Enforcement of Intra-EU BIT and ECT Awards in the UK Post Micula

Kluwer Arbitration Blog
April 25, 2020

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Please refer to this post as: Ana Stanic, 'Enforcement of Intra-EU BIT and ECT Awards in the UK Post Micula', Kluwer Arbitration Blog, April 25 2020, http://arbitrationblog.kluwerarbitration.com/2020/04/25/enforcement-of-intra-eu-bit-and-ect-awards-in-the-uk-post-micula/

In its unanimous decision in the Micula case the UK Supreme Court on 19 February 2020 made clear that ICSID arbitral awards rendered by tribunals established pursuant to intra-EU BITs could be enforced in the UK. As explained by Guillaume Croisant in his blog post on 20 February, the UK Supreme Court overruled the Court of Appeal and lifted the stay of proceedings to enforce the arbitral award rendered in 2013 by an arbitral tribunal constituted under the auspices of ICSID and a BIT between Sweden and Romania.

Since the General Court's EC Annulment Decision was still on appeal at the time the Supreme Court rendered its decision many expected that the Supreme Court would only address the issue of whether it had the power to stay the proceedings to enforce the *Micula* award until the final ruling of the CJEU on whether the *Micula* award amounted to illegal state aid as decided by the European Commission in 2015. However, the Supreme Court instead unanimously ordered that the *Micula* award be enforced immediately holding that the Court of Appeal had "exceeded the proper limits of" the power granted to English courts to stay proceedings in cases of an enforcement of an ICSID award.

The Supreme Court found that the relationship between Article 351 TFEU and Article 4(3) TEU was "the issue [that] goes to the heart of the present dispute" and consequently could be raised by the court of its own motion. Romania had objected to the Supreme Court considering submissions on this point since the Claimants

had not appealed the decision of Blair J in the High Court to the Court of Appeal thereon. It was Lady Justice Arden in paras. 190 to 198 of her separate opinion to the Court of Appeal decision (rather than the parties in their submissions) who highlighted the importance of Article 351 TFEU in resolving the conflict between the UK's obligations under EU law and international law. In particular in para. 198 she noted that in her view the duty of sincere cooperation "is only engaged if [the English courts], as an emanation of the UK in its capacity as a member state, ha[ve] some obligation under EU law". She then suggested that Article 351, which expressly provides that "[t]he rights and obligations arising from agreements concluded … 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", may be construed to mean that such a duty does not apply in respect of the ICSID Convention, it being a multilateral treaty.

The Supreme Court agreed with Arden LJ. Having carefully reviewed the *travaux préparatoires* of the ICSID Convention, the preparatory works leading up to its conclusion and the writings of Professor Schreuer and acknowledging that "ultimately" the scope of the provisions of the ICSID Convention could "only be authoritatively" interpreted by the International Court of Justice, it found that the "grounds of objection raised by the Commission, even if upheld before the EU courts, were not valid objections to the [Micula award] or its enforcement under the ICSID Convention". Furthermore, since the obligations imposed on the UK pursuant to Articles 53 and 54 of the ICSID Convention regarding the enforcement of arbitral awards were owed by the UK to all signatories thereto and thus also to states which are not parties to the EU and that the UK had become a signatory to the ICSID Convention before it joined the European Communities (as the EU was known in 1973), the Court held that "[A]rticle 351 TFEU has the effect that any obligation on the UK courts to give effect to a decision such as the Commission Decision pursuant to the duty of sincere co-operation which might arise under the Treaties in other circumstances does not arise in this case".

Surmising from the Supreme Court's decision, it is clear that intra-EU BIT and ECT ICSID arbitral awards will be enforced in the UK post *Achmea*. Since the UK joined the EU before it ratified the New York Convention[fn]UK joined the EU on 1 January 1973. It acceded to the New York Convention on 24 September 1975[./fn] it is also clear that the Supreme Court's reasoning cannot be applied by analogy to ensure

that New York Convention arbitral awards, whether pursuant to a BIT or ECT, are enforced in Micula-type circumstances.

There is some uncertainty about the approach English courts will take in cases where the enforcement of New York Convention awards is sought once the United Kingdom is outside the EU (prior to the outbreak of the coronavirus pandemic the transition period was expected to end on 31 December 2020) in case of intra-EU BITs and ECT awards in which Micula-type arguments are raised.

What is clear is that post-Brexit English courts will no longer be bound by a duty of sincere corporation as per Article 4(3) TEU nor will they be entitled to seek a preliminary ruling from the CJEU as per Article 267 TFEU. Instead, English courts will have to enforce arbitral awards which raise questions of EU law by reference to the terms of the European Union (Withdrawal Agreement) Act 2020 (as discussed below) and the provisions of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ("the Withdrawal Agreement").

In particular, Article 89 of the Withdrawal Agreement provides that the "judgments and orders of the Court of Justice of the European Union handed down before the end of the transition period … shall have binding force in their entirety on and in the United Kingdom". In addition, Article 4(5) of the Withdrawal Agreement provides that "[i]n the interpretation and application of this Agreement, the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period".

Giving effect to these provisions of the Withdrawal Agreement in domestic law, Section 6(1) European Union (Withdrawal Agreement) Act 2018, as amended by the Withdrawal Act 2020, provides that English courts are "not bound by any principles laid down, or any decisions made, on or after exit day by the European Court", Section 6(2) provides that courts "may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal", and Section 6(4) clarifies that the Supreme Court is not bound by any retained EU case law.

The obligation of the courts in respect of EU law as in force as at the end of the transition period is further watered-down in Section 26(5)(A) of the European Union

(Withdrawal Agreement) Act 2020 (which entered into force on 23 January 2020) which gives the British government the power to adopt regulations (i) to provide for *inter alia* the "extent … and circumstances in which, a relevant court or relevant tribunal is not to be bound by retained EU case law"; (ii) "to prescribe the test which a relevant court or relevant tribunal must apply in deciding whether to depart from any retained EU case law"; or (iii) lay down the considerations which such courts or tribunals should consider relevant in deciding whether to depart from EU case law.

Whether a decision by the European Commission and/or the CJEU that an arbitral award amounts to illegal state aid will be a ground which can successfully be invoked before UK courts to refuse enforcement on account of public policy as per Article V(2)(b) of the New York Convention will largely depend on the provisions of the agreement currently being negotiated between the EU and the UK concerning their future relations, since the EU is insisting that such agreement must cover *inter alia* state aid and competition law.