



School of International Arbitration

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International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date:

Ioan Micula, Viorel Micula and others v. Romania (ICSID Case No. ARB/05/20) –
Annulment Proceeding

Case Report by:

Devika Agarwal **, editor Ignacio Torterola***

Summary:

In a Decision on Annulment issued on 26 February 2016, an International Centre for Settlement of Investment Disputes (“ICSID”) *Ad Hoc* Committee (“Committee”) unanimously rejected Romania’s application for annulment of the Award rendered on 11 December 2013 under the Agreement Between the Government of the Kingdom of Sweden and the Government of Romania (“Sweden-Romania BIT”) by an ICSID Tribunal. The Committee found that none of the grounds for annulment of Article 52 of the ICSID Convention invoked by Romania had been met, namely that (1) the Tribunal manifestly exceeded its powers, (2) there was a serious departure from a fundamental rule of procedure, and (3) the award failed to state the reasons upon which it was based.

Main Issues:

Annulment proceeding under the ICSID Convention; manifest excess of powers; serious departure from a fundamental rule of procedure; failure to state reasons; narrow scope of grounds for annulment.

***Ad Hoc* Committee:**

Dr. Claus von Wobeser (President) – Dr. Bernardo Cremades– Judge Abdulqawi A. Yusuf.

Claimants’ Counsel: Mr. Jakob Ragnwaldh, Mr. Robin Rylander, Mr. Brian Kotick (Mannheimer Swartling, Stockholm, Sweden); Prof. Dr. Kaj Hobér (Gray’s Inn, London, U.K.) and Prof. Emmanuel Gaillard, Dr. Yas Banifatemi, Ms. Veronika Korom (Shearman & Sterling LLP, Paris, France).

Respondent's Counsel: Mr. D. Brian King (Freshfields Bruckhaus Deringer LLP, New York, New York, U.S.A.); Dr. Boris Kasolowsky (Freshfields Bruckhaus Deringer LLP, Frankfurt, Germany); Mr. Ben Juratowitch (Freshfields Bruckhaus Deringer LLP, Paris, France); Dr. Moritz Keller (Freshfields Bruckhaus Deringer LLP, Vienna, Austria) and Ms. Manuela M. Nestor, Ms. Georgeta Dinu (Nestor Nestor Diculescu Kingston Petersen, Bucharest, Romania).

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Digest:

1. Facts of the Case and Procedural Background

On December 13, 2013 an ICSID Tribunal handed down a decision on jurisdiction dismissing Romania's objections to jurisdiction. The Tribunal held that the applicable law is the Europe Agreement and the Sweden-Romania BIT, and that the EU law is not directly applicable to Romania although the EU law formed part of the "factual matrix" of the case. The Tribunal noted that it would not address the parties' arguments regarding the enforceability of an award of compensation against Romania on the ground that it would not delve into the possible conduct of various persons and authorities after the Award has been rendered. Consequently, the Tribunal rendered an Award holding that Romania had breached its FET obligation towards Claimants, dismissed the umbrella clause claim and considered it unnecessary to rule on the claims regarding unreasonable and discriminatory treatment or expropriation. Claimants were awarded RON 376.4 million in damages (excluding interest) (¶¶ 104-113). The Tribunal did not allocate the damages and awarded the entirety of the damages collectively to the five claimants (¶ 114). Prof. Abi-Saab wrote his Separate Opinion in the Award (¶ 119).

On 9 April 2014 Romania filed an application for the annulment of the Award, including a request for the stay of enforcement of the Award under Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(2). On 12 May 2014 the Committee was deemed constituted (¶¶ 1-4). On 11 June 2014 Claimants filed preliminary objections under Rules 41 (5) and 53 of the 2006 ICSID Arbitration Rules for 'manifest lack of legal merit'. Romania contested this on the ground that the 2003 Arbitration Rules applied to the annulment proceedings and that there was no equivalent of 'manifest lack of legal merit' under the 2003 ICSID Arbitration Rules (¶¶ 7-9). On 25 June 2014 the Committee issued a separate decision on the Applicable Arbitration Rules and on Preliminary Objections and held that the 2003 ICSID Arbitration Rules would apply (¶¶ 14-18). On 22 May 2014 Romania filed a request for the continued stay of enforcement of the award. On 7 August 2014 the Committee granted the stay of enforcement on the condition that Romania provides a written assurance to comply with the award if upheld (¶¶ 21-32). When Romania refused to do so, the stay was automatically revoked on 7 September 2014 (¶ 37). On 10 June 2014 Claimants requested

