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The Role of the ECtHR in the Protection of International Arbitral Awards: Insights From BTS Holding v Slovakia

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On 30 June 2022, the European Court of Human Rights ("ECtHR" or "the Court") delivered its judgment in *BTS Holding, a.s. v. Slovakia* ("*BTS*"), a case concerning the non-enforcement in Slovakia of a Paris-seated ICC commercial arbitration award. Although there is nothing particularly ground-breaking in the Court's key findings, the judgment has caught the attention of international arbitration practitioners in Europe. The judgment is important partly because of its timing. It is the first time in many years that the ECtHR has addressed the topic of whether an arbitral award can be a "possession" and, correspondingly, whether non-enforcement of an award can constitute an unjustified interference with property rights. It also comes at a time when the European arbitration community is starting to look to the European Convention on Human Rights (the "Convention" or "ECHR") as a solution to problems created by the European Union's fervent – and by now, very successful – opposition to intra-EU investment arbitration (see e.g., here and here). It is on this latter aspect that we focus our comments.

Yes, An Arbitral Award Constitutes A "Possession" Under A1P1

There is nothing controversial in the ECtHR's confirmation that an arbitration award can constitute a "possession" for the purposes of Article 1 of Protocol No. 1 to the Convention ("A1P1") (*BTS*, para 49). The ECtHR's jurisprudence on arbitration awards as "possessions" for the purposes of A1P1 has been consistent in this respect ever since *Stran Greek v. Greece* (e.g., *Regent Co v. Ukraine* and *Kin-Stib v. Serbia*). A "claim" can constitute a "possession" within the meaning of A1P1 provided it is "sufficiently established to be enforceable" (*Stran Greek*, para 59).

In *BTS*, the facts giving rise to the Court's conclusion that the applicant's "award was sufficiently established to amount to a 'possession'" (*BTS*, para 53) could barely have been more straightforward: the award had become final and binding; Slovakia had not challenged it at the seat; it had become in principle enforceable in Slovakia by operation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and the provisions of the (Slovakian) Arbitration Proceedings Act; no separate decision was required for the recognition of the award in Slovakia; [1)] and the enforcement proceedings "did not allow for any substantive review of the award itself" (*BTS*, paras 50-2).

This judgment does not, however, provide the (eagerly-awaited) answer to the question we

considered in our article on 'The agreement terminating intra-EU BITs: are its provisions on 'New' and 'Pending' Arbitration Proceedings compatible with investors' fundamental rights', published in *Arbitration International* in 2021 (here). That is, where would the Court draw the line between a claim that is "sufficiently established to be enforceable" and one that is not, in the context of an arbitral award? Does an award constitute a "sufficiently established" claim only if there is no scope for a challenge proceeding to set aside or annul the award? In this respect, the *BTS* judgment offers no clues to the approach the ECtHR might take to those awards, or to investment awards impacted by the application of EU law after *Achmea* more generally.

Failure to Enforce an Award Can Constitute an Unjustified and Unlawful "Interference" with Possessions

The Court's analysis of the merits of BTS's claims provides somewhat more fertile ground for inferring how the Court might approach a clash-of-regimes-type dispute, for example where an award is set aside or not enforced as a result of the application of the Termination Agreement or simply of EU law post-*Achmea*.

The Court confirmed at the outset that the non-enforcement of the award was "an interference" with the applicant's possession (*BTS*, para 64; referring to *Stran Greek*, paras 67 and 68). It therefore fell to be assessed for compliance with the requirement of "lawfulness", in the ECHR sense of "manifestly erroneous application of the impugned legal provisions, or arbitrary conclusions being reached" (*BTS*, para 65; referring to *Beyeler v. Italy*, para 108), and as to whether the interference was "justified" (i.e., whether the non-enforcement struck a fair balance between the general interest of the community and the protection of the individual's fundamental rights (see *Sporrong and Lönnroth v. Sweden*, para 69)).

The Court focused on the requirement of lawfulness. It expressed "grave concerns" about the five bases cited by the domestic courts for non-enforcement of the award against NPF, an agency of the State (*BTS*, para 65). First, it described as "arbitrary" and lacking in (any) analysis the courts' assessment that there had effectively been no arbitration clause in place to found the tribunal's jurisdiction (para 67). Second, it found that the court of appeal's reliance on the lack of a specified time frame for compliance and of a certificate of the date of its becoming enforceable was ill-founded and went "beyond and above" the NFP's own arguments, without giving BTS an opportunity to respond (para 68). Third, it confirmed that, contrary to the courts' conclusions, "a lack of funds" (in the State budget) could not justify non-payment of the award (para 69). Finally, the ECtHR observed that the court of appeal had relied on two further bases for non-enforcement even though those arguments had not been raised by the NPF, and without giving BTS an opportunity to respond to them. One of those grounds concerned NPF's public policy objection, ostensibly advanced under Article V.2(b) of the New York Convention, that the NPF's rescission of the underlying contract (the act which gave rise to the applicant's successful arbitral claim) was done on competition grounds, *viz*. to prevent market concentration (para 28).

