

Neutral Citation Number: [2018] EWCA Civ 1801

Case No: A3/2017/1853, 1855, 1856 & 1903

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE BLAIR
[2017] EWHC 1430 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2018

Before :

LADY JUSTICE ARDEN
LORD JUSTICE HAMBLEN
and
LORD JUSTICE LEGGATT

- -

Between :

(1) VIOREL MICULA **(2) IOAN MICULA** **(3) S.C. EUROPEAN FOOD S.A.** **(4) S.C. STARMILL S.R.L.** **(5) S.C. MULTIPACK S.R.L.**	**Claimants / Appellants**
- and -	
ROMANIA	**Defendant / Respondent**
- and -	
EUROPEAN COMMISSION	**Intervener**

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- -

Sir Alan Dashwood QC, Patrick Green QC & Jonathan Worboys (instructed by **Shearman & Sterling (London) LLP**) for the **First Appellant**
Marie Demetriou QC & Hugo Leith (instructed by **White & Case LLP**) for the **Second to Fifth Appellants**
Robert O'Donoghue QC & Emily MacKenzie (instructed by **Thrings LLP**) for the **Respondent**
Nicholas Khan QC for the European Commission (instructed by **Commission Legal Service**)

Hearing dates : 1-3 May 2018

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Approved Judgment

LADY JUSTICE ARDEN

1. Save where indicated below in Part F of this judgment, this is the judgment of the Court to which each member has contributed.

A. OVERVIEW OF THESE APPEALS

2. These appeals concern the enforcement of an arbitration award given in accordance with the procedure laid down in the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention"), which entered into force on 14 October 1966. There are over 160 states which have signed it of which over 150 have ratified it. The UK ratified it on 19 December 1966. A particular feature of the ICSID Convention regime is that it protects awards from review by national courts at the enforcement stage by making them as enforceable as final judgments: there is thus, for example, no public policy exception as is permitted by the New York Convention and as would have applied in Romania if an award is given to which that Convention applies. Thus Article 54(1) of the ICSID Convention provides:

> Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

3. The UK incorporated the ICSID Convention into domestic law by the Arbitration (International Investment Disputes Act) 1966 ("the 1966 Act"). Section 2 of the 1966 Act provides:

> **2. Effect of registration**
> (1) Subject to the provisions of this Act, an award registered under section 1 above shall, as respects the pecuniary obligations which it imposes, be of the same force and effect for the purposes of execution as if it had been a judgment of the High Court given when the award was rendered pursuant to the Convention and entered on the date of registration under this Act, and, so far as relates to such pecuniary obligations—
> (a) proceedings may be taken on the award,
> (b) the sum for which the award is registered shall carry interest,
> (c) the High Court shall have the same control over the execution of the award,
> as if the award had been such a judgment of the High Court.
> (2) Rules of court under section 84 of the Supreme Court Act 1981] may contain provisions requiring the court on proof of the prescribed matters to stay execution of any award registered under this Act so as to take account

of cases where enforcement of the award has been stayed (whether provisionally or otherwise) pursuant to the Convention, and may provide for the provisional stay of execution of the award where an application is made pursuant to the Convention which, if granted, might result in a stay of enforcement of the award.

4. In this case, the appellants obtained an award (Case No. ARB/05/20) against Romania on 11 December 2013 ("the Award"). However, after the award became final, the EU Commission made a decision that enforcement would constitute a new State aid under Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU") and was prohibited. The Award had already been registered in the UK. The principal issue below was, therefore, whether enforcement should be stayed pending the appellants' appeal to the General Court of the EU ("the GCEU"). In a nutshell, by his Orders dated 23 January 2017 and 16 June 2017 respectively, Blair J (to whom we refer below as "the judge") stayed enforcement and dismissed an application for a sum to be paid into court as a condition of the grant of the stay. The appeal concerns both the grant of the stay ("the Stay Appeal") and the refusal to order security ("the Security Appeal").

B. EVENTS LEADING TO THE AWARD

5. The ICSID Convention entered into force in Romania in 1975.

6. In 1993 Romania applied for membership of what was then the European Community ("EC"). In 1995 the Europe Agreement between the EC and Romania entered into force, which *inter alia* required Romania eventually to introduce State aid rules similar to the EC rules on State aid.

7. In 1997 to 1998, the European Commission ("the Commission") encouraged Romania to pursue privatisation and to secure foreign investment. In 1999, Romania adopted an investment incentive scheme in the form of Emergency Government Ordinance No. 24/1998 ("EGO 24").

8. At the beginning of 2000, in preparation for eventual accession to the European Union ("EU"), Romanian Law no. 143/1999 on State aid entered into force. During the early 2000s, in reliance on the investment incentives provided for by the EGO 24 scheme, the appellants invested in a large, highly integrated food production operation as part of a 10-year business plan.

9. In 2002, Romania and Sweden (which was already an EU member state) signed the Sweden-Romania Bilateral Investment Treaty ("the BIT"). This came into force in 2003. The BIT provided reciprocal protections for investments, and consent to investor-state dispute resolution under the ICSID Convention.

10. In 2004, Romania repealed all but one of the tax incentives provided under EGO 24, effective from 22 February 2005, on the grounds that these were unlawful State aid in breach of the European Agreement.

C. ICSID ARBITRATION, AWARD AND COMMISSION'S DECISION

11. On 28 July 2005, the appellants filed a Request for Arbitration with ICSID under the BIT. The Commission participated as *amicus* in the arbitration, making submissions on EU law. Both Romania and the Commission argued that any payment of compensation arising out of the Award would constitute illegal State aid under EU law and render the Award unenforceable in the EU.

12. On 1 January 2007, Romania became a member state of the EU.

13. On 11 December 2013, the ICSID Tribunal issued the Award, finding in the appellants' favour. It declared that Romania had violated the BIT by failing to ensure fair and equitable treatment of the appellants' investments. It further:

    i. ordered Romania to pay RON (Romanian Leu) 376,433,229 in damages, together with interest of RON 424,159,150 and further interest accruing until Romania satisfies the Award in full. This sum was the equivalent of the assistance which it would have received under the terms of EGO 24.

    ii. found that Romania had violated the appellants' legitimate expectations and had failed to act transparently;

    iii. did not deal with the issue of enforceability under the EU State aid rules, on the basis that it was not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered, especially but not exclusively when it comes to enforcement matters.

14. On 9 April 2014 in accordance with ICSID procedures Romania filed an application for the annulment of the Award to the ICSID *ad hoc* Committee and requested a stay of enforcement of the Award, which was granted provisionally.

15. The Commission's position was that implementation of the Award would constitute new State aid. On 26 May 2014, the Commission issued a suspension injunction to restrain Romania from taking any action to execute or implement the Award until it had taken a final decision on the compatibility of State aid (the "Injunction Decision").

16. On 7 August 2014, the ICSID *ad hoc* Committee agreed to a continuation of the stay of enforcement of the Award, provided that Romania filed an assurance that it would pay the Award in full and subject to no conditions whatsoever if the annulment application was dismissed. Romania did not give this assurance, and the stay was revoked. On 2 October 2014 the first appellant applied to have the Award registered in the High Court of England and Wales. On 17 October 2014, the Award was registered in the High Court by Order of Burton J (the "Registration Order") pursuant to the provisions of the 1966 Act.

17. On 30 March 2015, the Commission adopted Final Decision 2015/1470 ("the Commission's Decision") in which it:

    i. declared that payment of the Award by Romania constituted new State aid within the meaning of Article 107(1) TFEU;

ii. prohibited Romania from making any payment under the Award to the appellants;

iii. demanded that Romania recover any sums already paid out under the Award;

iv. provided that the appellants together with named entities directly or indirectly owned by the first and second appellants were jointly liable to repay any sums received by any one of them as part-payment of the Award.

18. On 28 July 2015, Romania filed its application in the Commercial Court of England and Wales to set aside, vary, or alternatively stay the Registration Order of 17 October 2017. By consent, the second to fifth appellants joined the proceedings. Shortly afterwards, the Commission decided to intervene.

19. On 6 November 2015, the third to fifth appellants commenced proceedings before the GCEU seeking annulment of the Commission's Decision. The other appellants commenced similar proceedings shortly afterwards.

20. On 26 February 2016, the ICSID *ad hoc* Committee rejected Romania's annulment application. The value of the Award in sterling is said to be some £173m (with interest accruing).

21. On 29 September 2016, the appellants filed a cross-application for security for damages in these proceedings in the event of the court acceding to Romania's application.

22. For context, there are ongoing proceedings in other jurisdictions in addition to the annulment action before the CJEU.

23. There are ongoing enforcement proceedings by the appellants in the United States, France, Belgium, Luxembourg and Sweden, though none has so far yielded any recovery.

24. Further ICSID proceedings were begun on 24 November 2014 by the appellants. These proceedings are not relevant for present purposes.

25. Romania's application in The Commercial Court was heard on 1-3 November 2016. In a judgment dated 20 January 2017 the judge refused the application to set aside the Registration Order, but granted a stay of enforcement pending determination of the proceedings in the GCEU seeking annulment of the Commission's Decision. Following a further hearing on 24 May 2017, in a judgment dated 15 June 2017 the judge refused an application for security to be ordered as a condition of granting the stay. We explain the judge's reasoning under the various grounds of appeal as we come to them in this judgment.

D. STAY APPEAL ISSUES

26. We have divided the issues which the parties have agreed to be the issues arising on the Stay Appeal into two tranches. The first deals with the first ground of appeal (which is advanced by all appellants), namely:

1) Whether the judge applied the *res judicata* principle of EU law, the *Kapferer* principle (as defined in [37] below), effectively or at all ("Ground 1").

27. The second deals with the second and third grounds of the appeal namely:

2) Whether the 1966 Act (as implementing the UK's international obligations under the ISCID Convention) obliges the English court to enforce the Award ("Ground 2").

3) Whether, in the event that the 1966 Act obliges the English court to enforce the Award, the court's duties under EU law or those under the 1966 Act prevail ("Ground 3").

E. GROUND 1 – *RES JUDICATA*/THE KAPFERER PRINCIPLE

28. The issue raised by Ground 1 may be summarised as follows:

> **Whether the judge erred in failing to have appropriate regard to the fact that the award was *res judicata* and, in accordance with the *Kapferer* principle, was to be given effect even if doing so would be inconsistent with EU law rules or with a determination of the Commission or the CJEU.**

29. This was a ground of appeal advanced by all appellants, and was the sole ground of appeal advanced by the second to fifth appellants.

The appellants' case

30. Central to the appellants' case is the proper scope and application of the so called *Kapferer* principle. This is a convenient short-hand description of the principle to be derived from the decision of the CJEU in Case C-234/04 *Kapferer.*

31. In *Kapferer*, K, a consumer resident in Austria, received from a German company Schlank and Schick ("S&S") a personally addressed letter giving the impression that she had won a cash prize. When she did not receive the prize, she instituted proceedings in the Austrian court. S & S argued, among other things, that the Austrian court lacked jurisdiction as the claim asserted was not contractual in nature, as is required by Articles 15 and 16 of Regulation 44/2001.

32. At first instance, the Austrian court dismissed the jurisdictional defence but rejected the claim on its merits. K appealed, but S & S did not appeal the first instance decision on the issue of jurisdiction. The appeal court doubted whether the first instance court had jurisdiction to try the case. However, given that its decision on this issue had not been challenged, it considered whether it was obliged under Article 10 EC to reopen and set aside that final decision if it transpired to be contrary to Community law. The appeal court referred this question to the CJEU.

33. The CJEU described the question being asked in the following terms:

> 19. By Question 1(a), the referring court asks essentially whether, and, where relevant, in what conditions, the principle of co-operation arising from Article 10 EC imposes on a national court an obligation to review and set aside a final judicial decision if that decision should infringe Community law.

34. It then drew attention to the importance of the principle of *res judicata* to national law and Community law:

> 20. In that regard, attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question (Case C-224/01) Köbler [2003] ECR I-10239 paragraph 38).

35. In light of the importance of that principle the CJEU stated that:

> 21. Therefore, Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of Community law by the decision at issue (see, to that effect, Case C-126/97 Eco Swiss [1999] ECR I-3055; paragraphs 46 and 47).

36. Its formal ruling was:

> The principle of cooperation under Article 10 EC does not require a national court to disapply its internal rules of procedure in order to review and set aside a final judicial decision if that decision should be contrary to Community law.

37. The principle to be derived from this decision – the *Kapferer* principle – is said by the appellants to be that domestic law principles of *res judicata* are to be applied where any conflict arises between a final domestic court decision, or arbitral award recognised domestically, and a rule of EU law or determination of the Commission or the CJEU.

38. An example of the principle being applied by the UK courts is provided by the decision of the Divisional Court in *Interfact v Liverpool City Council* [2011] QB 744.

39. In that case the defendants had been convicted of offences under an Act of Parliament that was subsequently discovered to be unenforceable because the Government had failed to comply with notification requirements under an applicable EU Directive.

40. The Divisional Court decided that, in accordance with the *Kapferer* case, a national court was not required to disapply its domestic rules conferring finality on a decision.

41. The Divisional Court summarised the principle established by the *Kapferer* case in the following terms at [44]:

> It establishes as a matter of general principle that EU law does not require a national court to reopen a final judicial decision, even if failure to do so would make it impossible to remedy an infringement of a provision of EU law.

42. The Divisional Court recognised that this general principle was subject to the requirements of equivalence and effectiveness, explaining as follows at [52]:

> 52. In the decentralised system of the EU legal order, rights of individuals under EU law are given effect principally through national courts. In the absence of EU rules on the subject, EU law leaves to the domestic legal system of each Member State the designation of the courts having jurisdiction and the rules governing proceedings intended to secure rights conferred by EU law. However, national law is not given an entirely free hand in such matters. The applicable national rules must comply with two conditions. First, they must not be less favourable than those governing similar domestic actions (the principle of equivalence). (Joined Cases 66/79, 127/79 and 128/79 *Amministrazione delle Finanze v. Salumi* [1980] ECR1237 at paragraphs 17-21) Secondly, they must not render the exercise of rights conferred by Community law impossible or excessively difficult (Case C-199/82 *Amministrazione delle Finanze v. San Giorgio* [1983] ECR 3595).

43. It held that neither principle was engaged in that case. Although the Divisional Court accepted that there was no public record from which the failure of the Government to notify the legislation could be known, it nevertheless held that the point was open to be taken. The principle of effectiveness did not therefore require it to reopen the convictions, explaining at [65] that the domestic rules on appeals did not "have the effect of making it virtually impossible or excessively difficult for an individual to rely on the right conferred by EU law".

