

The Continued Push Against Investor-State Dispute Settlement in Europe and the Way Ahead

13 March 2023

The European Union's ("EU") policy against arbitration of intra-EU investor-State disputes remains largely cabined to its borders. Arbitral tribunals continue to reject objections to their jurisdiction on the basis of the CJEU's *Achmea*, *Komstroy* and *PL Holdings* judgments, the sole exception being the *Green Power* decision, in which the tribunal was seated within the EU. The EU's attempt to renegotiate the Energy Charter Treaty by, among other things, carving out intra-EU arbitration did not succeed, and the EU is now advocating for a coordinated withdrawal instead. And while EU Member States courts have set aside intra-EU awards issued by tribunals seated in their jurisdictions, U.S. courts have allowed requests for enforcement of intra-EU awards to proceed, showing that investors can still obtain relief outside the EU.

Investors in the EU will continue to manage these risks by introducing an extra-EU dimension to their investments and disputes, including by structuring their investments through foreign jurisdictions, seating their arbitrations outside the EU, and pursuing enforcement outside the EU.

Arbitral Tribunals Continue to Uphold Jurisdiction Over Intra-EU Disputes. In a June 2022 decision in *Green Power v. Spain*, a tribunal constituted under the Stockholm Chamber of Commerce Rules and seated in Stockholm was the first to decline jurisdiction over an intra-EU dispute on the basis that the arbitration clause was incompatible with EU law (as we noted [here](#)). Since then, other tribunals have continued to uphold jurisdiction. For example, on 24 October 2022, a tribunal also constituted under the Stockholm Chamber of Commerce rules and seated in Stockholm declined to follow *Green Power* and rejected Spain's intra-EU objection in *Triodos SICAV II v. Spain*.¹ A trio of ICSID tribunals in intra-EU cases against Spain also found that the *Green Power* award did not justify reconsideration of their previous decisions upholding jurisdiction.²

¹ *Triodos SICAV II v. Spain*, SCC Case No. 2017/94, Final Award, 24 October 2022, ¶ 356.

² *Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Spain*, ICSID Case No. ARB/16/18, Decision on Respondent's Second Request for Reconsideration, 19 August 2022, ¶¶ 39–48; *Cavalum SGPS v. Spain*, ICSID Case No. ARB/15/34, Procedural Order No. 6 on the Kingdom of Spain's Request for Reconsideration of the Tribunal's Decisions on Jurisdiction of 31 August 2020 and 10 January 2022, 7 September 2022, ¶¶ 51–58; *Sevilla Beheer B.V. and others v. Spain*, ICSID Case No. ARB/16/27, Decision Dismissing the Respondent's Request for Reconsideration of the Tribunal's Decision on Jurisdiction, Liability and the Principles of Quantum, 11 August

EU Domestic Courts Continue to Set Aside and Refuse to Enforce Intra-EU Awards.

On the heels of the first *Achmea*-based annulments of intra-EU investor-State awards by the Paris Court of Appeal (as we reported [here](#)), other EU domestic courts have followed suit:

- On 14 July 2022, Luxembourg’s Court of Cassation dismissed an enforcement action in *Micula v. Romania*, holding that, under *Achmea* and its progeny, the dispute was not arbitrable.³
- On 1 September 2022, the Higher Regional Court of Cologne declared a pair of ICSID arbitrations initiated by German claimants inadmissible under German and EU law.⁴
- On 13 December 2022, the Svea Court of Appeal set aside the award in *Novenergia II v. Spain*.⁵

These decisions occur against the backdrop of the EU and EU Member States’ broader push to limit intra-EU arbitration (as we reported [here](#) and [here](#)). Recent developments reinforce this trend:

- **Ireland Adds Obstacle to CETA Ratification.** As we reported [here](#), on 11 November 2022, the Irish Supreme Court ruled that (i) a referendum would be required to ratify the Comprehensive Economic Trade Agreement (“CETA”) between the EU and Canada, but that (ii) changing Ireland’s arbitration law to enable supervision of CETA tribunal awards at the enforcement stage would obviate the need for a referendum.
- **EU Thwarts Efforts to Modernize the ECT.** The European Parliament and the European Commission called for a coordinated withdrawal from the ECT, despite the ongoing efforts to modernize the treaty (on which we reported [here](#)).⁶ On 13

2022 (not public; see ECT Tribunal Declines to Reconsider Previous Ruling on Intra-EU Jurisdiction in View of Green Power Award, Investment Arbitration Reporter, 12 August 2022, available at:

<https://www.iareporter.com/articles/ect-tribunal-declines-to-reconsider-previous-ruling-on-intra-eu-jurisdiction-in-view-of-green-power-award/>).

³ Cour de cassation du Grand-Duché de Luxembourg [Court of Cassation of the Grand Duchy of Luxembourg], No. 116/2022, 14 July 2022 (*Micula*).

⁴ Oberlandesgericht Köln [OLG] [Higher Regional Court of Cologne] 1 September 2022, 19 SchH 14/21 [BGHZ] (*Uniper*); Oberlandesgericht Köln [OLG] [Higher Regional Court of Cologne] 1 September 2022, 19 SchH 15/21 [BGHZ] (*RWE AG and RWE Eemshaven Holding II BV*).