The ECtHR concluded that the grounds relied on by the domestic courts to refuse enforcement went beyond the framework established by local law and the New York Convention (para 71). To our knowledge, this is the first time that the ECtHR has assessed the "lawfulness" of the non-enforcement of an arbitral award by reference to the criteria established under the Convention, rather than moving straight to the question of justification.[2)]

Public Policy and the Lawfulness of an Interference

The potential significance of the Court's rejection of the public policy element of Slovakia's case will not be lost on practitioners. The actual ground for rescission of the contract was that the required approval from the Anti-Monopoly Office (AMO) was not issued within the time prescribed by national law (*BTS*, para 70). NFP did not suggest in the arbitral proceedings that the contract should be deprived of effect on the ground of allegedly anti-competitive effects. That argument was raised for the first time, and belatedly, in the Slovak enforcement proceedings.

While the ECtHR's reasoning on the point is rather sparse, the Court was evidently unimpressed by the domestic courts' public policy conclusions, reached in reliance on a competition argument unsupported by the actual decision of the AMO or by any other evidence, and raised for the first time during the enforcement proceedings (para 70). The Court's observations on this point fuelled its overall conclusion that the refusal to enforce the award crossed the threshold of "manifestly erroneous application" of the law or reaching "arbitrary conclusions". One can see ample scope for debate about similar issues should an objection to enforcement of an ISDS award on public policy grounds related to EU competition or State aid law come to be examined for compliance with the award creditor's A1P1 rights. Objections of this kind fall within the territory covered in well-known intra-EU ISDS cases such as *Micula* (see here).

Bringing Rights into the Balance

Turning to whether the interference was "justified", the Court found that the domestic courts had taken "no account of the requirements of the protection of the applicant company's fundamental rights and the need for a fair balance to be struck between them and the general interest of the community" (*BTS*, para 71). Accordingly, even if the refusal to enforce the award had served a general interest, it had not been demonstrated that it was proportionate to that aim (para 71). The ECtHR therefore concluded that Slovakia's refusal to enforce BTS' award was not justified for the purposes of A1P1 (para 72).

Again, there is nothing novel in the ECtHR's application of the "fair balance" test to a claim for violation of A1P1 arising out of a State's refusal to enforce an arbitral award. This is precisely the analysis we argued (here) would be required should an application arising out of the Termination Agreement ever reach the Court.[3)]

The failure of domestic courts to recognise the role of fundamental rights in domestic court proceedings arising out of arbitral proceedings has prompted findings of violation of the Convention in a number of recent cases (such as *BEG SpA v. Italy*, see also here). However, it is also an analysis that has been entirely lacking in judgments of the CJEU (*Achmea et seq*) and in the subsequent domestic judgments setting aside, or refusing to enforce, intra-EU awards (see e.g., *Slovak Republic v Achmea BV*, Case I ZB 2/15, German Federal Supreme Court (Bundesgerichtshof) Order, 31 October 2018, para 72; *Komstroy*).

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Time will tell whether the courts of the EU and its Member States can successfully incorporate fundamental rights into their handling of the difficult issues that arise in set-aside and enforcement proceedings arising out of intra-EU arbitration awards. Meanwhile it is highly likely that one of these cases will end up in the ECtHR in some form. That is where the clash of regimes will have to be resolved.

References

?1 As we observed in Nardell QC & Rees-Evans (p. 211), New York Convention awards usually require some “further enforcement measure”, such as an exequatur or other form of recognition by a domestic court. However, even where that is so, the jurisprudence of the ECtHR “suggests that the need for such further measures would not undermine their classification as ‘possessions’”.

?2 *Mont Blanc Trading Ltd and Antares Titanium Trading Ltd. v. Ukraine* presented a recent opportunity for the Court to consider complaints under ECHR Article 6(1) and A1P1 arising out of an alleged failure by domestic courts to give adequate reasons for not applying the New York Convention when refusing to enforce an award. However, the Court dismissed these aspects of the complaint as manifestly ill-founded (paras 86-95, 96-102).

?3 In that context, we refer in particular to domestic judicial proceedings for set aside or enforcement of an arbitration award caught by the Termination Agreement.

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