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After Twin Cert Denials, D.C. Courts Cement Path for Enforcing Arbitral Awards Against Sovereign States

WRITTEN BY

Matthew H. Adler | Jeremy Heep | R. Zachary Torres-Fowler | Julia-Françoise Raith | Brad Smutek

KEY POINTS

- The Supreme Court's June 29, 2026, denial of certiorari in *Kingdom of Spain v. Blasket Renewable Investments LLC* (No. 24-1130) and *Russian Federation v. Stabil LLC* (No. 25-1093) leaves intact D.C. Circuit rulings treating arbitrability as a merits — not jurisdictional — question under the FSIA.
- The D.C. Circuit distinguishes challenges to the *scope* of an arbitration agreement from challenges to its *existence*, treating only the latter as a potential basis for jurisdictional dismissal — making it significantly harder for foreign sovereigns to defeat enforcement at the threshold.
- For Energy Charter Treaty award creditors, EU member states cannot rely on sovereign immunity combined with the intra-EU objection to block enforcement proceedings in D.C. Circuit courts, even where enforcement within the EU has become difficult following *Achmea* and *Komstroy*.
- Award creditors filing outside the D.C. Circuit continue to face a circuit split the Supreme Court has again declined to resolve, risking dismissal if courts treat consent to arbitration as a threshold jurisdictional question.
- Practitioners drafting arbitration agreements with foreign sovereigns should include an express, unambiguous consent-to-arbitrate clause and should separately waive both jurisdictional immunity and execution immunity under 28 U.S.C. § 1610, as the FSIA treats the two as distinct.

For construction companies, energy developers, and infrastructure investors, contracts with foreign governments are routine, and so are the arbitration clauses included in them. When a foreign government refuses to pay an arbitral award, where you go to enforce it may matter as much as the award itself. Two recent Supreme Court cert denials appear to have settled that question for now, establishing the D.C. Circuit as arguably the most creditor-friendly forum in the United States for enforcing arbitral awards against foreign states.

"*Rex non potest peccare*" — "the king can do no wrong" — is the centuries-old saying at the root of sovereign immunity. As it turns out, kings frequently do things wrong and governments can be sued within their *own* countries, but sovereign immunity still has broad currency within international law. When acting as a sovereign state, a government should not be hauled into the courts of another country for what may be policy reasons. But what about when a state behaves in the manner of a private actor and engages in commercial activity?

U.S. law addresses that balance. The Foreign Sovereign Immunities Act (FSIA)[1] codifies the customary international law principle and provides foreign states presumptive immunity from the jurisdiction of U.S. courts. But what the FSIA grants, it also takes away, and so section 1605(a)(2), the "commercial activity exception," strips that immunity from states where they behave as private actors.[2]

Beyond the commercial activity exception, a related but narrower exception applies specifically to arbitration: no immunity attaches if the lawsuit seeks to “enforce an agreement made by the foreign state with or for the benefit of a private party” to arbitrate disputes, or “to confirm an arbitration award made pursuant to such an agreement to arbitrate.”[3] That exception follows naturally since, having agreed in the first place to arbitrate with a private party, a state should not later claim that it is somehow “immune” from court actions designed to enforce the arbitration agreement or any arbitration award resulting from that arbitration agreement.

Applying the arbitration exception, however, first requires establishing that an arbitration agreement existed in the first place. That threshold question — commonly known as “arbitrability” — has become a flashpoint of disagreement among the federal circuits. The Second and Fifth Circuits treat this inquiry as a threshold question of subject-matter jurisdiction, holding that a court must first determine whether the foreign state actually consented to arbitration before proceeding. The D.C. Circuit, by contrast, treats the existence of an arbitration agreement as a question going to the merits of the case, not to the court’s jurisdiction.

This distinction matters. In jurisdictions requiring a threshold jurisdictional determination, a foreign sovereign can challenge arbitrability at the outset, potentially defeating enforcement before it begins. In D.C., however, the question of whether an arbitration agreement exists is deferred to the merits stage, making it harder for foreign states to obtain early dismissals and easier for award creditors to proceed with enforcement.[4][5]

In two recent cert denials issued on June 29, 2026, the U.S. Supreme Court declined to resolve this circuit split.[6] The Court’s decision cements D.C. as a preferred enforcement destination for creditors seeking to confirm arbitral awards against foreign states. The two cases underlying those cert denials — one involving Spain and the other Russia — illustrate how this procedural divide plays out in practice and why forum selection matters for award creditors.

