



19 February 2020

PRESS SUMMARY

Micula and others (Respondents/Cross-Appellants) v Romania (Appellant/Cross-Respondent)

[2020] UKSC 5

On appeals from: [2018] EWCA Civ 1801 and [2019] EWHC 2401 (Comm)

JUSTICES: Lady Hale, Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Sales

BACKGROUND TO THE APPEALS

The appeals arise out of the attempted enforcement of an investment arbitration award (“the Award”) in favour of the Respondents to this appeal (“the Claimants”) against the Appellant (“Romania”) in relation to investments made by the Claimants in food production in Romania before the country acceded to the European Union (“EU”).

With effect from 1 April 1999, Romania adopted an investment incentive scheme for certain regions (“EGO 24”). On 30 June 1999, Romania incorporated EU State aid rules into domestic law, as a result of which EGO 24 was modified. During the early 2000s, the Claimants invested in a large, highly integrated food production operation in the relevant region in reliance on EGO 24.

In 2002, Romania and Sweden entered into a bilateral investment treaty (“the BIT”) providing reciprocal protection of investments and investor-State arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“the ICSID Convention”).

During the accession negotiations between Romania and the EU before its accession on 1 January 2007, the EU informed Romania that certain schemes, including EGO 24, were contrary to EU State aid rules. As a result, Romania repealed all but one of the incentives under EGO 24. On 28 July 2005, the Claimants filed a request for ICSID arbitration under the BIT based on this repeal. On 11 December 2013, the tribunal issued the Award, deciding that Romania had breached the BIT and awarding compensation of approximately £70m plus interest. Romania unsuccessfully applied to annul the Award.

Romania purported to implement the Award by setting off tax debts owed by one of the Claimants. This precipitated the European Commission issuing an injunction on 26 May 2014 ordering Romania to suspend any action that might lead to execution of the Award until the Commission had taken a final decision on its compatibility with State aid rules (“the injunction decision”). On 1 October 2014, the Commission formally opened a State aid investigation (“the initiating decision”). On 30 March 2015, the Commission adopted a final decision (“the

Commission Decision”) concluding that the payment of the Award by Romania constituted unlawful State aid.

The Claimants sought annulment of the Commission Decision before the General Court of the European Union (“the GCEU”) in 2015. On 18 June 2019, the GCEU annulled the Commission Decision on the ground that the Commission had purported to apply its powers retroactively to events pre-dating Romania’s accession to the EU. The Commission applied to appeal this decision.

The English proceedings were started in 2014 by the Claimants applying for registration of the Award under the Arbitration (International Investment Disputes) Act 1966 (“the 1966 Act”), which was granted. In 2015, Romania applied for a stay of enforcement and the Claimants sought an order for security. In 2017, the High Court granted Romania’s application to stay enforcement pending the GCEU proceedings and refused the Claimants’ application for security. The Claimants appealed these orders. In 2018, the Court of Appeal continued the stay but ordered that Romania provide security. Romania appealed the order for security and the Claimants cross-appealed the grant of a stay. The hearing before the Supreme Court was listed to start on 18 June 2019, but that morning the GCEU handed down its judgment, causing the hearing to be adjourned until October 2019.

JUDGMENT

The Supreme Court unanimously allows the Claimants’ cross-appeal and lifts the stay. In light of this, it is no longer necessary to consider Romania’s appeal in relation to security, so that order is discharged. Lord Lloyd-Jones and Lord Sales give the judgment, with which all members of the Court agree.

REASONS FOR THE JUDGMENT

The Court considers the Claimants’ cross-appeal first [40]. The Claimants appeal the stay on five grounds: (1) the effect of the GCEU’s judgment is that the duty of sincere co-operation no longer requires the English courts to stay enforcement; (2) there is no power to order a stay under the ICSID Convention and the 1966 Act; (3) the stay is incompatible with the ICSID Convention; (4) the European Communities Act 1972 does not require the United Kingdom to breach pre-accession obligations under the ICSID Convention; and (5) Article 351 of the Treaty on the Functioning of the EU (“TFEU”) applies, with the result that the obligations of the United Kingdom under the pre-accession ICSID Convention are not subject to the overriding effect of EU law [38] - [39].

First, the Claimants submit that the GCEU decision annulling the Commission Decision changes the circumstances, meaning there is no EU law duty on the English courts to stay enforcement [43]. Romania, and the Commission intervening, submit that the GCEU judgment annuls only the Commission Decision and not the injunction or initiating decisions [44]. The Court considers that the GCEU judgment leaves in existence an extant Commission investigation into State aid. Without a final Commission decision closing the formal investigation procedure, the effects of the initiating decision subsist, imposing a duty of sincere co-operation on the English courts [51].

Second, in relation to the Claimants’ second and third grounds, the Court examines the ICSID Convention and the 1966 Act [60] - [63]. The Court emphasises that the scheme of the ICSID Convention does not permit a domestic court before which recognition is sought to re-examine an award on its merits, once its authenticity is established [68]. In light of the wording

of articles 54(1) and the preparatory materials, it is arguable that there is scope for certain exceptional defences against enforcement if national law recognises them in respect of final domestic judgments [78]. Though the proper interpretation of article 54(1) of the ICSID Convention is something which could only be authoritatively resolved by the International Court of Justice, it does not affect the outcome of the present case [83]. The Court agrees with the majority in the Court of Appeal that English courts have the power to stay execution of an ICSID award in the limited circumstances they describe, but in the present circumstances the granting of a stay exceeds the proper limits of that power and is not consistent with the ICSID Convention [84].

Finally, the Claimants' fourth and fifth grounds collapse into one another and thus fall to be considered together [89]. Article 351 TFEU is intended to establish that the application of the EU treaties does not affect the duty of a member state to respect the rights of non-member states under a prior agreement and to perform its obligations thereunder [97]. In the Court's view, the specific duties in articles 54 and 69 of the ICSID Convention are owed to all other Contracting States, including non-member states [107] - [108]. The duty of sincere co-operation does not require courts in this jurisdiction to decline to decide the issue pending its resolution by the EU courts; EU case law makes it clear that questions regarding prior treaties under article 351 are not reserved to the EU courts. The article 351 issue here – the extent of the United Kingdom's obligations under the ICSID Convention – is not the same issue that is before the EU courts [112] - [113]. The possibility that the EU courts may consider the issue at some future stage is contingent and remote. In such circumstances the duty of sincere co-operation does not require the imposition of a stay of enforcement of the Award [117].

The Court therefore allows the Claimants' cross-appeal and lifts the stay. In light of this conclusion, it is no longer necessary to consider Romania's appeal in relation to security [118] - [119].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<https://supremecourt.uk/decided-cases/index.html>