School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date: Micula & Ors v Romania (Rev 1) [2018] EWCA Civ 1801 – Judgement - 27 July 2018

Case Report by: Amanda Sorenson**; Editor Diego Luis Alonso Massa***

Summary: Appellants appeal the High Court's judgment which granted a stay of enforcement of the 2013 ICSID Award, pending outcomes before the General Court of the European Union ("General Court"), and denied Appellants request for security of cost in the event the General Court outcome is favorable to the Appellants. The longstanding dispute arose out of Romania abolishing certain tax incentives in 2005 in order to comply with EU rules on State aid. Appellants relied upon these tax incentives in order to invest in large, highly integrated food production operation in Romania as part of a ten-year plan. The Court of Appeal dismissed the appeal against the High Court's decision to stay enforcement of the ICSID Award pending a final decision from the General Court, and granted an appeal against the decision to refuse to order security for the Award, and issued security in the amount of £150m.

Main Issues: Stay of Enforcement; Issue of Security; UK's international obligations under the ICSID Convention.

Justices: Lady Justice Arden, Lord Justice Hamblen, and Lord Justice Leggatt

First Appellants Counsel: Sir Alan Dashwood QC, Patrick Green QC and Jonathan Worboys (Shearman & Sterling (London) LLP)

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

Respondent's Counsel: Robert O'Donoghue QC and Emily MacKenzie (Thrings LLP)

Intervener's Counsel: Nicholas Khan QC (Commission Legal Service)

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Digest:

1. Relevant Facts

The facts of this case stem from an investment relationship between Swedish nationals, appellants, and Romania, which subsequently disintegrated once certain tax incentives were eliminated in order for Romania to be in compliance with EU law, as a condition of their membership to the European Union. (¶ 5-10)

In 1993, Romania applied for membership to the European Community ("EC", now known as the European Union, "EU") and in 1995 the Europe Agreement between the EC and Romania was entered into force, which required Romania to eventually introduce State aid rules similar to EC rules on State aid. (¶6)

Between 1997 and 1998, the European Commission ("Commission") encouraged Romania to pursue and secure foreign investments, and in 1999, Romania adopted an investment incentive scheme, Emergency Government Ordinance No. 24/1998 ("EGO 24"), in order to secure such investments. (¶7)

In early 2000, Romania started to take steps towards the eventual accession to the EU, and in this context, Romania passed Act no. 143/1999 on State aid. (¶8) It was during this period, the early 2000s, that the appellants invested in a large food production operation as part of a ten-year business plan, in reliance on certain investment incentives and protections afforded under the EGO 24 scheme. (¶ 8)

In 2002, Romania and Sweden entered into a Bilateral Investment Treaty ("BIT"), which came into force in 2003. (¶ 9) Like most BITs, the Sweden-Romania BIT provided for reciprocal protections for investments and consent to investor-state dispute resolution under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention"). (¶ 9)

In 2004, Romania effectively repealed all but one of the tax incentives, which the appellants relied upon, under the EGO 24, effective 22 February 2005, on the grounds that these were unlawful State aid and therefore in breach of the European Agreement of 1995. (¶ 10)

The Swedish investors, appellants in the case at hand, filed an ICSID Arbitration under the 2003 BIT in July 2005. (¶ 11) Romania finally became a member of the EU on 1 January 2007. (¶ 12)

2. Procedural History

On 28 July 2005, the appellants filed a request for arbitration with ICSID under the 2002 Sweden-Romania BIT. (¶ 11) During the course of the arbitration, the European Commission ("Commission") participated as *amicus* making submissions on EU law. (¶ 11) On 11

December 2013, the ICSID tribunal issued the Award (Case No. ARB/05/20), finding in the appellants' favor and declared that Romania had violated the BIT by failing to provide fair and equitable treatment for the appellants' investments. (¶ 13)

On 9 April 2014 Romania filed an application with the ICSID *ad hoc* Committee to annul the Award and request a stay of enforcement of the award, which was granted on a provisional basis. (¶ 14) On 26 May 2014 the Commission issued a suspension injunction to prevent any action being taken until a final decision on the compatibility of State aid had been issued. (¶ 15) The Commission determined that enforcement of the Award would constitute new State aid under Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU"). (¶ 4) On 7 August 2014 the ICSID *ad hoc* Committee decided to continue to a continuation of the stay of enforcement, on the basis that Romania would provide an assurance that it would pay the Award in full, should the annulment be dismissed, but Romania failed to provide such an assurance. (¶ 16)

On 2 October 2014 the first appellant applied to have the Award registered in the court in England and on 17 October 2014, and the Award was registered in the High Court pursuant to the Arbitration Act 1966 ("1966 Act"). (¶ 16) On 30 March 2015, the Commission issued Final Decision 2015/1470, which determined that payment of the Award by Romania constituted new State aid and was therefore in conflict with EU law. (¶ 17)

