

Insights

ACHMEA INDUCED CLARITY ON SOVEREIGN IMMUNITY IN THE US AND THE UK

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In *Achmea* (Case C-284/16) the CJEU ruled that intra-EU investor-state arbitration clauses in bilateral investment treaties were invalid as a matter of EU law. In the aftermath of that decision, the issue of sovereign immunity has taken centre stage in EU States' crusade against enforcement of intra-EU investment treaty awards, as part of their battle to persuade domestic courts to revisit jurisdictional objections based on *Achmea* that tribunals had already rejected. Other non-EU States have followed suit, seeking to rely on immunity from jurisdiction to revive jurisdictional objections in arbitrations before domestic courts.

The argument usually works like this:

- A foreign State is generally immune from being sued in another State's courts. So when an investor seeks to recognise or enforce an award, the enforcing court first has to identify an exception to immunity. Investors generally rely on arbitration/treaty exceptions to immunity. These exceptions typically require proof that the State agreed to arbitrate, or submitted to the enforcing court's jurisdiction through a treaty framework such as the ICSID Convention.
- Following *Achmea*, EU States argue that intra-EU investor-State arbitration clauses are invalid under EU law. On that basis, they say there was no valid consent to arbitrate. If there was no valid consent to arbitrate, they say the immunity exception is not triggered. In other words, they argue that domestic court cannot simply rely on the tribunal's decision that it had jurisdiction; the court must decide for itself whether a valid arbitration agreement existed. That lets States try to reopen jurisdictional objections at the enforcement stage.

This has led to a plethora of recent appeal court decisions in, amongst other jurisdictions, the US and the UK, namely with respect to Spain's submissions as made in enforcement proceedings commenced by Blasket Investment LLC and Infrastructure Services Luxembourg SARL. Now, with the US Supreme Court having declined on 29 June 2026 to hear Spain's appeal, it is time to take stock.

This insight gives an overview of the position as it currently stands in the US and in the UK and reports that, despite the States' best efforts, reliance on the immunity from jurisdiction before the courts in either jurisdiction will likely not result in a review of tribunals' jurisdictional decisions by those courts.

The Key Principle – Immunity from Jurisdiction

The key principle of law considered in the US and in the UK court decisions is immunity from jurisdiction (also known as immunity from adjudication). Different jurisdictions may define this immunity differently, but it usually operates to protect a foreign State from being brought before domestic courts.

It is important to distinguish between immunity from jurisdiction and immunity from enforcement. The latter usually prevents the seizing of a State's sovereign assets and has always been a key consideration in the enforcement of investment treaty awards. However, it is not the focus of the court decisions under discussion in this insight.

Further, compared to immunity from enforcement, immunity from jurisdiction in the context of investment treaty arbitration had historically not been subject to substantial debate. Claimants would readily rely on the statutory exceptions to immunity from jurisdiction as a basis for negating it. Although the language of these exceptions is not uniform across different jurisdictions, in the context of investment treaty arbitrations, these exceptions usually require a waiver as evidenced by an arbitration agreement and/or an international treaty.

Spain argued that the domestic legislations providing for the arbitration agreement exception require domestic courts to consider and determine their jurisdictional objections to the existence of an arbitration agreement afresh. As described below, the appeal courts in the US and in the UK have each declined to revisit the merits of the jurisdictional objections in the arbitrations in considering whether an exception to immunity from jurisdiction applied.

Before the US Court of Appeal (D.C. Circuit)

In the US, its Foreign Sovereign Immunities Act provides the basis for jurisdiction over foreign sovereigns in US courts. The relevant exception to immunity from jurisdiction is §1605(a)(6), which strips the immunity to confirm an arbitral award where the arbitration is under an arbitration agreement and is "*governed by a treaty or other international agreement in force for the United States*".

Spain submitted that the US courts have an independent obligation to determine whether subject-matter jurisdiction, i.e. an arbitration agreement, exists. This argument means that the US courts must satisfy themselves that there does exist a valid arbitration agreement and should do so by

considering objections to the existence of such agreement (i.e. the issue of intra-EU investment arbitrations/*Achmea*) afresh, even if such objections have been determined by the arbitral tribunal.

On 16 August 2024, the US Court of Appeal of the D.C. Circuit rejected Spain's submission (2024 WL 3837484 (D.C. Cir. Aug. 16, 2024)). In doing so, the Court of Appeal relied upon established precedents in the DC Circuit that

"disputes about the scope of an arbitration agreement, such as whether a binding arbitration agreement covers a particular dispute, are not jurisdictional questions under the FSIA... Scope questions instead go to the award's enforceability on the merits. To make the issue jurisdictional, the sovereign must attack the existence or validity of the arbitration agreement."

