

Enforcement of ICSID Awards against
EU Member States in the United Kingdom

Micula & Ors -v- Romania [2020] UKSC 5

19 February 2020

Supreme Court holds that ICSID arbitration award can be enforced despite long-standing objections by Romania and the European Commission

On 19 February 2020, the Supreme Court overturned the Court of Appeal judgment in *Micula & Others -v- Romania* [2018] EWCA Civ 1801. The Supreme Court reversed the decision of the Court of Appeal below and lifted the stay on enforcement of the ICSID Award in the United Kingdom. Holding that the duty of sincere co-operation is not applicable in this case and that the stay was unjustified and unlawful as a matter of international and domestic law, it lifted the stay which had prevented enforcement of the ICSID Award. The matter will now return to the Commercial Court for enforcement.

Croft Solicitors were instructed by Mr Viorel Micula, the First Claimant in these proceedings.

Croft Solicitors instructed Professor Sir Alan Dashwood QC and Patrick Green QC, both of Henderson Chambers, and Jonathan Worboys of 4 New Square Chambers.

Link to the full [judgment](#).

Link to the Supreme Court [summary](#).

CROFT

SOLICITORS



Rupert Croft, Managing Director



Laura Nelson, Director



Edward Hazzan, Associate



**Professor Sir Alan Dashwood QC,
Henderson Chambers**



**Patrick Green QC,
Henderson Chambers**



**Jonathan Worboys,
4 New Square Chambers**

BACKGROUND

1. In the early 2000's, the Claimants (the First and Second of whom are Swedish citizens) invested in a large and highly integrated food production operation in the Stei-Nucet region of Romania pursuant to an investment incentive scheme in the form of Emergency Government Ordinance No 24/1998 (**EGO 24**). In 2003, Romania and Sweden concluded a bilateral investment treaty (**BIT**) which provided for reciprocal protection of investments with provision for dispute resolution under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**ICSID Convention**). The United Kingdom and Romania had each ratified the ICSID Convention, in 1996 and 1975 respectively.
2. On 31 August 2004, in the context of its preparations to accede to the European Union (**EU**), Romania repealed many of the tax incentives provided for by EGO 24 with effect from 22 February 2005. Romania did so in order to align with EU rules regarding State Aid. On 28 July 2005, the Claimants filed a request for arbitration with ICSID under the terms of the BIT.
3. On 1 January 2007, Romania acceded to the EU.
4. On 11 December 2013, The ICSID Tribunal made the ICSID Award in favour of the Claimants, awarding them RON 376,433,229 (approximately £70m at the time) plus interest to that date of RON 424,159,150 (approximately £80m at the time), plus compound interest until satisfaction of the award.
5. On 26 May 2014, the EU Commission issued an injunction ordering Romania to suspend any actions executing the Award until it had taken a final decision as to whether its payment would constitute unlawful State Aid. On 1 October 2014, the EU Commission made an initiating decision formally opening an investigation into whether settlement of the Award would constitute State Aid.
6. On 30 March 2015, the EU Commission adopted the Final Decision 2015/1470 (**the Commission Decision**), in which it concluded that payment of the Award would constitute unlawful State Aid incompatible with the internal market. Romania was forbidden from paying the Award, ordered to recover sums already paid to the Claimants, and the Claimants were held jointly liable to repay any sums received as part of the Award. In November 2015, the Claimants sought annulment of the Commission Decision before the General Court of European Union (**GCEU**).
7. In October 2014, the Claimants registered the Award with the Commercial Court in London. Romania then applied to vary or set aside that registration order. The Claimants counter applied for security.
8. In January and June 2017, the Commercial Court stayed enforcement of the Award pending the outcome in the GCEU proceedings (**the Stay Order**) and refused the Claimants' application for security (**the Security Order**), respectively. The Claimants appealed both orders to the Court of Appeal which, in July 2018, dismissed the Claimants

appeal of the Stay Order, and allowed their appeal of the Security Order (and ordered Romania to provide security of £150m into court).

