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Navigating Through Stormy Seas: The UK Supreme Court Hears the Micula Case

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Introduction

With less than a month to go before the latest EU-UK divorce date, the UK Supreme Court resumed its hearing in *Micula et al. v Romania 2018/0177*, relating to the enforcement of the widely discussed ICSID award against Romania. With the UK grappling with its future relationship with the EU, it is interesting timing for the UK's highest court to consider the legal and policy intricacies arising from the intersection between the country's domestic legal order and its EU and other treaty obligations. While separated by arguments and perspectives, the Micula brothers, Romania, and the EU have combined to serve up a host of delicate questions for the court to navigate.

The *Micula* Saga

Much has been written on the *Micula* saga, on this Blog particularly (see here). In a nutshell, after 8 years of ICSID arbitration proceedings in case ARB/05/20, brothers Viorel and Ioan Micula (the "**Miculas**") obtained a EUR 330 million (post-interest) award against Romania, which they have been trying to enforce ever since. The enforcement entered into a new stage when, in 2015, the European Commission ("**Commission**") determined that by paying the award Romania would breach EU rules on State aid ("**Commission Decision**"), effectively barring the State from honouring its obligations under the award. The Commission Decision also required Romania to recover any amounts already paid under the award, with interest, and found Miculas – together with the other claimant companies – jointly liable to repay the State aid any of them had received. Notwithstanding that decision, the Swedish investors continued to seek enforcement of the award in a number of jurisdictions, including the United States, Sweden, and the UK.

Recent Background Developments

The enforcement saga has been particularly active recently, with key events occurring in 2019. An outline of these developments helps to put the UK proceedings in context.

Firstly, in January 2019, the investors' homeland court in Sweden – the Nacka District Court –

declined to enforce the award. The Swedish court decided against allowing enforcement against Romania, ruling that this would sidestep the Commission Decision and so violate the principle of sincere cooperation. The Commission filed a brief urging the court to refuse enforcement.

Secondly, in June 2019, the EU General Court quashed the Commission Decision. The EU General Court found that the relevant facts predate Romania's accession to the EU and that the Commission lacked competence to apply its Article 108 TFEU powers retroactively in this way. Further, the EU General Court found that the Commission's decision to classify the award of compensation as an advantage and aid within the meaning of Article 107 TFEU was unlawful as the facts underlying the award had occurred prior to EU law's entry into force in Romania.

Finally, in September 2019, the US District Court for the District of Columbia granted a petition to confirm the award in the US. Despite the Commission's *amicus curiae* brief relying *inter alia* on the *Achmea* judgment to argue that the Miculas' petition should be denied, the DC court declined to refuse confirmation. Romania instantly appealed the District Court's decision before the US Court of Appeals for the DC Circuit.

Overview of the UK Proceedings

The UK enforcement proceedings started in the autumn of 2014 when the investors obtained a Registration Order. Under Section 2 of the UK Arbitration (International Investment Disputes) Act 1966, for the purposes of execution, a registered ICSID award has the same force and effect as a judgment of the High Court of England and Wales.

Following the Commission Decision, Romania filed a set aside application with the Commercial Court (a sub-division of the High Court). As an alternative to the set aside request, the State also asked the court to vary or stay the registration. In September 2016, the Miculas cross-applied for security. On 20 January 2017, the Commercial Court dismissed the set aside application but granted a stay of enforcement pending the outcome of the EU General Court proceedings for the annulment of the Commission Decision. The investors' cross-application for security was dismissed.

On 27 July 2018, the UK Court of Appeal dismissed the Miculas' appeal against the Commercial Court judgment in relation to the stay. However, the court granted the requested security and ordered Romania to provide GBP 150 million as a condition of the stay. The three Court of Appeal justices had different views on the interplay of: the enforcement regime under the ICSID Convention; the UK's obligations under EU law; and the UK courts' powers under the 1966 Act. However, while their reasoning differed slightly, the justices formed a 2 on 1 majority on the ruling that it is within the powers of the domestic court to temporarily stay the execution of the award pending the outcome of the proceedings in the EU General Court and that this is consistent with the ICSID Convention's object and purpose.

