Achmea Goes to Washington

Steffen Hindelang 2023-04-19T16:09:32

When enforcing so-called intra-EU investor-State arbitral awards (investment award), investors frequently turn to the United States (US) and other non-EU jurisdictions. This is a deliberate attempt to avoid the consequences that an investment award made in violation of the EU Treaties would face in an EU Member State court. The enforcement decision of the US District Court for the District of Columbia (District Court) in *Blasket Renewable Investments, LLC v. Spain* (*Blasket*) of March 2023 presents us with yet another twist in the ongoing regime clash between EU law and international investment law: The District Court granted Spain's motion to dismiss a petition to enforce an intra-EU award. The investors were seeking EUR 26.5 million in compensation for their investments in solar energy. The District Court's decision suggests that enforcement of intra-EU investment awards in the US and beyond may not be taken for granted. At the same time, it reveals diverging views among the District Court's judges on how to address the EU and its Member States' efforts to stop intra-EU investment arbitration from continuing, despite having been found in breach of the EU Treaties.

Post-*Achmea* Recap

The CJEU's ruling in *Slovak Republic v. Achmea* (*Achmea*) marked the end of intra-EU investment arbitration, finding that arbitration clauses in investment agreements between Member States contravene the EU Treaties and can, therefore, not be applied in an intra-EU context. Since then, the environment for such arbitration within the EU has become increasingly difficult: In January 2019, in the aftermath of *Achmea*, EU Member States announced to eventually terminate their intra-EU bilateral investment treaties (intra-EU BIT(s)). In September 2021, the CJEU, in *Komstroy v. Moldova*, confirmed the obvious: The reasoning in *Achmea* equally applies to investor-State arbitrations brought under the Energy Charter Treaty (ECT).

However, arbitral tribunals have continued to uphold jurisdiction in defiance of the CJEU's rulings. In other words, privately-run arbitral tribunals have largely disregarded the so-called intra-EU objection. According to the intra-EU objection, the principles of autonomy and primacy of EU law conflicted with the jurisdiction of arbitral tribunals, which, therefore, cannot hear claims against an EU Member State brought by an investor from another EU Member State. Often, arbitral tribunals sought to avoid the consequences of *Achmea* by alleging that the EU Treaties and the ECT do not pertain to the same international legal regime. So far, the intra-EU objection has been accepted in full only by an arbitral tribunal in *Green Power v. Spain*, which declined its jurisdiction.

The effects of *Achmea* extend to anti-arbitration injunctions, as well as annulment and enforcement of intra-EU investment awards. In *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Croatia*, the German Federal Court found that an

investment arbitration was inadmissible as, in an intra-EU context, the parties could not form a valid arbitration agreement. Surprisingly, despite the CJEU's indication in *European Foods*, *Achmea*'s effects with regard to arbitrations pertaining to the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) is disputed among EU Member State courts (see Higher Regional Court of Cologne v. Kammergericht Berlin; decision by German Federal Court pending).

Awards not based on the ICSID Convention have been successfully challenged and set aside on the basis of a lack of jurisdiction of the arbitral tribunal (*Slot v. Poland and Strabag v. Poland*), non-arbitrability (*Novenergia II v. Spain*), and violation of the public order of an EU Member State which also includes the EU *ordre public* (*PL Holdings v. Poland*).

Regarding enforcement of intra-EU investment awards within the EU Member States, such would be contrary to the EU Treaties, even if based on the ICSID Convention (see *European Foods* and the corresponding decision by Luxembourg's Court of Cassation). Outside the EU, in contrary, *Achmea*'s effects on enforcement of intra-EU investment awards have been contested (*9Ren Holding S.A.R.L. v. Spain* and *NextEra Energy Global Holdings B.V. v. Spain* or *Spain v. Infrastructure Services Luxembourg S.à.r.l).* Simply put, there has been a real danger that investors might get away with enforcing their intra-EU arbitral awards outside of Europe, thereby circumventing the EU Treaties. The US District Court decision in *Blasket* sets a counterpoint.

Can the US District Court Exercise Jurisdiction Over Spain?

The starting point for the District Court's assessment is whether it has jurisdiction to enforce the arbitral award obtained by the claimants – two Dutch investors – in an earlier arbitration against Spain concerning regulatory changes to the Spanish renewable energy regime (*AES Solar and others (PV Investors) v. Spain*). Spain enjoys State immunity, which must be overcome before the District Court can determine whether the award is subject to enforcement under Art. V of the 1959 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which is applicable according to 9 U.S.C. § 207 of the Federal Arbitration Act.

