DISPUTE RESOLUTION JOURNAL®

A Publication of the American Arbitration Association®-International Centre for Dispute Resolution®

January-February 2025 Volume 78, Number 5

Dispute Resolution Journal®

A Publication of the American Arbitration Association®-
International Centre for Dispute Resolution®

Volume 78, Number 5 January-February 2025

DISPUTE RESOLUTION JOURNAL®

The Journal of the American Arbitration Association®-International Centre for Dispute Resolution® (AAA®-ICDR®)

ISSN 1074-8105 (print) and 25733-606X (digital).

Article Submissions

Direct editorial inquiries and send materials for publication to: Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541.

Material for publication is welcomed—articles, decisions, or other items of interest to arbitrators and mediators, attorneys and law firms, in-house counsel, corporate officers, government agencies and their counsel, senior business executives, and anyone interested in dispute resolution.

Subscriptions

Digital and print subscriptions to the Dispute Resolution Journal are available for purchase through the AAA-ICDR's online store, https://aaaeducation.org/bookstore.

Reprint Permissions

Please send requests to reproduce Dispute Resolution Journal articles to the AAA-ICDR's Publications Department Elizabeth Bain, Director of Publications, at baine@adr.org.

ISSN 1074-8105 (print) and 25733-606X (digital).

The cover of this journal features the painting *Close Hauled*, a drawing by Rockwell Kent, 1930, electrotype on paper.

Publishing Staff
Director of Publications: Elizabeth Bain
Production Editor: Sharon D. Ray
Cover Design: Sharon D. Ray

Cite this publication as:

Dispute Resolution Journal® (The Journal of the American Arbitration Association®-International Centre for Dispute Resolution® (AAA®-ICDR®))

Editorial Office
American Arbitration Association
120 Broadway, Floor 21
New York, NY 10271

POSTMASTER: Send address changes to American Arbitration Association-International Centre for Dispute Resolution, 120 Broadway, 21st Floor, New York, NY 10271

To reach Customer Service:

Elizabeth Bain
Available 8:00 AM-5:00 PM Eastern Time
(401) 431-4837
baine@adr.org

U.S. Court of Appeals for the District of Columbia Circuit Resolves District Court Split on the Enforcement of Intra-EU Investment-Treaty Awards in the United States

Danielle Morris and Alex L. Young[1]

In this article, the authors review a decision by a U.S. federal circuit court of appeals holding that U.S. district courts have jurisdiction to enforce arbitral awards issued in intra-EU disputes under the Energy Charter Treaty.

In a highly anticipated ruling, the U.S. Court of Appeals for the District of Columbia Circuit ruled in *NextEra Energy v. Spain*[2] that U.S. district courts have jurisdiction to enforce arbitral awards issued in intra-EU disputes under the Energy Charter Treaty (ECT).

On its face, this ruling would appear to be a major victory for holders of intra-EU awards and pave the way for the enforcement of those awards in U.S. courts. However, as discussed below, the District of Columbia Circuit's ruling also severely limits the ability of U.S. district courts to issue anti-anti-suit injunctions to protect their own jurisdiction and, in doing so, may have actually created a significant barrier for EU investors.

[1] The authors, attorneys with Wilmer Cutler Pickering Hale and Dorr LLP, may be contacted at danielle.morris@wilmerhale.com and alex.young@wilmerhale.com, respectively.

[2] No. 23-7031, 2024 WL 3837484 (D.C. Cir. Aug. 16, 2024).

Dispute Resolution Journal® | January-February 2025, Vol. 78, No. 5, pp. 451-456.

ISSN 1074-8105 (print) | ISSN 25733-606X (digital).

Background

The circuit court decision resolved appeals from three cases: *NextEra*,[3] *9REN Holding v. Spain*,[4] and *Blasket Renewable Investments v. Spain*.[5] The investors (or, in *Blasket*, the investor's successor-in-interest) held ECT awards against Spain and petitioned the U.S. District Court for the District of Columbia to confirm their awards—with mixed results.