44. Other examples of the application of the *Kapferer* principle relied upon by the appellants include Case C-69/14 *Târşia* (which concerned a subsequent

conflicting ruling of the CJEU); Case C-126/97 *Eco Swiss* and Case C-40/08 *Asturcom* (in which the principle was applied to arbitration awards), and Case C-507/08 *Commission v Slovak Republic* (in which the principle was applied in the State aid context).

45. In the *Slovak Republic* case, the Slovak Republic granted aid to Frucona in the form of a write off of tax liability as part of an arrangement with its creditors. This arrangement was confirmed by the regional court in a judgment which became *res judicata*. This judgment did not address the question whether the arrangement was compatible with the EU prohibition on State aid.

46. The Commission subsequently decided that this arrangement constituted State aid and was incompatible with the common market, and that the Slovak Republic was required to take all necessary steps to recover the unlawfully granted aid.

47. The Slovak tax office attempted to comply with the Commission's Decision by requesting that Frucona repay the aid with interest but Frucona did not comply. An application by the tax office to recover the sum was dismissed by the district court, as was their appeal against that decision in the regional court, on the basis that it was not possible to review the judgment on the arrangement with creditors as this had acquired the force of *res judicata*. The Commission brought infringement proceedings against the Slovak Republic for failing in its obligations to implement the Commission's Decision and to recover the aid.

48. The CJEU described the first issue as being whether the finality of a judgment can prevent recovery of what the Commission had determined to be State aid. The CJEU distinguished the earlier case of Case C-119/05 *Lucchini* on the grounds that in this case the judgment preceded the Commission's Decision. It drew attention to the importance of the principle of *res judicata*, making reference to *Kapferer*. It then stated:

> 60. Accordingly, European Union law does not in all circumstances require a national court to disapply domestic rules of procedure conferring the force of *res judicata* on a judgment, even if to do so would make it possible to remedy an infringement of European law by the judgment in question.

49. The CJEU went on to hold that the *res judicata* status of the decision did not mean that there were no available means for recovery of the aid. It held the Slovak Republic had failed to exhaust all options for recovering the aid under internal domestic law and had therefore failed to fulfil its obligations under EU law.

50. The appellants contend that the facts of this case fall squarely within the *Kapferer* principle. In particular:

    i. The domestic rules on finality and *res judicata* are set out in the 1966 Act. As the judge correctly held, pursuant to sections 1 and 2 of that Act, the Award is registered as, and given the same force and effect as, a final

judgment of the High Court, effective from the date it was issued: 11 December 2013.

ii. The *Kapferer* principle means that these rules conferring finality on the Award and the status of *res judicata* apply regardless of any incompatibility that may arise with EU law or with the subsequent Commission's Decision.

iii. There is no reason on the facts of this case not to apply the *Kapferer* principle. In particular, the assertion of EU rights was not rendered "virtually impossible or excessively difficult". Romania and the Commission had the opportunity to make submissions and actually did so, addressing the issue of State aid at length before the ICSID tribunal at first instance and on appeal before the *ad hoc* tribunal.

51. The judge should accordingly have applied the *Kapferer* principle and allowed enforcement of the Award to proceed.

The judge's decision

52. The judge emphasised that the context in which the issue in the present case arises concerns State aid. In a section headed "the relevant principles of EU law as regards State aid applicable in National courts" he summarised those principles. He noted that they were largely accepted by the appellants and no issue has been taken with his summary on appeal. It conveniently sets out the most relevant provisions of the TFEU and TEU (the Treaty on European Union), together with citations from a number of leading cases, and relevant principles to be derived from them.

> 63……Article 107(1) TFEU provides that "State aid" is, in principle, incompatible with the internal market. The commission's role is to examine the compatibility of aid measures with the internal market, based on the criteria laid down in article 107(2)(3) TFEU. This compatibility assessment is the exclusive responsibility of the commission, subject to review by the EU courts. National courts have a complementary role, and must not disregard the limits of their own jurisdiction to prejudice the effectiveness of these articles—see the recent decision of the Court of Justice in Dimosia Epicheirisi Ilektrismou AE (DEI) v Alouminion tis Ellados VEAE (Case C-590/14) EU:C:2016:797.
>
> 64. This is based on the duty of sincere co-operation contained in article 4(3) TEU, which provides:
>
> > "Pursuant to the principle of sincere co-operation, the Union and the member states shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
> >
> > The member states shall take any appropriate measure, general or particular, to ensure fulfilment of the

> obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The member states shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

65. As appears from article 4(3) TEU, the ambit of the principle of sincere co-operation is broad; it implies both positive and negative duties and may be engaged irrespective of to whom the relevant EU act is addressed. As the Court of Justice has held in *Masterfoods Ltd v HB Ice Cream Ltd* (Case C-344/98) [2001] All ER (EC) 130*;* [2000] ECR I-11369, paras 45–60, in the case of antitrust law, and in *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH (Ryanair Ltd intervening)* (Case C-284/12) [2014] 2 CMLR 20, para 41, in the case of State aid law, that duty is:

> "… the application of the European Union rules on State aid is based on an obligation of sincere co-operation between the national courts, on the one hand, and the commission and the courts of the European Union, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty. In the context of that co-operation, national courts must take all the necessary measures, whether general or specific, to ensure fulfilment of the obligations under European Union law and refrain from those which may jeopardise the attainment of the objectives of the Treaty, as follows from article 4(3) TEU . Therefore, national courts must, in particular, refrain from taking decisions which conflict with a decision of the commission." (See the Deutsche Lufthansa AG case, para 41).

66. This was reiterated by the Court of Justice in the *Dimosia Epicheirisi Ilektrismou* AE (DEI) case EU:C:2016:797, para 105:

> "It must be borne in mind that the application of the EU State aid rules is based on a duty of sincere co-operation between the national courts, on the one hand, and the commission and the European Union courts, on the other, in the context of which each acts on the basis of the role assigned to it by the TFEU. In the context of that co-operation, national courts must take all the measures, whether general or specific, necessary to ensure fulfilment of the obligations under EU law and must refrain from those that may jeopardise the attainment of the objectives of the

> Treaty, as follows from article 4(3) TEU . Accordingly, national courts must, in particular, refrain from taking decisions that conflict with a decision of the commission (judgment of 21 November 2013, Deutsche Lufthansa (Case C-284/12) [2014] 2 CMLR 20, para 41)."

67. Article 288 TFEU provides that a decision "shall be binding in its entirety" and article 278 TFEU provides that the bringing of actions for annulment before the General Court, as the claimants have, does not suspend the obligations flowing from an act of the EU.

68. The principle as regards State aid law as stated by the Court of Justice is, therefore, that national courts must refrain from taking decisions which conflict with a decision of the commission.

69.In reliance on these and other authorities, the general principle has been stated in the same terms by the Court of Appeal in *Emerald Supplies Ltd v British Airways plc (No 1)* [2016] Bus LR 145, para 70:

> "The duty under article 4(3)EU is binding on all authorities of the member states, including the courts: see Masterfoods Ltd v HB Ice Cream Ltd (Case C-344/98) [2001] All ER (EC) 130; [2000] ECR I-11369, para 49 ("*Masterfoods*"). The general principle of legal certainty, which underpins the duty of sincere co-operation, requires member states to avoid making decisions that could conflict with a decision contemplated by the commission: see Delimitis v Henniger Brau AG (Case C-234/89) [1991] ECR I-935, para 47 ("*Delimitis*"); Masterfoods, para 51 and National Grid Electricity Transmission v ABB Ltd [2009] EWHC 1326 at [24]. It is only where, in the words of the commission in Delimitis, at para 50, there is "scarcely any risk" of a conflict between decisions of domestic and EU institutions, that the national authorities should proceed. Where the EU and domestic authorities have overlapping jurisdictions i.e. considering the same or similar matters, the risk of conflicting decisions will be high."

70. This is the jurisprudential basis for the case made by the commission and Romania…

71.….They submit that the duty on national courts to refrain from taking steps which conflict with a decision of the commission may require a national court to stay proceedings

> pending the resolution of a challenge to that decision in the European court. This is so as to avoid the risk of the national court coming to a different conclusion.
>
> 72. As noted earlier, in November 2015 the claimants commenced proceedings before the General Court seeking annulment of the Final Decision, and a ruling by the General Court is awaited.
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> 73. The position in such a case was analysed by the English court in *Iberian UK Ltd v BPB Industries plc [1997] ICR 164*, 186 (a competition case), in which it was said:
>
> > "In my view these cases reinforce and support the following propositions. (1) The courts here should take all reasonable steps to avoid or reduce the risk of arriving at a conclusion which is at variance with a decision of, or on appeal from, the commission in relation to competition law. (2) Except in the clearest cases of breach or non-breach, it will be a proper exercise of discretion to stay proceedings here to await the outcome of the Community proceedings."
>
> 74. The same approach applies in relation to state aid law: see *Kelyn Bacon, European Union Law of State Aid*, 2nd ed (2013), para 20.49.
>
> 75. This is subject to a materiality threshold: in other words, the risk of a potential conflict with a decision of the European court must be a real one: see, eg, *Crehan v Inntrepreneur Pub Co (CPC) (Office of Fair Trading intervening)* [2007] 1 AC 333. This does not apply where there is "scarcely any risk" of a conflict between decisions of domestic and EU institutions: see the passage cited from the *Emerald Supplies Ltd case* [2016] Bus LR 145, para 70 above.
>
> 76. In summary and so far as relevant, as Romania and the commission submit, in cases concerning state aid: (i) a national court must refrain from taking decisions which conflict with a decision of the European Commission; and (ii) where proceedings are on foot in the European court (ie the General Court or Court of Justice) to annul such a decision, a national court should stay domestic proceedings where there is a material risk of conflict with the decision of the European court pending its decision.

53. In the light of these principles the judge decided that a stay should be granted notwithstanding his conclusion that the Award became *res judicata* on 11 December 2013 and so pre-dated the Commission's Decision.

54. The judge's reasoning is set out at [108]-[112] of the judgment:

> 108. It is true that the term "*res judicata*" may have several different meanings. But in the court's view the claimants are correct to submit that, as a matter of English law, the Award became *res judicata* in the sense of acquiring finality on 11 December 2013, not on 26 February 2016, and so pre-dated both the commission's decisions.
>
> 109. The question is what follows from this conclusion. If the court proceeds to enforce the Award against the assets of Romania as if it were a judgment of the court, as the claimants invite it to do, it would be acting in direct contradiction with the Final Decision the effect of which is to prohibit payment by Romania. In this regard, the case is different from *European Commission v Slovak Republic* [2010] I-13489, where the proceedings in the national court had closed, and the issue was as to recovery: see para 10. In the present case, enforcement has not yet begun in the English court, and court-sanctioned steps to enforce the Award would appear to engender a direct conflict between the court and the commission.
>
> 110. Further, account has to be taken of the claimants' annulment proceedings in respect of the Final Decision. The claimants' position is that the *res judicata* principle is not addressed in the Final Decision (this is not in dispute), and is not in issue in the claimants' proceedings in the General Court to annul that decision. In that regard, the claimants have two points, first that *res judicata* is not a ground that they advance for annulment of the Final Decision, and second that it does not arise for consideration before the General Court.
>
> 111. The first point is not in dispute. However, the second point is in dispute. In its defence in the annulment proceedings, the commission relies on the *Klausner Holz Niedersachsen v Land Nordrhein-Westfalen* case EU:C:2015:742, contending that it shows that the courts will not accept an outcome that produces a circumvention of the state aid rules by way of res judicata. Whilst the claimants do not raise *res judicata* as a ground on annulment of the Final Decision, therefore, the issue of *res judicata* in the context of the decisions of national courts is raised by the commission. In the court's view, Romania and the commission are correct to say that the meaning and scope of the *Klausner Holz Niedersachsen* case forms part of the General Court appeals, and because it forms part of the argument in these proceedings, there would be a real risk of inconsistent decisions if this court were now to decide as a matter of European law that the Award can be enforced.

> 112. On this basis, applying the principles set out above, the court considers that the final determination of the issue should be stayed pending the decision of the European court.

55. The judge accordingly gave two main reasons for concluding that a stay should be granted, namely:

    i. Enforcing the Award would conflict with the Commission's Decision.
    ii. There is an overlap between the *Kapferer* point, as raised in these proceedings, and the actions for annulment brought in the GCEU, so that these proceedings should be stayed pending the outcome of the GCEU proceedings to avoid the risk of inconsistent decisions being reached.

56. The appellants criticise the first of these reasons, pointing out that this is illogical. They stress that the whole purpose of the *Kapferer* principle is to resolve such conflicts by giving effect to the prior final decision.

57. As to the second reason, the appellants contend that the *Kapferer* point is not raised as a ground for annulment of the Commission's Decision, nor could it be. The *Kapferer* argument in these proceedings does not question the validity of the Commission's Decision. On the contrary, it assumes its validity. A stay can only be justified on grounds of overlap where the issue raised in the two sets of proceedings is identical. That is not this case.

58. It is further submitted that a stay would serve no useful purpose. If the Commission's Decision is ultimately upheld the same issue will arise. It will still be necessary to decide whether the *Kapferer* principle applies so that effect must be given to the prior recognised Award notwithstanding the upheld conflicting Commission's Decision.

The respondent's case

59. The respondent, Romania, supports the judge's decision for the reasons given by him, and in addition for the reasons set out in their respondent's notice.

60. The Commission has, with the agreement of the parties and the court, intervened in these proceedings pursuant to its rights under Article 29(2) of the Procedural Regulation to make submissions "where the coherent application of Article 107(1) or Article 108 TFEU so requires". Its role is as *amicus curiae* but the submissions it makes are largely supportive of Romania's position on this ground of appeal.

61. The main points made by Romania are:

    i. Any *res judicata* arose after the Commission's Decision.
    ii. The *Kapferer* issue is squarely before the EU Courts and so the judge was correct to grant a stay.

    iii. Alternatively, if the issue can be decided now, it must be resolved against the appellants because EU law precludes the application of the

principle of *res judicata* so as to allow enforcement in these circumstances, and in particular because to do so would circumvent the prohibition on State aid following Case C-505/14 *Klausner*.

iv. Alternatively, the *Kapferer* principle cannot be relied upon in respect of the Award as it only applies where effective judicial protection of EU law is secured and there is no such protection in this case as the arbitral tribunal had no power to make a reference for a preliminary ruling to the CJEU, nor is its decision subject to review by a court that has such a power. In this regard reliance is placed on the recent decision of the CJEU in a decision in Case C-284-/16 *Slovak Republic v Achmea ("Achmea")* (this argument was not advanced below).

v. Alternatively, there is no relevant *res judicata* in this case as the subject matter of the Commission's Decision is the implementation of the Award, a subject deliberately left undecided by the Tribunal.

