

UK SUPREME COURT LIFTS STAY OF ENFORCEMENT OF ICSID AWARD AGAINST ROMANIA

Micula & ors v Romania (European Commission intervening) [2020] UKSC 5

Introduction

By a decision handed down on 19 February 2020 in *Micula & ors v Romania (European Commission intervening)* [2020] UKSC 5, the UK Supreme Court held that the stay of enforcement granted by the courts below of an ICSID arbitration award, pending the outcome of a related challenge through the EU courts against a decision of the European Commission (which sought to prevent any payment made under the award on the grounds it would constitute unlawful state aid), was not lawful as it did not comply with the UK's obligations under the ICSID Convention (obligations which were unaffected by the UK's EU law obligations).

Background

In December 2013, the claimants obtained an award in ICSID arbitration proceedings against Romania for approximately £70 million plus interest, and Romania unsuccessfully sought annulment of the award. In March 2015, and after the award had been registered in the United Kingdom, the European Commission issued a final decision that payment of the financial compensation element of the award would amount to unlawful state aid contrary to EU law. The claimants challenged the European Commission decision before the General Court of the European Union. The English High Court granted Romania's application for a stay of enforcement pending the outcome of that challenge, and refused the claimants' application for Romania to provide security as a condition of the stay.

On appeal, the Court of Appeal upheld the decision to grant a stay, but reversed the decision not to require Romania to provide security. (Romania was ordered to put up security of £150 million, but the Court of Appeal also stated that non-compliance in this regard by Romania would not in itself lead to the termination of the stay).

Romania appealed to the Supreme Court against the order for it to put up security, and the claimants cross-appealed against the granting of a stay.

The General Court issued its judgment annulling the European Commission decision on the first morning of the Supreme Court hearing, (which led to a 4-month adjournment). The

European Commission appealed to the European Court of Justice against the judgment of the General Court.

Decision

The Supreme Court (Lord Lloyd-Jones and Lord Sales giving the court's judgment) allowed the claimants' cross-appeal. In those circumstances, it was not necessary to consider Romania's security appeal, and the order for security was discharged.

The claimants filed a new ground of appeal that the effect of the General Court's judgment was that the "duty of sincere cooperation" (as contained in Article 4(3) of the Treaty on the European Union) no longer required the English courts to stay enforcement of the award. The Supreme Court rejected this ground of appeal. The General Court's judgment annulled the final decision of the European Commission but not its original decision to initiate the state aid investigation. Although the Supreme Court took the view that that "initiating decision" suffered from the same flaws as the final decision, it was still extant and still gave rise to the EU law "duty of cooperation" for the United Kingdom. That duty would continue pending the Commission's appeal to the European Court of Justice and would, subject to the other grounds of appeal, *prima facie* require a stay so as not to undermine the effect of the European Commission's final decision were it to be upheld.

The Supreme Court was required to interpret Article 54(1) of the ICSID Convention, which obliges all Contracting States to recognise and enforce ICSID awards as if they were final judgments of their own domestic courts. Although there had been a difference amongst the Court of Appeal judges as to the proper interpretation of that provision, the Supreme Court held that neither interpretation assisted Romania here. The majority of the Court of Appeal had been correct to decide that the English courts could stay execution of an ICSID award, but only in limited circumstances. Because the UK had become a party to the ICISD Convention before it became an EU Member State (in 1972), that meant that (by virtue of Article 351 of the Treaty on the Functioning of the European Union) the UK's ICSID Convention obligations to non-EU states were unaffected by the EU Treaties.

However, the Supreme Court held that, in the instant case, the Court of Appeal had been wrong to conclude that the stay of enforcement of the award against Romania was consistent with the ICSID Convention, under which the UK had duties to enforce ICSID awards as if they were English court judgments, and to take steps to take measures to render the ICSID Convention effective. Those duties were owed to all the Contracting States, not just those who were EU Member States.

The granting of a stay pending the determination of the EU annulment proceedings had been an excess of the proper boundaries of the limited scope the English courts had to stay enforcement of an ICSID award. The Supreme Court held (at paragraph 84) that:

"This was not a limited stay of execution on procedural grounds, but a prohibition on enforcement of the Award on substantive grounds until the GCEU had ruled on the apparent conflict between the ICSID Convention and the EU Treaties. Effect was

given to the Commission Decision until such time as the GCEU might pronounce upon it. ... But the grounds of objection raised by the Commission, even if upheld before the EU courts, were not valid grounds of objection to the Award or its enforcement under the ICSID Convention ... In substance, the Court of Appeal made use of powers to stay execution granted by domestic law in order to thwart enforcement of an award which had become enforceable under the ICSID Convention”.

Concluding Remarks

The Supreme Court’s judgment constitutes an important statement on the “*limited*” circumstances in which domestic courts can stay the enforcement of an ICSID award pending the resolution of a related challenge elsewhere. At the time of writing, the European Commission’s appeal against the General Court’s judgment is still pending.

These English proceedings form part of the claimants’ ongoing broader efforts to enforce their ICSID award against Romania in a range of jurisdictions, including the USA, Sweden and Belgium.