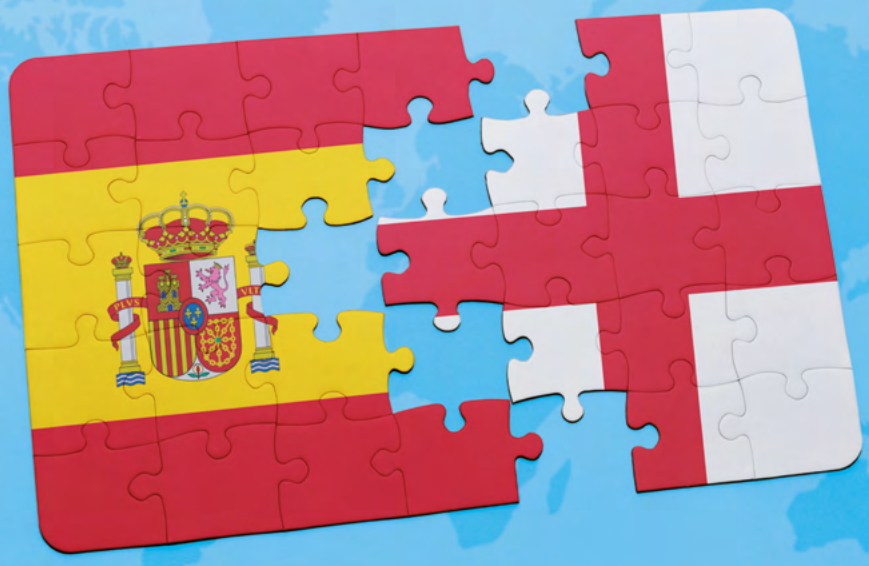
ENGLISH ENFORCEMENT EFFORTS PROCEED



PAIN FOR SPAIN AS ENGLISH COURT REFUSES TO SET ASIDE REGISTRATION OF ICSID AWARD

Authored by: Jon Felce (Partner) and Tulsi Bhatia (Associate) - Cooke, Young & Keidan

The impact of the CJEU's decision in Slovak Republic v Achmea[1] has been at the forefront of attempts by EU states to frustrate attempts to procure and enforce intra-EU arbitration awards. In the last year alone, this has led to awards being set aside at the seat of arbitration[2], attempts by the European Commission to intervene in enforcement proceedings[3], anti-enforcement and anti-anti-enforcement injunctions[4], arguments about whether state courts are competent to declare intra-EU ICSID arbitrations inadmissible[5], and attempts to enforce rejected[6].

Against that background, the English Court's recent judgment in Infrastructure Services Luxembourg SARL & Anr. v Republic of Spain[7], in which registration of an intra-EU ICSID award was upheld, and which follows earlier interim decisions paving the way for enforcement against Spain's assets, emphasises the potential benefits of seeking to enforce in the English jurisdiction especially post-Brexit.

Background

Over the past few years, many claims have been brought against Spain by investors in Spain's renewable energy industry for breaching obligations under the Energy Charter Treaty ("ECT"). In June 2018, the claimants in the present case were awarded approximately €120 million, as the Tribunal found that Spain had breached the fair and equitable treatment standard[8] under the ECT.

Thereafter, the claimants brought an ex parte application before the English High court for registration of the award under the Arbitration (International Investment Disputes) Act 1966 ("1966 Act"), which was granted by Cockerill J in 2021. The judgment in question relates to the application by Spain to set aside the decision registering the award.

Spain's challenge

Spain applied to have the registration of the award set aside on two grounds. The first was sovereign immunity. This was broadly based upon the lack of jurisdiction of the arbitral tribunal to make the award and the English court to register it. The second was material non-disclosure by the claimants when

