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Between the Rock and Hard Place: Will the U.S. Court Follow the EU or International Arbitration Tribunals?

Gene Burd (Pierson Ferdinand) and Ejesha Amanova · Thursday, April 25th, 2024

The second front can open in the United States ("U.S.") for over 50 investment arbitration claims against the Kingdom of Spain ("Spain") that are worth hundreds of millions of U.S. dollars combined. The ongoing disputes spotlighted the continuing controversy between the decisions of the European Union's ("EU") highest court and international investment tribunals. The cases in question relate to the events of more than ten years ago when the government of Spain declared special incentives for energy-renewable projects to stimulate investment flow into the country, which the country revoked in the aftermath of the economic downturn, eventually triggering investors to initiate arbitrations alleging breach of the Energy Charter Treaty ("ECT"). Although many investors received awards, the Supreme Court of Spain refused to enforce them, reasoning that payments may violate EU law, constituting illegal state assistance. Moreover, the Court of Justice of the EU ("CJEU") in *Achmea* and later in *Komstroy* has held that investor-state dispute settlement provisions between EU members are void as contravening the EU establishment treaties. However, the relentless investors from Luxemburg, the Netherlands, and the United Kingdom proceeded with the enforcement of their awards in the U.S. despite the CJEU's cold showers.

Two cases highlight critical aspects of the enforcement saga. The first case, *NextEra Energy Global Holdings B.V. et al. v. Kingdom of Spain*, involves two Dutch companies that obtained the EUR 291 million International Centre for Settlement of Investment Disputes ("ICSID") award in 2019, with the arbitral tribunal finding that Spain breached its fair and equitable treatment obligations under the ECT. In the second case, *AES Solar et al. v. The Kingdom of Spain*, another two Dutch companies obtained an award in 2020 from a Swiss-seated UNCITRAL tribunal.

I. The U.S. Enforcement Actions and the Cross-Atlantic Duel of Injunctions

Investors in both *NextEra* and *AES Solar* petitioned the U.S. District Court for the District of Columbia to enforce their awards under the ICSID and New York Conventions, respectively, asserting that the U.S. court has jurisdiction, *inter alia*, under the arbitration exception to the Foreign Sovereign Immunities Act ("FSIA"). Spain challenged jurisdiction, arguing that the arbitration exception does not apply because the agreements to arbitrate between the parties were void under EU law as pronounced by the CJEU in *Achmea* and *Komstroy*. That's where the similarities ended, and the cases diverged.

In *NextEra*, Judge Chutkan rejected Spain's jurisdictional challenge, explaining that the legal validity of the arbitration agreement under EU law is not jurisdictional but rather raises the issue of arbitrability, which is a merits question. The judge explained that under precedential District of Columbia Circuit decisions in *Chevron Corp. v. Ecuador* and *LLC SPC Stileks v. Republic of Moldova*, jurisdiction under the FSIA only requires the existence of the investor-state dispute settlement provision of the ECT and the investor's notice of arbitration. Noting that "there is no question as to the existence of the copies of the underlying treaty, the notice of arbitration, and the tribunal's decision," the court rejected Spain's "backdoor challenge to FSIA jurisdiction." *NextEra*, at 13. Notably, in *NextEra*, Spain initiated a cross-Atlantic anti-suit injunction duel by asking a court in the Netherlands to issue an injunction prohibiting NextEra from proceeding with the enforcement action in the U.S. courts. In response, NextEra petitioned the U.S. District Court for the District of Columbia to issue an "anti-anti-suit" injunction preventing Spain from proceeding with the anti-suit injunction in the Netherlands. The District Court agreed with NextEra and issued an injunction prohibiting Spain from pursuing actions in the Dutch court, citing the court's duty to protect their legitimately conferred jurisdiction. While injunctions have been issued previously against foreign states, this is the first published case where a foreign state was subjected to an anti-suit injunction.

The court in *AES Solar* (AES Solar subsequently assigned the award to a Delaware-registered Blasket Renewable Investments LLC) took the opposite route. There, Spain objected to the court's jurisdiction, arguing that under the CJEU's *Achmea* and *Komstroy* decisions, Spain's offer to arbitrate the dispute with other EU investors set forth in Article 26 of the ECT was void *ab initio*. Judge Leon sided with Spain and dismissed the petition, explaining that under the Treaty of Lisbon, Spain "lacked the legal capacity to enter into agreements inconsistent with their obligations under the EU Treaties." *Blasket Renewable*, at 12. According to the court, *Chevron* and *Stileks* did not apply because they invoked the issue of whether a particular investment fell within the scope of the arbitration provision rather than the issue of legal capacity raised by Spain in *AES Solar*. As such, the court has held that no valid arbitration agreement existed, preventing the application of the FSIA arbitration exemption.

