Kluwer Arbitration Blog

2024 in Review: Sovereign Immunity in Flux – An Uncertain Fate for Investment Arbitral Awards

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The doctrine of sovereign immunity has long been a cornerstone of international law, shielding states from enforcement actions. Sovereign immunity can be subdivided in two: immunity from jurisdiction and immunity from execution. While immunity from jurisdiction means that domestic courts are prevented to hear and decide cases involving another sovereign state, immunity from execution precludes domestic courts from enforcing judgments against particular assets of another sovereign state.

During 2024 some judicial decisions across various jurisdictions have expounded a shift in the doctrine of sovereign immunity, raising questions about the future enforceability of investment awards. Against this backdrop and as part of the 2024 Year in Review series, this post explores these developments, displaying the evolving landscape of sovereign immunity.

US Courts and Intra-EU Investment Awards

In *Blasket Renewable Investments LLC v. Kingdom of Spain,* 23-7038 (D.C. Cir. 2024), the US Court of Appeals for the District of Columbia Circuit addressed the enforceability of intra-EU investment awards based on the Energy Charter Treaty ("ECT") against Spain (for previous coverage on this decision, *see* here and here). It was affirmed that US courts have jurisdiction to enforce such awards under the Foreign Sovereign Immunities Act ("FSIA"), despite Spain's reliance on the *Achmea* and *Komstroy* rulings from the Court of Justice of the European Union ("CJEU") to contest the validity of intra-EU arbitration agreements.

The case involved three awards (i.e. *NextEra Energy v. Spain*, ICSID Case No. ARB/14/11; *9REN Holding v. Spain*, ICSID Case No. ARB/15/15; *AES Solar v. Spain*, PCA Case No. 2012-14) totalling over EUR 360 million, which were issued in favour of investors from the Netherlands and Luxembourg. Spain argued that the CJEU's rulings invalidated the ECT's investor-state dispute settlement ("ISDS") mechanism for intra-EU disputes, and therefore, the arbitration agreements were void. Spain also filed actions in Dutch and Luxemburgish courts seeking anti-suit injunctions to prevent the investors from pursuing their enforcement efforts in the US. In response, the investors asserted that the FSIA's arbitration and waiver exceptions to immunity apply and asked the US District Court to issue "anti" anti-suit injunctions preventing Spain from seeking anti-suit

injunctions in foreign courts.

In first instance at the US District Court level, judge Chutkan found that the court has jurisdiction under the FSIA's arbitration exception on *the NextEra* and *9REN* cases and granted the "anti" anti-suit injunctions (see NextEra Ruling of 2023 and 9REN Ruling of 2023). In contrast, with respect to the *AES Solar* award (which had been assigned to Blasket Renewable), judge Leon at the US District Court, found that Spain was immune under the FSIA and granted Spain's motion to dismiss the case (see Blasket Ruling of 2023). This evinced an inconsistent interpretation of the FSIA arbitration exception on immunity from jurisdiction at the US District Court level.

On appeal, Spain contested the District Court's jurisdictional rulings in *NextEra* and *9REN*, while investors sought to overturn the dismissal in *Blasket*.

The US Court of Appeals focused on the existence of the arbitration agreement. It held that the FSIA's arbitration exception applied because the ECT constituted an agreement to arbitrate for the benefit of private investors. Whether such arbitration agreement covered intra-EU investors was a question of the scope of the agreement, not its existence. The US Court of Appeals thus confirmed the first instance rulings in *NextEra* and *9Ren*, while reversing the first instance ruling in *Blasket*.

As such, the US Court of Appeals has now taken a uniformed approach on the FSIA, interpreting the arbitration exception to immunity from jurisdiction more broadly.

Interestingly, on the same ruling the US Court of Appeals overturned the "anti" anti-suit injunctions issued against Spain, emphasising the need to respect international comity and the sovereignty of foreign states.

The English High Court's Diverging Approach to Sovereign Immunity

In 2024, the English High Court rendered two decisions that seemingly shift the understanding of sovereign immunity under English law. These are (i) General Dynamics United Kingdom Ltd v. The State of Libya [2024] EWHC 472 (Comm); and (ii) Border Timbers Ltd & Anor v. Republic of Zimbabwe [2024] EWHC 58 (Comm).

(i) General Dynamics United Kingdom Ltd v. The State of Libya [2024] EWHC 472 (Comm)

The English High Court's ruling in *General Dynamics v. Libya* dated 22 March 2024 marks a significant departure from the traditional stance on sovereign immunity from execution (for previous coverage on this decision, *see* here). In this case, the court interpreted the arbitration agreement, particularly the phrase "wholly enforceable," as constituting a valid waiver of Libya's immunity from execution.

