

# Arbitration case law update:

## Supreme Court lifts stay on enforcement of ICSID award: the Micula saga continues

20 February 2020

### Key Contacts

**Tom Canning**  
Partner  
+44 20.7615.3047  
[tcanning@milbank.com](mailto:tcanning@milbank.com)

**Mark Padley**  
Associate  
+44 20.7615.3121  
[mpadley@milbank.com](mailto:mpadley@milbank.com)

**Alexandra Jefferies**  
Associate  
+44 20.7615.3136  
[ajefferies@milbank.com](mailto:ajefferies@milbank.com)

---

## Supreme Court lifts stay on enforcement of ICSID award: the Micula saga continues

### *Micula and others v Romania [2020] UKSC 5*

In the latest instalment of a long-running dispute, the Supreme Court has lifted the stay on the enforcement of a £150m ICSID<sup>1</sup> award against Romania relating to state incentives to invest in food production. The Commercial Court and Court of Appeal had previously ordered a stay of such enforcement in circumstances where the European Commission had issued a decision prohibiting Romania from making payment under the award on the basis that such payment, in and of itself, would constitute illegal State Aid. This European Commission decision is subject to appeal to the CJEU<sup>2</sup> having been annulled in 2019 by the GCEU.<sup>3</sup>

The Supreme Court held that:

- whilst the English Court has the power to temporarily stay execution of an ICSID award on procedural grounds, this power does not extend to “a prohibition on enforcement of the Award on substantive grounds”, pending a determination by the EU Court of an apparent conflict between the ICSID Convention and the EU Treaties;<sup>4</sup>
- further, the obligation on the English Court to enforce an award under the ICSID Convention, which the UK acceded to in 1966, is a prior obligation to the UK’s obligations under the EU Treaties. Therefore, to the extent that there is a conflict with provisions of EU law, Article 351 TFEU<sup>5</sup> is clear that the prior obligation (before the UK’s accession to the EU in 1972) will prevail; and

---

<sup>1</sup> International Centre for Settlement of Investment Disputes.

<sup>2</sup> Court of Justice of the European Union.

<sup>3</sup> General Court of the European Union.

<sup>4</sup> Micula and others v Romania [2020] UKSC 5 at [84].

<sup>5</sup> Treaty on the Functioning of the EU.

- this “means that [the obligation to enforce an ICSID award] cannot be affected by anything in the Treaties, which are the foundation for the legal effect of Commission rulings and for the obligation of sincere co-operation [Article 4(3) TEU<sup>6</sup>]”, and thus there is no basis for ordering a stay.<sup>7</sup>

This decision, coupled with the earlier decision of the GCEU, is a welcome clarification of the application of EU law and the narrow circumstances in which it is appropriate to stay enforcement of an ICSID award. The case also needs to be seen in the context of apparent hostility of the EU institutions to bilateral investment treaties between EU Member States, which effectively establish a competing source of supra-national jurisdiction (as to which, see our summary of the case of Achmea and the January 2019 political declaration of EU Member States setting out their intention to terminate all bilateral investment treaties between EU Member States, [here](#)).

## Background

### *The Award*

These proceedings arose following an award in 2013 by an ICSID arbitral tribunal against Romania (the “**Award**”). The tribunal held that Romania had breached the terms of the Sweden-Romania Bilateral Investment Treaty through its repeal in 2005 of a scheme of investment incentives (EGO 24), and it awarded the claimants (two Swedish nationals and three Romanian companies (the “**Claimants**”)) approximately £150m in compensation and interest.

### *The EU proceedings*

In 2014 the Commission commenced a state-aid investigation, and, in March 2015, it adopted a Final Decision (the “**Decision**”) prohibiting Romania from making payment under the Award on the basis that such payment would constitute new State Aid under Article 107(1) TFEU. The Claimants commenced proceedings before the GCEU to annul the Decision, and (on 18 June 2019) the GCEU granted that annulment.

The GCEU held that the Commission had exceeded its competence by applying its State Aid powers retroactively to events (the incentives under EGO 24 and their repeal in 2005) which pre-dated Romania’s accession to the EU in 2007. The Commission is currently appealing the GCEU’s judgment to the CJEU.

