U.S. Courts Disagree on Whether Spain Is Immune from Enforcement of Intra-EU Arbitral Awards

Two different judges in the U.S. District Court for the District of Columbia recently issued conflicting decisions on whether, under the Foreign Sovereign Immunities Act (FSIA), the Kingdom of Spain is immune from the jurisdiction of U.S. courts in actions to enforce arbitral awards rendered in favor of investors from other Member States of the European Union (EU).

The underlying disputes arose from Spain's decision to repeal certain subsidies for the renewable energy sector. EU investors claimed that, in doing so, Spain violated provisions of the Energy Charter Treaty (ECT), a multilateral treaty to which EU Member States and several non-EU countries are party. The United States is not party to the ECT. The investors invoked the arbitration provision in the ECT and obtained arbitral awards that are subject to enforcement in the United States under separate treaties to which the United States is party, the Convention on the Settlement of Investment Disputes (the "ICSID Convention") and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").

However, the FSIA immunizes foreign states from the jurisdiction of U.S. courts, subject to limited exceptions such as when a foreign state explicitly or implicitly waives sovereign immunity (the "waiver exception") or agrees to arbitrate and the resulting award is enforceable under a treaty to which the United States is party (the "arbitration exception"). Spain argued that the plaintiffs were required to show that a valid arbitration agreement existed between the parties to establish jurisdiction under the FSIA. Relying on recent decisions by the Court of Justice of the European Union (CJEU), which is the highest court for interpreting EU law, Spain argued that a valid arbitration agreement did not and could not exist between Spain and EU investors under the ECT.

One judge in the D.C. District Court agreed with Spain, concluding that the existence of a valid arbitration agreement is a substantive requirement for establishing jurisdiction to enforce an arbitral award under the FSIA and that no valid agreement to arbitrate existed between Spain and the EU investors as a matter of applicable EU law. By contrast, another judge held that, for purposes of the FISA, it was enough to show that the ECT existed and contained an arbitration provision, and that the applicability of that provision to these investors was an issue on the merits of the award.

The U.S. Court of Appeals for the D.C. Circuit will now have to clarify whether the existence of a valid arbitration agreement is a substantive requirement under the FSIA, and if so, whether a valid arbitration agreement exists in these intra-EU disputes.

One Judge Finds No Jurisdiction to Enforce Intra-EU Awards under the FSIA

On March 29, 2023, in *Blasket Renewable Invs., LLC v. the Kingdom of Spain*, Judge Richard J. Leon of the D.C. District Court dismissed an action to enforce an intra-EU arbitral award against Spain for lack of jurisdiction under the FSIA.[1]

The EU investors argued that jurisdiction was proper under the FSIA's arbitration and waiver exceptions. The dispute centered on (i) whether the existence of a valid agreement to arbitrate is a question for the court to decide in determining its own jurisdiction, and if so, (ii) whether a valid arbitration agreement existed between the parties in this case.

In answering the first question, Judge Leon read D.C. Circuit precedent as requiring a substantive inquiry into the existence of a valid arbitration agreement under the FSIA. He then relied on Supreme Court precedent including *Granite Rock Co. v Int'l. Bhd. of Teamsters*, which states that a court must "satisfy itself" about the existence of an arbitration agreement, such as by resolving "any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce."[2]

Following this reasoning, Judge Leon determined that a court cannot merely defer to the arbitrators' determination regarding the existence of a valid arbitration agreement but must undertake that analysis itself, particularly where the issue is whether the parties had the legal capacity to agree to arbitrate at all.

Judge Leon then turned to the second question. He looked to the text of the ECT, which requires arbitrators to interpret its provisions in accordance with "applicable rules and principles of international law." Judge Leon agreed with Spain that EU law, which derives from treaties between EU Member States, formed part of the rules of international law that applied to EU parties under the ECT. Judge Leon also accepted Spain's argument that two recent decisions by the CJEU, known as *Achmea* and *Komstroy*, established that EU Member States are legally incapable of agreeing to arbitrate disputes with other EU parties under investment treaties such as the ECT as a matter of EU law.

Another Judge Finds Jurisdiction to Enforce Intra-EU Awards under the FSIA

One month before Judge Leon's ruling in *Blasket Renewable*, Judge Tanya S. Chutkan also of the D.C. District Court issued two decisions upholding jurisdiction over actions to

[1] *Blasket Renewable Invs., LLC v. the Kingdom of Spain*, No. 21-cv-3249, 2023 U.S. Dist. LEXIS 54502 (D. D.C. Mar. 29, 2023).

[2] *Granite Rock Co. v Int'l. Bhd. of Teamsters*, 561 U.S. 287, 297 (2010).

enforce intra-EU awards against Spain, *9REN v. the Kingdom of Spain* and *NextEra v. the Kingdom of Spain*.[3]

Unlike Judge Leon, however, Judge Chutkan rejected the view that the court had to decide the question of the existence of a valid arbitration agreement at the jurisdictional stage. Rather, in Judge Chutkan's view, the existence of an arbitration agreement is only a facial requirement under the FSIA, and therefore, it was enough that the parties did not dispute that the ECT existed and contained an arbitration provision. According to Judge Chutkan, the question about whether EU investors could properly invoke that provision was a matter of arbitrability that went to the merits of the award.

Judge Chutkan did not address the line of cases referenced by Judge Leon such as *Granite Rock*, which hold that questions about the formation or existence of an arbitration agreement are for the courts to decide.

What to Expect in the D.C. Circuit

Whether EU Member States such as Spain are immune from actions to enforce intra-EU awards in the United States will first depend on the answer to this threshold question: How searching is the inquiry into whether a valid arbitration agreement exists for purposes of determining the court's jurisdiction under the FSIA?

If the D.C. Circuit agrees with Judge Leon that a U.S. court must satisfy itself that a valid arbitration agreement exists as part of the jurisdictional analysis under the FSIA, it will also need to determine whether Judge Leon was correct that Spain was legally incapable of agreeing to arbitrate with EU investors as a matter of applicable EU law.

Ultimately, if the D.C. Circuit affirms Judge Leon's decision, EU Member States will have a clear roadmap for fending off intra-EU award enforcement actions in the United States.

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[3] *9REN Holding S.À.R.L. v. Kingdom of Spain*, No. 19-cv-01871, 2023 U.S. Dist. LEXIS 25860 (D. D.C. Feb. 15, 2023); *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, No. 19-cv-01618, 2023 U.S. Dist. LEXIS 25862 (D. D.C. Feb. 15, 2023).

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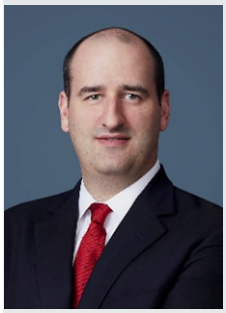

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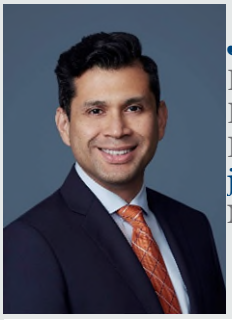

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