School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date: Micula and others (Respondents/Cross-Appellants) v Romania (Appellant/Cross-Respondent), [2020] UKSC 5 - Judgement - 19 February 2020

Case Report by: Andreas D. Desyllas**, Editor Diego Luis Alonso Massa ***

Summary: On 11 December 2013 an International Centre for Settlement of Investment Disputes tribunal ("the Tribunal") made an investment arbitration award ("the Award") in favour of Respondents to this appeal ("the Claimants") against the appellant ("Romania"). The present proceedings arose out of Romania's application in the Commercial Court to set aside the registration of the Award or to stay enforcement pending the determination of the proceedings in the EU courts, and out of Claimants' application for security. The Court of Appeal dismissed the appeal to stay enforcement of the Award pending a final decision from the General Court of the European Union ("GCEU") and issued security for £150m. Both Parties appealed before the Supreme Court ("the Court") which decided that the EU duty of sincere co-operation was not applicable in the case. It considered such stay as an unlawful measure under the ICSID Convention and unjustified and unlawful under English legislation. Therefore, the Court upheld Claimants' cross-appeal regarding the lifting of the stay of enforcement of the Award and discharged the order for security.

Main Issues: stay of enforcement under the ICSID Convention; conflict between obligations arising out of the ICSID Convention and the EU law.

Justices: Lady Brenda Hale, Lord Robert Reed, Lord Patrick Hodge, Lord David Lloyd-Jones and Lord Philip Sales

Appellant/Cross-Respondent's (Romania) Counsel: Robert O'Donoghue QC, Gerard Rothschild and Emily MacKenzie (Thrings LLP)

1st Respondent/Cross-Appellant ("Claimant"): Sir Alan Dashwood QC, Patrick Green QC and Jonathan Worboys (Croft Solicitors)

2nd-5th Respondents' Counsel (Claimants): Marie Demetriou QC and Hugo Leith (White & Case LLP)

EU Commission's (Intervener) Counsel: Nicholas Khan QC (European Commission's Legal Service, assisted by Langleys Solicitors LLP)

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Digest:

1. Relevant Facts

Viorel and Ioan Micula are Swedish nationals of Romanian origins. SC European Food SA, SC Starmill SRL and SC Multipack SRL are Romanian companies incorporated by the Micula brothers ("Claimants") (¶3). In 1995, an agreement entered into force between Romania and the European Community, which required Romania to introduce State aid rules; moreover, it encouraged Romania to establish a robust legal framework and conclude agreements for promoting and protesting investments (¶4).

In 1999, Romania adopted an investment scheme ("EGO 24") being implemented at the Ștei-Nucet region (¶6), which encouraged Claimants to invest in highly integrated food production operation there (¶8). Romania also adopted Law No 143/1999 incorporating State aid rules and designating Romanian Competition Council ("RCC") as the competent body to authorize the granting of such aid. On 15 May 2000, RCC issued Decision No 244/2000, declaring that certain facilities provided under EGO 24 distorted competition, in breach of Law No 143/1999. On 16 June 2000, Romania reformed EGO 24 (¶7). On 1 April 2003, the Sweden-Romania Bilateral Investment Treaty ("the BIT") entered into force. It included, *inter alia*, a dispute resolution provision under the ICSID Convention (¶9).

During the formal accession negotiations between Romania and the European Union ("the EU"), the former was informed that EGO 24 was not in line with the latter's State aid rules. Hence, Romania was urged to bring EGO 24 into alignment (¶10). On 31 August 2004, Romania passed an ordinance repealing all but one of the tax incentives provided in EGO 24 (¶11). On 1 January 2007, Romania acceded to EU (¶13).

2. Procedural History

On 28 July 2005, Claimants filed a request for arbitration under the ICSID Convention claiming that the repeal of EGO 24's incentives constituted a breach of the BIT. Romania contended that it was forced to revoke those incentives to comply with the EU State aid rules. The Commission participated in the arbitration as *amicus*. Both asserted that any payment of compensation to Claimants would constitute illegal State aid under EU law and render the award unenforceable in the EU (¶12).

On 11 December 2013, the Tribunal issued the Award, holding Romania liable and awarding a total amount of approximately £150m. It declined though to address the effect of EU State aid rules on the award's enforceability (¶15). On 9 April 2014, Romania applied to annul the Award under the ICSID Convention and suspend its enforcement (¶16).

