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Enforceability of Intra-EU Awards at the U.S. District Court for the District of Columbia: The Spanish Cases

Pablo Pérez-Salido · Sunday, June 21st, 2020

The filing of new actions continues in the United States District Court for the District of Columbia ("D.D.C.") to enforce ICSID awards rendered against Spain. The latest petition was filed on April 24, 2020, by Watkins Holdings S.à.r.l. and Watkins (Ned) B.V., both affiliates of the UK company Bridgepoint Advisers Limited, seeking the enforcement of a EUR 77 million award dated January 21, 2020. With this new action, there are, as of June 17, 2020, a total of seven pending cases in the D.D.C. brought by investors to enforce their favorable awards against Spain. In fact, new enforcement actions are likely to continue to be filed as other ICSID arbitrations relating to regulatory changes in the Spanish renewable energy regime (see prior posts here and here) are expected to conclude soon.

The choice of this venue as the default enforcement court persists, notwithstanding the potential implications of *Achmea* to the enforceability of intra-EU awards in the U.S. In a May 26, 2020 post, Seung-Woon Lee analyzes two recent rulings by the D.D.C., *Micula v Romania*, Case No. 17-cv-02332 (D.D.C. Sept. 11, 2019) and Novenergia II – Energy & Env't (SCA) v. Kingdom of Spain, 1:18-cv-01148 (D.D.C. filed May 16, 2018). Particularly, the author concludes that "after *Micula*, it remains an open question of whether the [D.D.C.] will enforce an arbitral award resulting from intra-EU disputes." In this light, a ruling on the pending cases against Spain are likely to be the first cases in which this "open question" is answered by the D.D.C. Further, such expected first ruling on the validity of intra-EU arbitral clauses under the ECT (and a BIT), is likely to have a major impact in future enforcement actions and the underlying choice of this venue. However, this article argues that it is unlikely that *Micula* will serve as future guidance in the enforcement actions of intra-EU awards against Spain, since the facts and the basis for jurisdiction in those cases are substantially different from those in *Micula*, and rather, the D.D.C. will conduct a case-by-case analysis.

This post aims to open the discussion as to what surely will become a 'hot topic' during the second half of this year. In doing so, this post briefly summarizes the reasons why the D.D.C. remains a default venue for enforcement actions against foreign sovereigns and how this tendency could substantially change soon.

The D.D.C. as the default venue.

After *Achmea*, the enforcement of many of the intra-EU awards would have been practically impossible in Europe, thus making the United States a preferable jurisdiction. In the U.S., the D.D.C. is "the dedicated venue for actions against foreign states."[1)] As a way of background, the default choice of the D.D.C. as an enforcement court is explained by the Second Circuit's holding in *Mobil Cerro Negro v. Bolivarian Repub. Venezuela*, 863 F.3d 96 (2d Cir. 2017) (see a prior post discussing this case in more detail here). In essence, the court in *Mobil* provided that arbitral awards issued against a foreign state pursuant to the ICSID Convention, when brought in federal court, must comply with the jurisdictional, service, and venue requirements under the Foreign Sovereign Immunities Act ("FSIA").

Under the FSIA actions may be brought, for instance, in the judicial district where a substantial part of the events giving rise to the claims took place or where the property in dispute, if any, is located (*see* § 1391(f) (1),(2), and (3)). Further, the FSIA, § 1391(f)(4), provides in relevant part that "[a] civil action[] may be brought…in the United States District Court for the District of Columbia if the action is brought against a foreign state[.]" Therefore, although other venues may be available, the D.D.C. will always be an appropriate venue to enforce an ICSID award against a foreign sovereign. From a procedural perspective, this choice of venue in most cases would avoid lengthy and costly dismissals for improper venue. In conclusion, the requirements under the FSIA have consolidated the D.D.C. as the default enforcement court for international arbitral awards rendered against foreign sovereigns.

Pending Cases against Spain

As stated above, *Mobil* established a plenary procedure under which a foreign sovereign, in this case Spain, must be served and given the opportunity to appear and file responsive pleadings. *Eiser Infrastructure Limited v. Kingdom of Spain*, 1:18-cv-1686 (D.D.C. filed July 28, 2017), was the first case in which the Court ordered staying the case pending a decision by an *ad hoc* annulment committee constituted by ICSID upon Spain's request. Recently, on June 11, 2020, the annulment committee issued its decision to annul the award. Therefore, the D.D.C. will likely soon rule on Spain's pending motions to dismiss and to strike.

