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UK SUPREME COURT PAVES THE WAY FOR ENFORCEMENT OF AN ICSID AWARD IN THE LONG-RUNNING *MICULA V ROMANIA* DISPUTE

To Our Clients and Friends:

On 19 February 2020, the UK Supreme Court rendered its judgment in *Micula and others v Romania*.^[1] In a unanimous ruling, the Supreme Court lifted a stay of enforcement of an ICSID arbitral award despite an extant State aid investigation by the European Commission (the **Commission**). With the stay lifted, the requirement for Romania to provide security as a condition of the stay was discharged.

This highly significant decision is the latest stage in the Micula brothers' (the **Claimants**) longstanding attempts to enforce their ICSID Award against Romania, which has involved proceedings in numerous jurisdictions. The Court's judgment concluded that while the English courts have the power to stay execution of ICSID awards in certain limited circumstances, the stay in this case exceeded the proper limits of that power. In particular, the EU Treaties did not displace the UK's obligations under the ICSID Convention (pursuant to which the UK had a prior (pre-EU-accession) obligation to enforce the Award).

Background

In December 2013, an ICSID Tribunal issued an Award finding Romania in breach of the Sweden-Romania bilateral investment treaty,^[2] and awarding the Claimants compensation of approximately £150 million (~\$200 million), plus compound interest until satisfaction of the Award.^[3] Romania subsequently commenced ICSID annulment proceedings, which were ultimately rejected.^[4]

In October 2014, the Claimants applied for registration of the Award before the Commercial Court,^[5] pursuant to the Arbitration (International Investment Disputes) Act 1966, which implemented the ICSID Convention into English law. In July 2015, Romania applied for the registration to be varied or set aside. By a counter-application, the Claimants sought an order for security to be made in the event that a stay of enforcement was ordered.

Meanwhile, in March 2015, the European Commission issued a decision (the **Commission Decision**) addressed to Romania concluding that payment of the Award constituted State aid in breach of the Treaty on the Functioning of the EU (the **TFEU**). Payment was, therefore, prohibited,^[6] and any payments made hitherto were to be recovered. The Claimants applied to the General Court of the EU (the **GCEU**) for the Commission Decision to be annulled.

Returning to the UK enforcement efforts: the High Court refused to set aside registration, but granted a stay enforcement pending the outcome of the GCEU proceedings.^[7] The High Court meanwhile refused the Claimants' application for security.^[8] In 2018, the Court of Appeal took a different approach. While

maintaining the stay, it ordered Romania to provide security in the sum of £150 million.^[9] Romania was permitted to appeal the order for security before the Supreme Court. The Claimants cross-appealed the grant of a stay.

In a further twist, on 18 June 2019—the morning the Supreme Court proceedings were scheduled to start—the GCEU annulled the Commission’s Decision (the **Annulment Decision**). The GCEU found that the Commission had exceeded its competence by retroactively applying its State aid powers under the TFEU to events predating Romania’s accession to the EU.^[10] The GCEU’s judgment caused the Court of Appeal’s order of a stay (and the conditional security) to lapse. The Supreme Court hearing was postponed.

The Commission next made clear its intention to appeal the GCEU’s decision before the Court of Justice of the EU (**CJEU**) triggering further applications by Romania and the Claimants for the stay of enforcement and grant of security, respectively. The High Court ordered both.^[11] A leapfrog application was granted for the parties’ appeals on these issues to be heard by the Supreme Court, with the Commission participating as an intervening party.^[12]

The Supreme Court Judgment

The Supreme Court essentially considered three issues in relation to the stay, advanced by the Claimants. As the stay was lifted, it was unnecessary for the Court to consider Romania’s grounds of appeal against the order of security.

1. *Did the Annulment Decision mean that the EU law duty of sincere cooperation no longer required the English courts to stay enforcement?*

EU law provides for a “*duty of sincere cooperation*”,^[13] which includes a mutual legal obligation for the EU and its Member States to assist each other in carrying out tasks which flow from the EU Treaties. It is intended to preserve the effectiveness of actions taken by EU bodies.

