Kluwer Arbitration Blog

English High Court Takes Pro-enforcement Stance in Intra-EU ECT Award Against Spain

Laura Rees-Evans (Fietta LLP) · Saturday, August 12th, 2023

The English High Court's judgment in *Infrastructure Services v Spain* is one of the most important developments of the past year in relation to the enforcement of intra-EU investment awards. It arises out of the Luxembourgish and Dutch claimants' successful ICSID arbitration against Spain under the Energy Charter Treaty ("ECT"), in which the tribunal held that Spain had violated the ECT by its reduction and ultimate removal of certain tariff advantages that had been available for investors in the renewable energy sector (*Antin Infrastructure Services et al. v Spain*). The claimants have sought enforcement of their award (worth around $120 million) in multiple jurisdictions, including the UK. In its judgment of 24 May 2023, the High Court (Mr Justice Fraser) upheld an order for the recognition of the award, finding that there were "*no proper grounds*" for setting it aside. This post sets out the background and context of the judgment, before analysing its significance for the enforcement of intra-EU investment awards.

Background to the Judgment in *Infrastructure Services*: Dismantlement of Intra-EU Investment Protection in the EU

The High Court's *Infrastructure Services* judgment follows a now infamous series of decisions of the Court of Justice of the European Union ("CJEU"), in which it has found that an arbitration clause in an intra-EU bilateral investment treaty ("intra-EU BIT"), and the arbitration clause (Article 26) in the ECT (when applied to intra-EU disputes), is contrary to EU law (*Achmea*; *Komstroy*; *Opinion 1/20*). As a result of the entry into force of the Agreement for the Termination of BITs between the Member States of the EU, most Member-States are now under obligations (among others) to object to the jurisdiction of tribunals in pending arbitration proceedings, and to resist enforcement of any adverse award. However, arbitral tribunals hearing proceedings instituted under intra-EU BITs and the ECT have continued to find jurisdiction under their respective arbitration clauses (the notable and sole exception being the award in *Green Power v Spain*). But the enforceability of extant awards has remained a matter of great legal uncertainty.

Investors have pinned their hopes, primarily, on jurisdictions outside the EU. The UK has occupied an unusual position in that respect: at the time of the CJEU's judgment in *Achmea*, it remained a fully-fledged (albeit outgoing) member of the EU; for an 11-month (transition) period in 2020, it had left the EU but remained bound by EU law pursuant to the Withdrawal Agreement; and by the beginning of 2021, it had become a fully-fledged non-Member, albeit with certain legacy

obligations remaining under the Withdrawal Agreement. There has been much speculation about the impact of the UK's unique position on the post-*Achmea* fall-out. In particular, the (multi-)million-dollar question on intra-EU award-holders' minds was whether the English courts would take a pro-enforcement stance towards those awards, when it was almost inconceivable that EU courts would do so.

The UK's Apparent Pro-Enforcement Stance to Intra-EU Investment Awards in the *Micula* Judgment of the Supreme Court and Subsequent Developments

The (unanimous) judgment of the UK Supreme Court ("UKSC") in *Micula* provided award-holders with the first glimmer of hope. There, the claimants sought enforcement in the UK of their ICSID award against Romania, rendered pursuant to the Romania-Sweden BIT. In parallel, the European Commission was pursuing proceedings against Romania, seeking to prevent enforcement of the award on the basis that its payment would constitute an unlawful State aid under EU law. The appeal before the UKSC arose out of Romania's application in the Commercial Court to set aside the registration of the Award or to stay enforcement, pending the determination of the State-aid proceedings before the EU courts (GCEU and subsequently CJEU). In its judgment of February 2020, the UKSC recognised the award and lifted a stay on its enforcement. It described the stay, which had been imposed by the High Court and upheld on appeal, as an "*unlawful measure in international law*" (paragraph 118; see also paragraph 84). It found that, in accordance with article 351 of the Treaty on the Functioning of the European Union, principles of EU law could not override the UK's pre-accession treaty obligations to implement the ICSID Convention. The question of the validity of the Romania-Sweden BIT was not at issue in the proceeding.