The court considered that the issue of *Achmea*/intra-EU investment treaties goes to whether the investment treaty - in this case the ECT - is broad enough to be applied to the dispute, which it held squarely was not a jurisdictional question before the US courts under the FSIA. This is a significant result for investors, insofar as it forecloses reliance on immunity from jurisdiction to re-open jurisdictional objections in the US.

However, the decision of the US Court of Appeal of the D.C. Circuit does not completely eliminate the prospects of US courts revisiting jurisdiction objections made in the arbitration. First, differences in the language used in treaties may lead to different results. Second, it depends on judicial characterisation of the relevant jurisdictional objections; US federal courts in other circuits may well characterise the same objection differently. Third, even if an objection is classified as a merits issue, that merits issue may still be considered at a later stage of the enforcement process before US courts.

All of these modalities were poised to be considered by the US Supreme Court on appeal from Spain. However, on 29 June 2026, the US Supreme Court declined Spain's petition for a writ of certiorari and would not be hearing its appeal.

Before the UK Supreme Court & English Court of Appeal

In the UK and in a joined appeal concerning *Blasket Renewable v Spain, Infrastructure Services v Spain* and *Border Timbers v Zimbabwe* before the UK Supreme Court ([2026] UKSC 9), the legal battle was fought over sections 2(2) and 9(1) of the State Immunity Act 1978. These provisions are unlike the US legislation discussed above, in that they provide two separate exceptions that are relevant in the context of investment treaty arbitrations. They are:

- Section 2(2) – submission to jurisdiction by prior written agreement, which includes treaties (the s.2(2) treaty exception); and
- Section 9(1) – the arbitration exception, which removes immunity should the State have agreed to submit a dispute to arbitration (the s.9(1) arbitration agreement exception).

Spain sought to argue that (a) its ratification of the ICSID Convention does not constitute submission to jurisdiction under the s. 2(2) treaty exception; (b) as such, only the arbitration agreement exception under s. 9(1) is available; and (c) reliance on s. 9(1) requires the UK courts to consider afresh the existence of a written agreement to arbitrate and any jurisdictional objections to such existence.

The UK Supreme Court only engaged with Spain's first proposition with respect to the s. 2(2) treaty exception. It held that (a) the obligation under Article 54(1) of the ICSID Convention to enforce ICSID awards is reciprocal; and (b) by ratifying the Convention, a contracting state assumes the obligation to recognise and enforce ICSID awards itself, and also agrees that all other contracting states will do the same, which constitutes a submission to jurisdiction under s.2(2).

This decision appears to have effectively closed the door on further reliance on immunity from jurisdiction to revisit jurisdictional objections determined in investment treaty arbitrations. However, it must be noted that not every investment treaty arbitration is conducted under the ICSID Convention regime; some fall under the regime of the New York Convention (the NYC).

With respect to the NYC, attention should instead be paid to the decision of the English Court of Appeal in *CC/Devas (Mauritius) Limited & Ors v India* [2026] EWCA Civ 797. In this decision, the English Court of Appeal held that, unlike Article 54(1) of the ICSID Convention, States' agreement to and ratification of the analogous provision in Article III of the NYC does not constitute a submission to jurisdiction under the s. 2(2) treaty exception. This means that investors in enforcing NYC awards can only rely on the s.9(1) arbitration agreement exception, which requires English courts to be independently satisfied that there does exist an arbitration agreement.

It remains to be seen whether *CC/Devas* will be appealed to the UK Supreme Court. As matters stand, in the UK, reliance on immunity from jurisdiction will likely not induce a review of a tribunal's jurisdictional decisions with respect to ICSID awards; however, the converse is true with respect to enforcement of NYC awards.

Conclusion:

Both courts have found ways to resolve these enforcement disputes without having to grapple with the intra-EU question. It is likely a reflection of both jurisdictions' pro-arbitration and pro-enforcement attitudes and may further reflect an institutional commitment to giving effect to treaty-based enforcement obligations, a reluctance to wade into questions of EU law that sit more naturally with the CJEU, or both.

Either way, the *Achmea* enforcement saga is far from over. Both US and UK courts have sidestepped for now a *de novo* examination of the intra-EU question and generally jurisdictional objections determined by tribunals at an initial stage of enforcement proceedings. Investors and sovereigns alike should watch further decisions by US federal courts (particularly those outside the

DC Circuit) and, potentially, by the UK Supreme Court in any appeal of *CC/Devas*. Those decisions will determine whether the existing parallels between the US and UK – in particular, their shared pro-arbitration and pro-enforcement disposition – hold up, or whether the enforcement landscape diverges further between the two major jurisdictions in which investment treaty award creditors commonly pursue enforcement.

Related Capabilities

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