### *The English proceedings*

Parallel to the EU proceedings, in October 2014, the Award was registered in the Commercial Court. In July 2015, Romania applied to set aside the registration order or to stay its enforcement, and the Claimants issued a counter-application for security if the court did order a stay of enforcement of the Award.

In January 2017, the Commercial Court dismissed Romania’s application to set aside registration of the Award, but granted its application to stay enforcement. In June 2017, the Commercial Court refused the Claimants’ application for security.

On the Claimants’ appeal, the Court of Appeal (in July 2018) upheld the Commercial Court’s order for a stay, but ordered that Romania provide security of £150m. Whilst the court was not unanimous in its reasons for upholding the stay, in summary it held that permitting the enforcement of the Award would frustrate the effective application of EU State Aid law and it was appropriate to exercise the discretion of the court to order a temporary stay on the facts of the case.

### *Appeal to the Supreme Court*

Romania appealed the order for security to the Supreme Court and the Claimants appealed against the continued stay on enforcement. However, on the same day as the Supreme Court hearing began in June 2019, the GCEU handed down its judgment annulling the Decision. The stay on enforcement of the Award therefore lapsed, and the Supreme Court adjourned the proceedings. Following confirmation from the Commission that it intended to appeal to the CJEU, the Commercial Court again stayed enforcement

---

<sup>6</sup> Treaty on European Union.

<sup>7</sup> Ibid at [86].

pending the judgment of the CJEU, ordered Romania to provide security of £150m and granted the parties' applications for a leapfrog appeal straight to the Supreme Court.

## Questions before the Supreme Court

In relation to the stay on enforcement, the Supreme Court considered the following questions:

1. Does the principle of sincere cooperation under EU law apply so as to impose a duty on the court to stay enforcement?
2. Is a stay compatible with obligations under the ICSID Convention?
3. Does Article 351 TFEU apply such that obligations under the ICSID Convention are unaffected by the provisions of the EU Treaties, including the duty of sincere cooperation?

### *Obligations under EU law: Duty of Sincere Cooperation*

The Claimants had argued that, since the Decision had been annulled by the GCEU, the “*principle of sincere cooperation*” did not require the court to stay the enforcement of the Award. The Supreme Court disagreed. It held that, although the Commission had not applied to stay the effect of the GCEU’s judgment, that judgment left in existence “*an extant Commission investigation into State Aid*” and that “*the subsisting initiating decision continues to engage the duty of sincere co-operation owed by national courts*”.<sup>8</sup> The Supreme Court also found that the Commission’s appeal to the CJEU was also, “*in itself, sufficient to trigger the duty of cooperation*” so as to impose a duty on the court under EU law to stay the enforcement of the Award.<sup>9</sup> The Supreme Court then turned to the question of whether this duty conflicted with the obligations under the ICSID Convention.

### *Compatibility of a stay with obligations under the ICSID Convention*

Under Article 54(1) of the ICSID Convention (as incorporated into English Law through section 2(1) of the Arbitration (International Investment Disputes) Act 1966 (the “**1966 Act**”), there is an “*obligation to treat an award under the Convention as if it were a final judgment of a local court...*”<sup>10</sup>

In the Court of Appeal, Hamblen LJ considered that the effect of section 2(1) of the 1966 Act was to make a registered ICSID award equivalent to a High Court judgment for all purposes. In his view, this meant that the English Court should stay enforcement of the Award under its general powers because of the duty of sincere cooperation. However, Arden and Leggatt LJ held that section 2(1) merely provided a legal mechanism to execute an ICSID award and gave the national court control over its execution, including the manner and timing of that execution. On their view, the Award could only be stayed temporarily where it was just to do so on procedural grounds.

The Supreme Court left open which was the correct interpretation of section 2(1) (noting that there were “*valid arguments on both sides*”<sup>11</sup>), but held that, on either interpretation, the Court of Appeal was wrong to grant the stay of enforcement:

- On Arden and Leggatt LJ’s interpretation, the stay was not a temporary one on procedural grounds, but was a “*prohibition...on substantive grounds until the GCEU had ruled on the apparent conflict*”.<sup>12</sup> In effect the Court of Appeal had improperly used domestic powers to “*thwart enforcement*” of the Award by granting the stay, contrary to the obligations under the ICSID Convention.<sup>13</sup>
- On Hamblen LJ’s interpretation, if there was no duty of sincere cooperation under EU law, the Award would “*be enforced without question*”<sup>14</sup> in the same manner as a final judgment of an English Court. A conflict therefore arose between the obligation under the ICSID Convention to enforce the Award

---

<sup>8</sup> *Micula* at [51].