On 28 July 2015, Romania filed an application with the High Court of England and Wales to set aside, or stay, the Registration Order from 17 October 2014. (¶ 18) It was at this time that the second to fifth appellants joined the proceedings. (¶ 18) On 6 November 2015, the third to fifth appellants commenced proceedings before the General Court of seeking to annul the Commission's Decision of 30 March 2015. (¶ 19)

On 26 February 2016, the ICSDIC *ad hoc* Committee rejected Romania's annulment application, leaving the value of the Award at approximately £173m with interest accruing. (¶ 20) On 29 September 2016 the appellants filed a cross-application for security for damages. (¶ 21) On 20 January 2017, the High Court refused the application to set aside the Registration Order of 17 October 14, but granted a stay of enforcement pending the outcome of the GCEU proceedings. (¶25) On 15 June 2017, the High Court refused an application for security to be ordered as a condition for granting the stay. (¶ 25)

3. Analysis of Legal Issues by the Court of Appeals

The Court of Appeal addressed the two main issues on appeal in three parts, discussed in detail below, regarding whether the stay of enforcement was proper and whether security, also referred to as assurances, should have been ordered.

3.1 Stay of Enforcement

The first issue to be addressed by the Court was broken down into three grounds: first, whether the High Court erred in failing to have appropriate regard to the fact that the award was *res judicata* and, in accordance with the *Kapferer* principle, was to be given effect even if doing so would be inconsistent with EU law or with a determination of the Commission or the CJEU (¶¶ 26, 28); second, if the High Court did err by finding that there was no conflict between international obligations of the UK under the 1966 Act, and the Court's EU law duties in light of the Commission's Decision; and third whether a proper construction of section 2 of the

European Communities Act 1972 ("the 1972 Act") precluded the result reached by the High Court. (¶¶ 28, 103)

3.1.1 Ground 1: Res Judicata and the Kapferer Principle

The Court addressed the issue as to whether the High Court erred in failing to regard the Award was *res judicata* and, in accordance with *Kapferer*, should have been enforced rather than stayed. (¶28)

The appellants argued that the CJEU case of *Kapferer* (Case C-234/04) should have applied and as a result the High Court erred in failing to enforce the Award. (¶ 30-32) The *Kapferer* Principle can be summarized as the following: "[i]t establishes as a matter of general principle that EU law does not require a national court to reopen a final judicial decision, even if failure to do so would make it impossible to remedy an infringement of a provision of EU law." (¶ 41 quoting *Interfact v. Liverpool City Council [2011] QB 744 at ¶ 44)* In other words, domestic laws of *res judicata* take precedence in cases where there is a conflict between domestic court decisions (or registered awards) and EU law. (¶ 40, 43, 48 - 50) Appellants argued that the High Court erred in failing to enforce the Award, even if it did conflict with EU law or the subsequent Commission's Decision because of the *Kapferer* principle. (¶ 50)

The Court agreed with the High Court, and held that the Award was *res judicata* and was therefore a final decision at the time it was issued, on 11 December 2013, as set out in the 1966 Act section 1 and 2. (¶ 50, 53, 66) The Award was therefore *res judicata* before the Commission's Decision. (¶ 67) However, while the Court agreed with the appellants that the Award was *res judicata*, it did not agree with the application of *Kapferer* in this case because enforcing the Award would have required the Court to violate EU law. (¶93-100) The Commission's Decision determined that any payment made would have been new State aid, and therefore unlawful; enforcing such an award would have put the Court in violation of the EU law. (¶96-98)

In upholding its decision, the Court relied on the *Klausner* case (Case C 505/14), where the CJEU held that *res judicata* must yield to the effective application of EU State aid law because "a principle as fundamental as that of the control of State aid cannot be justified either by the principle of *res judicata* or by the principle of legal certainty." (¶87 quoting *Klausner* at ¶ 45) The Court dismissed the first ground of appeal and upheld the High Court's stay of enforcement. (¶ 100-101)

3.1.2 Grounds 2 and 3: The 1966 Act, The Court's EU Law Duties and Article 351 TFEU

The Court held that the enforcement of the Award should be stayed pending the determination by the GCEU, which were challenging the Commission's Decision. (¶104) The Court came to this conclusion through several means.

First, it differed from the High Court by determining that Section 2(1) of the 1966 Act must be construed to give effect to the ICSID Convention in accordance with domestic law, whereas the High Court held that EU law should apply to the Award on registration because the UK is a member state of the EU at that date. (¶ 106 A) Second, there is no conflict between the international obligations of the UK contained in the 1966 Act implementing the ICSID Convention and the Court's EU law duties in regard to the Commission's Decision. (¶ 106 B) Third, if there were a conflict between the 1966 Act and the Court's EU law duties, the High

Court was correct in concluding that there should be a stay on the grounds that the issue of whether Article 351 TFEU applies is a matter before the GCEU and there is a risk of conflicting decisions. (¶ 106 C) Fourth, Article 351 TFEU normally must be considered when determining whether a stay of an ICSID Award may be granted. (¶ 106 D)