On 26 May 2014, the Commission issued an injunction ("the Injunction Decision"), ordering Romania to suspend acts of implementation or execution of the Award until reaching its final decision on the compatibility of that State aid with the EU internal market (¶17). On 7 August 2014, the ICSID *ad hoc* Committee agreed to a stay of enforcement, if Romania guaranteed payment of the Award in full, in case its annulment application was dismissed. Nevertheless, it failed to do so and the stay was revoked in September 2014 (¶18). The Commission took a decision formally opening the State aid investigation ("the Initiating Decision") right away (¶19). Meanwhile, the Award was registered in English jurisdiction on 17 October 2014 (¶28).

On 30 March 2015, the Commission decided that the payment of the Award constituted State aid within Article 107(1) of the Treaty on the Functioning of the EU ("TFEU") and was incompatible with the internal market ("the Commission Decision") (¶20). Claimants commenced proceedings seeking annulment of the Commission Decision before the GCEU (¶21). In the meantime, on 28 July 2015, Romania applied to the Commercial Court to vary or set aside the registration of the Award. By a counter application, Claimants sought for an order for security (¶28).

On 26 February 2016, the ICSID *ad hoc* Committee rejected the annulment application (¶22). Accordingly, on 20 January 2017, Blair J dismissed Romania's application to set aside the registration of the Award but ordered a stay of enforcement pending determination of the proceedings in the GCEU (¶29). On 15 June 2017, Blair J dismissed Claimants' application for security (¶30).

On 27 July 2018, the Court of Appeal dismissed the appeal against the order for a stay but ordered that security of £150m should be provided (¶31). However, it suspended enforcement of the security order to allow Romania time to lodge an application for permission to appeal to the Court (¶33). On 31 October 2018, the Court granted Romania permission to appeal on certain grounds. In addition, it ordered the stay of the security order to be continued until determination of the appeal or further order. The same order granted the Commission permission to intervene. On 11 April 2019, the Court granted Claimants permission to cross-appeal only in relation to the order for a stay (¶34).

On 18 June 2019, the GCEU annulled the Commission Decision (¶35). On 27 August 2019, the Commission appealed against the decision of the GCEU before the Court of Justice of the European Union ("CJEU"). The appeal is limited to the pleas of law addressed in GCEU's judgment (¶24). Romania immediately issued an application before the Commercial Court for the stay of enforcement of the Award, which had lapsed with the GCEU's judgment and Claimants issued applications for security in respect of any stay (¶36). On 10 September 2019, Phillips J ordered that enforcement of the Award be stayed pending the final determination of the CJEU. He also ordered Romania to provide security of £150m by 17 October 2019. Following judgment, the parties applied for certificates for a leapfrog appeal to the Court, which the judge granted (¶36).

3. Analysis of Legal Issues by the Court

The Court addressed the issue on cross-appeal against the grant of a stay of enforcement and discharged the appeal against the order for security. In general, the Court's reasoning focused on the provisions of the ICSID Convention regarding enforcement of an arbitral award and the potential conflict between obligations arising out the ICSID Convention and EU treaties.

3.1 The duty of sincere co-operation no longer required courts in English jurisdiction to stay enforcement of the Award

Claimants rebutted the implementation of the duty of sincere co-operation in EU law and the presumption of validity of the Commission's acts if they are not annulled or withdrawn. Given the annulment of the Commission Decision, Claimants contended that EU law duty to stay enforcement of the Award no more existed on English courts since said presumption with respect to the Commission Decision no longer applied. They also submitted that the Commission had no competence to find that the Award was State aid or to apply EU law to the Award and that the basis for the stay had fallen away. Finally, by pointing to Articles 278 and 279 TFEU, Claimants asserted that the annulment of the Commission Decision and the reasoning therein had gained full legal effect (¶43).

In contrast, the Commission and Romania argued that the effects of the GCEU's judgment did not affect the Injunction Decision and the Initiating Decision. Given that, the Commission's State aid investigation into Romania's implementation of the Award was reopened. So, even if the Commission's appeal does not succeed, it will still be open to the Commission to re-take a State aid decision by avoiding the legal difficulties identified in the GCEU's judgment. Finally, they maintained that the duty of sincere co-operation requires from the English courts to refrain from taking decisions that would conflict with the aforementioned decisions (¶44).