The issue for the Supreme Court was whether the Annulment Decision also annulled—as the Claimants argued—the Commission’s prior decision initiating formal State aid proceedings against Romania (on the basis it was “*tainted by the same illegality*”).^[14] If so, no requirement existed for the stay to be maintained.

The Court disagreed. While the prior decision was subject to the “*same flaws*” as the Commission Decision, those flaws did not prevent the Commission from relying on it as giving rise to a duty of sincere cooperation on the part of the national courts. Moreover, the Annulment Decision left the State aid investigation open. Absent a final decision by the CJEU and a formal closure of the State aid investigation, the duty of sincere cooperation applies:^[15] *i.e.*, the English courts must ensure compliance with EU law.

Subject to the further grounds of appeal, the Court found the grant of stay should be upheld.

2. *Do the English courts have the power to grant the stay, and is it incompatible with the ICSID Convention?*

The UK signed the ICSID Convention in 1966, prior to its accession to the EU. Under the ICSID Convention, Article 54(1) imposes a duty on national courts to recognise an ICSID award as binding, and to enforce it “*as if it were a final judgment*” by a domestic court.

In the Claimants’ view, while national courts have control over the execution of an award (including the power to grant a temporary stay), it may only do so: (i) for procedural (not substantive) reasons; and (ii) where no inconsistency arises with the (Convention) duty to recognise and enforce the award. The English courts thus did not have the power to grant a stay pending determination of the GCEU proceedings.

The Court agreed. The Court first observed that “*a notable feature*” of the ICSID Convention was that “*once the authenticity of an award is established, a domestic court ... may not re-examine the award on its merits*”; nor can a domestic court refuse to enforce on grounds of public policy.[16] Nevertheless, the Convention’s *travaux préparatoires* indicate that in “*certain exceptional or extraordinary circumstances*” national law defences to enforcement may be invoked.[17]

With that in mind, and taking into account the wording of Article 54(1), the Court concluded (agreeing with the majority in the Court of Appeal) that English courts have the power to stay execution in the “*limited*” circumstances described above.[18] In the present case, the Court found the stay “*exceeded the proper limits of that power*”, and “*was not consistent with the ICSID Convention under which the [UK] and its courts had a duty to recognise and enforce the Award*”.[19] The stay was not a limited stay on procedural grounds, but a prohibition on enforcement of the Award on substantive grounds.[20]

3. *Do the UK’s EU law obligations require the UK to breach its pre-accession obligations under the ICSID Convention?*

Article 351 TFEU provides that obligations arising from pre-EU-accession agreements involving third countries (*i.e.*, non-EU Member States) “*shall not be affected by the provisions of the EU Treaties*”. In the Claimants’ view, the UK’s obligations to recognise and enforce awards under the ICSID Convention are pre-accession obligations within the meaning of Article 351. As such, they are unaffected by EU obligations and a stay is not required.

The Court agreed with the Claimants. While the UK, Sweden and Romania were at all times EU-Member States, under the ICSID Convention, obligations are owed not just to EU-Member States but to Contracting States which are third countries. Article 351 is, therefore, engaged. More specifically, the ICSID Convention confers specific duties—owed to all other Contracting States—to recognise and enforce awards (Article 54) and take such measures as may be necessary to implement the Convention (Article 69).[21] Nothing in the Convention or the *travaux* warranted viewing those specific duties as only owed to the State of nationality of an award beneficiary (which, in this case would mean only the rights of EU-Member States are engaged, and Article 351 would not apply).

In Romania’s (and the Commission’s) view, the Article 351 issue nevertheless required a stay in accordance with the duty of sincere cooperation. This is because of the risk of conflict with a future (CJEU) ruling.

