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**School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law**

Award Name and Date:

Micula et al. v. Romania, [2017] EWHC 31 (Comm) - Judgment, 20 January 2017

Case report by:

Jessica Sblendorio** Editor, Diego Luis Alonso Massa***

Summary:

The High Court of Justice declined to set aside an order registering two Swedish investors' (the claimants) ICSID arbitral award against Romania. However, the court did stay proceedings regarding the enforcement of the award until the resolution of claimants' proceeding before the European Court to annul the European Commission's Final Decision 2015/1470. Final Decision 2015/1470 declared that the award constituted new state aid under Article 107(1) of the TFEU and prohibited Romania from making any payments to the claimants. The Final Decision also demanded that Romania recover any sums it had already paid under the award to the claimants and declared that the claimants be jointly liable to repay any sums received from Romania. In granting a stay of enforcement of the award, the Court noted that enforcing the award would result in a conflict with a decision of the European Commission prohibiting Romania from paying the award, and a national court would be obligated to stay proceedings under these circumstances. Further, registering the award under the Arbitration (International Investment Disputes) Act 1966 did not create a conflict between the duties of the United Kingdom under the ICSID Convention because an ICSID award is equated to a final domestic judgment for enforcement purposes. The Court found the claimants' request for an order requiring Romania to provide security persuasive because the proceedings related to an ICSID award which predated the decisions of the European Commission; the award was treated as a final judgment of the English court at the time of the award; and the award has remained unpaid for several years. However, the Court did not ultimately order Romania to pay security in this decision.

Main issues: finality of decisions (*res judicata*); registration and enforcement of an award under the Arbitration (International Investment Disputes) Act of 1966; European Union and state aid

Justice: William Blair

First Claimant's Counsel: Sir Alan Dashwood QC (Shearman & Sterling (London)); Patrick Queen QC (Shearman & Sterling (London) LLP); and Matthieu Grégoire (Shearman & Sterling (London) LLP)

Second to Fifth Claimants' Counsel: Marie Demetriou QC (White & Case); Hugo Leith (White and Case)

Respondent's Counsel: Robert O'Donoghue (Thrings); Emily MacKenzie (Thrings)

Intervener's Counsel: Nicholas Khan, European Commission

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Digest:

1. Facts of the Case

The first and second claimants were Swedish nationals, and the third, fourth and fifth claimants were Romanian companies that are owned directly or indirectly by these nationals. (¶ 1). The defendant/applicant was Romania, and the intervening party was the European Commission. (¶ 1). The application by Romania before the court arose from arbitration award in ICSID Case No. ARB/05/20, which was rendered against Romania in favour of the claimants on 11 December 2013. (¶ 2). The arbitral tribunal that rendered the award was established pursuant to the Sweden-Romania bilateral investment treaty (“Sweden-Romania BIT”) entered into on 1 April 2003. (¶ 3).

The claimants argued that the investments made in Romania were and are protected by the Sweden-Romania BIT and that the award rendered by the ICSID tribunal is valid. (¶ 16). Romania applied for membership to the European Union in 1993, and in 1995, the Europe Agreement between the European Community and Romania entered into force, which would require Romania to eventually adopt the European rules on state aid. (¶ 20). In 1998, Romania adopted Emergency Government Ordinance No. 24/1998 as an investment incentive scheme following the encouragement of the European Commission to pursue foreign direct investment, rapid privatization, and restructuring of its industrial and agricultural industries. (¶¶ 21, 22). In preparation for its accession to the European Union, Romania also adopted Law No. 143/1999 on state aid. (¶ 24).

Relying on these investment incentives, during the early 2000s, the claimants invested in a large, highly integrated food production operation in the Şeti-Nucet-Drăgăneşti region as part of a ten-year business plan. (¶ 25). During 2002, Romania signed a bilateral investment treaty with Sweden (an existing member of the European Union), which entered into force in 2003. (¶ 26). In 2004, Romania passed a government ordinance which repealed all but one of the tax incentives provided in Government Ordinance No. 24/1998 because the Ordinance No. 24/1998 was viewed as state aid. (¶ 27). Following the passage of this ordinance, the claimants filed a request for arbitration with ICSID under the Sweden-Romania BIT on 28

July 2005. (¶ 28). Romania became a member of the European Union on 1 January 2007. (¶ 29).