9. Romania appealed the Court of Appeal decision on Security and the Claimants cross-appealed the Court of Appeal's decision on the Stay. The Security Order was stayed in the meantime.
10. The Supreme Court appeals were listed for hearing over three days beginning on 18 June 2019. In the event, the GCEU delivered its judgment (**the GCEU Judgment**) that same morning, annulling the Commission Decision. As a consequence, the Stay Order made by the Commercial Court, upon which the Security Order was dependent, ceased to apply. It was therefore unclear whether the Supreme Court retained jurisdiction to hear the appeals. The Supreme Court adjourned the hearing until 7 October 2019 and made directions to clarify the basis on which it would have jurisdiction to hear the appeals.
11. The EU Commission then confirmed that it would appeal the GCEU Judgment annulling the Commission Decision. Romania then applied for a new Stay Order pending the outcome of any appeal by the Commission to the Court of Justice of the European Union (**CJEU**). The Claimants obtained a new Security Order. The Supreme Court hearing then resumed on 7 October 2019 before Lady Hale, and Lords Reed, Hodge, Lloyd-Jones, and Sales. Judgment was reserved following the hearing.

THE STAY APPEAL

12. The Claimants advanced five grounds of appeal in relation to the stay. Four of these arose from their initial cross-appeal to the Supreme Court. The fifth was a new ground arising since the GCEU Judgment.

The New Ground

13. The Claimants' new ground of appeal was that the effect of the GCEU's judgment annulling the Commission Decision is such that the duty of sincere co-operation¹ can no longer require the UK Courts to stay enforcement of the Award.
14. The GCEU judgment, in summary, concluded that the EU Commission had no competence to declare satisfaction of the Award to be unlawful State Aid because the events giving rise to the Award all took place prior to Romania's accession to the EU, at which point in time EU laws on State Aid did not apply to Romania.
15. Romania and the EU Commission took the position that, because the GCEU's judgment had only annulled the Commission Decision, the legal position reverted to what had been the case immediately prior to that Decision being made, i.e. Romania was still subject to the interim injunction preventing it from paying the award, and the initiating decision to open an investigation was reinstated.

¹ Article 4(3) Treaty on European Union.

16. The Claimants new ground of appeal relied on the rationale of the GCEU judgment, arguing that if the Commission lacked competence to decide that settling the Award would constitute unlawful State Aid, then it followed that the Commission also lacked competence to issue an injunction or initiate an investigation on that basis.
17. The Supreme Court dismissed the Claimants' new ground of appeal, holding that the existence of a pending appeal to the CJEU, with real prospects of success, was sufficient to trigger the UK's duty of sincere co-operation requiring the grant of a stay so as not to undermine the Commission Decision should it be upheld on appeal.

Grounds 1 & 2

18. Grounds 1 & 2 concerned whether the UK had the power to stay enforcement of an ICSID Award. The Claimants' argued, firstly, that the UK Courts had no power under the ICSID Convention to order a stay and, secondly, that the stay was incompatible with the ICSID Convention and served no useful purpose. The Supreme Court considered these grounds together.
19. The Supreme Court agreed with the Court of Appeal that the UK courts had jurisdiction to stay enforcement of an ICSID Award in the limited circumstances which it described but held that the Court of Appeal had exceeded those limits. The Supreme Court noted that, if the GCEU (or the CJEU on appeal) had upheld the Commission Decision then the stay would have lasted indefinitely, which would cause the UK to be in breach of its duties under the ICSID Convention to recognise and enforce the Award. In substance, the Court of Appeal made use of powers to stay execution granted by domestic law in order to thwart enforcement of an ICSID Award which had become enforceable under the ICSID Convention.
20. The Supreme Court therefore upheld the Claimants' first two grounds of appeal.

Grounds 3 & 4

21. Grounds 3 and 4 concerned whether the European Communities Act 1972 required the United Kingdom to breach its pre-accession obligations under the ICSID Convention. The Claimants' argued that the European Communities Act 1972, which brought the (then) European Treaties into UK Law, brought with them an article (now Article 351) which clarified that accession to the EU did not affect pre-accession treaties.
22. Ground 3 argued that s.2 of the 1972 Act did not require the UK to breach its obligations under the ICSID Convention. The Supreme Court agreed that, as a matter of the UK's constitution and the doctrine of Parliamentary sovereignty, EU law only has an effect within the UK to the extent that it has been given such effect by s.2 of the 1972 Act. Thus, it is for the UK Courts to decide on the scope and effect of s.2 where there is a conflict between the UK constitution and EU law.

