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English Court Thwarts Spain's Latest Attempt to Resist Enforcement of ECT Awards

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Some readers will be familiar with the many claims made against Spain for the alleged violation of its obligations to foreign investors under the Energy Charter Treaty (the **ECT**). In May 2023, the English Commercial Court became the latest forum to deny Spain's resistance to international enforcement, dismissing its application to set aside the registration of a €120 million arbitral award in the case of *Infrastructure Services Luxembourg SARL and Energy Termosolar B.V. v Kingdom of Spain*.[1]

In rendering its decision, the English Court rejected Spain's plea of sovereign immunity and reliance on the so-called "intra-EU objection" as established in *Slowakische Republic v Achmea* [2] (**Achmea**). In so doing, the Court further consolidated the UK's status as a pro-investor jurisdiction, particularly in the context of International Centre for Settlement of Investment Disputes (**ICSID**) awards and the Spanish "situation".

Background

The ECT is a multilateral framework with 54 signatories, principally engineered to liberalise energy markets. As stated on the ECT website, "It is designed to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources". Central to the ECT are the protections afforded to foreign investors, including a prohibition on expropriation and an obligation on states to afford investors fair and equitable treatment.

In the early 2000s, to meet EU renewable energy targets, the Spanish government introduced an incentive scheme to encourage investment in the renewables sector. However, after the 2008 economic crisis, the Spanish government reduced the premiums being paid to investors, who in turn sought to recover their loss by invoking the arbitration provisions of the ECT.

Infrastructure Services Luxembourg SARL and Energy Termosolar B.V. (the **Claimants**) were two such investors and, in June 2018, they secured an ICSID arbitral award in the amount of €120 million (the **Award**). Spain's challenge of the Award under the ICSID annulment procedure was rejected by an *ad hoc* committee on 30 July 2021.

Simultaneous with the annulment process, the Claimants applied to register the Award in England for the purposes of enforcement, which application was granted *ex parte* on 29 June 2021 (the **Registration**). Spain applied to set aside the registration of the Award on two grounds: (i) lack of jurisdiction; and (ii) non-disclosure (the **Set Aside Application**).

Alleged Lack of Jurisdiction

Section 1 of the UK State Immunity Act 1978 (**SIA 1978**) provides that a state is immune from the jurisdiction of the courts of the United Kingdom unless one of several specific exceptions apply. The Claimants invoked two such exceptions in applying to register the Award:

- *Section 2(1) of the SIA 1978*: immunity will not apply where the state has submitted to the jurisdiction of the UK, which may be evidenced by a prior written agreement.

- *Section 9(1) of the SIA 1978*: where a state has agreed in writing to submit a dispute to arbitration, the state is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.

Spain's Set Aside Application relied heavily on the Court of Justice of the European Union (**CJEU**) case of *Achmea*, which established that investor-state arbitration provisions in intra-EU bilateral investment treaties (i.e., investment treaties between European member states) violated EU law, on the basis that such provisions infringed upon the EU's autonomy to determine matters of EU law. The subsequent 2021 CJEU decision in *Moldova v Komstroy* [3] (**Komstroy**) extended the *Achmea* principle to multilateral agreements, including the ECT. Spain therefore argued that, in line with *Achmea*, it could not have submitted its dispute to arbitration as to do so would be inconsistent with EU law.

Justice Fraser rejected this argument, noting that the intra-EU objection was "a purely EU law issue". The CJEU did not have primacy over the ICSID Convention, and therefore, notwithstanding the *ratio decidendi* of *Acmea*, "by entering into an arbitration agreement, the parties agree that the arbitral tribunal will resolve their disputes, and not domestic courts". Spain could not rely on *Achmea* to "dilute the United Kingdom's own multilateral international treaty obligations" including those arising from the ICSID Convention under which the Award was rendered.

As regards the registration of ICSID awards, Justice Fraser applied the ratio of the UK Supreme Court in *Micula & Ors v Romania* [4] (**Micula**): it was not open to Spain to argue lack of jurisdiction after the outcome of the ICSID annulment process (as concluded in July 2021). *Micula* confirmed that there are very few avenues through which the registration of an ICSID award can be challenged under the Arbitration (International Investment Disputes) Act 1966 (which governs ICSID award registration in the UK).

In delivering a comprehensive overview of the regime for the enforcement of ICSID awards under UK law, Justice Fraser found that having acceded to the ICSID Convention, Spain had agreed in writing, by virtue of Article 54, to submit to the English Court's jurisdiction in respect of an award rendered pursuant to the ICSID Convention.

Accordingly, both the SIA 1978 exceptions relied upon by the Claimants were found to apply.

Non-Disclosure

It is a feature of without notice (*ex parte*) applications (as the Set Aside Application was) that the applicant must comply with the duty of full and frank disclosure. This requires, in essence, the applicant making the arguments that the respondent would have made had the application been made on notice. Whilst Justice Fraser remarked that the duty is a "high one", in the present case there had been no breach.

Of particular interest, Spain had argued that the Claimants had failed to update the Court on two EU law matters arising after the date of the Registration but before the date of service of the associated order on Spain. The Judge determined that:

1. It was not of any material significance that the Claimants had not alerted the Court to the *Komstroy* decision, which merely added to the weight in favour of Spain's argument based on *Achmea*, but did not raise any new arguments; and

2. "Intra-EU Declaration 1", which, in effect, gave credence at an EU level to the *Achmea* principle, is not binding on the English Court (following Brexit) and therefore the claimants not providing it did not constitute material non-disclosure.

In any event, the judge was satisfied that Spain had the opportunity to appeal the Registration, as it so did, and there was no prejudice suffered by Spain, as might be contrasted with, for example non-disclosure made on application for an *ex parte* freezing injunction.

Comment

The English Courts have previously granted interim relief in the form of third-party debt orders against Spain in favour of the Claimants and, in a separate case, Blasket Renewables Investments. In addition, earlier this year, the English Courts dismissed[5] the European Commission's application to intervene in these proceedings, on the basis that "the joinder of the Commission would inevitably increase complication and costs" and it had not been demonstrated that the Commission would "bring something extra to the table". With this latest judgment, the English Courts have therefore marked themselves out as a jurisdiction that will, notwithstanding *Achmea,* uphold investors' rights and has the judicial tools to give effect to the recognition and enforcement of ICSID awards.

Jenner & Block has extensive experience in international enforcement actions, particularly concerning arbitral awards, as well as a formidable reputation in investor-state arbitration and the energy sector more generally.

Footnotes

[1] [2023] EWHC 1226 (Comm)

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

[3] *Moldova v. Komstroy* (Case C-741/19)

[4] [2020] UKSC 5

[5] [2023] EWHC 234 (Comm)

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