Enforcement of ICSID award stayed by the English courts until the EU courts have ruled on the legality of enforcement

Another twist in the tale of the ICSID case *Micula and others v Romania* (“*Micula*”) occurred last week in the High Court, which has put the interplay between enforcement of ICSID arbitral awards and EU law fiercely under the spotlight.

**The ICSID award in Micula**

During the 1990’s, two Swedish brothers, Ioan and Viorel Micula, and three companies which they owned (together, the “Claimants”), built large-scale food and drinks production facilities in a disadvantaged area in Romania. These investments were made pursuant to Romania’s introduction in 1998 of economic incentives for the development of “disfavoured regions” in the country; the Claimants expected these to remain in force for a 10-year period and accordingly made considerable investments in one particular disfavoured region, Bihor County.

As part of Romania’s negotiations for its accession to the EU, these economic incentives were revoked (effective February 2005). The Claimants commenced an ICSID arbitration against Romania and in December 2013 the tribunal rendered an award in favour of the Claimants, and ordered Romania to pay the sum of US$250 million – one of the biggest in the history of ICSID – for its breaches of the fair and equitable treatment standard in the Sweden-Romania BIT arising out of its revocation of the economic incentives (the “Award”).

Romania issued an application to annul the Award on 18 April 2014, though this was later rejected by an ICSID *ad hoc* committee on 26 February 2016. The Award was registered in the High Court of England and Wales on 17 October 2014. We note that the Claimants have sought to enforce the Award in New York and the matter is waiting to be heard before the US Court of Appeals Second Circuit.

The nub of last week’s English High Court decision, and the ramifications it poses, stems from an injunction issued by the European Commission on 26 May 2014 instructing Romania to cease execution/implementation of the Award, and to recover any monies it had already paid to the Claimants. This injunction was confirmed by the European Commission on 30 March 2015, in a final decision prohibiting payment, as any monies paid by Romania would constitute ‘unlawful State aid’ and contravene the EU’s general restriction on State aid (the “Commission’s Decision”). This was a move which caused widespread concern in the international arbitration community. On 28 November 2015 the Claimants applied to the General Court of the Court of Justice of the EU (CJEU) to have the Commission’s Decision annulled (the “Annulment Application”). The outcome of these proceedings is still pending.

**Application to set aside the registration of the Award**

The case before the English High Court on 20 January 2017 was an application from Romania to set aside the registration of the Award on the grounds that: (i) Romania had paid the Award in full (however this was found to be inaccurate on the facts of the case); and/or (ii) the High Court should refuse recognition of the Award in light of the Commission’s Decision. In the alternative, Romania contended that (iii) the High Court should order a stay of any enforcement proceedings until the Claimant’s Annulment Application has been determined by the CJEU.

In response, the Claimants argued that even if (hypothetically) the Commission’s Decision was valid, there was no basis upon which to set aside the registration of the Award or to stay any enforcement proceedings because, *inter alia*: (i) the Award was *res judicata* and

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1 Treaty on the Functioning of the European Union, Article 107(1)
therefore binding on the date it was rendered (11 December 2013), and, as such, the Commission’s Decision, which occurred later on, should not affect its validity; (ii) the High Court had a duty under ICSID and the Arbitration (International Investment Disputes) Act 1966 (the “1966 Act”) to register/enforce the Award; and (iii) where a conflict of duties arises, the UK’s pre-existing obligations – in this case those under the ICSID Convention – should not be affected by its accession to the EU.2

**Stay of enforcement proceedings**

*Res judicata*

Justice Blair pointed out that under English law a judgment/order takes effect from the day it is given. In this regard he referred to CPR r. 40.7(1) and Article 54 of the ICSID Convention. Accordingly, finality of an arbitral award occurs at the time it is rendered and not when annulment proceedings are completed (Romania had argued that finality of the Award was on 26 February 2016). Therefore the Commission’s Decision did not affect the validity of the Award.

**Registration vs. Enforcement of an arbitral award**

There is a distinction – as Justice Blair pointed out – between registering and enforcing an arbitral award. Registration is not always a ‘precursor’ to enforcement; a party will often be justified in seeking registration of an award before it plans to enforce it, for example to establish its priority against other creditors. The Commission made explicit that it was Romania who was prevented from making any payment of aid. Registration of the Award was not cited by the Commission and Justice Blair held that such registration by the High Court did not conflict with the Commission’s Decision.

**Stay of further enforcement proceedings**

Arguments on the interpretation of EU law were posited by both sides. Justice Blair reasoned that if registration of the Award was set aside, the UK would be breaching its obligations under ICSID and the 1966 Act to: (i) recognise an ICSID award as final and binding on the parties to the proceedings; and (ii) ensure that such award “…shall not be subject to any appeal or to any other remedy except those provided for in this Convention”.4 Conversely, enforcement of the Award would lead to Romania breaching the Commission’s Decision and, in turn, the English courts would be deemed to have acted unlawfully in permitting enforcement of the Award. Justice Blair noted that the award essentially had the same status as a domestic judgment, and supported his decision by recalling that any domestic judgments would also be subject to the EU State aid rules. It is noted that as a matter of EU law, national courts must not make a ruling which goes against a decision by the European Commission.5 Therefore Justice Blair stayed enforcement proceedings until the CJEU has ruled on the Claimants’ annulment application.

In addition, the Commission had raised the question of *res judicata* in national courts, so to avoid inconsistent decisions being made a stay of enforcement proceedings was considered appropriate.

**Intra-EU BIT awards – the Commission steps in**

This judgment is important as it is the first time enforcement of an ICSID award has been stayed by the English courts for these reasons. Justice Blair pointed out that staying proceedings did not conflict with the 1966 Act/ICSID obligations because those obligations gave an ICSID award the same status as a domestic judgment; and enforcement of a domestic judgment would have also been stayed in these circumstances.

There is a discernible tension between the EU’s single market policy and intra-EU BITs, the majority of which were effected in the 1990s (before a large percentage of the current EU Member States had joined the EU). We are frequently seeing intervention from the European Commission in investor-state arbitrations, by way of an *amicus curiae* brief, usually in support of the state, championing the supremacy of EU law and attempting to expunge all intra-EU BITs and related arbitrations.

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2 ICSID Convention, Article 54  
3 Treaty on the Functioning of the European Union, Article 351  
4 ICSID Convention, Article 53(1)  
5 Treaty on European Union, Article 4(3)
Concluding thoughts – Brexit: watch this space

It remains to be seen how the CJEU will determine the Claimants’ application to annul the Commission’s Decision. ‘Eurosceptics’ might argue that the CJEU will support the Commission, particularly given the current interval of political uncertainty the EU is facing and its battle to re-assert its global reach during the Brexit negotiations. Indeed, we may even see the Commission block execution of intra-EU BIT arbitral awards as a matter of course, thereby forcing national courts to defer questions of the legality of enforcement of such awards to the CJEU.

On a related note, if we were to fast-forward a few years to the post-Brexit world, where (hypothetically) EU law does not have direct effect in the UK and the English courts are no longer bound by the CJEU’s decisions, it is conceivable that the High Court would not have stayed enforcement proceedings in this instance. Therefore, going forward we would advise that investors monitor what sort of “deal” the UK gets when it eventually does leave the EU, as this could impact their strategies in future arbitrations arising out of intra-EU BITs. Furthermore, investors must actively seek to ensure that their investments inside the EU are adequately protected.

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