(1) Whether any res judicata arose after the Commission's Decision

62. Both Romania and the Commission so contend in their written submissions, but neither developed the point orally.

63. Romania contends that there was no *res judicata* until after the rejection of the application for annulment. Reliance is placed on *Schreuer, The ICSID Convention: A Commentary* (2nd edn, 2009) ("*Schreuer*") at p1105 where it is stated:

> The exclusion of another remedy [that is, other than under the ICSID Convention review procedures] means that a party to ICSID proceedings that is dissatisfied with the Award may not turn to another forum to seek relief for the same claim. Once the ICSID tribunal has rendered its award and the review procedures under the Convention have been exhausted, the case is *res judicata*. The principle *ne bis in idem* precludes resort to any national or international remedy.

Particular reliance is placed on the underlined passage.

64. As the judge held, the basis for determining the date when the Award became *res judicata* is the 1966 Act. Section 2(1) of the 1966 Act provides that:

> … an award registered under section 1 above shall, as respects the pecuniary obligations which it imposes, be of the same force and effect for the purposes of execution as if it had been a judgment of the High Court given when the award was rendered pursuant to the Convention and entered on the date of registration under this Act, ….

65. The judge held at [107]:

> …s.2(1) of the 1966 Act provides that as respects the pecuniary obligations which it imposes, the Award is "of the same force and effect for the purposes of execution as if it had been a judgment of the High Court given when the award was rendered pursuant to the Convention and entered on the date of registration under this Act, …". A judgment or order takes effect from the day when it is given (CPR 4.40.7). Read with Art. 54 of the ICSID Convention, this shows that finality occurs at the time of the Award, because that is the time at which a final judgment of the High Court is deemed to be given for enforcement purposes, and not at the time of the resolution of annulment proceedings under the Convention.

66. We agree with the judge's reasoning. Further, under the ICSID Convention it is clear that an award becomes binding and thereby *res judicata* when it is rendered. It is rendered when certified copies of it are dispatched – see Article 49(1). Under Article 53 it is at that time that the award becomes binding. This is borne out by other passages from *Schreuer*. For example:

i. Chapter 53, para 50 (underlining added):

> *2. Timing*
>
> …Under the terms of the Convention, the obligation to comply with the award arises when the award is rendered, that is on the date on which the certified copies are dispatched (see Art. 49, paras. 10, 25–27). This means that the parties must take all steps to give effect to it promptly.

ii. Chapter 54, para 100 (underlining added):

> The obligations under Arts. 53 and 54 arise as soon as the award is rendered (see Art. 53, para. 50). Therefore, recognition and enforcement may be sought even while a request for rectification or supplementation, revision and annulment is still possible under the time limits provided by Arts. 49(2), 51(2) and 52(2). If proceedings under Art. 54(2) have been commenced, they have to be suspended in case of a subsequent stay of enforcement. But the mere initiation of procedures for the interpretation, revision or annulment of an award without a stay of enforcement should not have any suspensive effect on recognition and enforcement.

67. For all these reasons, we agree with the judge that any *res judicata* arose before the Commission's Decision.

(2) Whether the Kapferer issue is squarely before the EU Courts and so the judge was correct to grant a stay on that basis

68. In the proceedings before the GCEU, the appellants do not rely on the *Kapferer* principle as a ground for annulling the Commission's Decision.

69. As the appellants point out, the *Kapferer* principle concerns whether national courts are required to disapply their procedural rules. It does not bear on the issue of whether an act of an EU institution is invalid, which is the basis of the annulment application.

70. One of the grounds which are advanced is that damages paid under an arbitral award are not "aid" for the purposes of the State aid rules. They are just compensation.

71. In response to that ground, the Commission refers to and relies on *Klausner,* and contends that State aid rules should not be allowed to be circumvented in this way. Whilst *Klausner* is relied upon before the GCEU, it is in a different context and for a different purpose than in the present proceedings.

72. The *Kapferer* principle is not directly addressed in the parties' pleadings and its application is not a point which arises or which the GCEU will need to or will decide.

73. In these circumstances, it is difficult to see how there is a real risk of conflict between a decision of this court in relation to the application of the *Kapferer* principle and the decision of the GCEU as to the validity of the Commission's Decision. We would not therefore uphold this reason for the judge's decision (his second reason). It is to be noted that this is not an issue which has been addressed by the Commission itself.

(3) Whether the Kapferer issue can be decided now, and, if so, whether it must be resolved against the appellants because EU law precludes the application of the principle of res judicata so as to allow enforcement in these circumstances, and in particular because to do so would circumvent the prohibition on State aid following Case C-505/14 Klausner

74. We agree with the appellants that the issue of whether the *Kapferer* principle applies is one which this Court needs to address. The conflict between the prior award and the Commission's Decision is what makes that principle relevant. Conflict cannot be a good reason for declining to address the principle; it is the premise upon which it arises. As the appellants point out, assuming that the Commission's Decision is ultimately upheld, the consequence of not addressing the issue now will simply be that it will have to be addressed later, possibly in many years time.

75. The *Kapferer* principle was considered in the *Klausner* case and, Romania contends, its application thereby curtailed in appropriate State aid cases.

76. The outline facts in *Klausner* were that in 2007 the Klausner group, of which the claimant was a part, and the defendant concluded an agreement to supply wood. Following a series of disputes between the parties, the enforceability of the contract was the subject of a claim before the German courts in 2012. Both a first instance judgment in the Munster Regional Court and an appeal before the

Higher Regional Court, Hamm, ruled that the agreement remained in force. This decision became *res judicata* under German law.

77. The claimant then brought a further action for payments in respect of, *inter alia*, breaches of the agreement by the defendant. At this stage, the defendant raised the argument that EU law precluded the execution of the contract on the basis that it constituted state aid within the meaning of Article 107(1) TFEU, implemented in breach of Article 108(3) TFEU. The court sent the Commission a request for clarification but the Commission replied that it was unable to state its position at this stage. The court took the view that contracts did constitute State aid and referred the following question to the CJEU for a preliminary ruling:

> In civil proceedings concerning the performance of a civil-law contract granting aid, does EU law…and the principle of effectiveness, require that a final declaratory judgment under civil law which has been delivered in the same case and which confirms that the civil-law contract remains in force, without any consideration of the law on aid, be disregarded if under national law the performance of the contract cannot otherwise be prevented?

78. In its judgment the CJEU observed as follows at [30]:

> 30. While accepting that the principle of *res judicata*, as construed in national law, has certain objective, subjective and temporal limitations and certain exceptions, the referring court notes that that law precludes not only re-examination, in a second action, of the pleas already expressly settled definitively, but also the raising of questions which could have been raised in an earlier action and which were not so raised.

79. On the basis that that view of German law was correct, the CJEU went on to consider its application in the instant case. It noted the importance of the principle of *res judicata* to the EU legal order and to national legal systems:

> 38. ….attention should be drawn to the importance, both in the legal order of the European Union and in national legal systems, of the principle of *res judicata*. In order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that regard can no longer be called into question (see judgments in *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraph 22, and *Târșia*, C-69/14, EU:C:2015:662, paragraph 28).

80. It then stated that this meant that EU law "does not always require" the national rules of *res judicata* to be disapplied so as to remedy a breach of EU law and in this connection referred to the *Kapferer* case.

> 39. Therefore, EU law does not always require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a breach of EU law by the decision at issue (see judgments in *Kapferer*, C-234/04, EU:C:2006:178, paragraph 22, *Fallimento Olimpiclub*, C-2/08, C:2009:506, paragraph 23, *Commission v Slovak Republic*, C-507/08, EU:C:2010:802, paragraph 60, Impresa *Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 59, and *Târșia*, C-69/14, EU:C:2015:662, paragraph 29).

81. The CJEU pointed out at [40] that the application of national rules of *res judicata* are subject to the principles of equivalence and effectiveness.

82. In regard to the application of the principle of effectiveness, the CJEU stated as follows:

> 42. In that regard, it must be noted that an interpretation of national law, such as that described in paragraph 30 of the present judgment, can have the consequence, in particular, that effects are attributed to the decision of a national court, in the present case the Oberlandesgericht Hamm (Higher Regional Court, Hamm), which frustrate the application of EU law, in that they make it impossible for the national courts to satisfy their obligation to ensure compliance with the third sentence of Article 108(3) TFEU.
>
> 43. It follows therefrom that both the State authorities and the recipients of State aid would be able to circumvent the prohibition laid down in the third sentence of Article 108(3) TFEU by obtaining, without relying on EU law on State aid, a declaratory judgment whose effect would enable them, definitively, to continue to implement the aid in question over a number of years. Thus, in a case such as that at issue in the main proceedings, a breach of EU law would recur in respect of each new supply of wood, without it being possible to remedy it.
>
> 44. Furthermore, such an interpretation of national law is likely to deprive of any useful effect the exclusive power of the Commission, referred to in paragraph 21 of the present judgment, to assess, subject to review by the EU Courts, the compatibility of aid measures with the internal market. If the Commission, to which the Federal Republic of Germany has in the meantime notified the aid measure constituted by the contracts at issue, should conclude that it is incompatible with the internal market and order its recovery, execution of

> its decision must fail if a decision of the national court could be raised against it declaring the contracts forming that aid to be 'in force'.
>
> 45. In those circumstances, it must be concluded that a national rule which prevents the national court from drawing all the consequences of a breach of the third sentence of Article 108(3) TFEU because of a decision of a national court, which is *res judicata*, given in a dispute which does not have the same subject-matter and which did not concern the State aid characteristics of the contracts at issue must be regarded as being incompatible with the principle of effectiveness. A significant obstacle to the effective application of EU law and, in particular, a principle as fundamental as that of the control of State aid cannot be justified either by the principle of res judicata or by the principle of legal certainty (see, by analogy, judgments in *Fallimento Olimpiclub*, EU:C:2009:506, paragraph 31, and *Ferreira da Silva e Britto*, C-160/14, EU:C:2015:565, paragraph 59).

83. Its ruling was:

> EU law precludes, in circumstances such as those at issue in the main proceedings, the application of a rule of national law enshrining the principle of *res judicata* from preventing a national court which has held that contracts forming the subject-matter of the dispute before it constitute State aid, within the meaning of Article 107(1) TFEU, implemented in breach of the third sentence of Article 108(3) TFEU, from drawing all the consequences of that breach because of a national judicial decision which has become definitive, which court, without examining whether those contracts constitute State aid, has held that the contracts remain in force.

84. Romania contends that *Klausner* establishes that the principle of *res judicata* is subordinate to concerns about the circumvention of fundamental aspects of State aid rules and that EU law will not permit it to be used so as circumvent the prohibition on State aid.

85. The Commission's position is to similar effect. It says that the Court held that domestic rules of *res judicata* could not be relied upon to circumvent the application of State aid rules and that to give binding force to a national court judgment in such circumstances "must be regarded as being incompatible with the principle of effectiveness".

86. The appellants contend that *Klausner* provides an "outlier" exception to the *Kapferer* principle and was decided on its very specific facts. In particular, the application of the principle in that case would have allowed wholescale

circumvention of the State aid rules. That is not an issue or concern in the present case.

87. We do not consider that *Klausner* is a case which is limited to its own facts. The CJEU made a number of general statements as to when the principle of *res judicata* must yield to the effective application of EU State aid law. In particular, it stated at [45]:

> …. A significant obstacle to the effective application of EU law and, in particular, a principle as fundamental as that of the control of State aid cannot be justified either by the principle of *res judicata* or by the principle of legal certainty.

88. This reflected the language used by the court in Case C-160/14 *Ferreira da Silva e Britto*, which concerned the question of whether a State's liability for loss resulting from an infringement of EU law by a national court of last instance precluded the application of a rule that made a claim for damages against the State conditional upon the decision that caused the loss or damage having first been set aside. Setting aside the judgment was however precluded by national rules on *res judicata*, which thereby prevented a claimant from fulfilling the necessary condition precedent to claiming damages. The CJEU held at [59] that:

> ….a significant obstacle, such as that resulting from the rule of national law at issue in the main proceedings, to the effective application of EU law and, in particular, a principle as fundamental as that of State liability for infringement of EU law cannot be justified either by the principle of *res judicata* or by the principle of legal certainty.

89. We agree with the appellants that the *Kapferer* principle may still apply in State aid cases, as is illustrated by the *Slovak Republic* case. It is, however, to be noted that the *res judicata* status of the decision was not a defence to the infringement action brought against the Slovak Republic and that it is implicit in the CJEU's decision that the Slovak Republic should have overcome any problems caused by the status of the decision. If the decision had been held to be a bar to a successful infringement action it by no means follows that the same view would have been taken on the applicability of the *res judicata* principle.

90. As stated by the Court of Appeal in the *Interfact* case at [62]:

> …when addressing the principle of effectiveness, it is also necessary to consider the application of the national procedural rules to the particular facts of the case…, when weighed against the aim and importance of the Community measure in question.

91. Control of State aid is a "fundamental principle". The assessment of the compatibility of State aid is an exclusive competence of the Commission. As

the judge held, the application of EU rules on State aid engage the duty of sincere cooperation under Article 4(3) TEU.

92. As Romania submits, effectiveness is context-dependent. In particular, in the light of *Klausner*, it depends on the extent to which the effective application of the EU law of State aid will be "circumvented" or "frustrated" or significantly obstructed by the principle of *res judicata*.

93. In the present case the Commission's Decision is that "the payment of the compensation" awarded by the Tribunal "constitutes State aid within the meaning of Article 107(1) of the Treaty which is incompatible with the internal market" (Article 1).

94. It further provides that "Romania shall not pay out any incompatible aid referred to in Article 1 and shall recover any incompatible aid…which has already been paid out…in partial implementation or execution" of the Award (Article 2).

95. Under Article 7 Romania is to "ensure that no further payment of the aid referred to in Article 1 shall be effected".

96. Although the appellants are seeking annulment of the Commission's Decision, they have not sought its suspension. The Commission's Decision is valid and binding unless and until it is annulled. Indeed, the appellants accept and assert its validity for the purpose of their appeal based on the *Kapferer* principle.

