Kluwer Arbitration Blog

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Maxi Scherer (ArbBoutique & Queen Mary University of London) · Sunday, March 16th, 2025

We are happy to inform you that the latest issue of the journal is now available and includes the following contributions:

Philippa Webb, *Immunities and States' Alter Egos*

Comparing the approach to the alter ego doctrine in the United States ("US") with approaches taken in the United Kingdom ("UK"), Canada, Switzerland and Australia reveals that courts in the US tend to follow a stringent framework based on a set of factors. By contrast, other jurisdictions undertake a broad "control and functions" analysis. The Gécamines judgment in the UK has strengthened the presumption of separate status to a greater degree than seen elsewhere. Moreover, the UK relies on a matching-up of liability and immunity, whereas the US appears to be more concerned with equity in terms of, for example, the foreign state not benefiting unfairly in the US legal system. These variations are significant given the huge assets concentrated in state-owned entities and the question of their availability to satisfy debts owed by the state.

Fabio Trevisan, Aure-Hélène Gaicio-Fievez & Francesca Mastragostino, *Sovereign Immunity as an Obstacle to Enforcement: The Luxembourg Approach*

The article examines the complex interplay between sovereign immunity and the enforcement of arbitral awards, particularly in Luxembourg. It highlights the distinction between immunity from jurisdiction and execution, as well as their implications for enforcement. Luxembourg courts adopt a restrictive approach to sovereign immunity from jurisdiction and execution.

Through an analysis of key international conventions like the International Centre for Settlement of Investment Disputes (the "ICSID Convention") and the New York Convention, alongside Luxembourg's procedural rules, their complementary roles in enforcement processes are emphasized. It is furthermore explained that the *exequatur* procedure – meaning the recognition of an arbitral award as legally binding – is separate from execution, which in turn involves seizing the debtor's assets. Luxembourg's judiciary aligns with international standards, ensuring state assets used for sovereign purposes remain protected, while commercial assets may be subject to enforcement.

Case law is explored to demonstrate Luxembourg's pro-arbitration stance, including the conditions under which waivers of immunity are recognized. The article concludes that Luxembourg strikes a balance between upholding sovereign immunity and facilitating enforcement, positioning itself as a reliable forum for arbitration, while safeguarding state sovereignty and creditors' rights within a stable legal framework.

Johannes Hendrik Fahner, ***The Human Right to Enforcement: A Critical Analysis of Strasbourg's Case-Law on Unenforced Arbitral Awards***

The European Court of Human Rights has repeatedly held that the refusal of a Member State's court to recognize and enforce an arbitral award may violate the award-holder's property rights under Article 1 of Protocol 1 to the European Convention on Human Rights. This contribution discusses the Court's growing case law on unenforced awards. It argues that the framework developed by the Court in this context should be better aligned with the international standards governing the recognition and enforcement of arbitral awards, and that the Court's review should focus on whether a Member State court's decision to annul an award or refuse its enforcement complied with such standards. Under Article 1 of Protocol 1, the Court might make this assessment without the deference that it normally extends to domestic courts when evaluating their interpretation and application of domestic or international law.

Isabel San Martín, ***Enforcement of Intra-EU ECT Awards: Comparing the US, UK and Australian Approaches***

With the wave of Energy Charter Treaty ("ECT") renewable energy arbitrations coming to an end, investors are seeking to enforce their awards in three continents. This article examines the first decisions issued by domestic courts in relation to the recognition and enforcement of intra-European Union ("EU") ECT awards against Spain. The findings of the courts in the US, the UK, and Australia in these first enforcement cases will have an impact on the enforcement of the many awards that are pending enforcement and future awards that will be rendered in the pending cases against Spain.

Manuel Casas, ***The Enforcement of Intra-EU Arbitral Awards: Some Additional Policy Considerations***

This article analyses the enforcement of intra-EU investor-state awards from a policy-oriented perspective. The article considers that an exclusively doctrinal or formalistic approach to the question leads to a methodological blind spot, which ignores the broader context of these enforcement actions and the policy considerations that arise from them. To overcome that, the article focuses on the reactions of relevant states following the Court of Justice of the European Union's ("CJEU's") judgments in Achmea and Komstroy. It explains how, rather than generate backlash, those judgments received widespread support from the EU-Member States, which then took further actions to implement them. Finally, the article considers how, even within the limits of the current enforcement regime, enforcing courts may take into account some policy considerations when determining whether to enforce intra-EU investor-state awards.

Javier García Olmedo & Yael Ribco Borman, *Anti-enforcement Actions and the Assignment of Intra-EU Awards*

The assignment of intra-EU arbitral awards has become a strategy used by investors to mitigate the risk of EU Member States refusing to comply with the awards against them. In the recent *PV Investors v. Spain* case, the original Dutch claimants sought to enforce an intra-EU award rendered under the ECT in the District Court for the District of Columbia. In response, Spain petitioned the District Court of Amsterdam for an injunction to bar the investors from pursuing enforcement, arguing that the payment of the award would violate EU state aid rules. The original claimants then assigned the award to the United States company Blasket and asked the District Court for the District of Columbia to substitute Blasket as a petitioner in the enforcement proceeding. By assigning the award to Blasket, the Dutch companies attempted to change the nationality of the party enforcing the award before domestic courts so that Blasket could continue with the enforcement. This paper examines the practice of monetization of awards, with a focus on the legal issues that may be encountered by the assignees when trying to enforce the assigned awards. It then draws a comparative analysis between the strategy employed by the Dutch investors and corporate restructuring practices employed by legal entities that seek to access investment treaty protection that would otherwise be unavailable. This analysis shows the impact of nationality planning not only in the context of an investment arbitration proceeding but also when it comes to the enforcement of the award.

Crina Baltag & Loukas Mistelis, *NextEra/9REN v. Spain: The Latest in the Recognition and Enforcement of ICSID Arbitral Award in Intra-EU Disputes*

The decision of the US Court of Appeals for the District of Columbia in joined cases *NextEra Energy Global Holdings B.V.* and *NextEra Energy S Pain Holdings B.V. v. Kingdom of Spain*, and *9REN Holding S.A.R.L. v. Kingdom of Spain*, confirms that national courts are not prevented from recognizing and enforcing intra-EU ICSID arbitral awards. While some issues raised by the parties could have been conclusively determined by the Court, the value of the decision cannot be diminished. In fact, the decision validates the significance of the ICSID Convention and of the original commitment of the drafters of the Convention to the final and binding nature of the ICSID arbitral awards. Moreover, the decision confirms that the intra-EU development which has generated a “complex international puzzle” does not weaken the reality that the overall rate of voluntary compliance and post-award settlement of ICSID awards is 90%, with a further 7% of awards being satisfied following successful enforcement proceedings.

Cameron Miles, *Epilogue: Against Codification*

These short remarks are slightly expanded from a text delivered at the Conference on Enforcement of Arbitral Awards Against Sovereigns, held at the University of Luxembourg on 10 January 2024. It sounds an extended note of caution against unthinking use of codifications in international law, and explains how reference to materials beyond influential projects such as the Vienna Convention on the Law of Treaties (“VCLT”) and the Articles on the Responsibility of States for Internationally Wrongful Acts reveals a rather more complicated landscape than first appears when

considering the enforcement of arbitral awards against states. The author = briefly addresses two examples: the enforceability of arbitral awards procured by fraud or corruption, and the rules for the resolution of treaty conflicts.

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