1 Case C-284/16
2 For example, in Poland v PL Holdings (Case Number T 1569-19) (Swedish Supreme Court, 14 December 2022).
3 For example, Infrastructure Services Luxembourg and another v Kingdom of Spain [2023] EWHC 234 (Comm) (English High Court, 27 January 2023)
4 For example, NextEra Energy Global Holdings B.V. v. Kingdom of Spain, 2023 WL 2016932 (D.D.C. Feb. 15, 2023) and 9REN Holding S.Á.R.L. v. Kingdom of Spain, 2023 WL 2016933 (US District Court in Washington DC, 15 February 2023)
5 Docket Nos I ZB 43/22, I ZB 74/22 and I ZB 75/22 (German Federal Court of Justice, 27 July 2023).
6 Blasket Renewable Invs., LLC, v. Kingdom of Spain, 2023 WL 2682013 (US District Court for the District of Columbia, 29 March 2023).
7 [2023] EWHC 1226 (Comm)
8 Article 10(1) of the ECT

applying for registration of the award, in alleged breach of their duties of full and frank disclosure on an ex parte application. The court found that there were no facts to support the latter ground and dismissed Spain's submissions on that ground. This article outlines some of the aspects of the first ground.

At the heart of Spain's objection was a series of infamous decisions of the CJEU which have concluded that arbitration clauses in both intra-EU bilateral investment treaties and Article 26 of the ECT (when applied so intra-EU disputes) are contrary to EU law.

Spain submitted that it was immune to the Court's adjudicative authority under s. 1 of the State Immunity Act 1978 ("SIA") and that (by reason of the aforementioned cases) no exceptions under the SIA applied.

The Court first addressed whether Spain had submitted to the jurisdiction and thereby engaged s. 2(2) SIA. Spain argued that its consent to Article 54 of the ICSID Convention (the "Convention"), which provides inter alia that contracting states shall recognise awards rendered pursuant to the Convention as binding and enforce pecuniary obligations imposed by such awards within its territories as if they are final judgements of their own Courts, did not constitute its written submission to the Court's jurisdiction. Only an express submission would satisfy s. 2(2). The Court disagreed.

Second, Spain argued that s. 9 SIA – by which a state that has agreed in writing to submit disputes to arbitration is not immune as respect proceedings which relate to the arbitration - did not apply, on the basis that its offer of arbitration in the ECT did not extend to the claimants, depriving the Tribunal of jurisdiction. The Court rejected the idea that the arbitration provisions in the ECT were by some means partial, applying only to some investors and not others, depending upon whether those investors were resident within EU member states or elsewhere. Spain also initially advanced, but then withdrew, a contention that s. 9(1) SIA applied only to commercial arbitrations and not those involving sovereign acts (which argument in any event the judge stated was materially flawed).

Spain also relied upon the intra-EU objection to argue that the parties had not agreed to arbitrate the dispute and therefore that the Award was invalid. This was similarly rejected by the Court.

A fundamental aspect of the Court's approach concerned the terms and effect of the Convention, the 1966 Act and the Supreme Court's recent decision in the case of Micula v Romania[9]. In the latter, enforcement of an award was allowed, and the Court held that the UK's obligations under the Convention (which predated its accession to the EU) were not impacted by EU treaties. Further, whilst there was "scope for some additional defences against enforcement, in certain exceptional or extraordinary defences which are not defined, if national law recognises them in respect of final judgments of national courts and they do not directly overlap with those grounds of challenge to an award which are specifically allocated to Convention organs under articles 50 to 52 of the Convention"[10], there were no such additional defences available in this case, save for potentially those based on the SIA if any such defence had been available.

Comment

This case importantly emphasises the benefits of seeking to enforce awards (and judgments) in the English Court, not least in cases such as this where enforcement in certain other jurisdictions appears to face an uphill struggle. The judgment also provides a salutary warning to future award debtors seeking to resist enforcement – the judge making clear that he had produced a very detailed judgment to explain the context in which ICSID awards were to be enforced in the face of multiple grounds of opposition by Spain, thereby seeking to discourage states in a similar position to Spain from adopting a similar approach (it may also assist claimants on ex parte ICSID award registration applications, as from personal experience the evidence on such issues can result in extensive evidence in order to comply with duties of full and frank disclosure). With Spain and several other EU states amid battles at various stages, whether initial ICSID arbitrations, annulment proceedings or enforcement, the Court's decision offers significant promise to potential and actual ICSID award creditors in their efforts to obtain recoveries from EU states which have for several years now used the arguments underpinning Achmea to seek to frustrate claims and their enforcement.

9 [2020] UKSC 5

10 See paragraph 78 of Micula.