97. It follows that if the court were to permit enforcement on the basis of the *Kapferer* principle it would be permitting the appellants to be paid the very aid which the Commission has declared to be unlawful. It would also be compelling Romania to infringe the Commission's Decision.

98. This would appear to be a clear example of the effective application of EU state aid law being "circumvented" or "frustrated" or significantly obstructed by the application of the principle of *res judicata.* The Commission, which has sole competence in these matters, has decided that payment of the award would constitute unlawful State aid and that no such payment should be made by Romania. Allowing enforcement would lead to such payment being made and thereby directly frustrate, obstruct and circumvent the Commission's Decision and undermine its effectiveness. The principle of *res judicata* is being relied upon to ask the court to facilitate the payment of unlawful State aid in clear breach of its duty of sincere co-operation.

99. As the judge observed, if the court does "as the claimants invite it to do, it would be acting in direct contradiction with the Commission's Decision the effect of which is to prohibit payment to Romania" and, by applying the *res judicata* principle, "court-sanctioned steps to enforce the Award would appear to engender a direct conflict between the court and the Commission".

100. In our judgment this is accordingly a case in which the *Kapferer* principle cannot be relied upon. It must yield to the need for the effective application of EU State aid law. Our decision means that, if indeed the GCEU upholds the

Commission's Decision that payment of the Award is State aid, the appellants cannot escape that decision on the basis that the Award has determined Romania's liability to them and that this constitutes *res judicata*. There may be other grounds open to them, but the *Kapferer* principle is not one on which they can rely.

101. For these reasons we would reject the first ground of appeal. In those circumstances it is not necessary to consider Romania's further arguments (4) and (5).

102. It follows that the first ground of appeal must be dismissed.

F. GROUNDS 2, 3: THE 1966 ACT, THE COURT'S EU LAW DUTIES AND ARTICLE 351

1. THE GROUNDS 2 AND 3 ISSUES

103. The parties agree that these grounds present the Court with the following questions ("the Grounds 2 and 3 Issues"):

i. In light of the issues above, did the judge err by finding at [132] that there was no conflict between: (i) the international obligations of the UK contained in the 1966 Act implementing the ICSID Convention on the one hand; and (ii) (on the judge's analysis) the Court's EU law duties in light of the Commission's Decision?

ii. Does a proper construction of section 2 of the European Communities Act 1972 ("the 1972 Act") preclude the result reached by the judge?

2. THE COURT'S DECISION ON THE GROUNDS 2 AND 3 ISSUES

(1) Overview

104. For the reasons set out below, all the members of the Court conclude that the enforcement of the Award should be stayed pending the determination by the GCEU of the proceedings challenging the Commission's Decision or further order in the meantime. Those final six words are, we consider, implicit in the judge's order and mean that, if there were to be a material and unforeseen change of circumstances, a party could apply for the stay to be lifted or varied, and the order of the Court could usefully record this (and of course any such application should be made to the Commercial Court, not this Court). However, the reasons which have led the members of the Court reaching their overall conclusion are different.

105. We are all conscious that a single judgment of the Court is an important means in this Court of achieving clarity where all the members of the Court are agreed on the outcome. On the other hand, under this Part F of the judgment there are differences of both emphasis and substance in reaching the common view as to outcome which also need to be clear. It is the experience of the Court that the format of a judgment of the Court should not be treated as inflexible and moreover that it is one of the strengths of the common law that judges express

their reasoning in different terms. In this case, to enable the reasoning of Leggatt LJ to be read as a unity, it appears below as a separate judgment, but with the agreement of both Hamblen and Leggatt LJJ, Arden LJ has summarised the effect of their reasoning as an aide-memoire for the readers of the judgments in this case, though they will of course have to read the reasoning in full. Respectfully Arden LJ, paying tribute to both judgments, agrees with Leggatt LJ on the interpretation of section 2 (1) on the 1966 Act, and that leads to differences with the reasoning of Hamblen LJ. Arden LJ agrees with the separate judgment of Leggatt LJ (set out below) in all material respects.

106. The Court's conclusions may be summarised as follows:

A. **per Arden and Leggatt LJJ**: Section 2(1) of the 1966 Act must be interpreted to give effect to the ICSID Convention in accordance with domestic principles, and, so interpreted, it does not, as the judge held, have the effect of applying EU law to the award on registration simply because the UK is a member state of the EU at that date. Nonetheless, the ICSID Convention does not prevent the national court charged with executing an award from exercising its power to stay enforcement so long as such stay is within the overall purposes of the ICSID Convention. Applying this approach, a stay on execution is justified in this case until the resolution of the GCEU proceedings or further order in the meantime for reasons which are neither dependent on those proceedings nor inconsistent with the overall purpose of the ICSID Convention.

B. per Hamblen LJ: The judge was correct to hold that there was no conflict between the international obligations of the UK contained in the 1966 Act implementing the ICSID Convention and the Court's EU law duties in light of the Commission Decision.

C. per Hamblen and Leggatt LJJ: If there is a conflict between the international obligations of the UK contained in the 1966 Act and the Court's EU law duties, the judge was right to conclude that there should be a stay on the grounds that the issue of whether Article 351 applies in this case is a matter before the GCEU and there is a clear risk of conflicting decisions.

D. per Arden LJ: Article 351 TFEU must normally be considered when determining whether a stay of a duly registered ICSID award can be granted. It falls to be considered in this case even if the judge's ruling is not appealed. Under Article 351(1) TFEU, the rights and duties under a treaty made by a member state prior to accession to the EU with a third country are in general not affected by EU law. Moreover, EU law recognises that it is for the national court, not the CJEU, to determine the extent of obligations under international law imposed on the UK by the ICSID Convention. In addition, there appears to be little overlap between the GCEU proceedings and these proceedings. However, the stay proposed by the majority (which is made

pursuant to Article 54 ICSID and section 2(1) of the 1966 Act) converges with any stay that would be given under the duty of sincere co-operation and so it is unnecessary at this stage in the proceedings to reach a final view on that point or on the question whether Article 351 prevents that duty from applying in the first place.

107. We turn to amplify these conclusions, responding to counsel's submissions at the appropriate place. The reasoning of Arden and Hamblen LJJ appears in this judgment and that of Leggatt LJ in his separate judgment below.

(2) Amplification of conclusions

A. Per Arden and Leggatt LJJ: Section 2(1) of the 1966 Act must be interpreted to give effect to the ICSID Convention in accordance with domestic principles, and, so interpreted, it does not, as the judge held, have the effect of applying EU law to the award on registration simply because the UK is a member state of the EU at that date. Nonetheless, the ICSID Convention does not prevent the national court charged with executing an award from exercising its power to stay enforcement so long as such stay is within the overall purposes of the ICSID Convention. Applying this approach, a stay on execution is justified in this case until the resolution of the GCEU proceedings or further order in the meantime for reasons which are neither dependent on those proceedings nor inconsistent with the overall purpose of the ICSID Convention.

Arden LJ:

108. The reasoning in [109] to [132] is expressed in the words of Arden LJ but Leggatt LJ expresses his reasons for agreeing with it in his separate judgment at [253] to [271] below.

109. Romania's principal case on the Grounds 2 and 3 Issues is that the effect of section 2(1) of the 1966 Act, set out at paragraph 2 above, is to give the Award on registration the same status in English law as any other judgment which is given on the date of registration with the result that EU law applies simply because of the wording of section 2(1). Mr Robert O'Donoghue QC, for Romania, refers to this result as "equivalence", a term which is not used by any other party or the judge although it reflects the conclusion to which he came. I will refer to it as Romania's equivalence argument to avoid confusion with the EU doctrine of equivalence, which is not relevant. On that basis, any problem arising from the fact that Article 351 is a pre-accession treaty in relation to the UK is bypassed. The judgment is treated as given under the EU law regime.

110. Mr Patrick Green QC submits that the ICSID Convention is within Article 351(1) so far as the UK is concerned and because it is a multilateral convention concluded with third countries before the UK's accession to the EU, and so it has priority over the UK's EU obligations. This is because, in common with other international treaties, Article 64 of the ICSID Convention provides that *any party* to the ICSID Convention is entitled to bring proceedings against any other party to the Convention in the International Court of Justice if it disputes

the way in which it is giving effect to the Convention. I address that submission under Conclusion D below.

111. In support of its equivalence argument, Romania submits that section 2(1)(c) of the 1966 Act is even more specific as to the status of a registered ICSID award than section 2(1) since it provides that the High Court is to have the same control over execution of the judgment as if the award had been a money judgment of the High Court. This reflects Article 54(3) ICSID, which provides that:

> Execution of the award shall be governed by the laws concerning the execution of judgments in force in the state whose territories such execution is sought.

112. As I see it, Romania's argument, pursued to its logical conclusion, is that, far from providing for immediate enforcement, section 2(1) requires this Court to decline to enforce a judgment which would be contrary to EU law. In my judgment, Romania's equivalence argument is misconceived for the following reasons.

113. My first reason is that section 2(1) cannot be interpreted out of context and solely as a domestic statute. The long title to the 1966 Act makes it clear that the purpose of section 2 is to implement, no more and no less, the obligations of the UK under the ICSID Convention. In those circumstances, the court presumes that Parliament intended to perform its international treaty obligations (see, for example, *Federal Steam Navigation Co Ltd v Department of Trade and Industry* [1974] 1 WLR 505 at 523, HL, per Lord Wilberforce). There is no dispute about that proposition of statutory interpretation. However, the judge did not go down that path.

114. It follows from the presumption of compliance with international treaty obligations that it would not be open to the UK, for instance, to adopt new procedural rules allowing a defence on the grounds of public policy to be raised in relation to all final judgments, including those arising from the registration of ICSID awards. Section 2 would be interpreted as subject to a limitation that the procedural rules applicable to judgments sought to be enforced under section 2 were consistent with the ICSID Convention. The UK's international treaty obligations would have to prevail.

115. Applying that approach to the interpretation of section 2(1), the court must consider whether the interpretation will give effect to the international treaty obligations of the UK. That question cannot be answered without considering the effect of Article 351.

116. Moreover, Parliament is surely unlikely to have intended section 2(1) to have the effect that registered ICSID awards should be brought within the scope of a later international treaty, which did not expressly affect the UK's ICSID obligations, by the mere procedural step of registering the award as a judgment under section 2(1).

117. Section 2(1)(c) cannot logically be elevated into a provision which overrides the ICSID Convention. Any such aim would be outside the long title. Section 2(1)(c) is making it clear that the High Court controls its process applying its rules in the form in which they stood at the date of registration. It does not go further and make any change of substantive law for the reason which I next explain.

118. My second reason for rejecting Romania's equivalence argument is that to interpret section 2(1) of the 1966 Act involves the writing in of words, which it is not open to the court to do. Under section 2(1) of the 1966 Act, the question which Parliament has required any court asked to determine the effect of registration to answer is: what would have happened if, instead of an award, a judgment had been entered in the High Court at the date on which the award was given? That question has to be answered applying the normal principles of statutory interpretation. A relevant point for that purpose is that what has to be answered is a hypothetical question. That brings section 2(1) for the purposes of statutory interpretation within the category of provisions called "deeming" provisions. As *Bennion on Statutory Interpretation* (LexisNexisUK, 7ed, 2017 at [17.8]) states that

> The language used to set up a statutory hypothesis varies. The traditional form of words 'shall be deemed' has generally given way to expressions such as 'treated as', 'regarded as' or 'taken to be'. Whatever form is used the effect is the same.

119. Deeming provisions require a disciplined approach by the court because the court must not go beyond answering the question which Parliament has required to be answered. It is well established that, in interpreting a deeming provision, the court may only make the assumptions which are made necessary by the statutory hypothesis and no more: As *Bennion* also states at [17.8]:

> In determining the precise scope of a deeming provision the court must, as with any other question of construction, attempt to discover the legislative intention from the words used and the other relevant interpretative criteria. The effect of the authorities discussed below may be summarised as being that the intention of a deeming provision, in laying down a hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, *but no further*. (Emphasis added)

120. All that is required and authorised in this case is to assume that the judgment was entered on a particular date. There is nothing in section 2 to authorise the court to treat the ICSID Convention as having been entered into on that date for the purposes of Article 351 of the TFEU and EU law, or at all. That is to read words into section 2(1) of the 1966 Act. Nor is it permissible to do what Romania did in argument which was to draw an analogy with a case to which EU law did apply. There is no mandate in section 2(1) to say that the judgment must be treated as within the competence of the EU. That again is to read words into the section, which the proper process of statutory interpretation does not allow.

121. Leggatt LJ usefully puts the matter the other way: it would be inconsistent with Article 54 ICSID for a national court to refuse to enforce the pecuniary obligations imposed by an award on the ground that, had the award been an ordinary domestic judgment giving effect to it would be contrary to a provision of national law. In his judgment, the proper interpretation of section 2(1) is that the analogy with a judgment of the High Court is limited to defining the force and effect of a registered award for the purpose of execution. It does not give the High Court power to refuse to enforce an award for a reason that would justify staying enforcement of an ordinary domestic judgment. I would add that Article 55 ICSID expressly preserves state immunity, and this is consistent with its being regarded in international law as a matter of procedure not substance (see *R(o/a Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1719 at [107] to [108]).

122. The next issue to be decided under this head is whether a stay can be granted on the basis of the interpretation of section 2(1) of the 1966 Act as explained above.

123. I consider that the grant of a stay on the execution of the duly registered ICSID award in this case is within the powers conferred on a domestic court by the ICSID Convention provided that it consistent with the purposes of that Convention. I also consider it ought to be granted for the reasons explained in [129] to [131] below.

124. As we discuss in more detail in response to the Security Appeal, the courts of England and Wales indubitably have powers to stay the execution of a final judgment under CPR 40.8 A and CPR 83.7(4) (set out in [140] and [218] below). These give wide discretionary powers to stay the enforcement of judgments. Those powers must apply to ICSID awards on registration at least to some extent because that follows from the statutory hypothesis in section 2(1)(c) of the 1966 Act. I reject Mr Green's argument that the obligation to register an ICSID award cannot be divorced, or split, from the UK's obligation to enforce an ICSID award by virtue of Article 54 ICSID.