In *NextEra* and *Blasket*,[6] Spain moved to dismiss the petitions for lack of jurisdiction, arguing that it possessed sovereign immunity under the Foreign Sovereign Immunities Act (FSIA). One exception to foreign states' FSIA immunity, however—the "arbitration" exception—applies where a case is brought "either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen … or to confirm an award made pursuant to such an agreement."[7]

Spain argued that this exception did not apply because there was no valid "agreement to arbitrate" with EU investors in the ECT, as such agreements are contrary to EU law. According to Spain, it was therefore entitled to sovereign immunity under the FSIA, and U.S. courts do not have jurisdiction to enforce the awards at issue.

As an additional defensive measure, Spain also filed its own lawsuits in the courts of the Netherlands and Luxembourg, seeking to enjoin the investors from proceeding with their petitions in the United States (an anti-suit injunction). The petitioners in each case subsequently sought anti-anti-suit injunctions from the District of Columbia District Court to stop Spain from seeking its anti-suit injunctions.

---

[3] NextEra Energy v. Spain, 656 F. Supp. 3d 201 (D.D.C. 2023) (NextEra).

[4] No. 19-CV-01871 (TSC), 2023 WL 2016933 (D.D.C. Feb. 15, 2023) (9REN).

[5] 665 F. Supp. 3d 1 (D.D.C. 2023) (Blasket).

[6] A motion to dismiss was not at issue in *9REN*, only the petitioner's request for an anti-anti-suit injunction (which nevertheless required the court to first determine it possessed jurisdiction).

[7] 28 U.S.C. § 1605(a)(6).

The District Court Rulings

On 15 February 2023, the District of Columbia District Court in *NextEra* and *9REN* held that it had jurisdiction under the FSIA's arbitration exception. The court held that Spain's arguments as to the validity of its agreement to arbitrate with EU investors went to the scope of the agreement, not the agreement's existence, and were therefore not jurisdictional but, rather, a question for the merits. The court thus denied Spain's motion to dismiss in *NextEra* and granted the *NextEra* and *9REN* petitioners their anti-anti-suit injunctions.

However, just six weeks later, on 29 March 2023, the District of Columbia District Court in *Blasket* reached a different result. Contrary to the *NextEra* and *9REN* court, the *Blasket* court held that the question of whether the parties were capable of entering into an agreement to arbitrate was not one of scope but, rather, went to whether there existed a valid agreement to arbitrate. The court further determined that it must decide this question, as it could not rely on the decision of an arbitral tribunal formed under the potentially invalid agreement. The court concluded that "[b]ecause the agreement to arbitrate between Spain and the Companies was invalid under EU law, there was no valid agreement to arbitrate."[8] The court therefore granted Spain's motion and dismissed the case.

The Circuit Court Decision

Spain (in *NextEra* and *9REN*) and Blasket appealed these decisions to the District of Columbia Circuit, which heard the appeals for the three cases together. In its 16 August 2024 decision, the District of Columbia Circuit held that the district courts had jurisdiction to confirm the intra-EU arbitral awards under the FSIA's arbitration exception—but also held that the district court abused its discretion in issuing the anti-anti-suit injunctions in *NextEra* and *9REN*.

[8] Blasket, 665 F. Supp. 3d at 11.

