SQUIRE PATTON BOGGS

English High Court Greenlights Enforcement of an ICSID Arbitration Award Issued in Intra-EU Investment Treaty Proceedings

EMEA – 20 October 2023

A major development in the intra-EU investment treaty arbitration saga recently played out before the English courts. In *Infrastructure Services Luxembourg and Energia Termosolar v. Spain* (Antin v. Spain) the High Court took a stance in favour of recognition and enforcement of intra-EU awards issued under the ICSID Convention. Antin v. Spain follows the precedent set by the UK Supreme Court in *Micula v. Romania*, which held that the EU treaties did not supersede the UK's obligations under the ICSID Convention.

Background

The High Court's decision in *Antin v. Spain* concerns an ICSID arbitration award issued in Energy Charter Treaty (ECT) proceedings brought by Luxembourgish investors against Spain. The award was issued in June 2018, shortly after the Court of Justice of the European Union (CJEU) held in *Slovak Republic v. Achmea BV* that a clause providing for investor-state arbitration in a bilateral investment treaty concluded between two EU member states was incompatible with EU law. In 2021, the CJEU extended the effect of the *Achmea* judgment in *Republic of Moldova v. Komstroy LLC*, by precluding intra-EU investment treaty arbitration pursuant to the ECT.

Despite the *Achmea* decision and Spain's intra-EU jurisdictional objection, the arbitration tribunal upheld jurisdiction in respect of Antin's claims. The tribunal also found that Spain breached the fair and equitable treatment standard in the ECT and awarded damages to the investors.

In June 2021, the award-holders obtained an *ex parte* order registering the award in England (Registration Order) pursuant to Article 1 of the Arbitration (International Investment Disputes) Act 1966 (1966 Act), which implements the UK's obligation to recognise and enforce ICSID awards under Article 54 of the ICSID Convention. Registration is a prerequisite to enforcement as, for the purposes of execution, pecuniary obligations imposed under a registered award are, pursuant to Article 2 of the 1966 Act, of the same force and effect as a domestic High Court judgment.

Spain applied to set aside the Registration Order, raising, amongst others, a sovereign immunity objection. This objection was founded on the *Achmea*-line of CJEU jurisprudence and concerned the alleged lack of jurisdiction of (i) the ICSID tribunal in the arbitration proceedings; and (ii) the High Court in the English registration proceedings. This article considers these two strands in turn.

Achmea Jurisprudence and Tribunal's Jurisdiction

In the first strand of its jurisdictional objection, Spain posited that the ICSID tribunal lacked jurisdiction in light of the CJEU decisions in *Achmea* and *Komstroy*. Mr. Justice Fraser was thus required to consider whether the EU treaties, as interpreted by the CJEU, prevailed over the UK's obligation to recognise and enforce ICSID awards under the ICSID Convention, as implemented by the 1966 Act.

It was not the first time that the English courts had to weigh EU law against the UK's ICSID Convention obligations. In 2020, this issue was considered at length by the Supreme Court in the already-mentioned *Micula v. Romania*. On that occasion, the court had to determine whether the EU law duty of sincere cooperation required a stay on enforcement of an ICSID award, in circumstances where that award was subject to investigation for breaches of state aid rules by the EU Commission and proceedings before the CJEU.

The Supreme Court lifted the stay, finding that, under Article 351 of the Treaty on the Functioning of the European Union (TFEU), EU law could not trump the UK's obligations under the ICSID Convention, which had arisen prior to the UK's accession to the EU (para 111). As regards the UK's duties under the ICSID Convention, the court stressed that the ICSID Convention is "self-contained and does not permit any external review" of ICSID awards, including at the "stage of recognition and enforcement". Pertinently, the court went on to elaborate that a domestic court considering an application for recognition and enforcement of an ICSID award "may not reexamine the ICSID tribunal's jurisdiction". Rather, domestic courts are "restricted to ascertaining the award's authenticity" (para 68). Finally, the court stressed that interpretation of the ICSID Convention is governed by international law principles and cannot be affected by EU law (para 87).

