VAN BAEL & BELLIS

BLASKET:

IS ENFORCEMENT OF INTRA-EU AWARDS BEFORE US COURTS AT RISK?

| 24 April 2023

INTRODUCTION

On 29 March 2023, in *Blasket Renewable Invs., LLC v Kingdom of Spain*, Judge Richard Leon of the DC District Court dismissed an investor's action to enforce an intra-EU arbitral award against Spain for lack of jurisdiction under the Foreign Sovereign Immunities Act ('FSIA'). His decision was based in part on EU law including the decisions of the Court of Justice of the European Union ('CJEU') in *Achmea* and *Komstroy*.

This Client Alert provides a brief overview of the *Blasket* decision set in the wider context of other attempts to enforce intra-EU awards in the United States and considers whether intra-EU awards should now be treated as unenforceable in the United States.

BACKGROUND

In its 2018 judgment in *Achmea*, the CJEU held that investor-State arbitration clauses in intra-EU bilateral investment treaties ('**intra-EU BITs**') are incompatible with EU law and therefore inapplicable. In its later 2021 judgment in *Komstroy*, the CJEU extended that finding to intra-EU disputes under the Energy Charter Treaty ('**ECT**'). It also confirmed that EU law becomes applicable to proceedings for the recognition and enforcement of awards where the arbitration is seated in an EU Member State.

These judgments of the EU's highest court were also accompanied by the so-called Termination Agreement, an agreement for the termination of intra-EU BITs which was signed by 23 EU Member States. The Termination Agreement confirmed the binding effect of the *Achmea* decision and committed EU Member States to seek to annul any awards based on intra-EU investment treaties. Several national court decisions have also followed annulling intra-EU awards based upon the *Achmea / Komstroy* authority.

Partly as a result of this enforcement landscape, EU investors have increasingly resorted to the US courts to seek enforce intra-EU awards. The US courts have generally allowed enforcement by accepting jurisdiction and dismissing any claims to review or vacate the award.

US COURTS' APPROACH TO ENFORCEMENT OF INTRA-EU AWARDS

US courts have regularly rejected arguments by EU Member States and the European Commission ('**Commission**') to vacate intra-EU awards on EU law grounds. This has made the US an attractive jurisdiction for EU investors seeking to obtain compensation under arbitral awards in intra-EU cases.

For example, in *Micula,* the US courts refused to vacate an ICSID award on a number of occasions. In 2015, the US District Court for the Southern District of New York dismissed objections based on the EU's sovereign interests. In 2019, the US District Court for the District of Columbia dismissed the relevance of EU law and the Achmea judgment for the purposes of enforcing the same award.

In enforcing intra-EU awards, US courts have generally taken account of their obligation under Article 53 of the ICSID Convention not to review the award. They have also consistently asserted their jurisdiction to enforce awards under the FSIA. The FSIA grants States sovereign immunity in actions before US courts but provides an exception for the confirmation of an arbitral award.

DIVERGING APPROACHES TOWARDS EU LAW CONSIDERATIONS

On 29 March 2023, in *Blasket Renewable Invs., LLC v Kingdom of Spain,* Judge Richard Leon of the DC District Court declined to enforce an intra-EU arbitral award on grounds that EU law rendered the arbitration agreement invalid.

The underlying dispute arose out of Spain's decision to repeal certain subsidies in the renewable energy sector. As a result, certain Dutch investors claimed that Spain had by its measures violated the ECT and issued UNCITRAL arbitration proceedings. The tribunal (consisting of Gabrielle Kaufmann-Kohler (Presiding Arbitrator), Charles N. Brower and Judge Bernardo Sepúlveda-Amor) in its award ordered Spain to pay compensation and the investors then sought to enforce the award in the United States.[1]

In its objections to enforcement, Spain argued that it was immune from enforcement under the terms of the FSIA. Spain argued that, in order for the FSIA's arbitration exception to apply, it was necessary for the investors to show that there was a valid arbitration agreement in existence between them. Based on EU law, Spain claimed no such arbitration agreement could exist and therefore the Court could not have jurisdiction.

Referring to and relying upon the *Komstroy* judgment, Judge Richard Leon reasoned that no valid arbitration existed between Spain and the investors based on the primacy of EU law over incompatible international agreements such as the ECT. The Judge also concluded that subsequent interpretative practice shows that EU Member States understood their obligations under the ECT's arbitration clause without prejudice to their EU law obligations.

The Judge held that, because Spain lacked legal capacity under EU law to make an offer to arbitrate to the EU investors, there was no valid arbitration agreement and the arbitration exception under the FSIA could not apply. As a result, it declined jurisdiction to enforce the award.

The decision illustrates the current split in US case law in its approach to enforcing intra-EU awards. A month prior to the decision in *Blasket*, Judge Tanya Chutkan of the DC District Court held in *9REN* and *NextEra* that she did have jurisdiction under the FSIA to enforce intra-EU arbitral awards. For Judge Chutkan, the question of Spain's legal capacity under EU law to make an offer to arbitrate is one of arbitrability. As that is a merits issue, US courts should defer to the tribunal's findings. Judge Leon, by contrast, considers it to be a question of the validity of the arbitration agreement, which should be resolved by deference to the applicable law, in this case the ECT interpreted in the light of EU law.

CONCLUSION

This is the first time that a US court has refused to enforce an intra-EU arbitral award based upon the *Achmea / Komstroy* cases. This is clearly significant and a development which may signal that investors seeking to enforce intra-EU awards in the United States are going to face similar legal obstacles to those already present within EU jurisdictions, particularly where the courts feel bound to apply EU law in relation to the validity of the underlying arbitration agreement.

However, the *Blasket* decision remains an exception to the general trend in US courts, as they typically tend to apply the arbitration exception under the FSIA and enforce intra-EU awards. Furthermore, *Blasket* is a first instance decision and is likely to be appealed to the US Court of

1 *AES Solar and others (PV Investors) v. The Kingdom of Spain*, PCA Case No. 2012-14. The investors transferred their interest in the award to Blasket Renewable Investments LLC following oral arguments in the DC District Court, who acts now as plaintiff in the enforcement proceedings.

Appeals for the DC Circuit. The DC Circuit Court will then have a chance to clarify whether Judge Leon's approach was correct or should be rejected.

In sum, claimants in intra-EU disputes should continue to monitor the developments in the DC Circuit with extreme interest. It will be important to see how the case law develops and whether the *Blasket* approach or the *NextEra* approach is preferred. This may have a significant impact on whether investors (and their funders) continue to prosecute intra-EU investment claims.

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