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“The Emperor’s New Clothes”: Where Does the New York Convention End and the Brussels I bis Regulation Begin? The Spanish Procedural Strategy in Dutch Courts

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There is no dull moment in the intra-EU realm. Pandora’s box has long been opened by the Court of Justice of the European Union (“CJEU”) with its *Achmea* decision leading to numerous ongoing challenges. In a recent ruling, the District Court of Amsterdam (“Amsterdam Court”) had to address a strategic manoeuvre by the Kingdom of Spain in its multijurisdictional fight against intra-EU investment awards (see previous KAB posts here, here and here).

It is well known to KAB readers that creditors of intra-EU investment awards persist in their enforcement efforts against European States, often targeting States’ assets outside the EU (frequently in the U.S., the U.K. or Australia, as seen in earlier posts here, here and here). This has sparked many interesting procedural developments, including cross-applications for anti-enforcement injunctions, anti-anti-enforcement injunctions and alike where both award-creditors and award-debtors defend their legal interests intensively (see e.g. here). The case before the Amsterdam Court is an example of such a battle between Spain and investors, AES Solar Energy Coöperatief U.A. (“AES”) and Ampere Equity Fund B.V. (“AEF”). These proceedings are intertwined with the AES and AEF efforts to monetise an intra-EU investment award (“Final Award“) in the U.S.

In its latest interim judgment, the Amsterdam Court agreed with Spain that indeed neither the Brussels I arbitration exception nor the New York Convention applied to this case, thus granting itself jurisdiction to rule on Spain’s state aid claims, which were the very subject on the proceedings before the Amsterdam Court. However, Spain’s jurisdictional success, may disrupt the equilibrium between the New York Convention and the Brussels I *bis* regime. The following sections elaborate on Spain’s arguments, the court’s rationale and potential future implications.

Act I: New Fabrics

AES and AEF were awarded compensation for breaches of an investment treaty following their investments in the Spanish solar sector. In the Final Award of 28 February 2020, a Swiss-seated tribunal ordered Spain to pay EUR 15.4 million to AES and 11.1 million to AEF. Post-*Achmea*, enforcing this Final Award within the EU seems impossible considering the European Commission

and the EU Member States advocating that such enforcement would violate EU law.

Despite this procedural obstacle, the awards remain legally binding under the New York Convention. Therefore, AES and AEF, like other investors, seek enforcement beyond the EU. Moreover, AES and AEF developed additional strategy in order to shield the award – they assigned their legal rights from the award to Blasket Renewable Investments LLC ("Blasket"), a U.S. entity now pursuing enforcement of the Final Award in Washington D.C. courts (see here and here).

Seeking protection against this U.S. enforcement action, Spain initiated proceedings in the Amsterdam Court, primarily requesting an anti-enforcement injunction against AES and AEF, which was ultimately unsuccessful. After amending its claims, Spain sought (mostly) declaratory reliefs asserting that its PV investment promotion programme constituted unlawful state aid. This, according to Spain, means in turn that an arbitral award containing an obligation to compensate investors on the basis of this same programme *also* constitutes state aid and the Amsterdam Court should declare it as such.

Spain argued that EU state aid rules (Articles 107 and 108(3) of the Treaty on the Functioning of the European Union ("TFEU")) necessitate European Commission approval for adhering to such an arbitral award, otherwise it would constitute unlawful state aid. Hence, during the wait for the European Commission's decision on the Final Award's compatibility with internal market rules, Spain must follow a standstill obligation (Article 108(3) TFEU).

Finally, EU state aid rules require EU Member States to prevent unlawful state aid. Consequently, Spain contended that – if Blasket enforces the Final Award – the Amsterdam Court should order the AEF and AES (as original award-creditors) to repay Spain any amounts Spain is compelled to disburse.

Act II: Exquisite Tailoring

Spain effectively shifted its procedural strategy focus. Although the Amsterdam Court has yet to rule on the merits, it accepted jurisdiction despite objections from AES and AEF. The investors claimed that Spain's state aid based claims in reality related to Final Award's validity/enforcement, which should be governed by the New York Convention, leaving Dutch courts without jurisdiction (since enforcement is not sought in the Netherlands).