125. However, the application of those powers in relation to an ICSID award has to be in fulfilment of the objectives of the ICSID Convention. Article 54 ICSID is set out in paragraph 1 above. The words of Article 54 are wide and general but they have to be interpreted purposively in line with Article 31 of the Vienna Convention on the Law of Treaties. This Convention emphasises (among other matters) the importance of the context of the provision. We have not heard full argument on this aspect of the appeal but it seems to me that it would not be open to the courts of England and Wales to do more than impose a temporary stay on execution if an award is enforceable. It would seem to me, provisionally, to be likely to be inconsistent with the ICSID Convention if the courts, by using their own powers to stay enforcement granted by domestic law, could effectively thwart execution of an award which has become enforceable under that Convention.

126. Accordingly, I am satisfied that there is a limited discretion under Article 54 ICSID to stay execution of the judgment. That point takes me to the final conclusion stated above.

127. I consider that it would be appropriate to exercise that discretion in the way described in the following paragraphs of this judgment. It falls to this Court to exercise the discretion because the judge exercised it on the basis of accepting Romania's equivalence argument, which I have held involved an erroneous interpretation of section 2(1) of the 1966 Act.

128. In my judgment, a stay on execution is justified in this case until the resolution of the GCEU proceedings or further order in the meantime for reasons which are neither dependent on those proceedings nor inconsistent with the overall purpose of the ICSID Convention for the reasons given below.

129. The appellants have addressed us on the facts. Ms Demetriou described how, when the appellants were considering making investments in Romania before Romania became a member state, the Commission was encouraging Romania to privatise its industries and secure investments by entering into BITs. She also explained that the appellants are aware that, if the GCEU proceedings uphold the Commission's Decision, Romania will be obliged to recover any benefit which they have obtained from execution before a final decision in those proceedings. However, they consider that there would be benefit to them in enforcing the judgment in advance of the proceedings and to do so might make it more difficult for Romania to recover monies from them. It is moreover clear that there could be considerable delay and uncertainty involved for the appellants in waiting for that final decision.

130. I am conscious of the difficulties in which the appellants are placed. But I consider that at the time when the appellants made their investments they were aware that Romania would become a member of the EU during the currency of their investment and that Romania's activities would therefore become subject to EU law. The appellants may not have been able to foresee the precise basis on which the Commission has determined that Romania has granted them State aid, but, when making their investment, they had as investors sufficient means of knowledge to make them aware of the risks which could be posed by the State aid rules, which were established principles of EU law at that time. In addition, given that the Commission's Decision provides for Romania to recover any amount paid under the Award, the benefits of execution at this stage would be entirely circular. I do not consider that it could have been the intention of the ICSID Convention to require courts under Article 54 to enforce a judgment without giving a reasonable amount of time for the position to be clarified. No one has suggested that the GCEU proceedings are bound to be determined against the Commission. It does not meet the ends of justice to insist on enforcement in those circumstances.

131. Shortly before the appeal was heard, the CJEU delivered its judgment in *Achmea*, in which (in brief) it held that it was incompatible with a member state's obligations under the EU Treaties to permit disputes with it to be determined by a process of arbitration under which EU law issues were excluded from the system of preliminary references. The respondents relied on this decision in their written and oral submissions. Sir Alan Dashwood QC made submissions on behalf of the appellants that *Achmea* was distinguishable. In the circumstances it is not necessary to deal with the detail of Sir Alan's carefully-crafted submissions. His basic point was that the facts of that case

were different, and that EU law could not be "projected backwards" in this case so that it applied to investments made and arbitral proceedings begun, as here, before Romania acceded to the EU. I need only say that the question whether that point is a complete answer to the question of a discretionary stay does not need to be considered for the reasons given in the preceding paragraph.

132. For the reasons given above, I consider that it would be right to exercise the discretion in favour of stay so that any stay would run until the GCEU determines the proceedings before it or further order in the meantime.

Conclusion B. per Hamblen LJ: The judge was correct to hold that there was no conflict between the international obligations of the UK contained in the 1966 Act implementing the ICSID Convention and the Court's EU law duties in light of the Commission Decision.

133. As explained above, [134] to [152] express the reasoning of Hamblen LJ. Arden LJ respectfully adopts his analysis of the judge's judgment and the submissions and agrees with him down to but not including the last sentence of [148] below.

Hamblen LJ:

134. Article 54(1) of the ICSID Convention provides that for the purposes of enforcement of an ICSID award the courts of a Contracting State shall "enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State" and "shall treat the award as if it were a final judgment of the courts of a constituent state."

135. The 1966 Act gives effect to Article 54(1) by providing that a registered award "shall, as respects the pecuniary obligations which it imposes, be of the same force and effect for the purposes of execution as if it had been a judgment of the High Court" (section 2(1)) and that "the High Court shall have the same control over the execution of the award, as if the award had been such a judgment of the High Court" (section 2(1)(c)).

136. I agree with Arden and Leggatt LJJ that section 2(1) of the 1966 Act has to be interpreted in the context of the ICSID Convention and that it should be presumed that Parliament intended to perform its international treaty obligations. The essential issue is as to the nature and extent of those obligations.

137. Romania's argument, which was accepted by the judge, is that the relevant obligation under Article 54(1) is one of "equivalence". Enforcement of a registered award under the ICSID Convention is a matter for the national courts and the obligation imposed on the contracting states is to ensure that, in relation to pecuniary obligations imposed, a registered award is enforced as if it were a final judgment of the national court.

138. There will be different national rules and procedures relating to enforcement and these may change from time to time. Provided, in relation to pecuniary

obligations, the same rules and procedures are applied to registered awards as to final court judgments, Article 54 will be complied with.

139. If there was a final judgment of the English court in the terms of the Award and a subsequent Commission decision stating that payment of the judgment was prohibited and would constitute unlawful State aid there can be little doubt that the English court could and would stay enforcement.

140. That the English court could do so is borne out by rules of court. In particular, under CPR 40.8A "a party against whom a judgment has been given" may apply for a stay of execution "on the ground of matters which have occurred since the date of the judgment". Under CPR 83.7(4) the court may stay execution of a judgment "either absolutely or for such period and subject to such conditions as the court thinks fit" if satisfied that "there are special circumstances which render it inexpedient to enforce the judgment or order".

141. That the English court would do so is clear given the duty of sincere co-operation, the direct effect of the Treaty State aid prohibition and the duty to provide effective co-operation.

142. The only reason advanced by the appellants as to why the court would not stay such a final judgment was the *Kapferer* principle, but, for reasons already stated, that is inapplicable in this case.

143. As the judge held:

> 129. Enforcement is subject to the law applicable to enforcing such a judgment: see, eg, the AIG Capital Partners Inc case [2006] 1 WLR 1420, para 87, in which it was held that enforcement of an ICSID award was subject to the restrictions in the State Immunity Act 1978. In other words, by registration, the award is equated to a final domestic judgment for these purposes, but is not in a better (or worse) position. As is recorded in *Christoph Schreuer et al, The* ICSID Convention: *A Commentary*, 2nd ed (2009), p 1124, the 1965 Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States confirms in para 42 that, "article 54 requires every Contracting State to recognise the award as binding and to enforce the pecuniary obligations imposed by the award as if it were a final decision of a domestic court.

144. As the judge records at [130], in paragraph 43 of the 1965 Report of the Executive Directors to which he refers, it is stated:

> Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed.

145. The judge then continued:

> 131. In the present case, a judgment of the High Court is subject to the EU rules as to state aid as explained above. Applying the case law referred to above, the court must refrain from taking a decision which conflicts with a decision of the commission. Whilst this case law may be consonant with what is seen as public policy, it is not based on it. As the Court of Appeal put it in the passage from the *Emerald Supplies Ltd case* [2016] Bus LR 145, para 70 cited above, "The general principle of legal certainty, which underpins the duty of sincere co-operation, requires member states to avoid making decisions that could conflict with a decision contemplated by the commission". This applies to the court itself: "national courts must, in particular, refrain from taking decisions which conflict with a decision of the commission": see the *Deutsche Lufthansa AG* case [2014] 2 CMLR 20, para 41.
>
> 132. This court cannot therefore proceed to enforce the judgment consequent on registration of the Award in circumstances in which the commission has prohibited Romania from making any payment under the Award to the claimants because in doing so, the court would, in effect, be acting unlawfully. This does not (in the court's view) create a conflict with the international obligations of the UK as contained in the Arbitration (International Investment Disputes) Act 1966 implementing the ICSID Convention in UK law, because a purely domestic judgment would be subject to the same limitation.
>
> 133. The court accepts the submission of Romania and the commission in this respect. Contrary to the claimants' submissions, there is no question of this being "tantamount to granting states a power of full review of an ICSID award". There is no such review available on grounds of public policy or otherwise. The question is a very limited and specific one of legality in enforcement.

146. The first appellant challenged the judge's reasoning and conclusion on the basis that it does not recognise the special status of a registered ICSID award. Such an award, it is said, has a special quality of finality. Enforcement is "automatic". "Final" means "final": a final judgment, in this context, means an unappealable judgment which is taken to have disposed of all *a priori* issues which might vitiate the judgment or its effect, including any EU law arguments which could have been advanced. In argument this was described as a "supercharged" judgment.

147. In support of the special quality of such a judgment it was stressed that:

i. The ICSID Convention and the 1966 Act do not allow for any public policy exception to enforcement.

ii. Under the 1966 Act and the CPR the only specified grounds on which the English court can stay enforcement are those provided in the ICSID Convention itself – see section 2(2) of the 1966 Act and CPR 65.21(5).

iii. Articles 50 and 52 of the ICSID Convention only permit a stay of enforcement when an application to interpret, revise or annul an award is ongoing.

iv. Effective enforcement of ICSID awards is a fundamental feature of the ICSID Convention and is a recognized advantage over other arbitration mechanisms, such as enforcement und the New York Convention (under which there is a public policy exception).

148. I acknowledge the importance of ease of enforcement of ICSID awards under the Convention and the significance of the exclusion of any public policy exception. Enforcement cannot be resisted on the basis that the award was wrongly decided or improperly obtained. It must be taken as it stands. That does not mean, however, that it may not be subject to a bar to enforcement or execution, provided that that bar would equally apply to a final domestic judgment.

149. A bar to enforcement or execution need not be limited to issues arising out of the process or mechanics of execution, such as manner and timing. State immunity is a good example, as the judge observed and the ICSID Convention recognises.

150. In the present case there is a clear and specific bar to enforcement of the Award. The Commission's Decision prohibits payment of the Award by Romania and declares that any payment of the Award would be new State aid and therefore unlawful. In enforcing the Award, as the judge observed, "the court would, in effect, be acting unlawfully".

151. I agree with the judge that neither the ICSID Convention nor the 1966 Act confers a status on a registered award for the purposes of enforcement which is different or superior to that of a final domestic judgment. If, as is the case, there is a bar to enforcement which would mean that a final domestic judgment would not be enforced, then that may equally apply to the Award. That is consistent with and involves no breach of the ICSID Convention or the 1966 Act, nor does it involve the reading in of words to section 2(1) of the 1966 Act.

152. I accordingly agree with the conclusion of the judge that there is in this case no conflict between the international obligations of the UK contained in the 1966 Act and the Court's EU law duties.

B. per Hamblen and Leggatt LJJ: If there is a conflict between the international obligations of the UK contained in the 1966 Act and the Court's EU law duties, the judge was right to conclude that there should be a stay on the grounds that the issue of whether Article 351 applies in this case is a matter before the GCEU and there is a clear risk of conflicting decisions.

153. As explained above, [154] to [165] sets out the reasoning of Hamblen LJ.

Hamblen LJ:

154. I agree with Arden LJ that the resolution of this conflict depends upon the proper application of Article 351. Article 351 provides:

Article 351

> [1]'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.
>
> [2] To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take any appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

155. It is for the national court to determine the nature and ambit of obligations imposed by earlier international agreements – see Case-158/91 *Tribunal de Police, Metz v Levy.* Whether and how Article 351 applies to such obligations is, however, a matter of EU law and is the subject of a considerable body of EU case law.

156. The application of Article 351 is a central issue in the GCEU proceedings. The Commission's Decision decided that Article 351 does not apply in this case. In their application for annulment the appellants contend that the Commission's Decision prevents Romania from complying with its obligations under the BIT and the ICSID Convention and thus fails to give effect to Article 351.

157. There is CJEU case law to the effect that Article 351 does not apply to prior multilateral international agreements in cases involving "intra-Community relations" – see, for example, *Case T-69/89 RTE v Commission* ECR 1-743. Whether this is such a case is in issue both before the GCEU and in these proceedings.

158. A number of CJEU decisions and other legal material going to this question was put before the judge and is referred to in the pleadings before the GCEU. Case law relating to the application of Article 351 put before both tribunals includes Case C-10/61 *Commission* v *Italy* EU:C:1962; Case C-286/86; *Ministère public v Gérard Deserbais* [1988] ECR 4907; Case T-69/89 *RTE v Commission* EU:T:1991:39; Case C-158/91 *Levy* [1993] ECR I-4300; Case C-203/03 *Commission v Austria* [2005] ECR I-954; Case C-147/03 *Austria v Commission* [2005] ECR I-5992; Case C-478/07 *Budejovicky Budva*r [2009] ECR I-7721; Case C-264/09 *Commission* v *Slovakia*, EU:C:2011:580, and Case C-277/10 *Luksan v van der Let* [2013] ECDR 5. Since the judge's grant of a stay on the basis of Article 351 was not appealed, aside from *Levy* we were not referred to or addressed on this case law.

159. The present proceedings involve nationals of a member state (Sweden) asking the courts of another member state (the UK) to give effect to obligations it owes under the ICSID Convention to enforce rights Sweden possesses against another member state (Romania) under the BIT. There is no direct involvement of any non-EU or third country. However, it is said that the rights of such

countries are involved as all parties to the ICSID Convention have an interest in its effectiveness and in ensuring that state parties meet their obligations, including with regard to registration and enforcement. Whether that would give sufficient standing for infringement proceedings to be brought under Article 64 is in dispute in both these proceedings and those before the GCEU. Even if such a claim could in principle be brought, whether that would mean that this case is not one involving "intra-Community relations" is also in dispute in both these proceedings and those before the GCEU and is an EU law matter.

160. Although these issues do not arise in precisely the same way in the annulment proceedings (since they concern the ICSID Convention obligations of Romania to execute the Award rather than the UK's obligations to enforce it) the essential questions raised are the same. So, for example, in the GCEU proceedings the Commission's pleadings include the following:

> The fact that third countries have also signed up to ICSID is irrelevant for the application of Article 351 to the present case, since the international obligations specifically at issue in the present case are obligations between two Member States to which Article 351 does not apply.