In early 2022, the European Commission referred an infringement proceeding against the UK to the CJEU in respect of the judgment. The grounds cited include the breach of the principle of sincere cooperation, and the failure to make a preliminary reference to the CJEU regarding the application of article 351. The Commission explained that it:

> "considers that the [UKSC] judgment has significant implications for the application of EU law to investment disputes". In particular, the Commission's concern is that the "UK courts' recognition and enforcement of such awards […] would circumvent and undermine the Commission's efforts […] in the context of intra-EU investment disputes […]."

Under Article 89 of the Withdrawal Agreement, CJEU judgments handed down in such proceedings are binding on and in the UK. However, the effect of such a judgment under domestic law is less clear: the European Union (Withdrawal) Act 2018, Section 6(1)(a), provides that English courts are "*not bound by any principles laid down, or any decisions made, on or after exit day by the European Court*"; but Section 7A provides that obligations arising under the Withdrawal Agreement are to be "r*ecognised and available in domestic law*" and "e*nforced, allowed and followed accordingly*". As a result, it is difficult to predict what impact an adverse judgment of the CJEU in the *Micula* infringement proceeding would have on enforcement proceedings relating to intra-EU investment awards going forward.

The High Court's Approach in *Infrastructure Services v Spain*

The High Court judgment in *Infrastructure Services* arises out of the claimants' attempts to have their ICSID arbitration award against Spain recognised and enforced in the UK. The claimants have also sought recognition and enforcement in other jurisdictions; most notably, in Washington, D.C, and in Australia (see the recent decision of the High Court of Australia, here). In the UK proceeding, Spain sought to set aside an order of the Commercial Court registering the award (the "Order") on two principal grounds: first, sovereign immunity based on the lack of jurisdiction of the tribunal and of the court to register it (arguments based on the effect of the CJEU's *Achmea* and *Komstroy* judgments); and second, failure by the claimants to fulfil their duties of full and frank disclosure under English law in obtaining the Order. I focus here only on the first of these two principal grounds. On the second, which would of itself have been dispositive if upheld, Mr Justice Fraser found that there was no "*material non-disclosur*e", and thus no grounds to set aside the Order on that basis.

At the nub of Spain's first argument for a set-aside of the Order was essentially the question of whether EU law, as set out in *Achmea* and *Komstroy*, could trump the UK's existing treaty obligations under the ICSID Convention, as enacted in the Arbitration (International Investment Disputes) Act 1966. The judgment therefore begins with a review of the reasoning of the CJEU in those cases. In relation to *Komstroy*, Mr Justice Fraser observed that the decision "s*omewhat glosses over the difficulties that* [the CJEU's interpretation regarding Article 26 ECT] *would cause in terms of Member States' existing international treaty obligations under both the ECT and the ICSID Convention*" (paragraph 66). In his view, Spain has "*pre-existing treaty obligations under other treaties*" which are not "*trump*[ed]" by the EU treaties; and the EU treaties do not "o*verride the relevant domestic law mechanism in the* [UK]" (paragraph 67).

Mr Justice Fraser found that the application before him was clearly determined by the reasoning of the UKSC in *Micula* (set out above) (paragraph 72). In particular, he observed that the Court had held that: (a) Contracting States may not refuse recognition or enforcement of an award on grounds covered by the challenge provisions in the Convention itself (articles 50-52), nor may they do so on grounds based on any general doctrine of *ordre public*, since in the drafting process, the decision had been taken not to follow the model of the New York Convention (*Micula*, paragraph 69); (b) in light of the wording of articles 54(1) and 55 and the *travaux préparatoires*, it is arguable that there is scope for some additional defences against enforcement, in certain exceptional or extraordinary circumstances which are not defined, if national law recognises them in respect of final judgments of national courts and they do not directly overlap with those grounds of challenge to an award which are specifically allocated to Convention organs under articles 50 to 52 of the ICSID Convention (*Micula*, paragraph 78); and (c) the proper interpretation of the Convention is given by principles of international law applicable to all Contracting States and it cannot be affected by EU law (*Micula*, paragraph 87). None of the "*exceptional or extraordinary circumstances*" (i.e., point (b)) for refusing enforcement were present in *Micula*. Mr Justice Fraser also found them to be absent in *Infrastructure Services*.