The case arose from a Geneva-seated ICC arbitration under a Swiss law-governed contract between General Dynamics and Libya. The arbitration agreement included a clause stating that the award would be "*final, binding and wholly enforceable*". Libya argued that this language was insufficient to constitute a waiver of execution immunity under the English State Immunity Act 1978 ("SIA"). However, the English High Court found that the phrase "wholly enforceable"

indicated an intention to waive immunity from execution, as it implied that the award could be enforced without limitation rather than a repetition of the words "final" and "binding". This interpretation, according to the High Court, aligns with the principle of good faith under Swiss law.

It is nevertheless questionable whether such language constitutes an express waiver for immunity from execution as required by Sec. 13(3) of SIA, and *Alcom Ltd. v. Republic of Colombia [1984] AC 580*.

(ii) Border Timbers Ltd & Anor v. Republic of Zimbabwe [2024] EWHC 58 (Comm)

In an unrelated dispute, the English High Court's decision in *Border Timbers v. Zimbabwe* dated 19 January 2024 further illustrates the divergent approaches within English jurisprudence regarding sovereign immunity (for previous coverage on this decision, *see* here).

In *Border Timbers*, the claimants sought to enforce an ICSID award against Zimbabwe, in which the latter was ordered to pay approximately USD 125 million for expropriation of the claimants' land in that country pursuant to Zimbabwe's Land Reform Programme. The award creditors obtained an enforcement order in 2021. Subsequently, Zimbabwe applied to set that order aside on the basis that Zimbabwe was immune from the jurisdiction of the English courts by virtue of Sec. 1(1) of SIA. In response, the claimants argued that Zimbabwe fell within one or both of the exceptions to immunity set out in Sec. 2 and 9 of SIA.

The English High Court held that Article 54 of the ICSID Convention "*is not a sufficiently clear and unequivocal submission to the jurisdiction of the English courts for the purposes of recognising and enforcing the award against Zimbabwe*". In her reasoning, Mrs Justice Dias explicitly declined to follow the decision by another English High Court judge, Mr Justice Fraser, who a couple of months before had decided exactly the opposite in *Infrastructure Services Luxembourg Sarl v. Spain [2023] EWHC 1226 (Comm)*. In *Infrastructure Services*, Mr Justice Fraser considered that Article 54 of the ICSID Convention and Article 26 of the ECT were deemed a "prior agreement" for the purpose of SIA, constituting an exception to sovereign immunity (for previous coverage on this decision, *see* here and here).

This divergence in judicial interpretation highlights the complexities and uncertainties in the enforcement of investment awards under SIA.

Colombian Supreme Court's Decision on the Rusoro Mining Award

The Colombian Supreme Court's decision to deny recognition of an ISDS award against Venezuela further complicates the enforcement landscape. In its Judgment No. SC1453-2024 of 20 June 2024, the Colombian Supreme Court denied the recognition of the award rendered in the *Rusoro Mining v. Venezuela* case (for previous coverage on this decision, *see* here) .

The case involved an award issued in favour of Rusoro Mining Ltd., a Canadian company, which sought recognition of the award in Colombia. While the award was not subject to the ICSID Convention, the Colombian Supreme Court opened its reasoning referring to this Convention, in particular Articles 54 and 55 thereof. The Supreme Court then emphasized that immunity from

execution is a stricter concept than immunity from jurisdiction and requires an express waiver under international and comparative law. Succinctly, alluding to immunity from execution and without further explanation, the Court denied recognition of the *Rusoro* award.

The methodological shortcomings of the Supreme Court's reasoning are problematic for two reasons. *First*, the Supreme Court's application of the ICSID Convention reveals a grave misunderstanding of investment arbitration in general and the ICSID framework in particular. This poses serious questions as to the reliability of Colombia as an enforcement jurisdiction, which might deter investors and award creditors from directing enforcement actions in the country. *Second*, in an attempt to use a "stricter" ground for denying enforcement, the Court ignored that immunity from execution is inherently linked to the assessment and nature of particular assets subject to the enforcement action. However, the Court analysis was limited to the award debtor being a sovereign state. As a result, the Supreme Court's decision served only to muddy the waters, leaving a confusing approach to sovereign immunity in the Colombian legal system.

Conclusion

The judicial developments in 2024 reflect a dynamic landscape for sovereign immunity and the enforcement of investment awards. Crucially, lack of uniformity persists across the globe, with some courts exhibiting methodological shortcomings in their reasoning.

But one thing is certain: Domestic enforcement proceedings will continue to shape the future of investment arbitration, as these proceedings have become a "second round" for states that refuse to comply with investment awards.

The Blog will continue to monitor these developments in the coming year.

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