Legal Shrapnel: Brexit, Micula and Europe's Banker

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Introduction

It has by now become amply clear that nothing truly prepares the jurist for an analytical maze run of predicting the effects of Brexit. In some way, it reminds one of "Nebel des Krieges", the "fog of war" faced by military decision makers once on the battlefield. The best you can hope for is sound judgment when facing the unexpected (which, ironically, is inevitable).

Enforcing *Micula*

Here is one example of the unexpected scenarios: The state of the enforcement of the Micula ICSID Award in the High Court in England and its impact on the money market. The outline of the legal conundrum is notorious, but it bears recapping briefly to bring the issue into relief. *Micula et al*[fn]More precisely: Viorel Micula, Ioan Micula, S.C. European Food S.A., S.C. Starmill S.R.L., and S.C. Multipack S.R.L.[/fn], relying on the bilateral investment treaty between Romania and Sweden [fn]The Sweden-Romania Bilateral Investment Treaty had been ratified in 2002 by Law no 651/2002 and has now been denounced unilaterally by Romania alongside other intra-EU BITs by Law no 18/2017[/fn], have brought an ICSID claim in 2005, which they won in 2013. The dispute concerned the withdrawal by Romania of tax incentives in furtherance of EU State Aid rules and became a test case for the EU Commission assault on Intra-EU BITs as incompatible with EU law.[fn] Some of the legal and practical issues arising out of this conflict between EU Law and BITs have been usefully reviewed here.[/fn] In any event, ever since the Award, the claimants have tried to enforce it both in Romania and elsewhere with only limited success, despite the tenacity of the ICSID enforcement mechanism.[fn]Article 54(1) of the ICSID Convention provides for enforcement of money awards to be enforced by each Contracting State "within its territories as if it were a final judgment of a court in that State".[/fn]

One reason for the difficulty, at least in the enforcement attempts within the EU, has been the role played by EU law within the legal orders of Member States. For itself, Romania has been enjoined by the Commission pursuant to its powers under art 108 of the Treaty on the Functioning of the European Union (TFEU) from voluntarily complying with the ICSID Award and was even ordered to seek the recovery of whatever it had already granted to the claimants pursuant to the Award.[fn]Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517) (known as the "Final Decision" by reason of a provisional order having also been issued earlier in 2014.[/fn]

Other Member States face a separate hurdle in dealing with enforcement actions, namely to choose

between complying with the ICSID framework for enforcement as instituted by their respective national law, and their obligations of sincere cooperation under the Treaty of the European Union (TEU).

The United Kingdom (UK) is the case in point. In the UK, under the 1996 Arbitration Act, ICSID Awards gain, essentially, the status of a High Court decision by registration and follow thereafter a regular enforcement route.[fn]Registration is by right (section 1(2) of the 1966 Act) and there is no public policy exception to be raised to the registration of an ICSID Award; Section 2 of the 1996 Act lays out the effects of "registration" of an Award and its status.[/fn] This is what happened with the Micula Award, which was registered in 2014. Following registration, on application by Romania, the High Court decided to stay enforcement, pending a decision by the General Court of the European Union (GCEU) on the challenge lodged by the claimants against the Final Decision of the Commission. That decision by the High Court was affirmed by the Court of Appeal.

In sum, the High Court stayed the enforcement on account of the corroborated effects of:

(1) the Final Decision of the Commission issued under the authority of the TFEU;

(2) the "sincere cooperation" principle in the TEU; and

(3) the real prospect of a decision by the GCEU which would be incompatible with a High Court decision.

Brexit

Since no one really knows what the terms of Brexit will be, it is not for us to say with any certainty whether specific TEU provisions will be clearly regulated by a withdrawal agreement or by national legislation. The political signs, however, are not particularly edifying. The current draft Withdrawal Agreement does not expressly regulate the fate of the sincere cooperation principle, apart from disclaiming any limitation on it that the provisions of the Withdrawal Agreement itself may be construed to have.[fn] See Art. 5 of the November 2018 Withdrawal Agreement containing the disclaimer, which, remains, however, silent on what happens after the Union law ceases to have effect.[/fn]

A fortiori, a withdrawal on the basis of Article 50(3) of the TEU (in the absence of any specific withdrawal terms) means essentially what it appears to mean on its face, namely that the TEU ceases to apply from the relevant exit date, taking with it (presumably) Article 4(3) and the sincerity out of the cooperation. In such a case, it is safe to expect that the High Court would no longer consider itself bound by the principle.