The Court, however, disagreed; it was not required to defer to the EU courts on this issue. First, questions regarding prior treaties under Article 351 are not reserved to the EU courts.[22] Second, the Article 351 issue before the EU courts was different: it concerned *Romania’s* obligations, and not the *UK’s* obligations.[23] Third, the possibility that the EU courts may consider the issue at some future stage is “*contingent and remote*”.[24] Thus, the circumstances did not require a stay.

Accordingly, the Supreme Court allowed the Claimants’ appeal, and lifted the stay, which it described as “*an unlawful measure in international law and unjustified and unlawful in domestic law*”.[25] The issue of security consequently fell away.[26]

Comment

The Supreme Court’s judgment in *Micula* is significant. The Court agreed with the majority in the Court of Appeal that English courts have the power to stay execution of an ICSID award—but only in limited circumstances. Stays may only be granted for procedural (and not substantive) reasons, and only in circumstances where no inconsistency arises with the ICSID Convention duty on national courts to recognise and enforce the award. This is positive news for parties looking to enforce ICSID awards in the UK.

So far as Brexit is concerned, as matters currently stand, the UK remains bound by EU law. The relevance of the “*duty of sincere cooperation*” in future proceedings of a similar nature will depend on the agreement subsequently reached between the UK and the EU.

[1] *Micula and others v Romania* [2020] UKSC 5.

[2] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013.

[3] The Award plus interest is now estimated to be worth in excess of £251 million.

[4] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, 26 February 2016.

[5] *Micula and others v Romania* [2020] UKSC 5, ¶ 28.

[6] Commission Decision 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania.

- [7] *Viorel Micula and others v Romania and European Commission (Intervener)* [2017] EWHC 31 (Comm); [2017] Bus LR 1147.
- [8] As per a subsequent judgment in *Viorel Micula and others v Romania and European Commission (Intervener)* [2017] EWHC 1430 (Comm).
- [9] *Viorel Micula and others v Romania and European Commission (Intervener)* [2018] EWCA Civ 1801; [2019] Bus LR 1394.
- [10] *European Food SA and Others v European Commission* (Cases T-624/15, T-694/15 and T-704/15) EU:T:2019:423.
- [11] *Viorel Micula and others v Romania and European Commission (Intervener)* [2019] EWHC 2401 (Comm).
- [12] *Micula and others v Romania* [2020] UKSC 5, ¶ 36.
- [13] *Micula and others v Romania* [2020] UKSC 5, ¶ 42.
- [14] *Micula and others v Romania* [2020] UKSC 5, ¶ 49. The Claimants further argued that the Annulment Decision annulled the effect of the Commission’s injunction decision of May 2014, which prohibited Romania from implementing the Award pending further investigation by the Commission. The Court concluded that it was not necessary to reach a conclusion on this issue. *Micula and others v Romania* [2020] UKSC 5, ¶ 52.
- [15] *Micula and others v Romania* [2020] UKSC 5, ¶ 51.
- [16] This may be contrasted with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which provides a detailed list of grounds on which recognition and enforcement may be refused, including public policy grounds pursuant to Article V(2)(b). *Micula and others v Romania* [2020] UKSC 5, ¶ 68.
- [17] *Micula and others v Romania* [2020] UKSC 5, ¶ 78.
- [18] *I.e.*, provided that in the particular circumstances it was just to do so and the stay was temporary and consistent with the purposes of the ICSID Convention. *Micula and others v Romania* [2020] UKSC 5, ¶ 84.
- [19] *Micula and others v Romania* [2020] UKSC 5, ¶ 84.
- [20] *Micula and others v Romania* [2020] UKSC 5, ¶ 84.

- [21] ICSID Convention, Article 69 (“Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.”).
- [22] *Micula and others v Romania* [2020] UKSC 5, ¶ 112.
- [23] *Micula and others v Romania* [2020] UKSC 5, ¶ 113.
- [24] *Micula and others v Romania* [2020] UKSC 5, ¶¶ 114-117.
- [25] *Micula and others v Romania* [2020] UKSC 5, ¶ 118.
- [26] *Micula and others v Romania* [2020] UKSC 5, ¶ 119.



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