

ENGLISH HIGH COURT STAYS ENFORCEMENT OF ICSID AWARD

Micula & Ors v Romania & Anor [2017] EWHC 31 (Comm) (20 January 2017)

Introduction

On 20 January 2017, the English High Court handed down its decision in *Micula & Ors v Romania & Anor* [2017] EWHC 31 in which it stayed enforcement of an ICSID award pending resolution of the proceedings in the European court.

Background

The present application arose out of arbitration proceedings between Romania and various individuals and entities.

Prior to 2004, Romania operated a series of tax incentives for certain Swedish investors in economically challenged regions. On 31 August 2004, Romania repealed these tax incentives following complaints from the Romanian Competition Council that these incentives distorted competition and amounted to incompatible State aid schemes. Furthermore, Romania was under an obligation to remove schemes that infringed the European Union's State aid rules in line with the terms of the European Union's Common Position that regulated Romania's compliance with the European Union's accession criteria.

Following this, certain investors commenced ICSID arbitration proceedings against Romania pursuant to the Romania-Sweden Bilateral Investment Treaty. On 11 December 2013, the ICSID Tribunal gave its Award by which it ordered Romania to pay €82million as damages for its failure to ensure a fair and equitable treatment of the claimants' investments in violating of the Romania-Sweden BIT.

By way of a letter dated 26 May 2014, the European Commission informed Romania of its decision to issue a suspension injunction obliging Romania to suspend any action which may lead to the implementation of the outstanding parts of the Award as such implementation would constitute unlawful State aid. On 1 October 2014 (as reported in the Official Journal of the European Union), the Commission notified Romania that that a formal investigation would be commenced.

In Commission Decision (EU) 2015/1470 of 30 March 2015, the European Commission concluded that compensation paid by Romania breached EU state aid rules and required Romania to refrain from paying out any incompatible aid and recover any incompatible aid already paid (that being the part of the award that Romania had already paid to the Claimants). The claimants were also said to be jointly liable to repay the State aid received by any one of them. The claimants have filed applications before the General Court seeking

annulment of Commission Decision (EU) 2015/1470 of 30 March 2015, either in whole or in part, and a decision is awaited.

Application before the English High Court

On 17 October 2014, the ICSID arbitration award was registered in the High Court by Order of Burton J pursuant to the provisions of the Arbitration (International Investment Disputes) Act 1966, which implemented the ICSID Convention in the UK.

In the present application, Romania (supported by the intervening party, the European Commission) applied:

- to set aside the Registration Order,
- alternatively to stay the Registration Order,
- alternatively that the questions which arise should be submitted to the Court of Justice of the European Union (CJEU) for a preliminary ruling.

The claimants opposed Romania's application.

Decision

Key issues before the Court included whether the ICSID award had the status of *res judicata*, and if so, did EU law require this court to disregard national law rules as to finality of decisions; whether the English courts had a duty to under the 1966 Act to register/enforce the Award; whether the UK (and the English courts) were obliged to enforce the Award under the ICSID Convention; and the impact of the European Communities Act 1972 and EU duties upon the obligations of the UK and the English courts.

In summary, the High Court (Mr Justice Blair) held:

- Other than the amounts already received by the claimants in Romania by way of court-ordered execution, Romania has not made any payments under the Award.
- The application of Romania and the Commission to set aside the court's Order of 17 October 2014 registering the ICSID Award was refused, on the basis that the registration of the Award did not place Romania in breach of the Commission's Injunction Decision of 26 May 2014, and the claimants themselves were not in breach by registering the Award.
- Enforcement of the Award was stayed pending the resolution of the claimants' proceedings in the European court seeking the annulment of the Commission's Final Decision of 30 March 2015, on the basis that the Commission's Final Decision prohibits Romania from paying the Award, and the "principle of sincere cooperation" in Art. 4(3) TEU precluded national courts from taking decisions which conflict with a decision of the Commission.

- There was no conflict with the duties of the UK under the ICSID Convention, because by registration under the Arbitration (International Investment Disputes) Act 1966 which implements the Convention, an ICSID award is equated to a final domestic judgment for enforcement purposes, and a purely domestic judgment would be subject to the same principle.
- Alternatively, a stay was appropriate because the issues raised in the present application substantially overlapped with the arguments raised in the annulment proceedings in respect of the Commission's Final Decision which are being brought by the claimants in the European Court in Luxembourg, giving rise to the risk of inconsistent decisions.

The High Court declined to make a reference to the Court of Justice on the basis that the issues were not straightforward to identify, and the matter was already before the European court (through the annulment proceedings).

In relation to security, while the Court considered that the claimants had advanced a persuasive case for an order requiring Romania to provide security as a term of the stay, before reaching a decision the Court would require (i) to be satisfied that there is legal power to make an order for security, and (ii) to be assured that the making of an order for security and such steps as may be consequent on any non-compliance would not themselves be treated as a violation of EU law.