⁵ Svea Hovrätt [HovR] [Court of Appeals] [RH] 2022-12-13, T 4658-18 (Swed.) (*Novenergia II*).

⁶ In U-turn, Brussels Recommends EU-Wide Exit from Controversial Energy Charter Treaty, Euronews, 7 February 2023, available at: <https://www.euronews.com/my-europe/2023/02/07/in-u-turn-brussels-recommends-eu-wide-exit-from-controversial-energy-charter-treaty>.

February 2022, the ECT Secretariat defended the revised text.⁷ A vote on the amendments to the treaty is set for April 2023.

Intra-EU Arbitrations Seated Outside the EU Allowed to Proceed. The impact of the EU's policy against intra-EU investment arbitration seems largely confined to the EU's borders. On 8 March 2023 the District Court of Amsterdam rejected Poland's request for an injunction against a Dutch investor's U.K.-seated arbitration. Because the arbitration was seated outside the EU, the court held that it was not manifestly without a prospect of success and did not amount to an abuse of process.⁸

Enforcement Prospects Materialize Outside the EU. Meanwhile, U.S. courts have joined courts in the United Kingdom and Australia in allowing enforcement of intra-EU ICSID awards after initially staying enforcement pending annulment proceedings (see our previous update [here](#)). For example:

- **New Developments in the *Micula Saga*.** The federal courts in the District of Columbia had upheld enforcement of the award in *Micula v. Romania (I)*.⁹ On 22 December 2022, the district court rejected Romania's second request for relief from that judgment and the case is once again pending in the D.C. Circuit.¹⁰
- **Recent Decisions Confirm Pro-Enforcement Trend in the U.S.** The D.C. district court has also rejected various objections to enforcement of intra-EU awards based on the *Achmea* judgment. On 15 February 2023, the court upheld its jurisdiction under the Foreign Sovereign Immunities Act ("FSIA") to enforce the *9REN* and *NextEra* awards and to grant injunctive relief to plaintiffs. The court rejected Spain's *Achmea*-based jurisdictional defense as "a question of arbitrability and therefore an issue of the award's merits," and stated that the ICSID Convention prevents it from re-examining the tribunals' jurisdictional findings.¹¹

The court also issued an anti-anti-suit injunction, restraining Spain from obtaining anti-enforcement injunctions from courts in Luxembourg and the Netherlands. The impact of the injunction against Spain remains to be seen, as the availability of civil contempt sanctions against sovereigns is not settled. While other circuits have

⁷ Letter to Ms. Roberta Metsola, President of the European Parliament, International Energy Charter Secretary General, 13 February 2023, available at: https://www.energycharter.org/fileadmin/DocumentsMedia/News/0047-SG-13022023-EP_President.pdf.

⁸ Rechtbank Amsterdam [Rb.] [District Court of Amsterdam] 8 March 2023, C/13/721410 / HA ZA 22-614(Neth.) ([LC Corp](#))

⁹ *Micula v. Govt. of Romania*, 404 F. Supp 3d 265 (D.D.C. 2019), *aff'd*, 805 Fed Appx 1 (D.C. Cir. 2020).

¹⁰ *Micula v. Govt. of Romania*, 17-CV-02332 (APM) (D.D.C. Dec. 22, 2022).

¹¹ *9REN Holding v Spain*, 19-CV-01871 (TSC) (D.D.C. Feb. 15, 2023), at 6, 10; *NextEra v. Spain*, 19-CV-01618 (TSC) (D.D.C. Feb. 15, 2023), at 7, 11.

refused to impose such sanctions,¹² the D.C. Circuit has held that the FSIA does not prevent U.S. courts from enforcing their inherent powers against a sovereign.¹³

In another case, on 7 March 2023 the D.C. district court allowed a U.S. entity to be substituted for the Netherlands-based investors in enforcement proceedings against Spain, despite Spain's objection that this would allow investors to evade the application of EU law.¹⁴

Investors May Need to Play the Long Game. The EU continues on its collision course with the rest of the world regarding the arbitrability of intra-EU disputes and enforcement of intra-EU awards. The large number of outstanding awards (over 65) and pending claims (over 55) against EU Member States may call for a negotiated solution at the EU level. While this uncertainty lingers, investors should consider seeking investment-structuring advice to avoid these pitfalls. Developments outside of the EU, including the burgeoning secondary market for sale and purchase of pending awards (as we reported [here](#)), also merit close attention.

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¹² *Af-Cap Inc. v. Congo*, 462 F.3d 417 (5th Cir. 2006).

¹³ See *Micula v Govt. of Romania*, 17-CV-02332 (APM), at 7 (D.D.C. Nov. 20, 2020), *aff'd*, 20-7116, 2022 (D.C. Cir. June 24, 2022); *FG Hemisphere Assoc., LLC v. Congo*, 637 F3d 373 (D.C. Cir. 2011).

¹⁴ *AES Solar Energy Cooperatief U.A. et al v. Spain*, 1:21-CV-03249-RJL (D.D.C. March 7, 2023).