Supported by the European Commission, Spain maintained it must prevent unlawful state aid benefits during the abovementioned standstill period. As all its (amended) claims were independently grounded in the EU's regime on state aid, the court's jurisdiction fell under the Brussels I *bis* Regulation. Consequently, pursuant to Articles 4 and 8(1) of the Brussels I *bis* Regulation, the Dutch District Court has jurisdiction.

Considering the parties' positions, the Amsterdam Court sided with Spain. Looking at the qualification of the claims, it ruled that Spain's declaratory state aid-related claims are not governed by the New York Convention or the arbitration exception of Recital 12 and Article 1(2)(d) of the Brussels I *bis* Regulation.

A more challenging question concerned the court's jurisdiction over Spain's request for repayment of monies successfully collected elsewhere directly tied to the enforcement of the Final Award.

The investors urged the court that these measures may lead to the Final Award being left without effect.

Nonetheless, the Amsterdam Court concurred that Spain's claims were aimed at enforcing EU state aid rules. Following the CJEU's *Easti Pagar* judgment, the Amsterdam Court recognised Spain's obligation to prevent unlawful aid during the standstill period before the European's Commission's decision and to recover previously granted (unlawful) aid.

Thus, the Amsterdam Court determined that Spain's claims fell under the Brussels I bis Regulation, permitting jurisdiction. Notably, and perhaps surprisingly, the Amsterdam Court stated it does not prioritize EU law over the New York Convention (when determining jurisdiction, simply finding the New York Convention inapplicable).

Act III: Final Fitting and Adjustments

It remains to be seen whether the Amsterdam Court decision sets the stage for another conflict between EU law and international law. This potential conflict manifests in both (i) the interaction between the Brussels I bis regime and the New York Convention (see discussed here), and (ii) the broader clash between EU and international law (on regime interactions see KAB post here).

Recital 12 of the Brussels I bis Regulation specifies that "[t]his Regulation should not apply to any action or ancillary proceedings relating to […] recognition or enforcement of an arbitral award". Article 1(2)(d) of the Brussels I *bis* Regulation excludes the application of the Brussels I regime to arbitration, and Article 73(2) stipulates that "[t]his Regulation shall not affect the application of the 1958 New York Convention".

Nevertheless, the District Court concluded that Spain's claims did not concern the Final Award, nor (legally) affect it. Although the Court's jurisdictional findings seem to follow the letter of the law, given Spain's amended claims fit the EU state aid framework, it appears Spain is avoiding its obligations under the arbitral award.

Contextual analysis matters as Spain's original claims were explicitly aimed to prevent AES and AEF from enforcing the Final Award, even going so far as to request a prohibitive global enforcement injunction. These claims, though partially rooted in state aid regulations, would likely have led the Amsterdam Court to a different conclusion had they remained. Spain's amended claims, on the other hand, were better aligned with EU law.

The Amsterdam Court found no basis to allow intermediate appeal; thus the case proceeded onto the merits. While the European Commission will determine if a State's actions qualify as unlawful or incompatible state aid, the Amsterdam Court plays a role in upholding Article 108(3) TFEU's standstill obligation (see, for example, para. 90 of the CJEU's *CSTP Azienda della Mobilità SpA* judgment). We would like to note that the Amsterdam Court will not assess the actual compatibility of the Final Award with the internal market, because this is left to the European Commission, subject to the CJEU review. In this respect, these proceedings will therefore be more limited in scope, contrary to the CJEU's decisions in the *Micula* saga. However, the Amsterdam Court's considerations will influence whether Spain would be justified in not adhering to its obligations under the Final Award.

"The Emperor has no clothes" one could say, given Spain's continued goal to thwart intra-EU investment awards. If the Amsterdam Court rules in Spain's favour in the merits phase of the proceedings, it may offer States another avenue to evade compliance with their obligations under intra-EU investment awards. The Amsterdam Court's decision will likely be scrutinized by both arbitration practitioners and States. This is particularly so, considering that Spain just lost a parallel case where the District Court in Washington recently confirmed that the U.S. courts have jurisdiction to enforce intra-EU investment awards against Spain.

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