MCNAIR CHAMBERS
INTERNATIONAL COMMERCIAL LAWYERS

ROMANIA ORDERED TO PAY SECURITY FOR STAY OF PROCEEDINGS TO ENFORCE ICSID AWARD

Micula v Romania [2018] EWCA Civ 1801

Introduction

By a decision handed down on 27 July 2018 in *Micula v Romania* [2018] EWCA Civ 1801, the Court of Appeal held that a stay of enforcement of an ICSID award against Romania was to be made conditional upon Romania paying £150 million security into court. However, because of the duty of sincere co-operation contained in Article 4(3) TEU, the English courts were precluded from ordering that non-compliance with the security condition would cause the stay to be lifted.

Background

In *Micula v Romania* (ICSID Case No.ARB/05/20), an ICSID Tribunal (Dr. Laurent Lévy, President; Dr. Stanimir A. Alexandrov; Professor Georges Abi-Saab) issued a monetary award in favour of five companies against Romania on 11 December 2013. The European Commission considered that enforcement and the payment of compensation under the award would amount to unlawful new state aid for the purposes of Article 107(1) TFEU and thus prohibited such payment. By that stage, the ICSID award had been registered in the United Kingdom. On 23 January 2017, enforcement of the ICSID award was stayed by a decision of the English High Court pending determination by the EU General Court of an appeal against the decision of the European Commission. On 16 June 2017, the High Court also rejected the companies' application for an order for security to be paid into court by Romania as a condition for the granting of a stay of enforcement of the ICSID award.

The companies appealed against those decisions of the High Court.

Decision

The Court of Appeal (Arden LJ; Hamblen LJ; Leggatt LJ) dismissed the appeal against the decision granting a stay of enforcement but allowed the appeal against the decision refusing to order security.

As regards the appeal against the decision to grant a stay, the appellants contended that the court below had failed to have appropriate regard to the fact that the ICSID award was *res judicata* and, according to the principle in *Kapferer v Schlank & Schick GmbH (C-234/04)* [2006] ECR I-2585, had to be given effect even if so doing would be inconsistent with EU

Law. In *Kapferer*, the Court of Justice of the European Union established a principle providing that: "*The principle of cooperation under Article 10 EC does not require a national court to disapply its internal rules of procedure in order to review and set aside a final judicial decision if that decision should be contrary to Community law*". The Court of Appeal upheld the decision of the court below that any *res judicata* arose at the time that the ICSID award was rendered (i.e. before the decision of the European Commission). The Court of Appeal decided that the *Kapferer* principle could not be relied upon in the instant case because it had to yield to the need for the effective application of the EU law on state aid. The doctrine of *res judicata* could not be used to ask the court to facilitate a breach of EU law on the basis of its duty of sincere co-operation.

The appellants also contended that the court below had been wrong to find that there was no conflict between the United Kingdom's international obligations contained, on the one hand, in the Arbitration (International Investment Disputes) Act 1966 (which implemented the ICSID Convention 1965) and, on the other hand, the court's EU law duties in light of the decision of the European Commission Decision. Hamblen LJ agreed with the court below that there was no conflict but (agreeing with Leggatt LJ) noted that, if there was a conflict, the court below had been right to order a stay. However, Leggatt LJ interpreted Section 2(1) of the 1966 Act as giving effect to the ICSID Convention in accordance with domestic principles and that the court below was wrong to find that it applied EU law to the ICSID award simply because the UK was an EU Member State – the ICSID Convention nevertheless did not prevent national courts from exercising stay powers provided that the stay was within the overall purposes of the ICSID Convention (Arden LJ agreed with Leggatt LJ on this point, but Hamblen LJ did not).

As regards the appeal against the decision refusing to order security, the Court of Appeal held that English procedural law included the power under CPR 40.8A to grant a stay of execution "*on such terms, as it thinks just*", which included terms such as security. The court could also order security as a condition of a stay under its general case management powers. The Court of Appeal further held that the duty of sincere co-operation contained in Article 4(3) TEU prevented the English court from making an order that the stay would be lifted in the event of non-compliance with the obligation to put up security on the basis that such an order would be as much of a conflict with the decision of the European Commission as would an order requiring Romania to pay the award. It was irrelevant whether such an obligation arose immediately or in the event that Romania failed to pay security into court. Even if Romania did fail to pay the security, the English court would still be under the duty of sincere co-operation which in the instant matter entailed not allowing enforcement of the award.

However, the Court of Appeal held that an order for security without the imposition of such a sanction for non-compliance would <u>not</u> be in conflict with EU law because the operative part of the decision of the European Commission prohibited only the payment of the compensation awarded. Paying security into court would not involve the making of a payment to the award creditors at all, let alone the payment of compensation.

Overall, the Court of Appeal (despite some differences of opinion between the judges on some issues) unanimously held that Romania was to pay into court security £150 million as a condition of the stay of enforcement of the ICSID Award. However, the order was to be made on the basis that non-compliance by Romania would not (without more) lead to the lifting of the stay.

Concluding Remarks

The Court of Appeal's judgment provides an important analysis of issues arising in the course of attempts to enforce investor-state arbitration awards in intra-EU disputes. Taken together with the decision of the Court of Justice of the European Union in *Slovak Republic v Achmea BV (Case C-284/16)* [2018] 4 WLR 87, which ruled that an arbitration clause in an intra-EU Bilateral Investment Treaty was incompatible with EU law, it would appear that EU law is beginning to have a profound impact upon more aspects of investor-state dispute settlement.

Of course, with the possibility of a "no-deal" UK exit from the EU at the end of March 2019, there may yet be considerable uncertainty in respect of such matters raised before the English Courts in the future.