In *Infrastructure Services Luxemburg S.à.r.l. v. Kingdom of Spain*, 1:18-cv-1753 (D.D.C. filed July 27, 2018), the action was stayed by the court in August of 2019 in relation to Spain's application at ICSID to annul the award. The merits of Spain's annulment application are still under review by that committee and a hearing is scheduled for in the fall. On April 20, 2020, Infrastructure Services Luxembourg S.à r.l. filed a counter-memorial on annulment.

On July 31, 2019, briefing on Spain's motion to dismiss the petition to recognize and enforce in *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, 1:18-cv-2254 (D.D.C. filed Sept. 28, 2018), was completed. Like in *Infrastructure*, the action in *Masdar* was stayed while a provisional stay was entered in connection with Spain's application for annulment at ICSID. However, on May 20, 2020, Spain's request for a continuation of the stay of enforcement of the award was rejected by the *ad hoc* committee and thus ordered the enforcement to be lifted. he D.D.C. was informed of such update through a joint status report and thus will soon rule on the pending motions to dismiss and to strike.

In *9Ren Holding S.à.r.l. v. Kingdom of Spain*, 1:19-cv-1871 (D.D.C. filed June 25, 2019), Spain

filed, on January 15 of this year, its motion to dismiss or stay the proceedings. Like in the above-mentioned cases, in *9Ren Holding S.à.r.l.*, Spain subsequently notified the D.D.C. that it had filed, on April 7, 2020, an annulment proceeding with the ICSID Secretary General. On June 8, 2020, the *ad hoc* committee was constituted with French arbitrator Nicolas Molfessis as President.

Another case is *Nextera Energy Global Holdings B.V. v. Kingdom of Spain*, 1:19-cv-1618 (D.D.C. filed June 3, 2019). This is a EUR 290 million award, one of the larger awards in this particular group. Briefing was concluded at the end of February and the enforcement is provisionally stayed in connection with Spain's annulment application submitted on December 16, 2019. On May 28, 2020 the *ad hoc* committee issued a decision on the termination of the stay of enforcement of the award, although such decision has not been made public yet.

The two most recent cases filed at the D.D.C. are *RREEF Infrastructure v. Kingdom of Spain*, 1:19-cv-3783, filed on December 19, 2019 (access to the docket sheet here), and *Watkins Holdings S.à.r.l. and others v. Kingdom of Spain*, 1:20-cv-1081, filed on April 24, 2020 (access to the docket sheet here). On April 15, 2020, ICSID's Secretary General registered the application for annulment of the award by Spain and, on May 29, 2020, Spain filed within the D.D.C. its motions to dismiss and to stay proceeding. In *Watkins*, however, Spain has not yet entered appearance before the D.D.C. while rectification proceedings at ICSID commenced on March 11, 2020, are still pending.

Finally, in various *amicus curiae* briefings[2)], Spain has been joined by the EU. In these briefings, the European Commission (acting on behalf of the EU) argued that, in the related intra-EU ICSID arbitrations, *Achmea* precludes the arbitral tribunals from exercising jurisdiction.

Conclusion

Despite the underlying uncertainties, the filing of new actions confirms that the D.D.C. continues to be the default venue for actions seeking to enforce ICSID awards, including those cases against Spain. However, this default choice could either persist or discontinue as the D.D.C. enters its first judgment and decides upon the enforceability of the above-mentioned ICSID awards rendered against Spain resulting from intra-EU disputes.

It seems reasonable to conclude that Spain will likely continue to file for annulment proceedings at ICSID, while requesting the stay of proceedings at the D.D.C., as this procedural strategy appears to have proven effective in delaying or avoiding compliance with the awards thus far. However, a first adverse ruling could significantly impact Spain's strategy (and that of other EU Member States) in the remaining actions in the U.S., and could also impact the U.S. enforcement regime as it relates to intra-EU awards.

Finally, at issue remains whether this first decision will have a major effect not only on the "value" of ICSID intra-EU awards, but also on the governing principles of enforceability and finality that make international arbitration so popular? A lot is at stake in the Spanish cases at the D.D.C.

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References

?1 *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 332 (D.C. Cir. 2003).

?2 See e.g., *Eiser Infrastructure Limited v. Kingdom of Spain*, 1:18-cv-1686 (D.D.C. filed July 28, 2017), Proposed brief of the European Commission on behalf of the European Union as *amicus curiae* in support of the Kingdom of Spain

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