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Amsterdam's Interim Relief Judge: Anti-enforcement Proceedings Against Arbitral Awards Could Violate the New York Convention

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On 28 February 2020, two Dutch investors obtained a favourable arbitral award against Spain. The tribunal found that Spain had violated the Energy Charter and ordered Spain to pay damages of EUR 15.4 million to AES Solar Energy Coöperatief U.A. (AES) and EUR 11.1 million to Ampere Equity Fund B.V. (AEF). Despite Spain's attempts to set aside the award, the Tribunal Fédéral of Switzerland denied the application. AES and AEF sought enforcement before the District Court of the District of Columbia. In response, Spain sought countermeasures before the District Court of Amsterdam to halt the enforcement of the arbitral award, claiming that it qualifies as unlawful state aid. Additionally, Spain initiated interim relief procedures before the District Court of Amsterdam, seeking measures to cease the then pending enforcement procedure in the US, in which the petition of enforcement has later been dismissed due to lack of jurisdiction. This blog post discusses the decision of the Dutch interim judges in first instance in this dispute and in particular the consideration that anti-enforcement proceedings against arbitral awards could violate the New York Convention.

The case before the District Court of Amsterdam

Spain initiated proceedings before the District Court of Amsterdam, under case number C/13/728512, requesting:

1. a declaration that the final arbitral award qualifies as unlawful state aid, and
2. an injunction prohibiting AES and AEF from taking measures aimed at the enforcement of the arbitral award.

In essence, Spain bases its requests on the argument that enforcing the arbitral award would compel Spain to violate EU state aid laws. Spain contends that no agreement to arbitrate exists between the parties, citing previous CJEU cases such as *Achmea*, *Komstroy*, and *PL Holdings*, which establish that disputes between a Member State and an investor from another Member State under the Energy Charter Treaty cannot be resolved through arbitration. Therefore, Spain claims that any payment made under the arbitral award would constitute unlawful state aid, particularly considering that AES and AEF's claims pertain to Spanish measures supporting renewable energy.

In addition to these proceedings, Spain also initiated summary proceedings against AES and AEF (and its (indirect) directors), as well as separately against an American company, Blasket Renewable Investment LLC, to which the claims of AES and AEF have been assigned. These summary proceedings aimed to halt the enforcement proceedings in the US, which were pending before the District Court of the District of Columbia. The Dutch judges in interim relief had to determine whether they had jurisdiction, whether Spain's claims were plausible, and if so, whether the requested interim measures could be ordered.

In the summary proceeding against Blasket Renewable Investment LLC, the interim relief judge ruled that they had no jurisdiction. First, the interim judge considered that by bringing a civil action before the District Court of Amsterdam, in which, although not explicitly seeking the annulment of the arbitral award, claims have been filed with the purpose of preventing the enforcement of the arbitral award, Spain has prima facie incorrectly established an additional forum outside the scope of the New York Convention. With that regard, the interim judge found that it could not have jurisdiction on the sole basis that there is a pending proceeding on the merits before the District Court of Amsterdam. Furthermore, the judge found no jurisdiction based on other grounds, particularly as the interim judge found no links with the Netherlands. Whereas in the summary proceedings against the Dutch investors, the court found that it has jurisdiction, mainly because the defendant companies are based in the Netherlands. In the summary proceeding against AES and AEF, Spain demanded various interim orders and bans, with penalty payments, against AES and AEF related to the enforcement proceeding before the District Court of the District of Columbia, as well as any acts that could frustrate the proceedings before the District Court of Amsterdam. These demands were denied by the interim relief judge.

The ruling of Amsterdam's interim relief judge

On 6 March, the interim relief judge issued a decision on Spain's preliminary application. The ruling mainly relies on two reasons to deny Spain's interim relief application.