In doing so, he first considered Spain's overarching submissions on the impact of EU law upon its other, pre-existing treaty obligations under the ICSID Convention and the ECT. He found that the "[j]*urisdiction of the tribunal, and matters covered in the annulment application, are plainly within* [the] *areas allocated to* [Convention] *organs* [under articles 50 to 52 of the Convention]. *They are exclusively allocated under the ICSID Convention to ICSID itself*" and therefore couldn't be deployed by Spain in this application (paragraph 79). He concluded that it was not possible for

Spain (or any other Member State) to "re*ly upon the Achmea and/or the Komstroy cases to dilute the United Kingdom's own multilateral international treaty obligations*" and certainly not to "*interpret the 1966 Act differently to what its clear terms require*" (paragraph 86).

Next, he considered the "*only defence*" of Spain that could potentially fall into the category of defences set out in *Micula* (paragraph 78); i.e., that based on the State Immunity Act 1978 ("1978 Act"). He observed that Spain's arguments regarding the lack of a written agreement to arbitrate, and the validity of the award, were both within the grounds of challenge allocated to Convention organs and thus not permitted according to the UKSC's judgment in *Micula* (paragraph 90). He nonetheless addressed and dismissed those defences on their own merits at (paragraphs 104-125). Spain's immunity defence rested on the exceptions to immunity set out in section 2(2) (concerning the State's prior agreement to submit to jurisdiction) and section 9 (concerning the State's agreement to arbitrate) of the 1978 Act. He held that both Article 54 of the ICSID Convention and Article 26 of the ECT fall within "*prior written agreement*" for the purposes of section 2(2) of the 1978 Act (paragraph 95). He further found that the ICSID Convention satisfies the requirements of section 9(1) of the 1978 Act (paragraph 102).

Mr Justice Fraser's conclusion on the "jurisdiction" aspects of Spain's submissions is vehement: it simply cannot be correct, he said, at paragraph 123, that

> "by reason of the terms of the EU Treaties, and by reason of the rulings of the CJEU and its supremacy over EU law matters, the EU and the CJEU […] unilaterally changed – if not removed – all the existing treaty obligations of all the Contracting Parties to the ICSID Convention".

Implications of the Judgment for the Enforcement of Intra-EU Investment Awards

The potential significance of the High Court's judgment cannot be overstated. It is a very clear, elaborately reasoned and strongly worded rejection of the *Achmea* and *Komstroy* incompatibility issue as a basis for the non-enforcement of ICSID awards in England and Wales.

Earlier in the same proceeding, in January 2023, the High Court (Mr Justice Cockerill) had dismissed an application by the European Commission to intervene. The Commission argued that one of the reasons it sought to do so was that the UK "*is a very influential jurisdiction and, in a situation where these issues are very controversial, a decision in this jurisdiction may assist to clarify matters for the Commissio*n" (here, paragraph 21). Time will tell whether the approach spelled out by the High Court in *Infrastructure* is subject to and withstands any appeal by Spain, and if it does, whether it influences the approach to recognition and enforcement of intra-EU ICSID awards taken by courts in other jurisdictions. Judging by the concerns of the European Commission, and the direction of travel of courts in Australia and the US, award holders have cause to be optimistic.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Saturday, August 12th, 2023 at 8:52 am and is filed under Achmea, Energy Charter Treaty, Enforcement, Intra-EU BITs, Intra-EU Investment Arbitration, Intra-EU ISDS, UK
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.