28 U.S.C. § 1605 (a) (6) of the Foreign Sovereign Immunities Act ("FSIA") allows an exception to State immunity (and, thus, for enforcement against a State) if the petitioner can establish three so-called jurisdictional facts: an agreement to arbitrate, an arbitral award, and a treaty governing the award (p. 8). The petitioners in *Blasket* relied upon the ECT, the award obtained against Spain, and the New York Convention, and the burden shifted to Spain to show, by preponderance of the evidence, that the ECT and the notice to arbitrate did not constitute a valid arbitration agreement. Spain raised the objection that, in an intra-EU context, EU Member States that are parties to the ECT lacked legal capacity to form an agreement to

arbitrate. In Washington, unlike in the preceding arbitral proceedings administered by the Permanent Court of Arbitration in The Hague, Spain succeeded with the intra-EU objection.

Diverging Views Within the District Court

In two earlier decisions issued by the District Court in February 2023, *9Ren Holding S.A.R.L. v. Spain* and *NextEra Energy Global Holdings B.V. v. Spain*, Judge *Tanya Chutkan* abrogated from Spain's immunity as she found herself bound by the arbitral tribunal's prior rejection of Spain's intra-EU-objection. She understood Spain's intra-EU objection as a challenge to the arbitrability of the dispute and hence beyond the District Court's scrutiny when it comes to establishing its jurisdiction (p. 14).

In the case at hand, Judge *Richard Leon* strongly disagreed to defer to the arbitral tribunal's findings. Among others, he relied on the reasoning of the District Court in *Micula v. Government of Romania*. He pointed out that issues of "arbitrability" concern questions such as whether an investment falls within the scope of an (valid and existing) agreement, not if an agreement has at all been validly concluded (p. 12). Moreover, in his view, challenges to the validity of an arbitration agreement due to a potential lack of legal capacity is beyond an arbitrator's competence and must necessarily be resolved by a court (p. 9).

The Award Issued Against Spain as *Ultra Vires*

With this reasoning, the scene is set to turn to the core question of whether an EU Member State's legal capacity to form an agreement to arbitrate under the ECT is impaired in an intra-EU context. The District Court in *Blasket* concluded that it is, resorting to both the Vienna Convention on the Law of Treaties (VCLT) (Art. 31 (3) (a), (c)) and Art. 26 ECT. It considered the EU Treaties to be public international law in the sense of Art. 31 (3)(c) VCLT and Art. 26 (6) ECT. The District Court endorsed the CJEU's ruling in *Komstroy* (p. 14) and found that its commitments under the EU Treaties barred Spain from making a standing offer to arbitrate to the investors from another EU Member State.

Additionally, the District Court referenced the Lisbon Treaty, the Declaration of the Member States to end intra-EU BITs of 2019, and the *amicus* brief filed by the European Commission as evidence of subsequent (interpretative) agreement of State parties to the ECT, Art. 31 (3)(a) VCLT; all of which reflect the shared understanding of the EU Member States that they "lacked the legal capacity to enter into agreements inconsistent with their obligations under the EU Treaties" (p. 15).

As Judge *Leon* points out, "the bottom line is straightforward" (p. 17): Spain lacked legal capacity to enter into an agreement to arbitrate. Without valid offer to arbitrate, there is no arbitration agreement and hence, the arbitration exception under 28 U.S.C. § 1605(a)(6) FSIA is inapplicable. In short: the District Court cannot overcome Spain's immunity to exercise jurisdiction.

Conclusion

The decision demonstrates that courts in enforcement proceedings outside the EU must consider the international law obligations of the Member States under the EU Treaties and their impact on the (illegally assumed) jurisdiction of arbitral tribunals in an intra-EU context. Yet, compelling as the decision might be from a European perspective, the case is pending for appeal before the D.C. Circuit Court.

Investors seek enforcement wherever a State has assets. The UK seems to emerge as yet another battleground. A recently issued order of the High Court of Justice allowed *Blasket Renewable Investments* to, among others, seize the premises of the London branch of the *Instituto Cervantes*, a Spain-owned cultural institution. This will certainly heat things up, also diplomatically.

Additionally, investors are exploring alternative means to pressure EU Member States to pay awards: Some investors are reported to approach private rating agencies and the International Monetary Fund (IMF) to seek a credit rating downgrade of such EU Member States that are unwilling to pay.

However, if Member States gave in and paid voluntarily an intra-EU investment award, the payment, when not following Article 108(3) TFEU, may constitute illegal state aid and expose them to sanctions under EU law.

While the enforcement phase can serve as a possible corrective to the continuing illegal assumption of jurisdiction and blatant disregard for the EU Treaties by arbitral tribunals in disputes brought before them under the ECT. But it treats the symptom, not the cause. There is an end in sight as EU Member States abandon the ECT. However, only a stop in the practice of arbitral tribunals acting ultra vires, ignoring the express will of the true masters, i.e., the EU Member States, of both the EU Treaties as well as the ECT in an intra-EU context, would immediately eradicate the problem.

Disclaimer: Steffen Hindelang provided an expert opinion in Blasket *in support of Spain.*

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