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German Regional Court Dismissed Spain's Request for an Anti-Enforcement Injunction of an Intra-EU Investor-State Arbitration Award

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On 12 April 2024, the Regional Court of Essen ("LG Essen") dismissed Spain's request for an anti-enforcement injunction of an intra-EU investor-state arbitration award ([2 O 447/22](#)). The LG Essen held that anti-enforcement injunctions are inadmissible because they violate state sovereignty. This blog post will cover the facts and background of the decision, examine the legal issues involved, discuss its implications, and provide an outlook.

Facts and Background

The LG Essen's decision is part of a broader effort by investors to enforce investor-state arbitration awards between an EU investor and an EU member state ("intra-EU awards") outside the EU, after the Court of Justice of the European Union ("CJEU") has blocked the enforcement of such awards within the EU ([Romatsa](#)).

In December 2020, an ICSID tribunal found Spain to be in breach of the Energy Charter Treaty ("ECT") and awarded the German and Spanish subsidiaries of RWE AG ("RWE") \$28,080,000 in compensation ([ICSID ARB 14/34](#)). Spain refused to pay the award, relying on recent CJEU decisions, in which the CJEU held that arbitration clauses contained in both investment treaties concluded between EU member states and in the ECT violate EU law and must not be applied ([Achmea](#); [Komstroy](#)). Following Spain's refusal to pay, RWE initiated enforcement proceedings in the US District Court for the District of Columbia ("DC District Court") in December 2021.

A back-and-forth between the US and German courts followed. In response to the commencement of enforcement proceedings in the US, Spain applied to the LG Essen for an order preventing RWE from enforcing the award in non-EU countries ("anti-enforcement injunction").

RWE countered in March 2023 by seeking a preliminary injunction and temporary restraining order from the United States District Court for the District of Columbia, ordering Spain to stay the anti-enforcement proceeding in Germany ("anti-anti enforcement injunction"). While the US District Court has not yet ruled on this anti-anti-enforcement injunction, it has previously ruled in two similar cases in favor of EU investors ([9Ren v. Spain](#); [NextEra v. Spain](#)), granting anti-anti-

enforcement injunctions. In another case (*PV Investors v. Spain*), the request for an anti-anti-enforcement injunction was dismissed due to the intra-EU nature of the dispute and the primacy of EU law. These decisions are currently under appeal (see our [previous coverage](#)).

In response to the anti-anti-enforcement injunction brought by RWE in the US, Spain filed a motion with the LG Essen for a temporary restraining order to block the proceedings in the US (“anti-anti-anti enforcement injunction”). While the LG Essen denied Spain’s request for an anti-anti-anti-enforcement injunction, it was upheld on appeal by the Higher Regional Court of Hamm (“OLG Hamm”) in May 2023 ([I-9 W 15/23](#)). This was the first time an anti-anti-anti-enforcement injunction had been issued in Germany in the context of investment arbitration. The OLG Hamm’s decision was based on preserving Germany’s judicial sovereignty.

While the LG Essen had already decided on the anti-anti-anti-enforcement injunction, it still had to decide on Spain’s request for an anti-enforcement injunction. On 12 April 2024, the LG Essen dismissed Spain’s request for an anti-enforcement injunction of an intra-EU arbitration award ([2 O 447/22](#)).

Legal Issues

The decision on the anti-enforcement injunction addressed crucial legal issues, outlined below.

German Regional Court Has International Jurisdiction

The LG Essen established its international jurisdiction not under the [Brussels Ia Regulation](#), but under domestic rules ([Sections 12, 17 German Code of Civil Procedure](#) (“GCCP”)) applied by analogy. It emphasized that the Brussels Ia Regulation was not applicable, since it excluded the enforcement of arbitral awards pursuant to Art. 1 II lit. d), as indicated by the Regulation’s recitals. According to the analogously-applied provisions of Sections 12 and 17 GCCP, the court of the legal entities’ general venue has jurisdiction. In this case, RWE’s venue is in Essen. Regarding the Spanish subsidiary, the court determined that it also had jurisdiction over this entity under Section 8 I GCCP, which permits the joint hearing of related proceedings.

Anti-enforcement Injunctions Are Inadmissible in Germany

With respect to the injunction’s admissibility, the LG Essen scrutinized Spain’s request against the principle of state sovereignty. It argued that anti-enforcement injunctions violate the judicial sovereignty of states, even if they were directed against the investor rather than the enforcement court. The LG Essen argued that respect for the sovereignty of non-EU states is part of the EU’s constitutional identity, as reflected in Art. 3 V and 21 I Treaty on the European Union (“[TEU](#)”), and Art. 216 V Treaty on the Functioning of the European Union (“[TFEU](#)”). Spain, on the other hand, argued that the principle of effectiveness required the blocking of enforcement in non-EU countries in order to give full effect to the CJEU’s decisions *Achmea* and *Komstroy*. The LG Essen countered that although the principle of effectiveness is part of the EU’s constitutional identity, it cannot supersede the respect for state sovereignty. Furthermore, the CJEU’s judgments (*Achmea*;

Komstroy) do not create an obligation for EU member states' courts to block enforcement proceedings outside the EU.