161. In both proceedings a key issue is whether obligations which may be owed by under the ICSID Convention to third countries mean that this is not a case of "intra-Community relations" so that Article 351 applies.

162. In these circumstances I agree with the judge's conclusion at [152] that:

> ….. even accepting that there is a difference in how the article 351 TFEU issue arises in the two proceedings, it is difficult to see how the risk of conflicting decisions could be avoided if this court was now to rule on the issue. As Romania and the commission point out, at the minimum the General Court will be considering the same cases and the same principles decided under article 351 TFEU (including the *Radio Telefis Eireann* case [1991] ECR II-485) as this court is being asked to consider.

163. In the light of that finding the judge was clearly entitled to grant a stay and there was no appeal against this basis for the stay.

164. For all these reasons I agree with the judge's conclusions on Issue i. of the Grounds 2 and 3 Issues and would accordingly dismiss the appeal on Ground 2 of the Stay Appeal.

165. As for Issue ii. of the Grounds 2 and 3 Issues, in the light of my conclusions on Issue i., this further Issue does not arise. If it did, I would agree with Arden and Leggatt LJJ that it should not be addressed at this stage.

Conclusion D. Per Arden LJ: Article 351 TFEU must normally be considered when determining whether a stay of a duly registered ICSID award can be granted. It falls to be considered in this case even if the judge's ruling is not appealed. Under Article 351(1) TFEU, the rights and duties under a treaty made by a member state prior to accession to the EU with a third country are in general

not affected by EU law. Moreover, EU law recognises that it is for the national court, not the CJEU, to determine the extent of obligations under international law imposed on the UK by the ICSID Convention. In addition, there appears to be little overlap between the GCEU proceedings and these proceedings. However, the stay proposed by the majority (which is pursuant to Article 54 ICSID and section 2(1) of the 1966 Act) converges with any stay that would be given under the duty of sincere co-operation and so it is unnecessary at this stage in the proceedings to reach a final view on that point or on the question whether Article 351 prevents that duty from applying in the first place.

166. [167] to [198] sets out the views of Arden LJ on Conclusion D.

Arden LJ:

167. Neither of the Grounds 2 and 3 Issues in terms refers to Article 351 TFEU, which is set out in [154] above.. Article 351 addresses the position of potentially conflicting treaty obligations, due in this case to the fact that the UK entered the EU after it had entered into the ICSID Convention. In a nutshell, Article 351 TFEU preserves the obligations of member states under pre-accession treaties but imposes an obligation in certain circumstances on the member state to take steps to eliminate inconsistencies.

168. Article 351 thus lies at the intersection of international law and EU law. It sets out certain rules for the regulation of the relationship between those two legal orders. I note in passing that Article 351 is summed up in a newly-published work as "[t]he EU deference clause *par excellence*" (A. Arena, *The Twin Doctrines of Primacy and Pre-emption*, ch 10 in *Oxford Principles of European Union Law*, vol 1, Oxford, 2018,p. 301*).*

(b) The judge's judgment

169. In the light of the analysis of the judge's judgment given by Hamblen LJ above, I need only explain here how the judge dealt with Article 351. Before the judge the parties formulated an entirely separate issue to address the question of the effect of Article 351 TFEU ([154] above). It is in relation to this issue that the judge reached his conclusion that there was no conflict between EU law and the 1966 Act as explained in the next paragraph.

170. Romania and the Commission argued before the judge that the relevant treaty was the BIT, and not the ICSID Convention, and that this concerned only members of the EU (Sweden and Romania) so that the Commission's Decision therefore applied. Without forming any final view on the UK's separate international law obligations under the ICSID Convention, the judge reasoned that Article 351 was one of the grounds on which the appellants asked the GCEU to annul the Commission's Decision, and that, even though those issues were not necessarily the same as arose in these proceedings, there was a risk of conflicting decisions if the court were to decide the effect of Article 351 while the GCEU proceedings were pending. This, therefore, was another reason supporting a stay, utilising domestic powers in the way that they could be used in relation to a purely domestic judgment.

171. I consider that Article 351 TFEU must normally be considered when determining whether a stay on enforcement can be granted in this situation because it determines the question whether EU law applies to that question. The purpose of Article 351(1) is to make clear, in accordance with the principles of international law, that application of the EU Treaties does not affect the commitment of the member state concerned to respect the rights of non-member countries under an earlier agreement and to comply with its corresponding obligations (Case 10/61 *Commission v Italy* [1962] ECR 1).

172. It is common ground that the appellants have not appealed in terms against the judge's rejection of their arguments based on Article 351 TFEU. Moreover, the first appellant's main skeleton argument stated, in relation to the interpretation of section 2(1) of the 1966 Act (Ground 2), that "the application of Article 351 is (deliberately) not in issue in this appeal." However, the first appellant then went on to argue in its skeleton argument under Ground 3 that by virtue of Article 351 EU law was not incorporated so as to affect the ICSID Convention in the context of his argument that section 2 of the 1972 Act, and the Article 351 issue was amplified in oral submissions on behalf of the first appellant. Mr O'Donoghue made the point that the appellants had not appealed the judge's order on the grounds of his reasoning on Article 351 TFEU only after the appellants had opened their case. Ms Demetriou adopted the submissions of the first appellant on behalf of the other appellants in her reply.

173. The first appellant ought to have applied to amend his grounds of appeal to raise the Article 351 point. However, the question of the UK's obligation to enforce the Award goes directly to the position of this Court as an organ of the state. On general principle, this Court ought (so far as the law allows) to exercise its powers to ensure compliance with the UK's international obligations (cp *Bulale v Secretary of State for the Home Department* [2009] QB 806). Therefore, had it been necessary to do so, this was a point which this Court could and should properly have taken of its own motion. The Court cannot ignore the UK's obligations under an international treaty which, like the ICSID Convention has been incorporated by statute into domestic law, and enforce the terms of another treaty (also so incorporated) which is inconsistent with the former obligations without considering the legal question of when that is permitted to occur. The issue is, therefore, not one the parties can withdraw from the Court's consideration.

174. Moreover, the correctness of any stay must require the determination of the power under which that stay may be given. Article 351 goes to the Court's jurisdiction and the Court is entitled and bound to consider the issue of the effect of Article 351 in any event. Furthermore, analysis of that issue results in clarity as to the correct basis for any order made on the application. Hence, in my judgment, having reached the conclusion expressed in Conclusion A (above) as to the meaning of section 2(1) of the 1966 Act, the Court has to go on to consider the potential application of Article 351.

175. The second sentence of Conclusion D (above) merely states what Article 351(1) provides. Had the ICSID Convention been executed after the UK's entry into the EU, the position might have been different.

176. In my judgment, Romania's equivalence argument, even if it were the correct interpretation of section 2(1) of the 1966 Act, cannot sit without Article 351. Indeed, it takes no account of Article 351, even though EU law is to be regarded as part of our domestic law (see *R (Miller and another) v Secretary of State for Exiting the European Union* [2018] AC 61). The thrust of Article 351 is that, in relation to obligations under a member state's pre-accession treaties, EU law does not apply. That means none of the following apply unless so permitted by Article 351: the doctrine of supremacy of EU law, the principle of sincere cooperation (Article 4.2 TFEU), State aid (Articles 107 and 108 TFEU) and the member state's duty to provide remedies to ensure effective legal protection in fields covered by EU law (Article 19 TEU). The ICSID Convention is in relation to the UK a pre-accession treaty. If, as I conclude, the 1966 Act must so far as possible be interpreted so as to enable the UK to fulfil its international obligations under the ICSID Convention, the Court has to know the extent to which those obligations have been altered by the UK's entry into later treaties, in particular the EU Treaties.

177. If EU law does not apply to the UK's treaty obligations arising from the ICSID Convention, self-evidently it cannot apply to acts done or required to be done under that Convention, such as enforcing an ICSID award given pursuant to a BIT which has been registered in the High Court. The BIT was an agreement between the two states who were parties to the ICSID Convention, and the agreement under which the appellants sued Romania and obtained the Award was made under an "umbrella" clause in the BIT permitting investors who were nationals of one of the state to make investment agreements with the other state.

178. Since section 2(1) of the 1966 Act has to be interpreted to give effect to the ICSID Convention unless and to the extent that that treaty has been modified by the UK's entry into the EU, I consider that the Court is naturally taken back to the question whether the UK's obligations under the ICSID Convention have been altered by that event.

179. Mr Green submits that the EU Treaties make it clear that the correct analysis is that, by acceding to the EU Treaties and becoming members of the European Union, the member states have conferred limited powers on the European Union, not that they had transferred sovereignty to the European Union. He refers us to among others Article 5 TEU, and to the decision of this Court in *Shindler v Chancellor of the Duchy of Lancaster* [2017] QB 226 at [16], where this Court held that the conduct of referenda on withdrawal from the EU did not fall within the scope of EU law. On this analysis, which I accept, the jurisprudential basis for the competence of the EU to determine matters that the members of the EU would have been entitled to decide as separate sovereign states is the principle of conferral contained in Article 5(1) TEU.

180. On that basis, the EU has no stand-alone competence to determine matters of international law. Consistently with the doctrine of conferral, the CJEU has repeatedly held that the purpose of Article 351 is to enable member states to perform their obligations to third countries (see [171] above) and that the question of the nature and scope of obligations under pre-accession treaties is a matter for the national court to determine. Thus, in *Levy* at [21], the CJEU held:

> 21 However, in proceedings for a preliminary ruling, it is not for this Court but for the national court to determine which obligations are imposed by an earlier international agreement on the Member State concerned and to ascertain their ambit so as to be able to determine the extent to which they constitute an obstacle to the application of Article 5 of the directive.

181. Mr O'Donoghue does not challenge *Levy*, which on the face of it at least means that it would not be open to this Court, even if it were otherwise minded to do so, to seek a preliminary ruling from the CJEU on the question whether the ICSID Convention falls within Article 351(1). In addition, it would seem to lead to the conclusion that this Court has to reach its own view on the effect of the ICSID Convention. That can only mean that on this appeal this Court is the appropriate court to decide whether the pre-accession treaty in question contains obligations and whether they are obligations which can give rise to remedies at the instance of third countries.

182. Mr Green argues that once the ICSID Convention is shown to be within Article 351 TFEU, EU law does not apply and that that is the end of the matter. But the jurisprudence under Article 351 provides that, where a pre-accession treaty confers a margin of discretion on a member state, it must be used in a manner compatible with EU law: see, for example, C-324/93 *Evans Medical and Macfarlane Smith*, paragraph 27. I consider that there is no reason why this qualification should not apply to a multilateral convention involving third countries. Nor is there any reason why it should not apply to a step which the member state is able to take pursuant to the pre-accession treaty rather than under it. On that basis, EU law applies to the exercise of any power to grant a stay in respect of the enforcement of an ICSID award which has been registered in the High Court under the 1966 Act. It is, moreover, difficult to see how a court of a member state which has pre-accession treaty obligations can be required to do more than this. So, whether the UK's ICSID Convention obligations are within Article 351(1) or not, and whether or not the Commission's Decision is lawful under EU law or not, the grant of the stay pursuant to ICSID Convention principles is, at this stage at least, compliant with EU law.

183. Mr O'Donoghue in essence submits that (to use my own words) there is some twilight zone between Article 351 and the treaty obligations of a member state and that there may be aspects of issues arising out of Article 351 which are properly treated as matter of the interpretation of Article 351, and thus a matter for the CJEU. For example, the CJEU has considered the obligations of member states to use any discretion which they may have under the EU Treaties compatibly with EU law position of member states: see, for example, as in Case C-62/98 and C84/98 *Commission v Portugal*. But in the light of the conclusion just reached it is unnecessary to refine the boundaries of this twilight zone. As things stand at present, a stay can be granted under section 2(1) of the 1966 Act, interpreted in accordance with its purpose of giving effect to the UK's obligations under the ICSID Convention.

184. There is, however, a further argument on the part of Romania which should be addressed at least provisionally. Romania argues that the relevant ICSID Convention obligations in this case should be treated as being solely between member states so that those obligations are within the scope of EU law. But this argument depends on analysing the ICSID Convention obligations on the UK as purely bilateral obligations owed to Sweden whose nationals are the appellants.

185. The significance of the ICSID Convention being a multilateral convention is that where a member state owes non-discretionary obligations to third countries under a pre-accession treaty to which Article 351 applies, it may perform those obligations. The significance of obligations to third countries often arises in relation to membership of international organisations which is generally pursuant to an international treaty with the non-EU member states.

186. Mr O'Donoghue argues that the exception applying to obligations which involve third countries does not apply here because there is a bilateral treaty relationship between Sweden and Romania (viz. under the BIT) and it is only under that arrangement that treaty obligations arises.

187. On the basis of the limited argument on this point, I do not find that argument persuasive for two reasons. First, the question here is whether the UK, through the instrumentality of the courts of England and Wales, is bound to enforce the award. The obligation to do that may (subject to the EU Treaties) be owed to Sweden as the appellants are its nationals, but that does not mean that it is not owed to other parties to the ICSID Convention who are not parties to the BIT.

188. I accept that the CJEU has exclusive competence to determine the meaning of Article 351 TFEU, taken on its own, and that Article 351 and the CJEU's jurisprudence draws a distinction between obligations owed under pre-accession treaties only as between member states and those owed also to non-member states, or third countries, as where a member state and third countries are parties to an international convention such as the ICSID Convention. Nonetheless, I consider - provisionally because this point has not been fully addressed by counsel in their submissions- that, as a matter of the law of England and Wales the obligations which the UK owes under the ICSID Convention are not owed solely to the states which are parties to the BIT, but also to the other states which can bring a claim to establish what its obligations are, as can be done under Article 64 ICSID (discussed in the [190] to [195] below). Of course, the question whether that would be sufficient for EU law purposes would be a matter of EU law. But, if my provisional view is right, it is difficult to see how EU law could come to any conclusion other than that the ICSID Convention is a multilateral convention, especially given the *Levy* doctrine, which assigns the adjudication of such matters to national courts.

189. Throughout this process, the national court has also to be mindful of the fact that, if the Commission's Decision has the effect of preventing enforcement, the appellants may in law be deprived of a property right and its right of access to court. The Court must be aware of the significance of those issues for the purposes of the rule of law.