23. However, the Supreme Court distinguished the present case from those on which the Claimants relied² and noted that the 1966 Act ratifying the ICSID Convention was not an act of fundamental constitutional importance. As a result, the effect on pre-accession international treaties such as ICSID of the UK's accession to the EU must be derived from s.2 of the 1972 Act and EU law itself. Consequently, Ground 3 collapsed into Ground 4, and one must look to the EU Treaties and their effect on pre-accession treaties to determine whether the 1972 Act requires the UK to breach its ICSID obligations.
24. Ground 4 concerned Article 351 on the Treaty on the Functioning of the European Union. Article 351 provides that the rights and obligations of a Member State of the EU arising from international agreements concluded before those Member States acceded to the EU shall not be affected by the provisions of the EU Treaties. It goes on to say that insofar as a pre-accession treaty affected the rights and obligations of two Member States, and that treaty was incompatible with EU Law, those member states are obliged to eliminate those incompatibilities. In short, it distinguishes between pre-accession treaties between Member States and non-Member States, and those pre-accession treaties which only impose obligations as between Member States.
25. The UK ratified the ICSID Convention in 1966, prior to its accession to the EU, and so Article 351 was potentially engaged to disapply the EU Treaties from the UK's observance of the ICSID Convention.
26. The Supreme Court applied the cases of *Levy*³ and *Evans Medical*⁴ in concluding that it was for national courts to determine which obligations were imposed by a pre-accession treaty and the extent to which those obligations thwarted the application of EU law. The Supreme Court rejected Romania's submission that where the particular dispute before the national court involves only Member States Article 351 did not engage. In both *Levy* and *Evans Medical* what mattered was that the relevant obligations under the pre-accession treaties were owed to non-Member States.
27. The Supreme Court considered the narrow question of whether the obligation in the ICSID Convention that the UK enforce this award was owed to non-Member States. Romania submitted that Sweden was the only State with a direct interest in the enforcement of the Award (the Micula brothers being Swedish citizens). The Supreme Court concluded, however, that the obligation on ICSID signatories is owed to all contracting states as ICSID is a scheme of mutual trust and confidence which depends on the compliance of each contracting state in order to operate successfully. Failure by one state to enforce an ICSID Award would have consequences for all other contracting states, for instance by encouraging states to withdraw their commercial assets from compliant states in preference to the non-compliant state.

² *R (Buckinghamshire County Council) v Secretary of State for Transport ("HS2")* [2014] UKSC 3; [2014] 1 WLR 324, para 79; *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591, paras 80, 90; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, paras 60, 61.

³ Case C-158/91

⁴ Case C-324/93

28. Accordingly, the Supreme Court concluded that Article 351 was engaged such that the EU Treaties and, crucially, the duty imposed by them of sincere co-operation between Member States and the EU institutions did not affect the UK's obligations arising under the ICSID Convention to enforce ICSID Awards.

OUTCOME

29. The Supreme Court concluded that the duty of sincere co-operation is not applicable to this case and that there was no impediment to the stay being lifted, which was unlawful in international law and unjustified and unlawful in domestic law.
30. Having upheld the Claimants' cross-appeals and reached the conclusion that the Stay Order was unlawful it was not necessary for the Supreme Court to consider Romania's appeal against the Security Order, which was only necessary in the case of a Stay Order being maintained.

KEY POINTS

31. The case confirms that the UK is a jurisdiction in which awards made against Member States of the EU by ICSID Tribunals can be enforced as if they were final judgments of the UK's own courts.
32. While it is presently unclear to what extent the UK will be bound by any duties to the institutions of the EU or its Member States after the Brexit transition period ends on 31 December 2020, this case will be of interest to those who have made capital investments in EU Member States pursuant to state operated investment schemes. It confirms that the UK is a jurisdiction which will enforce ICSID Awards should the worst happen and those investors are forced to go to ICSID Arbitration.

Edward Hazzan
19 February 2020