provisional measures to prevent Romania from taking enforcement measures against the EFDC. On 18 August 2014 the Committee dismissed the request (¶¶ 38-47). On 15 October 2014 the EC filed an Application for Leave to Intervene as a Non-Disputing Party under Rules 37(2) and 53 of the ICSID Arbitration Rules (2006). On 3 December 2014 the Committee granted leave to the EC to participate as a non-disputing Party (¶¶ 53-61). Claimants filed their Counter-Memorial on Annulment on 2 December 2014; Romania filed its Reply on Annulment on 9 March 2015, and Claimants their Rejoinder on Annulment on 9 June 2015 (¶¶ 65-77). The hearing was held at the seat of ICSID from September 21 to September 22, 2015 (¶ 81). The Committee declared the proceeding closed pursuant to ICSID Arbitration Rules 38(1) and 53 on 13 January 2016 (¶ 86).

2. Analysis of Legal Issues by the Committee

Romania challenged the Award by invoking Articles 52(1)(b), 52(1)(d) and 52(1)(e) of the ICSID Convention, making reference to the following three issues; (1) the failure to apply the law that the Tribunal had found was applicable to the dispute, the 1995 Europe Agreement; (2) the failure to decide whether Romania was prohibited from paying compensation for the repeal of illegal State aid; (3) the failure to require each Claimant to prove that it suffered harm and to award compensation to each Claimant only for the harm it proved it had suffered (¶¶ 120-140).

The Committee first generally addressed the grounds listed in Article 52 of the ICISD Convention and held that the threshold for annulment under the grounds is very high. It also mentioned how it is well established in arbitration case law that the annulment proceeding is not to be considered an appeal, but rather as a narrowly circumscribed remedy. The Committee also noted that a committee “has only limited jurisdiction under Article 52 of the Convention” and “cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal” (¶¶ 122-139). The Committee examined Romania’s three main arguments as follows:

2.1 Analysis of Romania’s First Argument: Failure to apply the applicable law as grounds for annulment under 52(1)(b) and 52(1)(e) of the ICSID Convention

According to Romania the Tribunal failed to apply the applicable law pursuant to Article 42(1)¹ of the ICSID Convention and thus the Tribunal manifestly exceeded its powers (Article 52(1)(b) of the ICSID Convention) and failed to state the reasons on which the Award was based (Article 52(1)(e) of the ICSID Convention) (¶¶ 144, 153, 156). Romania submitted that the Tribunal had found that the relevant rules of international law were the Europe Agreement and the Sweden-Romania BIT; the Tribunal had also ruled that EU law, with the exception of Romania’s international obligations under the Europe Agreement, was not directly applicable to Romania. Romania stated that the Tribunal had held the Europe Agreement and EU State aid law applicable to assess the EGO 24 regime and asserted that by virtue of the Implementing Rules enacted by the Romanian Association Council in 2001, the whole body of European competition law, including the rules on prohibition of State aid, was applicable to Romania. However, although the Tribunal had identified these rules as the applicable source, it failed to apply them (¶¶ 144, 145, 148). It also contended that the Tribunal had found that the Europe Agreement was a ‘relevant’ rule of international law but

¹ The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

not ‘directly applicable’ and that it had found that the Europe Agreement would apply to the factual matrix of the case and consequently did not enter into a legal analysis of Romania’s obligations under the Europe Agreement, including the EU rules on State aid. Consequently, Romania contended that it is clear from the Tribunal’s analysis of EGO 24 that the Tribunal failed to apply the rules that it had itself identified as the governing law because nowhere did it actually assess EGO 24 in the context of the EU State aid rules (¶¶ 149-150).

Claimants argued that Romania’s argument that the Tribunal failed to apply the applicable law to the question of the lawfulness of EGO 24 must fail because it was at odds with the Applicant’s arguments before the Tribunal. According to Claimants, the Tribunal did not decide the legality of EGO 24 because the question had not been presented to it and Romania had presented the issue as “whether Romania acted reasonably in amending EGO 24 in August 2004” (¶ 167).