NEXTERA ENERGY GLOBAL HOLDINGS B.V. V. KINGDOM OF SPAIN

In *NextEra Energy*, the D.C. Circuit’s treatment of arbitrability as a merits question allowed an award creditor to survive Spain’s jurisdictional challenge. The case arose under the Energy Charter Treaty (ECT), which obligated member-states to protect investments from companies in other member-states and allowed foreign investors to submit disputes to international arbitration.[7] In the 2000s, several European companies invested in solar power projects in Spain, relying on Spanish subsidies for electricity rates. When the 2008 financial crisis drove Spain to withdraw those subsidies, the companies initiated arbitrations under the ECT.

The Court of Justice of the EU issued decisions in 2018 and 2021 holding that the ECT’s arbitration clause could not apply to disputes between EU members because parties may only submit disputes to forums within the EU’s court system. Spain argued the arbitration clause was invalid, but the companies prevailed in arbitration and received awards worth hundreds of millions of euros. The European Commission declared that EU law prohibits payment of the awards because they would constitute illegal “state aid.”

The companies came to the U.S. to enforce the awards, filing three actions in the U.S. District Court for the District of Columbia.[8] Spain moved to dismiss the actions under the FSIA, arguing that the FSIA’s arbitration exception did not apply because the arbitration agreements were invalid under EU law.[9] The D.C. Circuit consolidated the appeals and sided with the companies.[10]

The court reasoned that the EU treaties were made between nations but also “for the benefit of” investors,[11] and that “disputes about the scope of an arbitration agreement, such as whether an agreement covers a particular dispute, are not jurisdictional questions under the FSIA,” but are questions that “go to the award’s enforceability on the merits.”[12] Spain did not dispute that the treaties existed; it argued only that the arbitration provision did not cover these particular claims.[13] Because that argument went to the scope of the arbitration agreement rather than its existence, the FSIA’s arbitration exception applied, and the D.C. Circuit concluded that the district court had jurisdiction.[14]

RUSSIAN FEDERATION V. STABIL LLC

In *Stabil LLC v. Russian Federation*, the D.C. Circuit applied the same framework to reject Russia’s attempt to defeat jurisdiction at the threshold. This case arose out of Russia’s 2014 annexation of Crimea. Two groups of Ukrainian companies held investments on the peninsula: 11 companies (the investors) that owned and operated petrol stations, and JSC DTEK Krymenergo (DTEK), an electricity distributor serving more than 780,000 customers.[15] Following Russia’s seizure of the territory, Russian and Crimean forces took over the companies’ facilities, nationalized their assets, and transferred operations to Russian state-owned entities without compensation.[16] Both groups of companies initiated arbitrations under the 1998 Ukraine-Russia Bilateral Investment Treaty (the Investment Treaty) and prevailed. The investors were awarded more than $34 million, and DTEK was awarded approximately $208 million.[17] The companies then petitioned the D.C. District Court to enforce the awards under the New York Convention. Russia moved to dismiss both actions under the FSIA, arguing that the treaty’s arbitration clause did not cover investments in Crimea, that the awards were geopolitical rather than commercial, and that exercising personal jurisdiction would violate due process. Both district courts rejected those arguments,[18] and the D.C. Circuit consolidated the cases on appeal.[19]

The D.C. Circuit held that Russia’s challenge to the treaty’s reach went to the *scope* of the arbitration agreement, not its *existence*: “Russia does not deny that the Investment Treaty exists or that it contains an agreement to arbitrate.”[20] Because Russia disputed only “whether the Companies’ investments fall within the scope of the Investment Treaty — not […] whether an agreement to arbitrate exists at all,” the D.C. Circuit concluded that the argument was a merits defense, not a jurisdictional one.[21]

The D.C. Circuit also rejected Russia’s two remaining defenses. On the commercial-activity point, the court explained that the statute requires only that the award “is or *may be* governed by” a qualifying treaty,[22] and that the underlying disputes were commercial in nature because they involved petrol stations and an electricity grid, not a determination of Crimean sovereignty.[23] On personal jurisdiction, the court held that foreign states are not “persons” entitled to Fifth Amendment protections and that personal jurisdiction under the FSIA follows automatically once an immunity exception applies and service is proper.[24]

Russia’s cert petition (No. 25-1093) squarely presented the circuit split on whether consent to arbitration must be resolved at the jurisdictional stage.