First, the Amsterdam's interim relief judge ruled that Spain was attempting to create a new and non-existent forum in order to re-open the discussion of the award before the District Court of Amsterdam and prevent its enforcement, which is prima facie a violation of the closed system of the New York Convention.

The interim relief judge considered that the recognition and enforcement of foreign arbitral awards are governed by the New York Convention, which operates under a closed system. A request for the annulment of such an award can only be submitted to the court in the country where the arbitration took place. In this case, an arbitral award in a dispute between Spain and Dutch investors was issued by a tribunal seated in Switzerland. Spain's attempts to annul the arbitral award before the Tribunal Fédéral of Switzerland have failed. As a result, the arbitral award has become irrevocable. The interim relief judge considered further that a request for recognition and enforcement of a foreign arbitral award can only be submitted to the court in the country where this award is being enforced. The Dutch investors and later Blasket Renewable Investments LLC, the assignee, sought enforcement in the US, and not in The Netherlands. Despite that, Spain sought measures before the Dutch Court of Amsterdam aiming to prevent enforcement in the US and any other territory. Therefore, according to the interim judge, the procedure initiated by Spain before the District Court of Amsterdam prima facie violates the New York Convention, as such procedure

does not fall within the framework of the New York Convention. In other words, the New York Convention does not seem to leave room for anti-enforcement proceedings against arbitral awards, at least not in a territory where no enforcement is sought.

Second, Amsterdam's interim relief judge considered that the actions brought in the proceeding on the merits by Spain before the District Court of Amsterdam can be regarded as an anti-suit or anti-enforcement procedure, which *inter alia* denies or restricts AES and AEF's access to the courts in the United States. This amounts to a de facto prohibition of litigation. Since access to the courts is an important fundamental right, such a litigation prohibition is only permissible in very exceptional cases. It can only be granted if there is an abuse of the right to litigate (for example, if an obviously unfounded claim is filed based on incorrect facts or circumstances, and it is clear in advance that it has no chance of success). Since Spain has not complied voluntarily with the arbitral award, the interim judge considered that in principle AES and AEF have the right to seek enforcement against Spain's assets in the US and therefore, AES and AEF are not prima facie abusing their rights.

Thus, the demands by Spain were mainly denied because the interim judge found that Spain's claims in the proceeding on the merits, on which the interim requests are based, prima facie fall outside of the closed system provided by the New York Convention. Furthermore, even if the New York Convention allowed for anti-enforcement injunctions, in the Netherlands, this would probably not be granted under Dutch law as it does not appear that AES and AEF would abuse its right to litigate by seeking enforcement of the arbitral award.

Concluding remarks

The Dutch courts confirmed (so far in the interim in first instance) that to avoid enforcement of an arbitral award, the remedies in principle are to apply for setting aside or suspension by the competent authority of the country in which, or under the law of which, the award was made (in this instance, Switzerland) or to request refusal of the enforcement of the arbitral award where the enforcement is actually sought (in this case, in the US). Based on this interim finding, the Dutch courts consider this approach to be in line with the closed system of the New York Convention.

This matter will probably be further dealt with in the merits phase by the Dutch courts, as the proceeding on the merits in first instance is still pending. If an anti-enforcement proceeding (or a similar proceeding) against an arbitral award were possible in a state other than where enforcement is sought, it is questionable whether a judgment prohibiting the enforcement would be recognized and enforced in the state where enforcement of the arbitral award is sought. The effects of such a judgment could stay within the territorial limits of the State where the judgment was rendered, including the payments of penalties.

Meanwhile, the US District Court for the District of Columbia has dismissed the petition to enforce the arbitral award against Spain, as it ruled that no valid agreement to arbitrate existed under EU law and therefore, it lacks jurisdiction. For now, it appears that an anti-enforcement injunction by Spain relating to the US is unnecessary. However, the question remains as to whether other jurisdictions would adopt the same approach if enforcement is sought elsewhere.

Given the ongoing developments, this captivating case is definitely one to keep a close eye on.

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