<sup>9</sup> *Ibid* at [56].

<sup>10</sup> *Ibid* at [69].

<sup>11</sup> *Ibid* at [83].

<sup>12</sup> *Ibid* at [84].

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid* at [86].

and the principle of sincere cooperation under the EU Treaties. In those circumstances, Article 351 TFEU (as explained below) meant that the obligation on the English Court under the ICSID Convention could not be affected by anything in the EU Treaties, such that there should be no stay of enforcement.

#### *Article 351 TFEU*

Having found that a conflict existed between the obligations under the ICSID Convention to enforce the Award, and the duty of sincere cooperation under EU law, the Supreme Court considered whether the ICSID Convention obligations are “*pre-accession treaty obligations within article 351 TFEU and...therefore unaffected by EU obligations.*”<sup>15</sup>

Article 351 TFEU regulates priority between “*potentially conflicting obligations*” and establishes that the “*application of the EU Treaties does not affect the duty of a member state to respect the rights of non-member states under a prior agreement*” (emphasis added).<sup>16</sup> The Supreme Court held that the UK’s obligations to recognise and enforce the Award under Articles 54 and 69 of the ICSID Convention were owed to all other contracting states and not just to the “*State of nationality of an award beneficiary.*”<sup>1718</sup>

Therefore, because the UK owed relevant obligations to non-EU member states under the ICSID Convention (to which it was a party before it joined the EU), Article 351 TFEU meant that the obligations on the UK under the ICSID Convention were “*not...affected by the provisions of the Treaties*”. Since the obligation of sincere cooperation arose from the Treaties, it did not have “*any application at all*”<sup>19</sup> and there was “*no impediment to the lifting of the stay*”<sup>20</sup> on enforcement of the award.

### **Conclusion and ongoing proceedings**

In light of the above, the Supreme Court held that there was no duty on the court to stay enforcement of the Award. It ordered that the stay be lifted, and held that it was no longer necessary to consider Romania’s appeal on security.

However, this is far from the end of the Micula story. Enforcement proceedings continue in the United States, France, Belgium, Luxembourg and Sweden, and there are questions before the CJEU from the Belgian Court as to the enforcement of the Award and the duty of sincere cooperation (Belgium having acceded to the EU Treaties before it signed the ICSID Convention). The CJEU is also due to give judgment on the annulment of the Decision and it remains to be seen what the Commission’s next move will be.

---

<sup>15</sup> Ibid at [92].

<sup>16</sup> Ibid at [97].

<sup>17</sup> Ibid at [108].

<sup>18</sup> The Court noted that “[t]he Convention scheme is one of mutual trust and confidence which depends on the participation of every Contracting State”, *ibid* at [104].

<sup>19</sup> Ibid at [86].

<sup>20</sup> Ibid at [118].

## Global Contacts

London | 10 Gresham Street, London EC2V 7JD

Tom Canning	<a href="mailto:tcanning@milbank.com">tcanning@milbank.com</a>	+44-20-7615-3047
William Charles	<a href="mailto:wcharles@milbank.com">wcharles@milbank.com</a>	+44-20-7615-3076
Charles Evans	<a href="mailto:cevans@milbank.com">cevans@milbank.com</a>	+44-20-7615-3090
Julian Stait	<a href="mailto:jstait@milbank.com">jstait@milbank.com</a>	+44-20-7615-3005
Mona Vaswani	<a href="mailto:mvaswani@milbank.com">mvaswani@milbank.com</a>	+44-20-7615-3002