3.1.2.1 1966 Act and Potential Conflict with EU Law

Romania argued that the effect of Section 2(1) of the 1966 Act provides Awards on registration the same status in English law as any other judgment which given on the date of registration with the result that EU law applies. (¶ 109). Section 2(1) of the 1966 Act provides: "Subject to the provisions of this Act, an award registered under section 1 above shall, as respects the pecuniary obligations which it imposes, be of the same force and effect for the purpose of execution as if it had been a judgment of the High Court given when the award was rendered pursuant to the Convention *and entered on the date of registration* under this Act . . ." (¶ 3, emphasis added)

The appellants argued that the ICSID Convention is within Article 351(1) TFEU in relation to the UK because it is a multilateral convention concluded before the UK's accession to the EU and therefore has priority over the UK's EU obligations. (¶ 110)

The Court disagreed with Romania's interpretation of the 1966 Act. (¶ 112-18) Firstly, the 1966 Act cannot be interpreted out of context, it is more than a domestic statute, it incorporates the ICSID Convention into domestic law, and thereby giving international judgments recognition in the UK Courts. (¶ 113-15) Secondly, the Court disagreed with Romania's interpretation because had the Award been made in the High Court, the date of effect would have been when the judgment was issued, not when it would have subsequently been registered, as what Romania contends. (¶ 118-19)

The Court went on to address whether, under the 1966 Act, the Court has the authority to grant a stay based on the interpretation of section 2(1). (¶ 122) The Court determined that the grant of a stay on the execution of a registered ICSID Award is within the powers of the domestic court conferred on by the ICSID Convention provided it is consistent with the purposes of that Convention. (¶ 123) Unlike the New York Convention which provides domestic courts the authority to deny enforcement based on a public policy exception, the ICSID Convention only permits a stay of enforcement when an application to interpret, revise or annul an award is ongoing, as provided in Articles 50 and 52. (¶ 147) As such, the Court has the authority to grant a stay of enforcement, pending the decision of the GCEU, both through the ICSID Convention, the 1966 Act, and pertinent domestic procedural rules. (¶140, 143)

The Court agreed with the High Court and determined that there is no conflict between the international obligations of the UK contained in the 1966 Act and the Court's EU law duties. (¶152)

3.1.2.2 Article 351 TFEU

Article 351 TFEU provides: "(1) The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. (2) To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take any appropriate

steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude." (¶ 154)

The Court interpreted Article 351 that it is for the national courts to determine the nature of obligations imposed by earlier international agreements. (¶ 155) The Commission's Decision decided that Article 351 does not apply in this case. In their application for annulment the appellants contend that the Commission's Decision prevents Romania from complying with its obligations under the BIT and the ICSID Convention and thus fails to give effect to Article 351. (¶ 156)

The Court was split in relation to its rationale as to whether there were conflicts in the application of Article 351 at this stage. Hamblen and Leggat LJJ held that *if* there is a conflict between the obligations under the 1966 Act and the Court's duties as a matter of EU law, the resolution was dependent on the application of Article 351 TFEU. (¶ 162, 169 - 170) However, because the issue as to whether Article 351 applied was before the GCEU in the annulment proceedings, the Court concluded that the High Court was correct to stay this issue to avoid the risk of conflicting decisions. (¶ 162)

Arden LJ disagreed with the majority view that there was a risk of conflicting decisions, because in her view, there was little overlap between the GCEU proceedings (annulment) and the present proceedings (stay and security). (¶ 172) The GCEU proceedings concerned the BIT between Sweden and Romania, the present proceedings concerned the UK's role in enforcing the ICSID Award and the obligations the UK were required to adhere to under the 1966 Act. (¶ 173-75)

While the Lord Justices disagreed as to whether there would be a conflict in the application of Article 351, the Court concluded that the stay of proceedings was justified under the ICSID Convention and the 1966 Act. (¶201-203)

3.2 Security

The Court held that issuing an order requiring Romania to provide security would not contravene the Final Decision and would be the "next best thing" to permitting enforcement. (¶ 245-47) The Court determined that the High Court erred its rationale to deny security on the basis that doing so would constitute a "material risk" and be in breach of the Commission's Decision. (¶ 246) The Court disagreed and instead found that the appellants had a final and binding decision in the form of the ICSID Award, and therefore that security would assist the appellants to secure payment of the sums due under the valid award. (¶ 246-47)

Finally, the Court ordered Romania to provide security of £150m, the time within which the security was to be provided and the form it should take was to be arranged by the parties; if no agreement were reached by the parties, the Court would receive submissions on those matters. (¶ 248)

4. Conclusion

The Court agreed with the High Court that a stay should be granted until the GCEU proceedings concluded, at such a time the issue will then need to be addressed again. (¶ 249-250) The Court held that the High Court had authority to grant a temporary stay of execution under the ICSID Convention. (¶ 251) The Court upheld the stay of execution pending the outcome of

the GCEU proceedings, or any other pending orders. (¶ 252) The Court disagreed with the High Court, and determined that Romania should provide security in the sum of £150m, but the stay will not terminate in the event Romania does not comply with that order for security. (¶ 252)

The Court of Appeals dismissed the Stay Appeal and granted the Security Appeal. (¶ 272)