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The Treatment of Intra-EU Treaty Awards in the United States: D.C. District Court Declines to Enforce ECT Award Against Spain

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Recently Judge Richard J. Leon of the U.S. District Court for the District of Columbia granted Spain's motion to dismiss a petition to enforce an ECT award, holding that the court lacked subject-matter jurisdiction under the FSIA because Spain's agreement to arbitrate ECT claims against EU investors was invalid under EU law. This decision marks the first time a U.S. court has refused to enforce an investment treaty award based on the intra-EU objection and raises questions for EU investors seeking to enforce awards against EU member states in the U.S.

Background

This dispute originates as part of a series of investment claims under the Energy Charter Treaty (ECT) arising out of certain Spanish regulatory changes, including the rollback of the feed-in tariff scheme for renewable energy producers. Petitioners, AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V., are Dutch entities that invested in photovoltaic installations in Spain.

In 2011, petitioners submitted a notice of arbitration against Spain, alleging that Spain's regulatory changes decreased the value of their investment and violated Spain's obligations under the ECT. A Geneva-seated tribunal was constituted under the UNCITRAL rules. On February 28, 2020, the tribunal issued an award holding that Spain breached its obligations under the ECT and requiring Spain to pay €26.5 million in damages. On April 27, 2020, Spain unsuccessfully sought to set aside the award before the Swiss Federal Supreme Court.

On December 10, 2021, petitioners filed a petition to enforce the award in the U.S. District Court for the District of Columbia, which Spain moved to dismiss. Spain argued that the court lacked subject-matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA) because the arbitration exception to the FSIA, which permits U.S. courts to enforce awards against sovereigns "made pursuant to an agreement to arbitrate," did not apply. Specifically, Spain contended that the arbitration agreement was invalid because Spain lacked the capacity under EU law to agree to arbitrate this dispute. Spain also argued the award should not be enforced under Article V(1)(a) of the New York Convention because Spain lacked capacity to agree to arbitrate under EU law. Petitioners opposed, arguing that the court had jurisdiction under the FSIA's arbitration exception, that the tribunal's ruling that Spain consented to arbitration is binding on the court, and that the award should be enforced under the New York Convention. Petitioners assigned their interests in the case to Blasket Renewable Investments LLC, which, on March 7, 2023, was substituted for the petitioners in the U.S. proceedings.

Decision

On March 29, 2023, the District Court granted Spain's motion to dismiss and declined to enforce the award. The court first held that whether Spain had the capacity to agree to arbitrate — and, thus, whether the parties' arbitration agreement under the ECT was valid — is for the court to decide under U.S. law, and prior decisions by the tribunal on these issues were not binding. The court further held that it was not bound by the Swiss court's confirmation of the award, reasoning that U.S. courts "are not required to accord preclusive effect to foreign judgments in petitions pursuant to the New York Convention."

In addressing the merits of Spain's argument, the court analyzed two cases decided by the EU's highest court, the Court of Justice of the European Union (CJEU): *Achmea B.V. v. Slovak Republic* and *Republic of Moldova v. Komstroy*. The court observed that *Achmea* precludes EU member states from "entering into a 'treaty by which [it] agree[s] to remove from the jurisdiction of its own courts … disputes which may concern the application or interpretation of EU law.'" Additionally, the court noted that in *Komstroy*, the CJEU extended *Achmea*, holding that arbitration agreements contained within multilateral treaties (such as the ECT) "are incompatible with EU law insofar as they are applied to disputes between an EU Member State and a national of another EU Member State." *Komstroy*, the court also held, applied retroactively.

The court also examined the European Commission's amicus brief in support of Spain's motion to dismiss. The amicus brief explained that obligations of member states under EU treaties retain "primacy" over inconsistent obligations incurred by member states. The amicus brief also provided that after the *Achmea* decision, a collection of EU member states—including Spain and The Netherlands—released a joint statement that the nations shared the understanding that obligations under the Energy Charter Treaty must be compatible with EU treaties. The court viewed these statements as "persuasive evidence that the EU Member States understood their obligations under the ECT's arbitration clause to be limited to their obligation under the EU treaties."

The court, relying on U.S. law, EU jurisprudence, and the European Commission's amicus brief, held that Spain lacked the legal capacity to agree to arbitrate ECT claims against Dutch nationals under EU law. Accordingly, the court held "there was no valid agreement to arbitrate"; the arbitration exception of the FSIA was inapplicable; and the court, therefore, lacked subject-matter jurisdiction to enforce the award. The court, in dismissing for lack of subject-matter jurisdiction, departed from the reasoning of recent D.C. District Court decisions in which the court resolved petitions to enforce arbitral awards against Spain under the ECT by holding that petitioners had established jurisdiction under the arbitration exception to the FSIA. The court reasoned that those decisions misapplied the U.S. Court of Appeals for the District of Columbia Circuit's precedent in concluding that whether a party lacks legal grounds to enter an arbitration agreement is not a jurisdictional question under the FSIA but a merits issue. The decisions criticized by *Blasket* are now pending appeal at the D.C. Circuit, and *Blasket* has signaled its intent to appeal the court's March 29 decision.

Finally, the court held that FSIA's waiver exception, under which a court may establish jurisdiction over a foreign sovereign if the state has waived immunity from the suit, did not apply. For the waiver exception to apply, the court explained, a state must "intend" to waive sovereign immunity, and a prerequisite to intentionality is the existence of an agreement to arbitrate, which the court already established did not exist.

While the court dismissed the case on jurisdictional grounds, it indicated in *dicta* that even if jurisdiction existed it would have discretion to refuse enforcing the award under Article V(1)(a) of the New York Convention "because the parties lacked the capacity to form an agreement 'under the law applicable to them.'" This would mark a departure from the previous decisions of U.S. courts on that issue.

Implications

The *Blasket* case could have implications for investors seeking to enforce intra-EU awards in U.S. courts. While most tribunals continue to reject jurisdictional challenges to intra-EU investment treaty awards based on *Achmea* and *Komstroy*, *Blasket* raises the question whether U.S. courts may become more receptive to this argument. If other courts follow *Blasket*, EU nationals may be advised to look outside the U.S. to enforce intra-EU treaty awards, whether under the ECT or otherwise. Moreover, it remains to be seen whether *Blasket*, should it survive appeal, would have the same impact on ICSID Convention awards, which are to be treated as final judgments of the courts of ICSID member states and thus are not subject to review on jurisdictional, merits, or other issues by the courts of the U.S. or other ICSID member states.