Moreover, the decision addressed Spain's argument that enforcing the intra-EU award would violate [EU state aid law](#). According to the LG Essen, Spain had not obtained sufficient authorization from the EU Commission, which is competent for assessing and approving state aid measures. While Spain argued that it had initiated the authorization process and was subject to a "standstill obligation" ("Stillhalteverpflichtung") during this process, the LG Essen noted that the "standstill obligation" could have been overcome by a "presumed authorization" ("Genehmigungsfiktion") under Art. 4 VI of [EU Regulation 2015/1589](#), a course of action that Spain had not pursued. This indicates Spain's lack of intention to comply with the award. Consequently, Spain's behavior violates the principle of good faith and Spain lacks the need for legal protection ("Rechtsschutzbedürfnis"), a requirement for the admissibility of the request.

No Legal Basis for Anti-enforcement Injunctions in EU, Spanish or German Law

Finally, the LG Essen dismissed Spain's application for an anti-enforcement injunction on the merits, finding no legal basis in EU, Spanish, or German law. The court observed that, in accordance with Art. 4 I of the [Rome II Regulation](#), US law would typically apply because the assets in question were located in the US. However, the LG Essen determined that the enforcement of the award was more closely connected to Spain, given that the dispute originated from a change of Spanish legislation and the investor's operations in Spain. Consequently, Spanish law – rather than US law – is applicable under the Regulation. Regardless of whether German or Spanish law were applicable, the relevant provisions would have to be interpreted in light of EU law, which prohibits anti-enforcement injunctions as previously explained in the decision.

For these reasons, the LG Essen dismissed Spain's request for an anti-enforcement injunction.

Spain's efforts to prevent the enforcement of intra-EU awards in other jurisdictions, such as in [PV Investors v. Spain](#) in the Dutch courts, encountered comparable dismissals. The District Court of Amsterdam dismissed Spain's request, deeming it an attempt to create an additional forum for challenging the award, which is not permitted under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("[New York Convention](#)") ([Amsterdam District Court, 15 March 2023](#)).

Implications and Outlook

The LG Essen decision represents a new development in the trend among EU jurisdictions to refrain from intervening in enforcement proceedings of arbitral awards beyond EU borders. While the CJEU has already held that anti-suit injunctions are inadmissible within the EU ([Turner v. Grovit](#)), the LG Essen has extended this view to anti-enforcement injunctions outside the EU. In a broader context, this decision aligns with the [cautious approach of civil law jurisdictions](#) to anti-enforcement injunctions. Unlike common law jurisdictions, which are more inclined to grant such injunctions, civil law courts are typically more reluctant to do so. This is because they generally view such injunctions as an *ultima ratio* judicial tool of equitable relief that might undermine the policy in favor of *res judicata*.

The reasoning of the LG Essen stands out because the court held that the principle of state sovereignty, which is considered to be part of the EU's constitutional identity, cannot be superseded by the EU principle of effectiveness and the primacy of EU law. It explicitly confirmed that these principles merely require EU member states to ensure the application and observance of EU law in the EU. Moreover, the LG Essen held that the CJEU's case law (*Achmea*; *Komstroy*) does not establish an obligation for German courts to prevent the enforcement of ICSID awards outside of the EU. It is the responsibility of EU courts only to prevent the enforcement of arbitral awards within the EU. This is a particularly noteworthy development, as EU member states typically rely on these principles and arguments in intra-EU arbitration proceedings.

Looking ahead, it seems probable that Spain will appeal the LG Essen's decision to the OLG Hamm. Although the OLG Hamm previously issued an anti-anti-anti-enforcement injunction in favor of Spain in this case, it did so to safeguard the judicial sovereignty of German courts. The LG Essen's decision mirrors the reasoning of the OLG Hamm and therefore might be upheld by the latter.

On the other hand, potential issues that might be picked up by the OLG Hamm are the EU principle of effectiveness and EU state aid law. In light of the significance of the EU principle of effectiveness and the primacy of EU law in [previous decisions of the German Federal Court of Justice](#) ("BGH") in the context of intra-EU arbitration cases, it is possible that the OLG Hamm may reach a different conclusion regarding the conflict between the sovereignty principle and the EU effectiveness principle. The OLG Hamm may also reconsider the state aid argument and the relevance of Spain's lack of authorization. In this instance, the OLG Hamm would reverse the decision of the LG Essen. Alternatively, Spain might file an immediate appeal on points of law ([Section 566 GCCP](#)) to the BGH. In this scenario, it is likely that the BGH will maintain its previous approach in intra-EU proceedings and reverse the decision.

Compared to the Amsterdam court's decision, it seems questionable that the LG Essen did not address in more detail the [self-contained nature](#) of the ICSID regime. The Dutch court found it inadmissible to create another forum for challenging the award in addition to the New York Convention, a principle that applies even more to the ICSID Convention, which precludes other forms of judicial review outside its established rules due to its self-contained nature.

Overall, the LG Essen decision represents a setback for Spain's attempts to block the enforcement of intra-EU ECT awards. The decision sets a precedent indicating that EU courts might not support EU member states that refuse to comply with investment treaty awards.

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