

Enforcement in Spain of US judgments given under Title III of the Helms-Burton Act

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The Helms-Burton Act grants US nationals a right to sue, in US federal courts, those foreign individuals or companies that do business with the Cuban government involving property in which, at the time of the Cuban Revolution, said US nationals (including those who acquired such status after the Revolution) had rights. The enforcement in Spain of US judgments handed down under the aforementioned statute runs counter, in a good number of cases at the very least, to the prohibition imposed by Council Regulation (EC) No 2271/96.

1. Background information

On 2 May 2019, Title III of the Cuban Liberty and Democratic Solidarity (Libertad) Act (Helms-Burton Act) of 1996 was activated for the first time, granting US nationals a right to sue, in US federal courts, those foreign individuals or companies that do business with the Cuban government involving property in which, at the time of the Cuban Revolution, US nationals (including those who acquired such status after the Revolution) had rights.

The enactment of the Helms-Burton Act and the provision for its extraterritorial application prompted the European Union to denounce the United States to the World Trade Organization and to take other steps to protect the interests of its citizens. Such steps included the adoption of Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and ac-

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tionsbased thereon or resulting therefrom (“Regulation No 2271/96”). This instrument seeks to protect against the effects of the extraterritorial application of certain laws - among them, the Helms-Burton Act - where such application affects the interests of persons, referred to in Article 11 thereof, engaging in international trade or the movement of capital and related commercial activities between the Community and third countries.

2. The provisions of Regulation No 2271/96

According to the aforementioned Article 11, Regulation No 2271/96 applies to “(1) any natural person being a resident in the Community and a national of a Member State; (2) any legal person incorporated within the Community; (3) any natural or legal person referred to in Article 1(2) of Regulation (EEC) No. 4055/86; (4) any other natural person being a resident in the Community, unless that person is in the country of which he is a national; (5) any other natural person within the Community, including its territorial waters and air space and in any aircraft or on any vessel under the jurisdiction or control of a Member State, acting in a professional capacity”.

The reference in paragraph 2 to legal persons incorporated within the Community raises the question of whether Regulation No 2271/96 only applies to them or whether it also extends to companies outside Europe belonging to the same corporate group as that incorporated in the European Union. Article 2 seems to advocate this second reading when it concerns the situation where the economic or financial interests of any person referred to in Article 11 are “directly or indirectly” affected by the laws the application of which is sought to be avoided. The reference in Article 5 to subsidiaries or intermediaries of the persons referred to in Article 11 is read in the same way. Even if such a reading were not accepted, from a strictly Spanish perspective, the enforceability of decisions taken by a foreign court in application of such rules of extraterritorial scope and intended to be recognized or enforced in Spain could be denied.

Among the measures adopted by Regulation No 2271/96 to safeguard the economic interests of the persons referred to in Article 11 to whom US extraterritorial legislation has been applied, the one provided for in Article 4 is of particular interest, according to which “no judgment of a court or tribunal and no decision of an administrative authority located outside the Community giving effect, directly or indirectly, to the laws specified in the Annex or to actions based thereon or resulting therefrom, shall be recognized or be enforceable in any manner”. Along with it, the measure provided for in Article 6 – that will be briefly referred to - establishes the entitlement to the recovery of damages of the persons referred to in Article 11 for any loss caused to them by the application of the laws specified in the Annex or by actions based thereon or derived therefrom.

2.1. *The prohibition of enforcement*

The perspective from which this question is analysed is that of the enforceability in Spain of a ruling by a US court that imposes a sanction on a company domiciled in the

European Union or outside it, but enforceable on assets in Spain. In the second case, it will be necessary for the sanction against the group company to be understood as affecting the economic interests of the company domiciled in the European Union in order for Regulation No 2271/96 to be applicable. However, as noted above, it should be understood that, even if this is not the proper reading of Article 11 thereof, Spanish law would oppose enforcement on grounds of public policy, as discussed below.

Since there is no international agreement between Spain and the United States concerning the recognition and enforcement of judgments, the applicable text is the International Legal Cooperation (Civil Matters) Act ("LCJI"), which requires the appropriate declaration of enforceability ("exequatur") for the enforcement of a foreign judgement in Spain. According to Article 41 LCJI, "final and conclusive foreign judgments given in contentious proceedings shall be subject to recognition and enforcement in Spain in accordance with the provisions of this Title", such judgments being understood to be those that are not open to ordinary appeal in the State of origin. That is to say, in order to apply for an exequatur in Spain it will be necessary that the internal remedies of appeal in the country of origin have been exhausted or that the appropriate time limits have lapsed without those having been lodged.