190. The ICSID Convention is a single treaty to which all parties subscribe. Furthermore, as Mr Green QC submits, the ICSID Convention contains Article 64 (the compromissory clause dealing with dispute resolution). This provides:

> Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

191. The wording of this Article is perfectly general. Thus, it appears to me (as stated, provisionally) that any party to the ICSID Convention could start proceedings in the International Court of Justice against the UK to seek an assurance that it would apply what it contended was the correct interpretation of Article 54 in the future.

192. Indeed, supporting Mr Green's submission, *Schreuer* states in his commentary under Article 64 that other contracting states may raise a dispute on the enforcement of an award in a particular case, as here in relation to the UK's enforcement of the award the subject of these appeals (page 1261). Mr O'Donoghue submits that a contracting state which is not a party to an award cannot require compliance with the ICSID Convention in respect of that award under Article 53 of the Convention. But this is a separate point: another contracting state which was not a party to an award could not require the enforcement of that award. The International Court of Justice would not be able to reopen an award made between other states under Article 64. However, the text produced to the Court from *Schreuer* does not go further than this. Inability to intervene in relation to an award to which it was not party would not appear to stop it proceeding under Article 64 to bring before the International Court of Justice a dispute as to whether the enforcing state had fully complied with its obligations under the ICSID Convention for the simple reason that every state has an interest in every other's adherence to its mandatory obligation to enforce awards and has been given the right on an unqualified basis to bring a dispute before that Court. On that basis, even though the current dispute concerns only Romania and Sweden, third countries are involved and that means that Article 351(1) applies.

193. The point is illustrated by *Levy*, in which the relevant pre-accession treaty (for France) was Convention No 89 of 9 July 1948 of the International Labour Organisation, to which both member states and non-member states were party and the dispute was one between the French state and persons subject to its jurisdiction.

194. The judge referred to *Radio Telefis Eireann v Commission of the European Communities* ("RTE") (a decision of the Court of First Instance). But that does not take the matter any further as it appears that there was no right for third countries which were parties to the Berne Convention to complain if member states which were also party were required under EU competition law to grant compulsory licences.

195. However, I consider that it is not necessary to reach a final view at this stage on whether the rights of third countries under Article 64 makes the ICSID Convention a multilateral convention for Article 351 purposes because the issue is not dispositive of this appeal.

196. That leaves the question whether there is any real overlap between the issues under Article 351 in these proceedings and those in the GCEU proceedings. I conclude, with respect to Hamblen and Leggatt LJJ, that there is little overlap between the GCEU proceedings and these proceedings essentially because the issue in the GCEU proceedings is the effect of the BIT between Sweden and Romania under which the appellants made their investment in Romania. Very different considerations apply to those agreements because firstly, the UK is not a party to that BIT, and, secondly, while the BIT was made when Romania was not a member state of the EU, it was made in anticipation of its becoming a member state and so the appellants must be taken to know that they might wish to enforce it at a time when Romania was indeed a member state and when its activities were necessarily subject to the provisions of EU law. That cannot be said of the UK's entry into the ICSID Convention in 1966. Self-evidently, the UK did not enter into the ICSID Convention in anticipation of EU membership. The UK's role is simply that of the state of enforcement of the Award and none of its obligations in that capacity were undertaken at the time of EU membership or in the shadow of EU membership. Those factors in a nutshell mean that the issues which arise under Article 351 TFEU in the GCEU proceedings are fundamentally different from those which arise in these proceedings and, unlike issues arising from State aid, they stem from issues as to the scope of the UK's ICSID Convention obligations which the national court has to determine.

197. As already explained under Conclusion A, at the present time a stay is justified on the special facts of this case on the basis of section 2(1) as I have interpreted it above. For the reasons given under this Conclusion, no greater stay could be obtained at the present time if EU law applied. The exercise of discretion whether pursuant to the ICSID Convention or under Article 351 at the present time leads to convergence. So, it is unnecessary to reach any final view on issues such as the effect of Article 351 and the degree of overlap between these proceedings and the CJEU proceedings. It is also clear that there is no conflict between the grant of the stay and EU law, and in addition that the stay conflicts with neither EU law nor the ICSID Convention obligations of the UK.

198. I have already stated that I agree with Leggatt LJ in all material respects. I respectfully differ from him on his conclusion that a risk of conflicting decisions will arise simply because the GCEU might decide the very aspect of Article 351 with which we are concerned (as well as on the question whether there was any argument on that Article on this appeal). The duty of sincere co-operation is only engaged if this Court, as an emanation of the UK in its capacity as a member state, has some obligation under EU law. I acknowledge the importance of the duty of sincere co-operation but reach the outcome on the Grounds 2 and 3 Issues *via* the ICSID Convention, together with an analysis of what Article 351 might mean if it applied to the fullest extent. That makes it unnecessary for me to reach any view as to the engagement or impact of that

duty in the particular circumstances of this case - a solution which is redolent of the wise counsel cited by Leggatt LJ from *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591, [91] in the possibly different context of a conflict arising from case law which the CJEU had already decided. So far as Article 351 is concerned, I have found sufficient guidance in the submissions on that Article which were presented in the course of the appeal and the text of the Article itself.

Issue ii of the Grounds 2 and 3 Issues

199. Mr Green criticises the judge for not deciding whether the UK's obligations in ICSID Convention were excluded from section 2 of the 1972 Act because they are pre-accession obligations of the UK. The judge took the view that the risk of conflicting decisions as a result of the GCEU proceedings was a strong reason for ordering a stay (judgment, [152]).

200. As already explained, Mr Green argues that section 2 of the 1972 Act is not to be construed in a way which will put the UK's compliance with the ICSID Convention in the hands of another body. Arden LJ pointed out that this is in substance one of the points which this Court left open in *Gahan v Emirates* [2017] EWCA Civ 1530 [81] to [89] in relation to the Montreal Convention. Mr Green further submits that this Court must interpret section 2(2) of the 1972 Act with section 18 of the European Union Act 2011.

201. Arden LJ does not consider that it is necessary to deal with this issue in order to reach a conclusion on this appeal and accordingly does not so. As already explained, in her judgment, the current order satisfies both the UK's obligations under EU law, if applicable, and the UK's obligations under the ICSID Convention, and this issue only needs to be decided if and when a court is faced with a situation in which that is no longer the case. She has already accepted Mr Green's submissions on the doctrine of conferral ([179] and [180]) and section 2 of the 1972 Act falls to be interpreted compatibly with that doctrine.

202. Leggatt LJ agrees that this Court should not should not decide this issue for the reasons given in his separate judgment, below.

203. The view of Hamblen LJ on this issue is set out in [165] above.

G. THE SECURITY APPEAL

204. As all the members of the Court are agreed that the Stay Appeal must be dismissed, it is necessary to consider the Security Appeal against the judge's decision not to order Romania to provide security for the Award. The issues on this appeal are set out in [217] below.

The judge's decision

205. In the Commercial Court Romania's application to set aside the order for registration or to stay enforcement of the Award and the appellants' application for security were listed for hearing at the same time. But in the event there was not enough time at the hearing for oral argument on the appellants' application

for security, with the result that the judge was not able to reach a final decision on that issue in his first judgment dated 20 January 2017, in which he held that enforcement of the Award should be stayed.

206. In that judgment, having at that stage considered written submissions only on the issue of security, the judge expressed the view that the appellants had advanced a "persuasive case" for an order requiring Romania to provide security as a term of the stay (judgment, [192]). This was on the basis that:

> (i) the proceedings relate to an ICSID Award which pre-dates the decisions of the Commission, (ii) the Award is to be treated as a final judgment of the English court given at the time of the Award, and (iii) the Award has been unpaid for some years. More generally, although security is not the same as enforcement or payment because the monies may never be paid to the claimants, the grant of security is at least consonant with the obligation placed on the UK under the ICSID Convention is to enforce awards. Finally, as the claimants say, should the European Court rule in their favour, security would assist in enabling them promptly to recover the sums due to them. This is particularly important given the long duration of this dispute.

207. Before reaching a final decision, however, the judge required to be satisfied (i) that there is legal power to make an order for security and (ii) that the making of an order for security and such steps as may be consequent on any non-compliance with it would not themselves be treated as a violation of EU law (judgment, [193]-[202]).

208. Following a further hearing at which these two points were addressed, the judge refused to order security for reasons given in his further judgment dated 15 June 2017.

209. In this judgment, as his starting-point, the judge remained "firmly" of the view expressed in his first judgment that the appellants had advanced a persuasive case for an order requiring Romania to provide security as a term of the stay ([11]) and was satisfied that "all other things being equal, the appellants have made out their case for security" ([14]).

210. On the first of the two points specifically reserved for further argument, the judge saw force in the appellants' contention that, if there is power to order a stay, then there is power to do so on terms, including a term requiring security to be provided. However, in view of his conclusion on the second point, he did not find it necessary to reach a final conclusion on this question ([9]).

211. On the second point reserved for further argument (whether ordering security would itself violate EU law), the judge noted that the appellants had sought an order which would result in the stay being automatically lifted if Romania failed to provide security. The judge considered that this involved "a circularity, in that upon non-provision of the security, the position reverts to that which the court has held should not happen" ([21]).

212. To meet this difficulty, the appellants had put forward an alternative case that the court should simply order security to be provided without directing that, if the order is not complied with, the stay will be lifted. They submitted that, in the event of non-compliance by Romania, the parties could come back before the court to consider what the consequences should be and that any such non-compliance could be addressed through case management measures falling short of lifting the stay. For example, the court could order Romania to disclose its assets within the jurisdiction which would speed up the enforcement process should the stay be lifted ([22]).

213. The judge declined to adopt this course for three reasons ([23]):

    1) There was at least a "material risk" that the provision of security would itself be contrary to the Commission's Decision;

    2) There was potential for confusion if the Commercial Court could be asked to take action to enforce an order for security whilst the appellants' appeal against the grant of a stay was pending; and

    3) It appeared that the appellants' challenge to the Commission's Decision before the GCEU would be heard sooner than had originally been anticipated.

214. In these circumstances, and noting also that the prejudice caused to the appellants by the delay in enforcing the Award did not extend to the risk of diminution of Romania's assets, the judge concluded that "the balance at the present time appears to be against making the stay conditional on the provision of security" ([24]).

The issues on the Security Appeal

215. On their appeal against this decision the appellants contend that the judge should have held (i) that the court has power to require Romania to provide security as a term of granting a stay and (ii) that the Commission's Decision and the duty of sincere cooperation under EU law do not preclude the court from making such an order. The appellants maintain as their primary case that the court is not precluded by the Commission's Decision from making an order for security which provides for the automatic lifting of the stay if Romania does not comply with it. Alternatively, if that is wrong, they submit that the judge erred in principle in relying on the three factors that he gave as reasons for declining to make an order for security which did not have that consequence attached to it.

216. Romania has not filed any respondent's notice but contests the appellants' grounds of appeal and argues that the decision to refuse security should be upheld for the reasons given by the judge. The Commission has adopted the same position as Romania.

217. Accordingly, the following issues arise on this appeal:

    (1) Does the court have power under domestic law to require Romania to provide security as a condition of the stay?

(2) If so, does the Commission's Decision and/or the duty of sincere cooperation under EU law preclude the court from exercising its power to grant a stay on terms that security be provided by Romania?

(3) Was the judge wrong to reject the appellants' argument that the consequence of Romania failing to comply with an order to provide security need not be a lifting of the stay but that alternative consequences could be determined?

(4) Accordingly, was the judge wrong to decline to order security?

Power to order security

218. CPR 40.8A, which gives the court power to grant a stay of execution of a judgment or order on the ground of matters which have occurred since the date of the judgment or order, provides that "the court may by order grant such relief, and on such terms, as it thinks just" (emphasis added). Similarly, CPR 83.7(4) gives the court power to grant a stay of execution of a judgment or order for payment of money if satisfied that there are special circumstances which render it inexpedient to enforce the judgment or order "either absolutely or for such period and subject to such conditions as the court thinks fit. More generally, CPR 3.1(3) states:

> Where the court makes an order, it may –
>
> (a) make it subject to conditions, including a condition to pay a sum of money into court; and
>
> (b) specify the consequence of failure to comply with the order or condition.

219. In the course of oral argument counsel for Romania, Mr O'Donoghue QC, accepted that, in circumstances where Romania is relying on the power of the court to order a stay under CPR 40.8A or under its general powers of case management, Romania is bound to accept that the court has power to make the stay subject to terms, which could include a term requiring the provision of security. He was plainly correct to do so.

Does EU law preclude a conditional order?

220. The next question is whether making the order for a stay subject to a condition that Romania must pay a sum of money into court (or provide security in some other form) would conflict with the Commission's Decision and would therefore violate the duty of sincere cooperation under EU law. This question has to be considered separately with reference to each of the two alternative forms of order proposed by the appellants. The first is their preferred option of an order providing for the stay to be lifted if the condition is not complied with. The second is their alternative proposal of an order to provide security which does not make it a consequence of non-compliance that the stay will be lifted.

221. In our view, if the duty of sincere co-operation applies (as to which see Grounds 2 and 3 above), the judge was clearly right to find that the duty of sincere cooperation precludes the court from making an order of the first kind. An

order which obliges Romania to pay the Award is just as much in conflict with the Commission's Decision whether the obligation arises immediately or only in the event that Romania does not provide security. In either case, the duty of sincere cooperation on the English court requires the court not to permit the Award to be enforced. That duty will not disappear if Romania is ordered to provide security and fails to do so. The court cannot, therefore, order that the stay will be lifted in that eventuality without breaching its duty under EU law. (Arden LJ considers that in any event this Court should not make an order for a stay on the basis that the stay will be lifted if the conditions as to security are not complied with since this would necessarily destroy the independent purpose for the stay explained above.)

222. In his submissions on behalf of the first claimant, Mr Green QC sought to resist this logic by arguing that the court should make what he described as a "holistic" assessment which takes account of Romania's own obligations of sincere cooperation. He emphasised that any failure by Romania to comply with an order to provide security would be a breach of Romania's duty of sincere cooperation towards the UK court. Furthermore, to make an order providing for the stay to be lifted in the event of non-compliance would create an additional legal reason for Romania to comply with the order, as Romania's duty of sincere cooperation owed to the Commission would require it to avoid a situation in which the Award could be enforced against it, thereby placing Romania in breach of the Commission's Decision which prohibits it from paying the Award. In these circumstances, Mr Green submitted, any lifting of the stay resulting from a breach by Romania of an order requiring it to provide security would be attributable exclusively to Romania and could not be said to place the English court in breach of its duty of sincere cooperation.

