is a question of admissibility rather than jurisdiction. Therefore, although the investors overcame Spain's jurisdictional objections, enforcement could eventually be denied on the merits.

Import of the DC Circuit's Ruling and Next Steps

The next step is for the DC District Court to consider whether Spain's scope of consent to arbitration in the treaties extends to disputes against EU investors. The Court may have to consider whether its assessment of the scope of the consent to arbitration should be treated differently depending on whether the ICSID Convention or the New York Convention governs the underlying award.

If the award-creditors prevail in the remand proceedings and the arbitral awards are enforced by the US courts against Spain, then the award-creditors will be able to benefit from the extensive discovery allowed under the Federal Rules of Civil Procedure in their efforts to seize Spain's commercial assets in the United States and abroad. We have discussed in a previous client alert the execution and discovery tools that are available to award creditors post-recognition and enforcement of arbitral awards by US courts. In *Republic of Argentina v. NML Capital, Ltd*., the US Supreme Court ruled that the FSIA does not restrict the discovery of a foreign state's extraterritorial assets in aid of post-judgment attachment.[16] As the District Court for the DC Circuit explained, under the FSIA, "a foreign state's immunity from discovery is generally coextensive with its immunity from suit."[17] Therefore, the award-creditors should be able to obtain information on assets or accounts owned by Spain, regardless of their location, in the event that the District Court enforces the awards.

[13] *NextEra Energy Global Holdings B.V. et al. v. Kingdom of Spain*, 656 F. Supp. 3d 201 (D.DC 2023).
[14] *9REN Holding SARL v. Kingdom of Spain,* No. 19-CV-01871 (TSC), 2023 WL 2016933 (D.DC Feb. 15, 2023).
[15] *Blasket Renewable Investments LLC v. Kingdom of Spain*, 665 F. Supp. 3d 1 (D.DC 2023).
[16] 134 S. Ct. 2256–57 (2014).
[17] *Broidy Capital Mgmt. v. Muzin*, 19-cv-150 (DLF) (D.DC Jun. 2, 2022)

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