TAKEAWAYS

These cert denials carry dual significance. On the one hand, they leave intact a creditor-friendly jurisdictional path in one of the most important federal forums for sovereign immunity litigation. On the other hand, because the Supreme Court declined to resolve the circuit split, award-creditors filing outside the D.C. Circuit continue to face the risk that courts will treat consent to arbitration as a threshold jurisdictional question, potentially allowing debtorstates to defeat enforcement before reaching the merits. Against that backdrop, four takeaways warrant particular attention from award creditors and drafters alike.

1. Intra-EU objections alone cannot block U.S. enforcement proceedings. For ECT award creditors, EU member states cannot rely on sovereign immunity combined with the intra-EU objection to block enforcement proceedings in U.S. courts. This is significant because enforcement within the EU has become increasingly difficult following *Achmea* and *Komstroy*.

2. U.S. procedural tools are powerful but not unlimited. Surviving a sovereign's jurisdictional challenge in D.C. unlocks access to U.S. enforcement machinery — including post-judgment discovery to identify attachable sovereign assets. But creditors must still clear additional hurdles, like navigating confirmation standards, complying with any applicable treaty framework, and overcoming FSIA execution immunity under section 1610.

3. Drafting takeaways. Practitioners drafting arbitration agreements with sovereign or state-owned counterparties should consider the following:

- **Include an express, unambiguous consent-to-arbitrate clause.** This is best practice in all arbitration agreements, as clear and specific consent language reduces the risk of threshold jurisdictional challenges, a consideration that becomes particularly acute when a sovereign is involved.
- **Include an express waiver of sovereign immunity from both jurisdiction and execution.** The FSIA distinguishes between immunity from jurisdiction and immunity from execution, and a waiver of one does not automatically waive the other. A waiver of jurisdictional immunity allows a court to hear the case and confirm an arbitral award, but execution immunity separately shields a foreign state's assets from attachment and enforcement under 28 U.S.C. § 1610. A creditor who prevails at the jurisdictional stage may therefore still find itself unable to collect if the underlying contract waived only jurisdictional immunity. Drafters should address both forms of immunity expressly.

For questions about arbitral award enforcement, sovereign immunity strategy, or contract drafting involving state-owned counterparties, please contact Matthew H. Adler, Jeremy Heep, Zachary Torres-Fowler, Julia-Françoise Raith, or Brad Smutek, or visit Troutman Pepper Locke's International Arbitration practice page.

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[1] 28 U.S.C. § 1604.

[2] 28 U.S.C. § 1605(a)(2).

[3] Id. § 1605(a)(6).

[4] *See, e.g.*, *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1018 (2d Cir. 1993); *Al-Qarqani v. Saudi Arabian Oil Co.*, 19 F.4th 794, 802 (5th Cir. 2021), *cert. denied*, 142 S.Ct. 2753 (2022).

[5] *See NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088, 1101 (D.C. Cir. 2024).

[6] *See Spain v. Blasket Renewable Invs. LLC*, No. 24-1130, — S.Ct. —-, 2026 WL 1855038 (June 29, 2026); *Russian Fed'n v. Stabil LLC*, No. 25-1093, — S.Ct. —-, 2026 WL 1855103 (June 29, 2026).

[7] *NextEra*, 112 F.4th at 1094.

[8] *Id.* at 1097.

[9] *Id.* at 1098.

[10] *See* Per Curiam Order (Document #1995557), *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, No. 23-7031 (Apr. 20, 2023).

[11] *NextEra*, 112 F.4th at 1101–02.

[12] *Id.* at 1101 (citing *Stileks*, 985 F.3d at 878).

[13] *Id.*

[14] *Id.* at 1104-05.

[15] *Stabil LLC v. Russian Fed'n*, 167 F.4th 506, 511-12 (D.C. Cir. 2026).

[16] *Id.* at 514-15.

[17] *Id.*

[18] *Stabil LLC v. Russian Fed'n*, No. 1:22-CV-00983 (TNM), 2024 WL 5093202, at *2-6 (D.D.C. Dec. 12, 2024); *JSC DTEK Krymenergo v. Russian Fed'n*, No. 1:23-CV-03330, 2025 WL 1148347, at *4-6 (D.D.C. Apr. 17, 2025).

[19] 167 F.4th at 516.

[20] *Id.* at 518.

[21] *Id.*

[22] *Id.* at 522.

[23] *Id.* at 525-526.

[24] *Id.* at 527.

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