With respect to the jurisdictional question, the District of Columbia Circuit largely followed the reasoning laid out by the district court in *NextEra* and *9REN*. The District of Columbia Circuit explained that the question is whether such an agreement exists, not whether the dispute at issue actually falls within the scope of such an agreement (which instead goes to the enforceability of the award on the merits). Here, the appellate court determined that the ECT was unquestionably an agreement signed by Spain for the benefit of private parties and that Spain's argument that the ECT was not for the benefit of EU investors goes to the scope, not the existence, of the arbitration provision. Thus, "[w]hether the ECT applies to [a] dispute" is not "a jurisdictional question under the FSIA."[9]

Notably, while the District of Columbia Circuit stated that there are "powerful reasons to conclude that the standing offer to arbitrate contained in the ECT's arbitration provision extends to EU nationals," the court's decision did not go that far.[10] The District of Columbia Circuit cautioned that its holding is only that the district courts have jurisdiction to enforce (or to decline to enforce on the merits) intra-EU arbitral awards. The District of Columbia Circuit was clear that it was taking no position on the ultimate enforceability of the awards and therefore left open the merits question of whether the ECT's arbitration provision extends to EU nationals.

In addition, despite finding that the district courts had jurisdiction under the FSIA's arbitration exception, the District of Columbia Circuit (by majority) determined that the district court in *NextEra* and *9REN* abused its discretion in issuing the anti-anti-suit injunctions. According to the appellate court, the district court did not properly consider (1) the fact that the injunctions were directed to a foreign sovereign (as opposed to a private entity), and (2) whether any domestic interests were strong enough to warrant the injunctions. The District of Columbia Circuit explained that the injunctions would impinge on the sovereignty of both the Spanish government to litigate and the Dutch and Luxembourgish courts to decide important questions

[9] NextEra, 2024 WL 3837484, at *10.

[10] Id. at *9.

of EU law and that anti-anti-suit injunctions against foreign sovereigns are nearly unprecedented. Moreover, given that the underlying disputes did not involve any U.S. parties or interests, the only domestic interest at issue was the public interest in encouraging arbitration, which the District of Columbia Circuit found insufficient to justify the injunctions.

Conclusion

For holders of intra-EU awards contemplating enforcement in the United States, the takeaways from the District of Columbia Circuit's decision are mixed.

On the one hand, the District of Columbia Circuit's holding that district courts have jurisdiction under the FSIA's arbitration exception removes one hurdle from the enforcement process. Further, while the District of Columbia Circuit did not decide the merits of Spain's intra-EU arguments, in practice, with jurisdiction established, EU state-respondents may now not have the opportunity to raise such merits arguments at all in cases involving International Centre for Settlement of Investment Disputes (ICSID) awards (such as *NextEra* and *9REN*). In such cases, the district court's role in confirming the award is "exceptionally limited," constrained to ensuring that it has subject matter and personal jurisdiction, that the award is authentic, and that its enforcement order tracks the award.[11] An EU state-respondent could therefore have little opportunity to assert its intra-EU arguments to avoid enforcement in those ICSID cases. (We note that in cases involving awards issued by tribunals under other rules and seated outside of the United States, such as *Blasket*, the district court's review is coextensive with the New York Convention and therefore provides EU states more room to challenge the validity of the underlying arbitration agreement as a basis for the court to refuse to confirm the award.[12])

---

[11] TECO Guatemala Holdings, LLC v. Republic of Guatemala, 414 F. Supp. 3d 94, 101 (D.D.C. 2019); see also 22 U.S.C. § 1650a(a).

[12] See 9 U.S.C. § 207; United Nations Convention on the Recognition & Enforcement of Foreign Arbitral Awards (1958), at art. V(1)(a).

On the other hand, the District of Columbia Circuit's decision would seem to severely limit district courts' ability to protect their own jurisdiction with anti-anti-suit injunctions. The heart of the appellate court's reasoning—that anti-anti-suit injunctions enjoining foreign sovereigns raise serious comity concerns—arguably applies in every case. While the District of Columbia Circuit stated that it was not categorically foreclosing anti-anti-suit injunctions against foreign sovereigns, there may be few, if any, fact patterns that would persuade the court that such an injunction is justified under the court's guidance. As a result, while EU investors may, in theory, be able to enforce their intra-EU awards in the United States, such investors could be left largely defenseless (in the U.S. proceedings) to the EU state-respondents' anti-suit injunctions brought in EU courts.