The Court took a step back and examined the GCEU's judgment (¶45). According to the GCEU, the Commission had exceeded its competence because it had applied its State aid powers retroactively to events predating Romania's accession to the EU. Hence, the Commission Decision was unlawful to the extent that it classified as an aid compensation relating to the period prior to Romania's accession. As the Commission had not distinguished between the pre- and post-accession periods, its decision was annulled as a whole (¶46).

3.1.1 The Initiating Decision and the Injunction Decision

Romania and the Commission submitted that those decisions were distinct from the annulled Commission Decision and thus, they remained lawful (¶47). They relied on CJEU case law to prove that the annulment of an EU measure does not necessarily affect any preparatory act (¶48). Therefore, those decisions were restored and the Commission's investigation was reopened. Such investigation could only have been closed either by a successful appeal or by the Commission adopting a new final decision. To support its argumentation, the Commission referred to Article 108(3) TFEU (¶47).

In response, Claimants submitted that both decisions were tainted by the same illegality as the Commission Decision. Additionally, the Commission was under an obligation to comply

also with the reasoning of the judgment, by virtue of Article 266 TFEU. As a result, the Commission could not rely on the preceding decisions as giving rise to a duty of sincere co-operation on the part of national courts (¶49).

The initiating step of the Court's analysis was the identification of the provision held to be illegal and the reasoning underlying such illegality, in order to find whether the annulment of an EU measure affects a preparatory measure. To this end, it pointed to the Commission's decision that failed to distinguish between pre- and post-accession periods. According to the Court, the same flaws characterized the injunction decision and the initiating decision since, by implementing the Award, Romania was reinstating the EGO incentives; said action would have resulted in granting Claimants the advantages foreseen under the abolished EGO 24 from its repeal until its scheduled expiry (¶50).

Nevertheless, the Court was not persuaded that such errors prevented the Commission from relying on the Initiating Decision as giving rise to a duty of sincere co-operation on national courts. In the absence of a final decision of the Commission closing the investigation procedure, the effects of the Initiating Decision subsist and that imposes a duty of sincere co-operation on the United Kingdom ("the UK"). Hence, it may well be open to the Commission to reconfigure the investigation to avoid the errors that resulted in the annulment of the Commission Decision. For these reasons, the Court considered that the Initiating Decision continued to engage the duty of sincere co-operation owed by national courts (¶51).

As regards to the Injunction Decision, the Court decided that whether the injunction may have been revived as a result of the annulment of the Commission Decision was a point not fully argued before it and it was not necessary to reach a conclusive view on this point (¶52).

3.1.2 The pending appeal

Romania and the Commission argued that the duty of sincere co-operation continued to apply since the GCEU judgment is currently under appeal, pointing to a potential risk of conflict between the EU courts and the UK courts (¶53). In this vein, they based their argument in the *Masterfoods* case issued by the CJEU for the purpose of staying the proceedings in English jurisdiction pending the final judgment of the CJEU (¶54). On the other hand, Claimants argued that said case was irrelevant in the present dispute because the Court was not asked to determine whether the Award or any part of it constituted State aid, so there was no risk of conflicting judgments on that point or on EU law in general (¶55).

The Court noted first that the CJEU judgment in *Masterfoods* makes it clear that the duty of sincere co-operation and, thus, the obligation to stay national proceedings, continues to apply pending final judgment in the action for annulment. Second, said duty is intended to preserve the effectiveness of EU bodies' actions. Therefore, the Court was concerned that a potential risk of conflict between two separate decisions on the same subject matter between the same parties might arise in the case at hand. Such risk could amount to a substantial impediment to the operation of EU law. Accordingly, the existence of a pending appeal was sufficient to trigger said duty and required the grant of a stay so as not to undermine the effect of the Commission Decision (¶56). For all these reasons, this ground of appeal was dismissed (¶57).

3.2 The Effect of the ICSID Convention and the 1966 Act

Romania and the UK are parties to the ICSID Convention (¶59). Additionally, the 1966 Act implements the ICSID Convention in the UK's domestic laws (¶63). By applying those instruments, Romania's attempt to set aside the registration order of the Award was dismissed at first instance. Nevertheless, a stay of enforcement was ordered pending the outcome of the annulment proceedings in the GCEU (¶65). The Court of Appeal affirmed the order for a stay. It held that the 1966 Act did not have the effect of making a registered ICSID award equivalent to a domestic judgment. Yet, it pointed that a domestic court can grant a stay of execution if in the circumstances of the case it is just to do so, provided the stay is temporary and consistent with the ICSID Convention (¶66).