The High Court considered that the *Micula* reasoning was directly applicable in *Antin*. Since Spain's jurisdictional objection based on *Achmea* was "raised before and considered (and rejected) by the ICSID arbitral tribunal and the ICSID Committee", it could not be reexamined at the enforcement stage in England (*Antin v. Spain,* para 90). Crucially, the court noted that the issue of the tribunal's jurisdiction is "exclusively allocated under the ICSID Convention to ICSID itself" (para 79). Therefore, the UK was under an international obligation to enforce the award against Spain under the ICSID Convention (as implemented in national legislation through the 1966 Act).

Mr. Justice Fraser also noted that the UK's own multilateral international treaty obligations, owed to all signatories of the ICSID Convention, remained unaffected by the CJEU's judgments in *Achmea* and *Komstroy,* given that the CJEU could not be considered the "ultimate arbiter under the ICSID Convention nor under the ECT" (para 80).

Alternatively, Mr. Justice Fraser reasoned that, even if the UK's international obligation to enforce the award had been affected by the TFEU, as interpreted by the CJEU's judgments in *Achmea* and *Komstroy*, its obligation to enforce the award under the ICSID Convention should still be given precedence under the rules of the Vienna Convention on the Law of Treaties (VCLT) applicable to "successive treaties relating to the same subject-matter" (Art 30(1)). The VCLT provides that "when the parties to the later treaty do not include all the parties to the earlier one: […] as between a state party to both treaties and a state party to only one of the treaties, the treaty to which both states are parties governs their mutual rights and obligations" (Art 30(4)(b)).

Mr. Justice Fraser concluded that, on the facts, given that (i) many state parties to the ICSID Convention are not parties to the TFEU; (ii) the ICSID Convention predates the TFEU; (iii) both Spain and the UK are party to the ICSID Convention, and (iv) the UK is no longer party to the TFEU, the ICSID Convention governed the mutual rights and obligations of the UK and Spain. Accordingly, Mr. Justice Fraser held that the enforcement of intra-EU ICSID awards in the UK was thus governed by the ICSID Convention, rather than the conflicting provisions of the TFEU.

State Immunity

In *Micula*, the Supreme Court left open a possibility that national law defences to enforcement may potentially be invoked but only in "certain exceptional or extraordinary circumstances" (*Micula v. Romania,* para 78), without specifying what such circumstances must entail. It is under this potential exception that Fraser J considered the second strand of Spain's jurisdictional objection, which was based on state immunity. Spain argued that, under section 1(1) of the State Immunity Act 1978 (SIA 1978), it enjoyed immunity from the jurisdiction of the English courts in the registration proceedings. Accordingly, Spain asserted that the English High court had no jurisdiction to issue the Registration Order in the first place.

The Claimants countered that Spain had waived its immunity under two separate grounds. First, under section 2(2) of the SIA 1978, Spain had concluded a "prior written agreement" to submit to the jurisdiction of the English courts. The High Court agreed that Spain had concluded prior written agreements to submit to the jurisdiction of the English courts by agreeing to (i) Article 54 of the ICSID Convention, pursuant to which state parties undertook to recognise and enforce ICSID awards; and (ii) Article 26 of the ECT, which provided the jurisdictional basis for the claimants' award against Spain. Second, the claimants argued that, under section 9(1) of the SIA 1978, Spain had "agreed in writing to submit a dispute […] to arbitration". Again, the High Court considered that both the ICSID Convention and Article 26 of the ECT constituted agreements in writing by Spain to submit disputes with investors from other states to international arbitration (*Antin v. Spain,* paras 95 and 102).

Comment

Mr. Justice Fraser's judgment gave precedence to the ICSID Convention over EU law, thus potentially attracting a wave of enforcement proceedings in respect of intra-EU ICSID awards. Indeed, on 27 March 2023, the High Court granted investors two interim charging orders and an interim third-party order in connection with enforcement of another intra-EU ICSID award – *Blasket Renewable Investments v. Spain*. The court set a return hearing date for 2 May 2023 to decide whether the orders should continue or be discharged. The resulting judgment is likely to be handed down in 2023 and will likely contain observations on the interplay between EU law and the ICSID Convention.