The Committee distinguished between failure to apply the applicable law by the Tribunal and erroneous application of that law. The Committee relied on *M.C.I. v. Ecuador*² and held that it was not the Committee’s role to review whether the Tribunal correctly applied the Europe Agreement, but simply to verify that the Tribunal applied it. The Committee found that the Tribunal had applied the Europe Agreement to the questions posed by Romania and held that the Tribunal did apply the law it had determined as the applicable law. It also found that the Tribunal had applied the VCLT and concluded that there was no conflict of treaties between the Europe Agreement and the Sweden-Romania BIT (¶¶ 186, 188, 189, 195).

The Committee relied on *Impregilo v. Argentina*³ and held that the Award is not annulable under Article 52(1)(e) of the ICSID Convention, because reasons had been stated, addressing the questions submitted to the Tribunal, irrespective of whether they were incorrect, unconvincing or non-exhaustive (¶ 196). The Committee also rejected Romania’s argument that the Award made it impossible for the reader to understand how the Tribunal reached its conclusions and thus suffered from “a total failure to state reasons for a particular point, which is material for the solution” and it held that the Tribunal gave sufficient reasons to explain why EU law was not directly applicable by virtue of the Europe Agreement. The Committee also held that the Tribunal had stated its reasons for its finding that there was no conflict of treaties (¶¶ 201-202).

2.2 Analysis of Romania’s Second Argument: Tribunal’s failure to decide the issue of unenforceability as grounds for annulment under 52(1)(b) and 52(1)(e) of the ICSID Convention

Romania argued that the Tribunal failed to decide whether Romania was prohibited from paying compensation for repeal of State aid granted under EGO 24 because it would violate the treaties on which the European Union was founded (“EU Treaties”) thus constituting ‘illegal State aid’. Romania argued that the Tribunal deliberately declined to decide this issue and, as a result of the compensation awarded to Claimants, created a conflict of Romania’s obligations under the ICSID Convention, on the one hand, and Romania’s international obligations under the TFEU, on the other hand. Accordingly, Romania argued that the question was “a crucial or decisive argument,” and deciding it might, therefore, have led to a materially different outcome. Finally, Romania argued that the failure of the Tribunal to

² *M.C.I. v. Ecuador* (ICSID Case No. ARB/03/6)

³ *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17)

decide the issue of enforceability of the award constituted ‘manifest excess of powers’ and ‘failure to state reasons’ (¶¶ 204-205,208).

Claimants argued that although the Tribunal did not make an affirmative decision on the issue of enforceability of the Award, it clearly dealt with the issue and even if the Tribunal had not dealt with Romania’s unenforceability argument, it would not be a violation of Article 48(3)⁴ of the ICSID Convention. According to Claimants’ argument Article 48(3) did not require a tribunal to comment on all arguments, in particular arguments that the tribunal had already found to be irrelevant to the merits. Claimants argued that an omission by a tribunal to decide a question could only amount to an annulable ground in limited circumstances where the defect met the standard of a failure to state reasons under Article 52(1)(e) of the Convention; Claimants argued that it could amount to a manifest excess of powers under Article 52(1)(b) (¶¶ 213, 216, 218).

On the *manifest excess of power* argument, Claimants argued that even if the Tribunal had violated Article 48(3) of the Convention, this would not have constituted an excess of power, let alone a *manifest* excess of power because Article 48(3) was not intended to be a ground for annulment. According to Claimants if a party is discontent that the tribunal had not addressed a question, the proper remedy is to request a supplementary decision or interpretation of the award. Furthermore, Claimants argued that in order for an excess to be ‘manifest’, it must be obvious and discernable without elaborate analysis of the award and must be material to the outcome of the case. Finally, Claimants submitted that the Tribunal had stated reasons which could be followed and which enabled the reader to understand what motivated the Tribunal. (¶¶ 219, 221-223)

According to the Committee, the Tribunal had reasoned that it was inappropriate for the Tribunal to base its decision in the instant case on matters of EU law that would come to apply after the Award has been rendered and found that the Tribunal had dealt with the issue of enforceability of the award although the Tribunal did not make an affirmative decision on the issue of enforceability of the Award. The Committee also rejected Romania’s argument that the question of enforceability was “a crucial or decisive argument,” and that, had the Tribunal decided it, it might have led to a materially different outcome in the Award; the Committee held that it was not vested with powers to speculate on the merits, which would be required to address some of the questions posed by Romania such as whether the finding on enforceability have affected the Tribunal’s decision on the violation of the FET obligation under the Sweden-Romania BIT (¶¶ 229-230, 231).