The main issue before the court was whether court should dismiss the application by Romania to set aside the Registration Order and enforce the award as a final judgment under the Arbitration (International Investment Disputes) Act of 1966 (“1966 Act”). (¶ 6). The claimants argued that the court should dismiss Romania’s application and enforce the award. (¶ 6). Here, the claimants argued that the court was under a duty to recognize and enforce the award on the basis that the award was (1) *res judicata*; (2) the terms of the 1966 Act are clear and do not allow for derogation; (3) Article 351 of the Treaty on the Functioning of the European Union (“TFEU”) applies “because the ICSID Convention imposes applicable prior multilateral international obligations on the [United Kingdom] owed to non-EU Member States which take precedence”; (4) the European Communities Act 1972 was not meant to give primary on EU law in “relevant respect” or “put the [United Kingdom] in breach of pre-accession international obligations”; (5) rejecting the application would not infringe on the United Kingdom’s legal obligations as an European Union member; and (6) the award has not been paid in full. (¶ 10).

However, the procedural history raised a complicated issue—on 30 March 2015, the European Commission made a final decision regarding the award issued by the ICSID Tribunal: implementing or executing the award, including payment of the award, would be incompatible with the European Union’s rules on state aid. (¶ 7). Based upon this decision, Romania argued to the High Court that the Registration Order should be set aside because the award had been paid in full and/or the court would be obligated to refuse recognition of the award based upon the terms of the final decision of the European Commission. (¶ 9). In the alternative, Romania requested to vary the Registration Order to stay the proceedings until the claimants’ application to annul the final decision of the European Commission is adjudicated in European Union courts, or until the Court of Justice of the European Union (“CJEU”) issues a preliminary ruling pursuant to Article 267 of the TFEU. (¶ 9).

2. Procedural Background

On 28 July 2005, the claimants filed a request for arbitration with ICSID under the terms of the Sweden-Romania BIT. (¶ 28). During the arbitration, the European Commission participated as an *amicus* and presented submissions on European Union law. (¶ 28). On 11 December 2013, a majority of the tribunal concluded that Romania had violated the claimants’ legitimate expectations and had failed to act transparently and issued an award in favour of the claimants. (¶¶ 30, 47). The tribunal did not address the issue of enforceability with respect to the European Union’s rules on state aid.

Following the issuance of the award, Romania filed an application to annul the award to the ICSID *ad hoc* Committee and requested a stay of enforcement of the award, which was temporarily granted. (¶ 33). The *ad hoc* Committee agreed to continue the stay if Romania would provide assurances that the Award would be paid in full if the annulment application was dismissed—Romania failed to give this assurance and the Committee revoked the stay. (¶ 35).

The European Commission maintained the position that implementing the award would constitute state aid under European Union rules and paying the award would be a violation of these rules. (¶ 34). During the pendency of the ICSID annulment proceedings, the European

Commission issued an injunction, which prevented Romania from taking any action to execute or implement an award until a decision was reached as to the compatibility of state aid. (¶ 34). Following the issuance of this injunction, the claimants applied to the General Court of the European Union (“GCEU”) to annul the injunction decision. (¶ 36).

Following the award issued by ICSID tribunal, the first claimant applied to register the award in the English High Court and was registered on 17 October 2014 pursuant to the 1966 Act. (¶ 37, 48-51). The Registration Order allowed Romania, the defendant, the right to apply to vary or set aside the Registration Order. (¶ 37).

On 30 March 2015, the Commission adopted Final Decision 2015/1470, which declared that the award constituted new state aid under Article 107(1) of the TFEU and prohibited Romania from making any payments to the claimants. (¶¶ 38, 55-57). Further, the decision demanded that Romania recover any sums it had already paid under the award to the claimants and declared that the claimants be jointly liable to repay any sums received from Romania. (¶¶ 38, 57).

Following the Final Decision of the European Commission, Romania filed its application with the English High Court to set aside or vary the Registration Order on 28 July 2015. The second, third, fourth, and fifth claimants joined the proceedings, and the European Commission later intervened. (¶ 39). Shortly thereafter, the third, fourth, and fifth claimants began proceedings to the GCEU to annul the Commission’s final decision (the other claimants subsequently commenced similar proceedings). (¶ 40).

The ICSID *ad hoc* Committee upheld the award on 12 February 2016 and rejected Roman’s annulment application on 26 February 2016. (¶ 41, 54). The outcome of the proceedings to annul the Commission’s final decision before the GCEU were still ongoing during these proceedings. (¶ 58).

3. Analysis of Legal Issues by the High Court of Justice

The High Court addressed seven issues, discussed in detail below, regarding whether Romania’s application to set aside or vary the registration order should be granted.