Claimants argued that both courts erred in granting the stay. Specifically, Article 54 of the ICSID Convention does not permit a domestic court to refuse enforcement of an award in circumstances where it would have refused enforcement of a domestic judgment. They asserted that a domestic court has the power to grant a temporary stay strictly for procedural reasons and in cases where no inconsistency arises with the duties to enforce the award. Given that, they submitted that the stay granted in these proceedings was a stay of enforcement, which the courts had no power to order (¶67).

By interpreting the 1966 Act in the context of the ICSID Convention and its drafting history, the Court highlighted that a domestic court has no power to review an award or refuse its enforcement on grounds of national or international public policy, once its authenticity has been established (¶68). Enforcement may not be refused on grounds covered by the challenge provisions under the ICSID Convention as well (¶69). However, as set out in Article 54(1), an award should be enforceable in the courts of all Contracting States sharing the same status as a domestic judgment (¶70). Hence, Article 54(1) potentially allows other defences available in domestic law in relation to the non-enforcement of a domestic judgment to be raised against the enforcement of an award (¶69) except for the obligation to enforce the award like a court judgment relating to state immunity, which was specifically dealt with in Article 55 (¶73). In any event, those defences could only be available in exceptional circumstances (¶74).

With regard to execution, Article 54(3) of the ICSID Convention stipulates that the available processes of execution of an award are those reflected in the laws of the enforcing State and are of a procedural nature only. It does not limit the obligation on Contracting States to enforce awards (¶76). The ICSID Convention and, in the same vein, English laws, make specific provision for staying enforcement in the context of interpretation, revision and annulment of an award, none of which situations applied in that case. To that end, Romania had already exhausted its right under Article 52 of the ICSID Convention to seek annulment of the award (¶77). In light of the aforementioned, the Court found that there is scope for defences against enforcement of an award in certain but exceptional circumstances, if national law recognizes them in respect of domestic judgments and they do not directly overlap with those grounds of challenge stipulated to Articles 50 to 52 of the ICSID Convention (¶78).

By examining the Court of Appeal's majority opinion, the Court found that the former erred in granting a stay of execution and, by doing so, it exceeded its powers. The grant of such stay was not consistent with the ICSID Convention under which the UK courts are obliged to

enforce an award. Said stay constituted a prohibition on enforcement on substantive grounds until the GCEU had ruled on the conflict between the ICSID Convention and the EU Treaties. Therefore, 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 (¶84).

Under the circumstances of the case, English courts were obliged under Article 54(1) to give effect to the Award and this was not a case where an exceptional type of defence against enforcement arose. If the Award were a final judgment of an English court, it would have been enforced without question. Moreover, Article 351 TFEU means that this obligation cannot be affected by the EU Treaties (¶86). Therefore, EU Treaties did not have any relevant effect and the Court was not bound by EU law to interpret the ICSID Convention in the manner that Romania contended. In any event, the proper interpretation of the ICSID Convention is given by principles of international law applicable to all Contracting States (¶87).

3.3 Article 351 TFEU

At first instance, Blair J held that Article 351 TFEU did not apply since there was no conflict between the obligations of the UK under the ICSID Convention and the EU Treaties. In the Court of Appeal, the majority considered that the issue of a potential conflict depended on the proper application of Article 351 TFEU (¶91). Romania and the Commission submitted before the Court that the duty of sincere co-operation requires the imposition of a stay, while Claimants submitted that the UK's obligations to enforce awards under the ICSID Convention are pre-accession treaty obligations within Article 351 TFEU and remain unaffected by EU obligations (¶92).

After granting Claimants permission to appeal on this ground (¶96), the Court went to examine Article 351 TFEU. It noted that the scope of that Article is to establish that the application of the EU Treaties does not affect the duty of a Member State to respect the rights of non-Member States under a prior agreement and to perform its obligations thereunder. It also implies a duty on the part of the EU institutions not to impede the performance of the obligations of the Member States, which stem from a prior agreement (¶97).

The Court relied on the principle stated in CJEU's *Levy* and *Evans Medical* cases to determine whether a rule of EU law may be deprived of effect by a pre-accession international agreement considering whether that agreement imposes on the Member States concerned obligations, the performance of which may still be required by non-Member States that are parties to it (¶98). Nevertheless, both *Levy* and *Evans Medical* were concerned with proceedings for a preliminary ruling and in this case, the matter of discussion concerned an issue of interpretation. Accordingly, neither would it be possible for the Court to make a preliminary reference to the CJEU on this issue nor for the EU courts to determine the scope of obligations under a pre-accession agreement (¶99).