With regard to provisional or precautionary measures which may be granted by the US judge and which are intended to be enforced in Spain, paragraph 4 of the aforementioned article provides that "only protective and provisional measures may be recognised and enforced if their refusal would constitute a breach of the right to an effective remedy, and provided that they have been granted after hearing the opposing party". In the light of the following, it does not seem that such an enforcement could succeed.

If an exequatur is applied for in Spain, under the conditions set out above, for a US sentence in the context of the Helms-Burton Act, the defendant may oppose it on any of the grounds set out in Article 46 LCJI. Paragraph 1 of this article stipulates that final and conclusive foreign judgments will not be recognised:

- a) Where they are contrary to *public policy*.
- b) Where the judgment has been given in manifest breach of the rights of the defence of either party. If the judgment was given in default of appearance, a manifest breach of the rights of the defence is deemed to have occurred if the defendant was not formally served a document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence.
- c) Where the foreign judgment has been given on a matter in respect of which the Spanish courts have exclusive jurisdiction or, in respect of other matters, *if the jurisdiction of the court of origin is not reasonably connected*. The existence of a reasonable connection with the dispute shall be presumed when the foreign court has based its international jurisdiction on criteria similar to those provided for in Spanish law.

- d) Where the judgment is irreconcilable with a judgment given in Spain.
- e) Where the judgment is irreconcilable with an earlier judgment given in another State, provided that the earlier judgment fulfils the conditions necessary for its recognition in Spain.
- f) Where there is a pending litigation in Spain involving the same cause of action and between the same parties, initiated prior to the proceedings abroad.

In the context of this paper, grounds (a) and (c) are particularly relevant, without prejudice to the possibility of invoking any of the others if appropriate. With regard to the former, it could include the prohibition of enforcement contained in Article 4 of Regulation No 2271/96, since it is an internationally mandatory rule. This single argument would be sufficient to justify the refusal of exequatur on the basis of public policy, including the reasons justifying the adoption of Regulation No 2271/96, but it can be further elaborated (with a reasoning that would also serve to deny enforcement in situations that might not be clearly covered by Regulation No 2271/96) on the basis of grounds based on public international law: expropriations or nationalizations carried out by foreign States cannot be challenged before the courts of other States as acts emanating from State sovereignty, and only the adequacy of the appraisals paid, if any, can be questioned. That being the case, the United States cannot question such expropriations or nationalisations or refuse to recognise them, much less try to transfer the effects of this lack of recognition - for which it is not empowered - to persons - natural or legal - who may subsequently have acquired rights in the property in question.

As regards the ground for refusal on the basis of the factor on which the court of origin based its jurisdiction, a connection based on the fact that it is the court of the State of the claimant's domicile, without the case at issue having any further links with the State in question, cannot be deemed a 'reasonable connection' from the Spanish point of view. Thus, if the claim in the United States is brought against a Spanish company or a Spanish group company not domiciled in the United States and the only link with that country is the nationality or residence in its territory of the claimant, the ground provided for in Article 46(c) LCJI for refusing to recognise or enforce a judgment could be raised.

Along with the above, and without the need to wait for the exequatur of the US judgment to be instigated in Spain, it is also possible for the defendant, once said judgment has been given, to initiate proceedings in Spain to obtain a declaration of non-enforceability (a kind of "negative exequatur"), in accordance with the provisions of Article 42(2) LCJI ("The same procedure may be used to declare that a foreign judgment is not recognisable in Spain because it gives rise to any of the grounds for refusal provided for in Article 46").

2.2. Damages

Article 6 of Regulation No 2271/96 provides that the persons referred to in Article 11, engaging in international trade or the movement of capital and related commercial activities between the Community and third countries (Article 1), are entitled to recover any damages, including legal costs, caused to them by the application of the laws specified in the Annex (including the law at issue here) or by actions based thereon or resulting therefrom.

Such recovery may be obtained from the natural or legal person or any other entity causing the damage or from any person acting on its behalf or as an intermediary. The provision also provides that “without prejudice to other means available and in accordance with applicable law, the recovery could take the form of seizure and sale of assets held by those persons, entities, persons acting on their behalf or intermediaries within the Community, including shares held in a legal person incorporated within the Community”.

The situations that arise are intra-European, that is, those in which the claim for damages is addressed to defendants domiciled in the European Union, hence the reference that the provision makes to the grounds of jurisdiction provided in the Brussels Convention, in force on the date of adoption of Regulation No 2271/96 and which should now be understood as referring to Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).