2.3 Analysis of Romania’s Third Argument: Issuance of a ‘collective award’ in favor of all the Claimants for harm incurred by EFDG as a whole, and without requiring each claimant to prove that it suffered harm as ground for annulment under 52(1)(d), and 52(1)(e) of the ICSID Convention

Romania contended that the Tribunal breached a fundamental rule of procedure by “failing to require any of the five Claimants, or the Claimants collectively, to quantify and prove the amount of damages that it or they had suffered issuing instead a ‘collective award’ in favor of all five Claimants for harm incurred by the EFDG as a whole.” Romania contended that having held that the Individual Claimants could not recover compensation for the Corporate

⁴ The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.

Claimants' losses and that the Corporate Claimants could not recover compensation for the Non-Party Companies' losses, the Tribunal issued "an Award that has both of these consequences" (¶¶ 236, 238).

Romania contended that the rules on evidence and burden of proof were fundamental rules of procedure, and a serious departure from such rules might warrant an annulment under Article

52(1)(d) of the Convention. In that regard, Romania contended that an award of damages where a party had clearly not met the burden of proof to show damages, in effect reversing the burden of proof, constituted a serious departure from the fundamental evidentiary rule. According to Romania, the departure from the fundamental rule of procedure was "serious" for the purposes of Article 52(1)(d), in the sense that it deprived Romania of the benefit or protection that the rule was intended to provide (¶¶ 241-242, 249). Additionally, Romania argued that the Tribunal relied on contradictory reasons for its decision not to allocate compensation between Claimants and, as a result, failed to state the reasons upon which the Award was based for the purposes of Article 52(1)(e) of the Convention (¶ 250).

Claimants disagreed with Romania's contention that the Tribunal found that it was unnecessary for any Claimant to prove that it had suffered any harm; according to Claimants it was clear in the Award that the Tribunal expressly "established that both the Corporate and Individual Claimants were harmed." Claimants stated that the Tribunal had found that Claimants had proven two categories of damages – increased costs and lost profits – amounting to RON 376,433,229 and accordingly the Tribunal had rejected Romania's contention that each Claimant must specify and prove its individual harm.

The Committee stated that in order to prove the ground that there was serious departure from a fundamental rule of procedure there has to be first, a deviation from a fundamental rule of procedure, and second, that deviation must be serious. The Committee found that Romania had failed to prove both elements: it did not demonstrate the existence of such fundamental rule nor that the alleged departure from this hypothetical rule was serious. The Committee accepted Claimants' argument that the fundamental rules of procedure referred mainly to the parties' rights to be heard and present their case and accordingly the Committee held that such rights were fully granted to both Parties in the case-at-hand. The Committee accordingly held that there was no violation of the "burden of proving damages" rule alleged by the Respondent or to any other fundamental rule of procedure (¶¶ 283-284, 288).

The Committee held that the contradiction asserted by Romania did not amount to a "failure to state reasons." The Committee observed that case law had established a very strict scrutiny to annul awards in case of contradictory reasons. It noted that it could not reasonably be argued that such contradictory reasons existed in an award when: (i) the reasoning of the tribunal as a whole allows the reader to understand and follow the motives of fact and law given by the tribunal; (ii) the award gives ample reasons and explanations in support of its conclusions; and (iii) the award gives sufficient pertinent reasons, and deals in logical order and in some detail, with all relevant considerations. The Committee found that the Award allowed a reader to follow its reasoning by dealing in logical order and in detail with all the relevant considerations, and gave ample reasons and explanations for its conclusions. Accordingly, the Committee rejected Romania's arguments (¶¶ 298-299, 303-304).

The Non-Disputing Party Submission

The Committee considered the submissions made by the EC and confirmed its conclusion not to annul the award.

3. Costs

The Committee directed Romania to bear the expenses of the proceedings and directed each party to bear its own legal costs, finding that Romania's case involved a "difficult and novel question of public importance" and was not "fundamentally lacking in merit" nor was it "to any reasonable and impartial observer, most unlikely to succeed" (¶¶ 349-352).

4. Decision

In a unanimous decision, the Committee dismissed Romania's application for annulment under Articles 52(1)(b), 52(1)(d), and 52(1)(e) of the ICSID Convention in its entirety.