

Recent Developments in Micula and Kiobel



I wanted to quickly update you on recent developments regarding both the Micula and Kiobel cases, two cases on which we reported a couple of months ago.

Micula

The Micula case concerns the aftermath of an investment dispute initiated by two Swedish investors (the Micula brothers, the *Miculas*) against Romania. In 2013, an arbitral tribunal handed down an award requesting Romania to pay EUR 180 million (damages and interests) to the Miculas. In the absence of full payment by Romania, the Miculas initiated enforcement proceedings in several countries (including the UK).

In the meantime, the European Commission handed down [a decision \(the 2015 EU Decision\)](#) in which it ruled that the compensation that Romania had to pay to the Miculas amounted to State aid. That 2015 EU Decision is currently subject to an appeal before the General Court of the European Union.

Updates on UK proceedings

In awaiting the outcome of the proceedings before the EU

General Court, the English High Court decided, in January 2017, to stay the UK-related enforcement proceedings. [That decision was confirmed by the English Court of Appeal in July 2018.](#)

According to a recent press release published [by Mlex](#) a couple of weeks ago, the UK Supreme Court has now been asked to hear a challenge against that decision. The Permission to Appeal has been granted on 31 October 2018. The case is filed under the reference UKSC 2018/0177.

EU Commission takes Romania to court for failure to implement the 2015 EU Decision

In addition, it must also be noted that, despite Romania's refusal to pay the 2013 award, a partial implementation of that award has already taken place (Romania already offset part of the damages it had been ordered to pay against taxes owed by one of the claimant companies). Pursuant to the 2015 EU Decision, Romania was therefore required to recover that amount. The deadline set for Romania to recover that money was 31 July 2015.

However, on 7 December 2018, considering that *"almost half of the original aid amount still remains to be recovered and there is still no prospect of an immediate full repayment of the outstanding aid"*, [the European Commission announced](#) that it had referred Romania to the Court of Justice of the European Union for failure to implement the 2015 EU Decision.

New Kiobel case before U.S. Supreme Court?

[In March 2017, I had reported](#) on a decision by the U.S. District Court of the Southern District of New York (*S.D.N.Y*) which had granted a petition to access documents in the possession of the New York-based law firm *Cravath, Swaine & Moore LLP* (*Cravath*) for use in foreign legal proceedings initiated against one of Cravath's clients.

As I reported, the plaintiff in that case (Esther Kiobel) is well-known to U.S. courts. She gave her name to a leading class action case before U.S. courts in which she sought reparation against Shell for human rights violations committed by the Nigerian government (with the complicity of Shell) against her and others in Nigeria when they opposed Shell's activities in this country. She relied at the time on the U.S. Alien Tort Statute, which allows foreign citizens to seek remedies in U.S. courts for a tort committed outside the United States.

The case ultimately came before the U.S. Supreme Court, which ruled that U.S. federal courts did not have jurisdiction to hear claims for violations of international law that took place *wholly* outside U.S. territory. Mrs Kiobel's case was therefore dismissed.

Seeking other legal alternatives, she intended to file an action in the Netherlands where Shell is headquartered. However, she also sought to obtain the documents and other discovery materials that Shell's lawyer (Cravath) had produced on Shell's behalf in the earlier U.S. case but which were protected by a confidentiality agreement and were prohibited from being used for another purpose.

Since Cravath was based outside the jurisdiction of the Dutch courts, Mrs Kiobel brought an action before the S.D.N.Y on the basis of 28 U.S.C. Section 1782 (**Section 1782**) which allows a litigant before a "*foreign or international tribunal*" outside the United States to apply to the U.S. district courts to obtain discovery against a person or entity residing or found in the district where the application is sought.

On 24 January 2017, the S.D.N.Y granted Mrs Kiobel's petition and ordered Cravath to produce the requested documents. That decision was later reversed by the Second Circuit (click [here](#) for an excellent report by Ted Folkman).

Ted Folkman also recently [reported](#), that Mrs Kiobel has now petitioned the U.S. Supreme Court to hear that case. It will be interesting to see whether the U.S. Supreme Court will grant certiorari...

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We will of course keep you updated of those developments.

[UPDATE added on 19 February 2019]: Esther Kiobel's petition before the U.S. Supreme Court was denied on 7 January 2019.

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