How Effective are ICSID Provisional Measures at Suspending Criminal Proceedings before Domestic Courts: The English Example?

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Since the first application for provisional measures suspending criminal proceedings in *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18, Order No. 3, 18 January 2005), the number of applications before ICSID tribunals for these types of measures has steadily increased. Recent applications have been widely commented on in the arbitration community, including in this blog.

A question more rarely discussed is that of the effect of those measures before the domestic courts dealing with the criminal proceedings. It has arisen twice in less than a year before the same English court, giving rise to two hardly compatible – if not contradictory – judgments, *Albania v. Francesco Becchetti and Mauro de Renzis* (unreported) and *Romania v. Bodgan-Alexander Adamescu* (unreported). In the *Becchetti* judgment, Westminster Magistrates' Court gave effect to the arbitral tribunal's measures and stayed the extradition proceedings against Messrs Becchetti and de Renzis whereas in the *Adamescu* judgment, it refused to do so.

These judgments illustrate how domestic courts deal with the contemporary tensions between respect for state sovereignty and respect for decisions made by investment treaty tribunals.

The *Becchetti* judgment: Investment Treaty Arbitration 1 – 0 Criminal Proceedings

The *Becchetti* judgment relates to the enforcement of the Order on Provisional Measures which arose in the context of the *Hydro S.r.l and others v. Albania* arbitration (ICSID Case No. ARB/15/28, Order on Provisional Measures, 3 March 2016) (the "PMO").

This arbitration was commenced by three corporate claimants and four individual claimants, including Messrs Becchetti and de Renzis, who all had a direct or indirect ownership interest in the corporate claimants. They alleged that the tax treatment they received in relation to their investments (i.e. a hydroelectric plant in Kalivaç, a waste management facility and a TV station) was in breach of the bilateral investment treaty between Italy and Albania.

The Claimants' application for interim measures was made following the commencement by Albania of a number of administrative and criminal proceedings against them. These included criminal proceedings for tax evasion, money laundering and falsification of documents which, in turn, formed the basis for the issuance of arrest warrants for the extradition of Messrs Becchetti and de Renzis

from the UK to face criminal proceeding in Albania.

The Claimants applied for a number of measures, including that the tribunal order Albania to *"take all actions necessary to suspend the extradition proceedings currently pending"* against Messrs Becchetti and de Renzis until issuance of the final award in the arbitration proceedings. The tribunal granted this measure in the PMO recommending that Albania suspend the extradition proceedings.

When Albania sought their extradition from the UK, Messrs Becchetti and De Renzis relied on the PMO to request the withdrawal of the arrest warrants, which would end the extradition proceedings. Albania argued that it was not able to withdraw the warrants, essentially on technical domestic law grounds relying on documents which were found to be unreliable. It asked for the suspension of the extradition proceedings *sine die*.

The District Judge was deferent to the decision of the arbitral tribunal. She found that the extradition proceedings could not continue because it would be a breach of the PMO which is an international law obligation. She also referred to the rationale given by the arbitral tribunal for the PMO, namely preservation of the integrity of the proceedings and the possibility for Messrs Becchetti and De Renzis to run their businesses.

She refused to adjourn the case *sine die*, as she considered this would be an abuse of process because Messrs Becchetti and De Renzis would be on bail, subject to bail conditions, for an indefinite period of time, which would be an infringement on their liberty for an unspecified amount of time. The PMO recommended the suspension of the extradition proceedings until the final award was issued and it was unknown when this would be.

The PMO was therefore very effective before the English domestic courts.

This being said, the reach of this decision is to be nuanced, in that the Judge's analysis was somewhat superficial. She did not conduct any analysis as to what type of international obligation the PMO was and how it was incorporated into domestic law. She did not address the potentially conflicting international obligations arising out the ICSID Convention and the extradition agreement between the UK and Albania. This is partially the result of Albania's recognition of the binding nature of the order and the fact that it only asked for a suspension of the proceedings *sine die*.

The *Adamescu* judgment: Investment Treaty Arbitration 0 – 1 Criminal Proceedings

The rematch between ICSID provisional measures and extradition proceedings took place in the context of the proceedings for the extradition of Mr Adamescu to Romania.

At the time when the arbitration was commenced, proceedings for the extradition of Alexander Adamescu from the UK to Romania were already ongoing. Alexander Adamescu is the son of the late Dan Adamescu, a media and insurance tycoon, who died in custody while serving a four-year prison sentence for bribing judges to influence insolvency proceedings relating to his companies. Alexander Adamescu, was facing extradition to be tried in Romania on the same charges as his father.