Following the decision of the EU General Court in June 2019, Phillips J of the High Court issued a further order extending the stay pending the CJEU determination and ordering Romania to provide GBP 150 million security by 17 October 2019.

The UK Supreme Court hearing started on 18 June 2019 and continued for three days on 7-9 October 2019.

Issues Before the Supreme Court

There are two main issues before the UK Supreme Court: *first*, whether the High Court has the power to stay the enforcement of an ICSID award; and, *second*, where an ICSID award against an EU Member State has been stayed pending proceedings before the EU courts, whether the duty of sincere cooperation precludes an English court from ordering the State to provide security.

Parties' Submissions

The Miculas

Counsel for the Miculas built their case on the fact that the ICSID Convention allegedly offers a self-contained system of review to the exclusion of any other remedies, and that the Micula award has already survived ICSID annulment proceedings.

Consequently, according to the Miculas, the ordered stay is against the object and purpose of the ICSID Convention as the Convention precludes further challenges and stays of enforcement.

The Miculas further argued that:

1. The stay granted by the Court of Appeal is not a temporary stay of *execution*, as argued by Romania, but a stay of *enforcement*, which the court did not have the right to make under domestic law.
2. There is no conflict between the UK's duties under EU law and the enforcement of the award. Whether or not the ICSID Convention imposes obligations toward third countries is not a question of EU law. Even if there is a conflict, this is a matter of domestic law – it cannot be implied that the duty of sincere cooperation requires the English courts to wait for the CJEU's ruling, especially since the obligations under the ICSID Convention are owed not only to Sweden as the investors' host State, but towards all Contracting Parties.
3. The Commission Decision has been annulled and the Commission has not sought interim measures staying the decision of the EU General Court. Therefore, there is no EU law duty that should be taken into account by the English court.

Romania

Romania, on the other hand, argued that the stay is essentially a temporary case management measure pending the final determination of the EU proceedings by the CJEU. Romania's intention is to deal carefully and reasonably with that temporary measure.

Furthermore, Romania submitted that many other EU Member States have halted the enforcement of the award, including, of course, Sweden, which is the investors' home country. If the UK court now decides otherwise, this would deprive the decisions of the other Member States courts of practical value. This, according to Romania, would not be sincere cooperation, but quite the opposite.

Regarding the annulment of the Commission Decision by the EU General Court, Romania's case is

that nothing has changed materially. The EU General Court's conclusion that EU law does not apply has an interim character and there is a realistic possibility of its reversal in the second instance proceedings. Therefore, the risk of conflict between the UK's obligations under EU law and the ICSID Convention still remains and requires the continuation of the stay until a final determination by the CJEU.

The Commission

The Commission's intervention supported Romania's case and concentrated mainly on the EU General Court judgment. The Commission argued that, regardless of the annulment of the Commission Decision, the UK's obligations under EU law, and the duty of sincere cooperation specifically, are ongoing.

Counsel for the Commission also argued that, according to the EU General Court's judgment and contrary to the Miculas' submissions, the Commission has competence over Romania's post-accession conduct. The judgment could even be considered an invitation to for the Commission to reassess the matter. Further, the Commission has good prospects to win the appeal reaffirming the legal force of its Decision.

Concluding Remarks

While acknowledging that its ruling is long-anticipated, the Supreme Court noted it could not guarantee a judgment before 31 October 2019. This raises the intriguing prospect of a Supreme Court ruling on the scope and substance of the UK's EU law obligations at a point in time where such obligations have been ended as a result of a "no deal" Brexit.

Nevertheless, as well as this interesting timing, the legal and political ramifications of the Supreme Court's decision are significant beyond even the wide margins of the Miculas' dispute with Romania. The Court will have to carefully weigh a number of variables and possible consequences. It remains to be seen whether the UK Supreme Court's decision in the *Micula* case would be a harbinger of how the post-Brexit dialogue between UK and EU courts will shape.

This entry was posted on Friday, October 18th, 2019 at 8:01 am and is filed under Arbitration, BIT, International arbitration, Investment Arbitration, Micula, Romania
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