English Court of Appeal Stays Miculas' Enforcement Proceedings

On 27 July 2018 the English Court of Appeal (the ***Court of Appeal***) confirmed the stay of UK enforcement proceedings of the 2013 arbitral award handed down in favour of the Micula brothers (the ***Miculas***). Interestingly, the Court of Appeal's ruling carefully navigates through the thorny interrelationship of the ICSID Convention and EU law.

As you probably know, this case finds its origins in the investment made by the Miculas, two investors of Swedish nationality, in the food production sector in Romania in the 1990s. At the time of investment they relied on numerous tax incentive regimes that Romania had put in place in order to attract foreign investment.

In 2004, in the context of preparations of Romania's accession to the European Union, the tax incentives were revoked in an effort to conform with EU law on State aid.

The Miculas then instituted ICSID proceedings against Romania based on the Romania-Sweden Bilateral Investment Treaty, arguing that the revocation of the tax incentives constituted

a breach of their rights under that treaty. The arbitral tribunal issued its award in 2013 holding that by revoking the incentives, Romania had indeed failed to award the claimants fair and equitable treatment. The arbitral tribunal therefore awarded the Miculas EUR 180 million.

In 2015, the European Commission handed down a decision (the ***2015 EU decision***) which declared that the ICSID award in favour of the Miculas amounted to a State aid. Under the 2015 EU decision Romania had to refrain from paying the amount due under the award. The Miculas quickly challenged this 2015 EU decision before the General Court of the European Union (the ***General Court***) (Cases T-694/15 and T-704/15). Those cases are still pending today.

In the meantime, the Miculas obtained a registration order in the UK allowing for the enforcement of the 2013 award in that country. Romania, however, quickly moved to challenge that registration order before the English High Court.

In January 2017, the English High Court refused to set aside the registration order but nevertheless agreed to stay the enforcement proceedings pending the General Court's ruling regarding the validity of the 2015 EU decision. In its decision of 27 July 2018, the Court of Appeal rejected the appeal brought by the Miculas against this High Court's decision.

The appeal raised a number of interesting issues.

First, the Miculas argued that the High Court had failed to have appropriate regard to the *res judicata* effect of the arbitral award. The Miculas relied, in particular, on the judgement of the Court of Justice of the European Union (the ***CJEU***) in *Kapferer* (Case C-234/04). In that case, an Austrian consumer had brought a claim before Austrian courts against a German company. The German company argued, among other things, that the Austrian courts lacked jurisdiction to hear the case.

The court dismissed that jurisdictional defence and also rejected the claim on its merits. The plaintiff appealed that decision but the German company did not appeal the decision on the issue of jurisdiction. Given that the Austrian court of appeal also doubted whether the Austrian courts had jurisdiction to hear this dispute, it referred the matter to the CJEU for a preliminary ruling. The CJEU found that the EU principle of sincere cooperation did not require the Austrian court of appeal to reopen the issue of jurisdiction (which in the meantime had been granted *res judicata*) even if the initial decision of the first instance court on that issue appeared to infringe EU law.

Based on that case-law, the Miculas argued that since the ICSID award rendered in their favour had been granted *res judicata* effect, it did not matter whether that award also violated EU law provisions on State aid.

The Court of Appeal, however, rejected that argument because applying the *Kapferer* principle "*would be permitting the appellants to be paid the very aid which the* [EU] *Commission has declared to be unlawful* [and] *compelling Romania to infringe the* [EU] *Commission's Decision*". The Court of Appeal further found that the doctrine of sincere cooperation under EU law barred an "*outcome that produces a circumvention of the state aid rules by way of res judicata*".

The second crucial issue which was raised before the Court of Appeal was whether Section 2(1) of the UK Arbitration Act 1966 (the ***1966 Act***) (which provides that an ICSID arbitral award which has benefited from a registration order "*shall* […] *be of the same force and effect for the purposes of execution as if it had been a judgment of the High Court*") obliged the UK courts to enforce the arbitral award or whether such enforcement was precluded in light of the 2015 EU decision.

In this respect, Romania argued that since Section 2(1) of the 1966 Act gives an ICSID award the same status, in English law,

as any other English judgment and that since the enforcement of any judgment would be subject to potential EU law restrictions on enforcement, then EU law restrictions (such as the EU 2015 decision) could impact the enforcement of the ICSID award handed down in favour of the Miculas.

Although each member of the Court of Appeal reasoned differently, they all agreed with Romania's position and decided to confirm the stay of enforcement of the award pending the General Court's ruling regarding the validity of the 2015 EU decision.

Interestingly, they also discussed the application of Article 351 of the Treaty on the Functioning of the European Union which provides that the rights and duties under a treaty (such as, in the case of the UK, the ICSID Convention) signed by a member state prior to accession to the EU are in general not affected by EU law. Two members of the Court of Appeal, however, refused to further elaborate on that issue given that it was precisely one of the questions put before the GCEU in the annulment proceedings against the EU 2015 decision.

Although the Court of Appeal rejected the Miculas' appeal regarding the stay of the enforcement proceedings, it nevertheless afforded them GBP 150 million as a security for cost.

Overall assessment

The Court of Appeal's approach to the tricky legal questions presented can only be described as pragmatic. It realised that the benefit of executing the ICSID award would be entirely circular given that substantial aspects of the case are still to be heard before the CJUE.

This decision, coupled with the recent *Achmea* decision of the CJEU is demonstrative of the increasing importance and relevance of EU law in investor-state dispute resolution in the EU.

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