Nevertheless, irrespective of any withdrawal agreement, the UK Government has indeed begun a legislative and administrative process of preparing the country for an effective regulatory transition by adopting national legislation which perpetuates substantial EU rules, in particular related to standards, trade and myriad of other areas.

This spirit applies to State Aid and the UK authorities rightfully reassure businesses that the thinking about State Aid is not likely to change dramatically on "day 1" after Brexit. In fact, the European Union (Withdrawal) Act 2018 effects a far-reaching transposition of primary EU legislation into UK domestic law to ensure "day 1" continuity in substantive rules.

Notwithstanding that spirit, however, it remains the case that the stay of enforcement decided by the High Court in the *Micula* case is not issued in application of substantial state aid rules (however considerate they may remain to EU soon-to-be-neighbors), but in deference to the sincere

cooperation obligations of Member States under the TEU.

We are yet to receive any sign of willingness on the part of an exiting UK to uphold that principle after ceasing to be a Member State. If one may venture a negotiation prediction, it would be surprising if the UK took any steps in that direction. The sincere cooperation principle is reminiscent of a "further assurances" boilerplate and one would be rightfully surprised if the parties continued to volunteer such overarching cooperation after parting ways without further agreement. In other words, unless further grounds are mustered, it is difficult to see how the current High Court stay of enforcement of the Micula Award can survive an unregulated Brexit.

Europe's Banker

What does that mean, apart from the proper enforcement? The UK is not merely another country where diligent lawyers can look for assets (aircraft, buildings, etc.) following ICSID Awards, but one of the most active actors on the money market.

A great majority (perhaps as much as 70%) of EU government bond issuance (estimated to a total of 150 billion euro a year) is facilitated by London banks. Italy, Spain and France reportedly use Barclays Bank plc, JP Morgan Securities plc and Nomura plc (all UK incorporated) for bond issues. According to industry report, and the industry became rightfully concerned with the effects of Brexit on the London investment banking offering to the EU sovereign debt in 2017, when fears of the loss of 'passporting' privileges prompted contingency planning.[fn] See here. Also, solutions sought by banks vary widely, see Reuters 20 December 2018 report on the topic here.[/fn]

In addition to acting as 'primary dealers', countries hold accounts with London banks, for secondary market trading (*e.g.*, interest rate and currency swaps) as well as to service coupons.

This is what emerged in fact in the case of the enforcement of the Awdi et al v Romania ICSID Award (ICSID Case no Arb 10/13). Romania used Citibank N.A. London Branch for debt service, when the claimants succeeded in temporarily attaching the accounts of Romania held with the bank and delaying the service of sovereign debt coupons by one day.

Will Brexit and the death of "sincere cooperation" inside London courts render London banks less safe for sovereign money? Should EU States even become concerned with legal recourse to the funds raised for them by London banks?[fn] An anonymous eurozone official quoted by Reuters intimated as much.[/fn]In a sense, this may be too bleak a vision. No doubt, the legal complexities of the Micula Award are somewhat peculiar to its circumstances. However, as a core proposition, it remains the case that enforcement of the Award in the UK has been stayed in order to avoid court conduct potentially conflicting with a CJEU decision. So framed, the circumstances are not that unusual. In the seminal *Achmea* decision on the conflict between EU law and intra-EU Bilateral Investment Treaties, the CJEU asserted the priority of EU over public international law obligations between Member States, materially on the basis of the "sincere cooperation" obligation. This raises the specter (or, as has previously been mentioned, the "unexpected ray of light") of the UK's becoming a preferred basis for investment structures into the EU away from the *Achmea* reach.

But while this may indeed be a "ray of light" for the UK from that angle, it is bound to compound the question of enforcement of investment arbitration decisions under UK-EU Member States after Brexit discussed here. Releasing the High Court from its "strong bond of comity" towards EU institutions under Article 4(3) of the TEU, may be seen as an opportunity for third party enforcement actions where the EU law otherwise provides a shield against investment arbitration decisions, and consequently as a vulnerability for the banks acting as conduits for the service of global sovereign debt.