New York | 55 Hudson Yards, New York, NY 10001-2163

Wayne M. Aaron	<a href="mailto:waaron@milbank.com">waaron@milbank.com</a>	+1-212-530-5284
Antonia M. Apps	<a href="mailto:aapps@milbank.com">aapps@milbank.com</a>	+1-212-530-5357
Thomas A. Arena	<a href="mailto:tarena@milbank.com">tarena@milbank.com</a>	+1-212-530-5828
George S. Canellos <i>Global Head of Litigation</i>	<a href="mailto:gcanellos@milbank.com">gcanellos@milbank.com</a>	+1-212-530-5792
James G. Cavoli	<a href="mailto:jcavoli@milbank.com">jcavoli@milbank.com</a>	+1-212-530-5172
Scott A. Edelman <i>Firm Chairman</i>	<a href="mailto:sedelman@milbank.com">sedelman@milbank.com</a>	+1-212-530-5149
Adam Fee	<a href="mailto:afee@milbank.com">afee@milbank.com</a>	+1-212-530-5101
Christopher J. Gaspar	<a href="mailto:cgaspar@milbank.com">cgaspar@milbank.com</a>	+1-212-530-5019
David R. Gelfand	<a href="mailto:dgelfand@milbank.com">dgelfand@milbank.com</a>	+1-212-530-5520
Katherine R. Goldstein	<a href="mailto:kgoldstein@milbank.com">kgoldstein@milbank.com</a>	+1-212-530-5138
Robert C. Hora	<a href="mailto:rhora@milbank.com">rhora@milbank.com</a>	+1-212-530-5170
Alexander Lees	<a href="mailto:alees@milbank.com">alees@milbank.com</a>	+1-212-530-5161
Grant Mainland	<a href="mailto:gmainland@milbank.com">gmainland@milbank.com</a>	+1-212-530-5251
Atara Miller	<a href="mailto:amiller@milbank.com">amiller@milbank.com</a>	+1-212-530-5421
Sean M. Murphy	<a href="mailto:smurphy@milbank.com">smurphy@milbank.com</a>	+1-212-530-5688
Daniel Perry <i>Practice Group Leader</i>	<a href="mailto:dperry@milbank.com">dperry@milbank.com</a>	+1-212-530-5083
Tawfiq S. Rangwala	<a href="mailto:trangwala@milbank.com">trangwala@milbank.com</a>	+1-212-530-5587
Stacey J. Rappaport	<a href="mailto:srappaport@milbank.com">srappaport@milbank.com</a>	+1-212-530-5347
Fiona A. Schaeffer	<a href="mailto:fschaeffer@milbank.com">fschaeffer@milbank.com</a>	+1-212-530-5651
Jed M. Schwartz	<a href="mailto:jschwartz@milbank.com">jschwartz@milbank.com</a>	+1-212-530-5283
Alan J. Stone	<a href="mailto:astone@milbank.com">astone@milbank.com</a>	+1-212-530-5285
Errol B. Taylor	<a href="mailto:etaylor@milbank.com">etaylor@milbank.com</a>	+1-212-530-5545

Washington, DC | International Square Building, 1850 K Street, NW, Suite 1100, Washington, DC 20006

David S. Cohen	<a href="mailto:dcohen2@milbank.com">dcohen2@milbank.com</a>	+1-202-835-7517
----------------	--	-----------------

---

Andrew M. Leblanc	<a href="mailto:aleblanc@milbank.com">aleblanc@milbank.com</a>	+1-202-835-7574
-------------------	--	-----------------

---

Michael D. Nolan	<a href="mailto:mnolan@milbank.com">mnolan@milbank.com</a>	+1-202-835-7524
------------------	--	-----------------

---

Aaron L. Renenger	<a href="mailto:arenenger@milbank.com">arenenger@milbank.com</a>	+1-202-835-7505
-------------------	--	-----------------

---

Los Angeles | 2029 Century Park East, 33rd Floor Los Angeles, CA 90067-3019

---

Robert J. Liubicic	<a href="mailto:rlubicic@milbank.com">rlubicic@milbank.com</a>	+1-424-386-4525
--------------------	--	-----------------

---

Jerry L. Marks	<a href="mailto:jmarks@milbank.com">jmarks@milbank.com</a>	+1-424-386-4550
----------------	--	-----------------

---

Mark C. Scarsi	<a href="mailto:mscarsi@milbank.com">mscarsi@milbank.com</a>	+1-424-386-4580
----------------	--	-----------------

---

## Litigation & Arbitration Group

Please feel free to discuss any aspects of this case law update with your regular Milbank contacts or any of the members of our global Litigation & Arbitration Group.

This case law update is a source of general information for clients and friends of Milbank LLP. Its content should not be construed as legal advice, and readers should not act upon the information in this case law update without consulting counsel.

© 2020 Milbank LLP

All rights reserved.