II. The Appeal

Both cases went on appeal, along with another case against Spain. Notably, in all three cases, the appellate court invited the U.S. Government to submit its position on the issues raised in the appeal. In appropriate cases (such as here, where foreign policy implications are involved), a court may invite other branches of the government to express their views. The court, however, is not required to abide by such views. Here, the U.S. Government, represented by the U.S. Department of State's Office of Legal Advisor and the Department of Justice, submitted an *amicus* brief where it took the position that the court must determine that an arbitration agreement exists before exercising jurisdiction under the arbitration exception to the FSIA. According to the *amicus* brief, a court must engage in a *de novo* review to determine the existence of an arbitration agreement as a jurisdictional fact that must be established. Interestingly, the brief did not address the issue of what establishing the "fact" means. There could be different views on that. For example, is it sufficient for the petitioner to produce a written instrument or instruments to establish the fact that the arbitration agreement existed for the FSIA jurisdictional purposes? Or must the petitioner go further and establish the legal validity of the agreement to arbitrate? The brief seems to conflate these two aspects. It implies without much discussion that a court must determine the legal validity of the agreement before the FSIA jurisdiction is exercised. The Government also argued that the U.S. court injunction against the proceedings in the Netherlands is an affront to the principles of international comity and must be lifted. However, it did not explain why Spain's attempt to seek an injunction against U.S. court proceedings in the Netherlands does not constitute such an affront.

III. The Oral Argument

On February 28, 2024, a panel of three judges for the U.S. Court of Appeals for the District of Columbia Circuit held oral arguments, which lasted for over four hours. Because the cases have not been consolidated, the court is expected to issue separate decisions in each case. During the argument, the judges peppered all parties with numerous questions, delving into the relationship between the EU and U.S. law. For instance, the bench seemed puzzled about the "principle of autonomy of EU law," which according to Spain, grants the CJEU the exclusive right to decide issues of EU law to the exclusion of arbitration tribunals. Judges asked counsel for Spain whether such exclusivity also denies the U.S. court the right to decide the cases at hand since, to resolve the dispute, the U.S. court would need to apply the EU law. Further, following Spain's argument that EU members are prohibited from arbitrating disputes between themselves outside of the EU judicial system, the judges asked whether it can be concluded that the EU prohibits its members from arbitrating at all and, as a result, forces them to litigation. This conclusion was particularly concerning to Judge Rogers, who pointed out the importance and economic benefits that were vested in arbitration in the aftermath of the Second World War. Spain, on its part, argued that when the EU members signed the EU Treaties, they understood that disputes between EU members would not be decided by arbitration.

The panel was also concerned that Spain's request for an anti-suit injunction in the Netherlands conflicts with the U.S.'s obligations under both the New York and ICSID Conventions to ensure the protection of investors' rights and access to justice. Accordingly, foreign governments' attempts to stop U.S. courts from enforcing investment awards by initiating proceedings in courts abroad may lead to the collapse of the ICSID or the investment treaties framework. On the other hand, the court seems to recognize that the principle of sovereign equality of states may have significant implications in foreign affairs. In other words, the court's inquiry appears to be directed into balancing between judicial power to resolve international disputes and political questions that are decided through diplomatic channels.

IV. Conclusion

It appeared from the judges' questions during oral arguments in the *NextEra* and *Blasket* cases that they were skeptical of Spain's arguments. However, the outcome is hard to predict for several reasons. First, the court might need to address whether the principle of autonomy of EU law prevents arbitral tribunals from resolving issues of EU law. Second, the court might need to balance the political concerns of sovereign equality and the relationships between the EU and the U.S. against the rights of investors inscribed by the ICSID. As judges repeatedly noted, the framework of the ICSID and reliance on investor-state arbitration is currently at stake. Over 100 enforcement proceedings are pending in the U.S., and the decision of the U.S. Court of Appeals for the District of Columbia Circuit may have considerable implications on the enforcement of investment awards in the U.S.

Gene M. Burd, a Partner at Pierson Ferdinand LLP, is representing LLC SPC Stileks (successor of Komstroy) in the U.S. court proceedings relating to the enforcement of the Award issued against the Republic of Moldova mentioned in this article.

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