3.1 Finality of decisions: the European Commission’s Final Decision and the Award

The first issue centered on whether the arbitral award had the status of *res judicata* and if the Commission’s final decision of 30 March 2015 could affect the validity of the award, since it post-dated the award. (¶¶ 90-91). The claimants, Romania and the Commission disagreed as to when finality of the award occurred—claimants argued that finality occurred on the date of the arbitral award, 11 December 2013, whereas Romania and the Commission argued that finality did not occur until 26 February 2016, when the ICSID *ad hoc* Committee rejected Romania’s application for annulment. (¶¶ 98-100). The court ultimately agreed with claimants that, as a matter of English law under s. 2(1) of the 1966 Act, the award became *res judicata* on 11 December 2013, the date the award was issued and not on the date Romania’s annulment application was rejected. (¶¶ 106-108).

Additionally, the court considered the effect of the claimants' annulment proceedings with respect to the Commission's final decision. (¶ 110). In its analysis, the court also considered the case of *Commission v. Slovak Republic*, where the issue focused on the recovery of a tax claim, and the writing off of this claim was confirmed by a Slovak court in 2004. (¶ 101). After the period of appeal had expired, the decision of that court became *res judicata*. (¶¶ 101-103). In 2007, the Commission found this recovery to constitute state aid in breach of European Union law and the Slovak Republic was required to recover it. (¶¶ 101-103). Although this case and the cited case address the issue of state aid and *res judicata*, the court noted that the case here was distinctive from *Commission v. Slovak Republic*, in that the proceedings in the national court had concluded and the issue was about recovery, whereas here enforcement of the award had not yet begun and enforcing the award would appear to create a direct conflict between the court and the Commission. (¶ 109).

With respect to this argument, the claimants claimed that *res judicata* was not addressed in the Final Decision and secondly, *res judicata* was not at issue in the annulment. (¶ 110). The court noted that the first point asserted by claimants was not in dispute. With regards to the second point, the court agreed with the position of Romania and the Commission that the effect of the Commission's final decision on state aid and the application of the 1966 Act was part of the arguments that are on appeal to the GCEU. (¶¶ 94, 111). Because this issue overlaps with the appeal to the GCEU, the court highlighted the risk of inconsistent decisions if the High Court decided as a matter of European law whether the award could be enforced or not. (¶ 111). For those reasons, the court decided that the final determination of this issue would be stayed until the decision of claimants' annulment proceedings was resolved by the GCEU. (¶ 112).

3.2 The effect of the 1966 Act

The second issue the court addressed was whether the court had a duty to register/enforce the award under the 1966 Act. (¶ 113). Here, the claimants argued the 1966 Act required the court to enforce the award and that there was no ground under European Union law to derogate from this position. (¶ 114). Romania and the Commission argued that the High Court would refuse to enforce a judgment under these circumstances, giving priority to European law and avoiding conflict, and therefore the Registration Order should be set aside or, alternatively, stayed. (¶ 116). The court addressed the submissions of setting aside registration and staying enforcement separately.

In evaluating whether the Registration Order should be set aside, the court addressed the injunction decision of the European Commission that prohibited Romania from executing or implementing an award until a final decision regarding the compatibility of state aid had been issued and the alleged conflict with the 1966 Act, which allows for "automatic" registration of an ICSID award under s. 1(2). (¶¶ 119-120). The court noted that the scope of the injunction was directed towards Romania, and not the claimants. (¶ 121). The registration of the award in the English court by claimants did not put Romania in breach of the injunction nor were claimants in breach by registering the award. (¶ 123). The court emphasized that there is a difference between giving a judgment and enforcing it and registering an award and enforcing it. (¶ 125). Both Romania and the Commission emphasized that payment of the award is the prohibited state aid measure, and the court ultimately rejected the request to set aside the registration order: "Registration in itself does not create a risk of conflict between decisions of domestic and EU institutions in the sense established by the case law." (¶ 126).

Turning to the submission that the enforcement proceedings should be stayed, the court stayed the enforcement proceedings until the resolution of claimants' proceedings to annul the Commission's Final Decision. (¶¶ 127-135). The court noted that it could not enforce a judgment under circumstances in which the Commission has prohibited Romania from making payment under the Award and to do so would be unlawful. (¶ 132). The risk of conflict between the national court, here the High Court, and the European Court would require a stay pending resolution of the proceedings in the European Court to annul a decision of the Commission, and therefore the court accepted the positions of Romania and the Commission in this respect. (¶ 135).