The arbitration was commenced by a Dutch corporate Claimant, Nova, a group then chaired by the late Dan Adamescu (*Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19). According to publicly available information, Nova alleges that actions of the country's Financial Supervising Authority in relation to the liquidation of Astra Asigurări, a vehicle for its investments in Romania, and the pressure exercised by Astra's liquidator on other entities within the Nova group, including România Liberă (a centre-right newspaper critical of the government) breach the Netherlands Romania bilateral investment treaty.

Together with its request for initiation of arbitral proceedings, Nova filed a request for provisional measures, including a request that the tribunal order Romania to suspend extradition proceedings against Alexander Adamescu.

Nine month later (on 29 March 2017), the tribunal granted the provisional measure requested by Nova. It *"recommend* [ed] … *that Romania withdraw (or otherwise suspend operation of) the transmission of the* [European Arrest Warrant] … *by the Romanian Ministry of Justice and associated request for extradition submitted to the Home Office of the UK …. and refrain from reissuing or transmitting this or any other* [European Arrest Warrant] *or other request for extradition for Alexander Adamescu related to the subject matter of this arbitration until the Final Award in this case is rendered."*

The measure was essentially founded on the fact that Alexander Adamescu was a key witness in the arbitration, in particular since the death of his father in custody. The tribunal considered that the measure was urgent and proportionate even though the extradition proceedings pre-dated the arbitration filling.

Mr Adamescu sought to rely on the provisional measure to argue that it was an abuse of process for Romania to continue with the extradition proceedings.

The Judge in Westminster Magistrates' Court refused to give effect to the measure and held that there was no abuse of process in this case.

The District Judge sought to distinguish this case from the *Becchetti* judgment on the basis that (i) Romania is an EU Member State and accordingly there is more comity which means the threshold for a finding of abuse of process is higher; (ii) unlike the Albanian authorities, Romania has not attempted to mislead the Court through unreliable documents; (iii) unlike Messrs Becchetti and de Renzis, Mr Adamescu is not a party to the arbitration; (iv) Albania sought an order for adjournment *sine die* whereas Romania submits that the extradition proceedings should continue.

In spite of the Judge's attempt to distinguish his judgment from the *Becchetti* judgment, in at least two respects, the *Adamescu* judgment appears directly to contradict the *Becchetti* judgment.

First, unlike the Judge in *Becchetti*, the Judge in *Adamescu* seemed to consider the question of integrity of the arbitral proceedings almost exclusively from the point of view of Romania. He referred to Quilborax v. Bolivia, (ICSID Case No. ARB/06/2) explaining that Bolivia chose not to comply with the provisional measure in respect of the criminal proceedings which did not seem to have impacted the proceedings or have *"any adverse consequences for the government."*

He referred to Mr Adamescu's role as a witness but noted that he had already given evidence before the arbitral tribunal during the hearing relating to the provisional measures and would have the opportunity to do so before the full extradition hearing due to take place from 27th November to 1st December 2017. Whilst this highlights the Judge's lack of familiarity with arbitration proceedings (in particular, the extent of the evidence, the manner in which arbitration lawyers work with their client, the length of the proceedings and of the hearing itself), it is understandable for a District Judge specialising in extradition where, on average, hearings last only one or two hours.

Secondly, and perhaps more importantly, contrary to the Judge in *Becchetti*, the Judge in *Adamescu* did not consider that he was bound to give effect to the provisional measure. He held that ICSID provisional measures only extended to parties to the arbitration and were not binding on a domestic court. He made a distinction between provisional measures and final awards, noting that provisional measures are binding but only final awards are enforceable. He found that an ICSID tribunal is

permitted to issue provisional measures but must give proper consideration to comity. In reaching this conclusion, the Judge appeared to rely on an article adduced by Romania in which the author, Daniel Kalderimis, was critical of the lack of comity arising out of *"world-wide orders pre-empting the decisions of other courts or tribunals."*

The Judge failed to address the expert evidence of Judge Schwebel which was adduced by Mr Adamescu, indicating that non-respect of the provisional measure by Romania constituted an internationally wrongful act.

Yet, on the international plane, by allowing Romania to commit an internationally wrongful act, the UK could also be found to be in breach of its own obligations to give effect to a treaty it is party to, the ICSID Convention.

As for the domestic plane, the ICSID Convention has been incorporated into English law in its entirety. One would have expected the Judge to address how the obligation to give effect to the ICISD Convention was affected by his decision to disregard an order made by an ICSID tribunal.

This being said, the two judgments are merely first instance judgments, which means that the dice are yet to be finally cast on effect of ICSID provisional measures suspending criminal proceedings in England.