Furthermore, Romania argued that it was necessary to distinguish first, whether there was a relevant prior international obligation and second, whether, even if as a matter of international or domestic law the obligation was in some sense owed to all parties to the prior agreement, "the effect of that is that the case does not only involve 'intra-Community relations' for the

purposes of Article 351 TFEU". The Court found that relevant obligations under the prior treaty must be owed to a non-Member States in order for Article 351 TFEU to apply but that does not impose an additional requirement that the particular dispute must relate to extra-EU activities or transactions. Thus, notwithstanding the fact that the UK, Sweden and Romania were at the material times all Member States, if the obligations under the ICSID Convention are owed to Contracting States, which are non-Member States, Article 351 TFEU will be engaged (¶100).

In fact, the important question was whether the obligation of the UK under the ICSID Convention to enforce this award is owed by the UK to non-Member States. Romania's case was that the only legal obligation of the UK is that owed under the ICSID Convention to Sweden, which is an EU Member State. It submitted that Sweden was the only State with a direct interest in the enforcement of the Award. Claimants, on the other hand, identified as the relevant obligations of the UK Articles 54 and 69 of the ICSID Convention. They submitted that these obligations are owed to all other parties to the ICSID Convention (¶101). Romania counter-argued that if such submission were correct, it would apply equally to every obligation in every multilateral treaty with the result that every multilateral treaty involving some parties that are not EU Member States would fall within Article 351 TFEU (¶102).

The Court stated that, in order to determine whether Article 351 TFEU applies, it would be necessary to construe the prior agreement in question to ascertain whether any relevant obligations arising from it are owed to non-Member States (¶103). According to the Court, it was clear that the specific duties in Articles 54 and 69 of the ICSID Convention are owed to all other Contracting States (¶104). The structure of the ICSID Convention supports this interpretation, taking into consideration Articles 1, 27(1), 53, 54, 64 and 69 (¶105). Moreover, the *travaux préparatoires* of the ICSID Convention also strengthens the view that obligation to comply with the ICSID Convention scheme are owed to all Contracting States (¶107). Accordingly, neither the ICSID Convention nor its *travaux préparatoires* provide any warrant for restricting the duties owed by a Contracting State under Articles 54 and 69 so that they are owed only to the State of nationality of an award beneficiary (¶108).

Romania and the Commission further contended that the Court was precluded from deciding the issue of the extent of the obligations of the UK and to whom those obligations are owed because there would be a risk of a conflict between such a ruling and a future ruling by an EU court in the present dispute, relying on the duty of sincere co-operation (¶109).

According to the Court, neither the EU courts nor domestic courts had competence to give an authoritative decision, binding as between States, as to the existence and extent of obligations under a prior multilateral convention, such as the ICSID Convention. However, both the EU courts and domestic courts have competence to consider and rule upon the effect of a multilateral treaty, insofar as it may bear upon the outcome of the proceedings before them (¶110).

The Court concluded that the duty of sincere co-operation does not require courts in English jurisdiction to decline to decide this issue pending its resolution by the EU courts, or otherwise to defer to the EU courts on this issue on certain reasons (¶111). First, the case law of the CJEU makes clear that, as a matter of EU law, questions as to the existence and extent of obligations under prior treaties, in the context of Article 351 TFEU, are not reserved to the

EU courts (¶112). Secondly, the issue in those proceedings was the UK's obligations to implement the ICSID Convention and to recognize and enforce the Award under Articles 54 and 69. The extent of the UK's obligations under those Articles has not been raised before the EU courts. There was, therefore, no congruence of the issues before the domestic courts and the EU courts (¶113). Thirdly, the prospect of an EU court addressing the applicability of Article 351 TFEU to pre-accession obligations under the ICSID Convention in the context of the present dispute was remote (¶114).

4. Decision

The Court decided that the duty of sincere co-operation was not applicable in that case and there was no impediment to the lifting of the stay, which is an unlawful measure in international law and unjustified and unlawful in domestic law. Therefore, the Court allowed Claimants' cross-appeal regarding the lifting of the stay of enforcement of the Award (¶118) and, thus, discharged the order for security (¶119).