Mr. Justice Fraser's reasoning, however, only expressly applied to the ICSID Convention, rather than awards made under the New York Convention. Indeed, he noted that "the effect of [Articles 53 and 54 of the ICSID Convention] is to take ICSID awards outside the normal regime for the enforcement of arbitral awards, including the New York Convention regime, which enables recognition to be refused by national courts on specified grounds" (*Antin v. Spain,* para 78). One of those grounds contained in Article V(1)(a) is based on the invalidity of the arbitration "under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made" (New York Convention, Art V(1)(a)).

Interestingly, we may know the stance of the English courts on the question of enforcement of intra-EU awards under the New York Convention in the not-too-distant future. Recently, Poland sought to obtain an order from the Amsterdam Court requiring a Dutch investor to cease intra-EU investment treaty arbitration proceedings, which were seated in London. However, the Court of Amsterdam refused to issue the order, noting that it was for the tribunal to decide on its own jurisdiction under section 30 of the English Arbitration Act 1996, and that the English courts were not bound by EU law. Should the tribunal rule in favour of the investors, Spain will likely apply to the English courts to set aside any resulting award, as it is bound to do pursuant to Article 7(b) of the Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union 2020.

Notably, the conclusions of the High Court on state immunity are in line with the position adopted by the Australian courts in parallel *Antin v. Spain* recognition and enforcement proceedings. In that judgment, the High Court of Australia held that Spain's agreement to Article 54 of the ICSID Convention constituted a waiver of state immunity from the jurisdiction of the Australian courts, under the Australian equivalent of the SIA 1978, for the purpose of the recognition and enforcement of the award.

ICSID enforcement proceedings against Spain in the US have, however, produced contradictory judgments. On 15 February 2023, the US District Court for the District of Columbia rejected Spain's jurisdictional objections based on the CJEU judgments in the context of proceedings brought by investors to enjoin Spain from seeking anti-suit injunctions in the Dutch and Luxembourgish courts. However, on 29 March 2023, the same court accepted that, in light of *Achmea* and *Komstroy*, Spain lacked the legal capacity to agree to arbitrate disputes with investors under the ECT. These contradictory judgments are set to be resolved in an appeal to the US Court of Appeals for the District of Columbia.

Finally, jurisdictional objections based on *Achmea* and *Komstroy* have been upheld in enforcement and set-aside proceedings brought before the EU courts. *Achmea* was the first non-ICSID award to be set aside. The Federal Court of Justice of Germany annulled it due to the lack of a valid arbitration agreement in the Slovak Republic-Netherland BIT. A similar approach was adopted by the Paris Court of Appeal, which annulled an award issued under the Austria-Poland BIT. In the wake of *Komstroy*, the Swedish Court of Appeal set aside an intra-EU award in *Novenergia II v. Spain* issued under the ECT. Equally, following further extension of the *Achmea* doctrine by the CJEU in *PL Holdings v. Poland*, the Swedish Supreme Court annulled an intra-EU award even though the jurisdiction was arguably based on an *ad hoc* arbitration agreement for intra-EU investor-state arbitration. Furthermore, it appears that enforcement of intra-EU ICSID awards will be met with strong resistance in the EU. In fact, the Luxembourg Supreme Court refused enforcement of the *Micula* ICSID award in July 2022, finding that the arbitration agreement founded on the Sweden-Romania BIT became incompatible with EU law when Romania joined the EU in 2007, even though the ICSID claim itself was brought over a year before Romania's accession.

As more intra-EU arbitrations reach the stage of enforcement and set-aside proceedings, we will likely see a host of new decisions from the domestic courts grappling with the effect of *Achmea* and *Komstroy* on the validity and enforceability of awards.

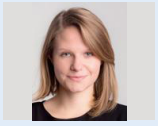
For the avoidance of doubt, the statements in this article are only of a descriptive nature and do not express any opinion on the correctness or incorrectness of any of the decisions or arguments described herein. The views expressed are those of the authors and do not necessarily reflect the views or positions of any entities they represent.

Karolina Latasz is a senior associate in the International Dispute Resolution Practice Group. She is also a co-founder of Young Investment Treaty Forum established under the auspices of the British Institute of International and Comparative Law.

Ruggero Chicco is an associate in the Litigation Practice Group.

Republished with permission from IISD, originally published on iisd.org/itn.

Contacts



Karolina Latasz
Senior Associate, London
T +44 20 7655 1552

Ruggero Chicco
Associate, London
T +44 7925 637 704