3.3 Article 351 of the TFEU

The third issue addressed by the court was whether the United Kingdom and the court would be obligated to enforce the Award under the ICSID Convention, and if so, would that obligation be affected by Article 351 of the TFEU. (¶ 136). Article 351 of the TFEU allows for a Member State's obligations under a prior international agreement with a non-Member State to continue, even after the non-Member State's later accession to the European Union. (¶ 137-139). Here, the prior agreement would be the United Kingdom's ratification of the ICSID Convention. (¶ 137). The claimants argued that the ICSID Convention requires the court to enforce the award as a final judgment of a United Kingdom court. (¶ 142). Additionally, claimants claimed that Article 351 applies because the ICSID Convention was a prior international agreement that created obligations for the United Kingdom to non-European Union Member States, and European Union law does not require the court to disregard the ICSID Convention or the 1966 Act (both of which require enforcement). (¶ 142). However, the court noted that many of the same considerations with respect to Article 351 arise in the claimants' annulment proceedings, and the application of Article 351 was one of the grounds on which they sought annulment of the Commission's final decision. (¶¶ 149-151). Even if there was a difference in how the Article 351 issue arose in the annulment proceedings and before this court, the court found it difficult to see how to avoid the risk of conflicting decisions on this issue and therefore stated that the case for a stay of these proceedings while the annulment action was pending was strong. (¶ 152).

3.4 European Communities Act 1972 ("ECA 1972")

The fourth issue focused on whether the ECA 1972 required the court to give priority to its obligations under 1966 Act over its obligations under European Union law. (¶ 154). Here, the court found that this conflict did not arise in this case—the claimants were entitled to register the award, and no grounds exist to set aside the registration of 17 October 2014. (¶ 160). With regards to enforcement under Article 54 of the ICSID Convention, this article requires Contracting States to equate an award with a final judgment of its own courts. (¶ 160). The court could not enforce the judgment based upon the Commission's decision prohibiting Romania from making any payment under the award, but "a purely domestic judgment would be subject to the same limitation, so that stay would not put the UK in breach of pre-accession international obligations." (¶ 160).

3.5 European Union duties and requiring the court not to recognize/enforce the award

Here, the issue focused on whether the court would be required not to recognize/enforce the award based upon Article 4(3) of the TFEU (sincere cooperation), Article 19 of the TFEU (effective judicial protection), and/or the principle of effectiveness. (¶ 161). The court did not address Article 19 separately from Article 4(3). Because the Commission's final decision prohibited Romania from paying the award, enforcement of the award would risk creating a conflict between the Commission and the court. (¶172). The presence of such conflict would preclude national courts under Article 4(3) in both European and English case law from making decisions that would conflict a decision of the Commission and enforcement of the award was stayed pending the resolution of the claimants' proceedings in the European court. (¶ 203).

3.6 Payment of the Award and the Registration Order

The court briefly addressed the issue as to whether the Registration Order must be set aside because Respondents argued that the Award had been paid in full. (¶¶ 173-174). The claimants argued that there was no payment in full on the date of Registration Order, and based upon a series of actions taken by Romania, the court agreed that the Award mostly remained unpaid to date. (¶¶ 175-176).

3.7 Validity of the Romania-Sweden BIT

The position of the European Commission is that once Romania has acceded to the European Union, the Romania-Sweden BIT became invalid as a matter of international law. (¶ 178). The court declined to rule on the validity of the Romania-Sweden BIT and noted that the issue could be referred to the CJEU. (¶ 180). However, the court agreed with the claimants' position that the validity of this BIT was not relevant to the issues presented in this case. (¶ 180).

4. Decision

The High Court ultimately rejected Romania's application to set aside the award, but stayed the enforcement proceedings pending the resolution of claimants' appeal of the Commission's March 2015 Final Decision before the European Court. The registration of the award did not place Romania in breach of the Commission's injunction decision, and the claimants were also not in breach by registering the award under the 1966 Act. Granting a stay was appropriate because the court considered the substantial overlap with the arguments raised before the High Court and the arguments raised in the annulment proceedings before the European Court, which could risk inconsistent or conflicting decisions. The court also noted that other than the amounts paid to claimants by Romania by way of court-ordered execution, Romania had not made any payments under the award. Lastly, the High Court stated that claimants had made a persuasive case for ordering Romania to provide security during the pendency of the stay of the enforcement proceedings, but did not require Romania to pay security. The court decided to further evaluate whether it had legal power to make such an order and to ensure that an order to lodge security would not violate European Union law.