223. Although Mr Green told us that this argument is "unanswerable", we find it wholly unpersuasive. The duty of sincere cooperation owed by the English court is not conditional on Romania's performance of its own obligations, such that if Romania were to fail to comply with its duties to the English court and to the Commission, the English court would be relieved of its own duty to cooperate with the Commission. Mr Green did not identify any authority or principle of EU law which would support such a conclusion. In *Emerald Supplies Ltd v British Airways plc (Nos 1 & 2)* [2015] EWCA Civ 1024; [2016] Bus LR 145, para 73, the Court of Appeal described as a "misguided approach" an argument that a breach by the Commission of its duty to cooperate with the English court relieved the English court of its mutual obligation to cooperate with the Commission. In our view, it is at least as misguided to suggest that a breach of duty by a third party could somehow do so. It is no answer to say that it would be solely the fault of Romania if it were to put itself in breach of legal duties by disobeying an order to provide security. Such a default by Romania would not excuse the English court from its own duty to prevent enforcement of the Award. Nor is it germane to suggest, as Mr Green did in argument, that the possibility of such a default by Romania is "vanishingly small", since the question of what the consequence of a default should be assumes as its premise that a default has occurred.

224. We conclude that the judge was right to reject the appellants' primary case and to hold that EU law precludes the court from making an order for security which provides for the stay to be lifted if the order is not complied with.

Does EU law preclude any order for security?

225. We turn to consider the appellants' alternative proposal that the court should order Romania to provide security as a term of the stay without making it a consequence of failure to do so that the stay will be lifted. Romania and the Commission have both argued that an order of this kind would also conflict with the Commission's Decision because the Commission's Decision prohibits Romania not only from paying the Award but also from providing security for the Award pursuant to a court order.

226. We cannot accept this argument, as it does not correspond to what the Commission's Decision says. Article 1 of the Decision states that:

> The payment of the compensation awarded by the arbitral tribunal … to the [appellants] … constitutes State aid within the meaning of Article 107(1) of the Treaty which is incompatible with the internal market.

Article 2 further provides:

> 1. Romania shall not pay out any incompatible aid referred to in Article 1 and shall recover any incompatible aid referred to in Article 1 which has already been paid out to any one of the [appellants] in partial implementation or execution of the arbitral award of 11 December 2013, as well as any aid paid out to any one of the [appellants] in further implementation of the arbitral award of 11 December 2013 that the Commission has not been made aware of or that is paid out after the date of this Decision.
>
> …
>
> 3. The sums to be recovered are those resulting from the implementation or execution of the award of 11 December 2013 (principal and interest).
>
> …
>
> 7. Romania shall ensure that no further payments of the aid referred to in Article 1 shall be effected with effect from the date of adoption of this Decision.

227. It is plain from these provisions that what the Commission's Decision prohibits – and all that it prohibits – is payment by Romania of the compensation awarded by the arbitral tribunal to the appellants, as this is the "incompatible aid" referred to in Article 1. Providing security, for example by paying money into court, pursuant to a court order would not involve making any payment to the appellants at all, let alone any payment which could be described as

payment of the compensation awarded by the arbitral tribunal. It is therefore clear from its operative terms that the Commission's Decision does not preclude Romania from providing security, if the court orders it to do so.

228. The Commission and Romania sought to get around this fatal objection by relying on the last recital, numbered (161), which forms part of the reasons for the decision. After referring to certain payments made by Romania in part satisfaction of the Award, this recital states:

> In addition, the Commission takes note of the fact that the Romanian authorities have voluntarily transferred ROM 472,788,675 (c. EUR 106.5 million) … into a blocked account in the name of the five claimants. Those sums, as well as any further payments to the claimants in fulfilment of the Award which have taken or will take place, must be recovered by Romania.

229. The Commission and Romania argued that there is no material difference between the payment of money into a blocked account which the appellants could not access and the payment of money into court. Accordingly, since the payment of money into a blocked account is treated for the purposes of the Commission's Decision as a payment in fulfilment of the Award which Romania should not have paid and is obliged to recover, the same must apply to a payment of money into court or other provision of security made pursuant to an order of the English court.

230. Simply from a textual point of view, the conclusion of this argument is not sustainable. It is established by case law that, when the Commission issues a decision, only the operative part of the decision is capable of producing legal effects and modifying a person's legal position: see e.g. Case T-358/06 *Wegenbouwmaatschappij J Heijmans v Commission* [2008] ECR II-110, para 22, cited in *Emmerson Electric Co v Morgan Crucible Co plc* [2011] CAT 4, para 29. The provision of security cannot become a payment of the Award just because, in a non-operative part of the decision, the Commission envisages that a particular payment into a blocked account in the name of the appellants is a sum that Romania must recover.

231. Furthermore, the Commission has not advanced any reason, either in the recitals to its Decision or in its submissions in the present action, to seek to justify treating the provision of security as constituting state aid. When asked whether there is a rational basis for treating the provision of security as equivalent to payment of the compensation awarded to the appellants which the Commission has decided would constitute state aid, counsel for the Commission, Mr Khan QC, was unable to offer one. It is not clear to us why the Commission should wish to argue that its Decision has an effect for which there is no legal justification.

232. It is in any event apparent on analysis of the Commission's Decision that there were special circumstances which led the Commission to regard the payment referred to in recital (161) as falling within the scope of its decision even though the account into which the money had been paid was blocked. Recital (37)

explains that this payment was made voluntarily by Romania "in order to implement the Award". By the time the payment was made the Commission had issued a suspension injunction obliging Romania to suspend any action which might lead to the implementation or execution of the Award until the Commission had taken a final decision on whether payment of the Award would constitute unlawful state aid. In those circumstances the payment was made on terms that the appellants could only withdraw the money from the blocked account in their name if the Commission decided that the payment of the Award would not constitute unlawful state aid. Recitals (41) and (42) go on to record an argument made to the Commission by Romania that its payment into the blocked account had constituted payment of the Award. A similar argument was made by Romania in court below in the present proceedings.

233. This context in our view explains why the Commission expected the money in the blocked account in the appellants' name to be returned to Romania after the Commission issued its final decision. The money had been paid into the account with the intention that it would constitute payment of the compensation awarded to the appellants by the arbitral tribunal but on terms that it could only be released to them if the Commission decided that such payment would not violate the rules against state aid. When the Commission reached the opposite decision, it followed that the money could not be used for its intended purpose and should therefore be returned to Romania.

234. By contrast, the provision of security pursuant to an order of the English court would not represent an attempt by Romania to pay part of the compensation awarded to the appellants. It would simply represent compliance with a court order, the purpose of which is not to execute the Award but to ensure that there are funds available against which execution could take place immediately in the event that the Commission's Decision in annulled. There is therefore a material difference between the payments into the blocked account referred to in recital (161) and the provision of security which the appellants are asking the English court to order. It is notable in that respect that recital (161) refers to "[t]hose sums, as well as any <u>other</u> payments to the appellants in fulfilment of the Award which have taken or will take place" (our emphasis). Neither that recital, nor anything said anywhere else in the decision, purports to prohibit Romania from making any payments which are not payments to the appellants in fulfilment of the Award.

235. For all these reasons, we are satisfied that ordering Romania to provide security would not itself conflict with the Commission's Decision.

The "risk of conflict" argument

236. The judge did not in fact find that the provision of security would conflict with the Commission's Decision. That is unsurprising, as in his first judgment he had rejected Romania's argument that its payment into the blocked account amounted to payment of (part of) the Award, holding that "those arrangements plainly do not constitute payment" (judgment, [176](3)). As discussed, the provision of security pursuant to a court order is an *a fortiori* case. Nevertheless, the judge accepted an argument advanced by Romania that there was a "material risk" that the provision of security would amount to a breach of

the Commission's Decision and that this was a reason why the English court should refrain from ordering security.

237. The authorities relied on by Romania for the proposition that a national court should not merely refrain from taking decisions which conflict with a decision of the Commission but should avoid a risk of such conflict were addressing a situation in which a decision by the Commission is contemplated but has not yet been made: see *Delimitis v Henniger Brau AG* (Case C-234/89) [1991] ECR I-935, para 47; *Masterfoods Ltd v HB Ice Cream Ltd* (Case C-344/98) [2001] All ER (EC) 130; [2000] ECR I-11369, para 49; *Emerald Supplies Ltd v British Airways plc* (Nos 1 & 2) [2015] EWCA Civ 1024; [2016] Bus LR 145, para 70. Before the Commission has made a decision, it is not known exactly what its terms will be. In such circumstances it makes sense for a national court to adopt a precautionary approach and to avoid making a decision which will give rise to a real risk of conflict with what the Commission might decide. The position is different, however, once the Commission has issued its decision. There is then no longer a need to avoid a risk of conflict with what the Commission might decide. It can be seen what the Commission has in fact decided. If the terms of the Commission's Decision are ambiguous, it may still be said that a national court should avoid taking a step which on one view is in conflict with the Commission's Decision unless or until the doubtful question of interpretation has been referred to the CJEU for a preliminary ruling. But where, as in the present case, it is plain that the decision contemplated by the national court would not conflict with the Commission's Decision, there is no relevant risk to avoid.

238. In the present case the judge did not identify any relevant ambiguity in the Commission's Decision or explain how it could sensibly be interpreted as prohibiting Romania from providing security if ordered to do so by the English court. He appears to have regarded the Commission's assertion, "correct or incorrect", that the provision of security would amount to a breach of its decision as of itself sufficient to give rise to a material risk of a conflict (judgment, [23](i)). However, the Commission has no special prerogative to determine the meaning or effect of its own decisions and its bare assertion in the court below (quoted at [22] of the judgment) that its decision "would regard the provision of the security sought as a payment under the Award made to the claimants" is no substitute for a reasoned argument. As discussed above, no argument in support of that assertion which bears scrutiny has been advanced on its behalf.

239. We therefore conclude that the judge went wrong in accepting Romania's contention that there is a material risk that the provision of security would put it in breach of the Commission's Decision and to treat this as a reason for not requiring Romania to provide security. He should have found that, for the reasons we have given, the provision of security could not reasonably be regarded as a breach of the Commission's Decision.

The "timing issue"

240. The second reason which dissuaded the judge from ordering security was what he described as a "timing issue" – the concern being that if the court was asked

to take action to enforce an order for security whilst the claimants' appeal against the grant of a stay was pending, this could be "a recipe for confusion" (judgment, [23](ii)). He thought this "particularly so" as it has remained the appellants' case on the Stay Appeal to this court that there is no power to grant a stay at all, with or without security. With respect to the judge, we are unable to see why there should have been any risk of confusion. The apparent suggestion that there was some contradiction in the appellants' position was misplaced. Unless and until it was overturned on appeal, all the parties including the appellants were bound by the judge's decision that there was power to grant a stay. The appellants were entitled – and indeed bound – to act on the premise that this decision was correct, even though they were appealing against it. If on that premise it was appropriate to make and enforce an order for the provision of security, the fact that the appellants were challenging the premise on appeal could not be a reason to deprive them of such relief.

The length of the delay

241. The third reason given for declining to order security was that the Commission had been notified and had informed the court that the GCEU would give the appellants' annulment action "priority", with the result that the case would be heard by the GCEU sooner than had originally been anticipated and "almost certainly" before the end of 2017. The judge described this as "a welcome development, since delay in resolving this matter runs counter to the policy of the effective resolution of investor disputes through the ICSID Convention process which all relevant states concerned in this matter have signed up to" (judgment, [23](iii)).

242. To appreciate the significance or otherwise of this "welcome development" it is necessary to have regard to the expected overall length of the annulment proceedings. The Commission's original time estimate, given when it intervened in these proceedings, was that the applications to the GCEU were unlikely to be determined before late 2018. It is common ground that, whatever the GCEU decides, there is then very likely to be an appeal by one or more parties to the Court of Justice, such an appeal being available as of right. The Commission has estimated that the time required to determine such an appeal would be at least 30 months. On that basis, the Commission's original time estimate was that the annulment proceedings would not be finally resolved until 2021. At the further hearing of the appellants' application for security on 24 May 2017, the Commission informed the court that this time estimate would be "brought down a bit" by the fact that the GCEU had agreed to give the case priority. It was said that this made the Commission "very confident indeed" that the hearing would be held in 2017 – albeit that "even in the absence of priority, a hearing would surely have been held this year" (i.e. in 2017). No indication was given of how soon after the hearing the GCEU would be likely to give its judgment.

243. On the information given to the judge, therefore, the most that could be said was that proceedings which on the original time estimate were likely to last a further four years before they were finally resolved might now be concluded slightly sooner, though it appeared that any difference would be marginal. We find it

difficult to see how this development could reasonably be regarded as a material change of circumstances.

244. As it is, the Commission's confidence that the hearing before the GCEU would take place before the end of 2017 proved to be misplaced and the hearing was in fact held in March 2018. Judgment is still awaited. Looked at from the present perspective, therefore, there has been no reduction in the expected length of the delay resulting from the annulment action.

Conclusions

245. Neither Romania nor the Commission has sought on this appeal to challenge the judge's assessment that, all other things being equal, the appellants had made out their case for security. Although, as we have held, the judge was right to reject the appellants' primary case that an order for security could properly provide for the stay to be lifted if Romania failed to comply with the order, no similar difficulty arises if an order is made which does not have that consequence. It has not been suggested that, if such an order were made, the court would be acting in vain. Romania has said nothing to intimate that it will not comply with an order to provide security. We agree in any event with the submission of Ms Demetriou that there is a range of measures which the court could consider in such circumstances. It seems to us that those would include not only ordering Romania to give disclosure of assets but granting a freezing order or appointing a receiver.

246. The only question, therefore, is whether the reasons given by the judge for nevertheless ultimately deciding not to order security were capable of justifying that decision. We are satisfied that they are not. We have explained why, in our opinion, it was wrong to apprehend a "material risk" that the provision of security would amount to a breach of the Commission's Decision, or to be concerned by the prospect that the Commercial Court could be asked to enforce an order for security while the Stay Appeal was pending or to regard the notification that the GCEU would give priority to hearing the annulment action as a significant factor. Exercising the discretion afresh, as we are bound to do in these circumstances, it is even clearer as matters now stand that none of the factors which dissuaded the judge from ordering security is a valid reason for declining to do so.

247. In our view, the reasons which led the judge to conclude that the appellants had advanced a persuasive case for an order requiring Romania to provide security demonstrate why it is just and convenient to make such an order. In particular, the appellants have an ICSID Award and an order for its registration which is equivalent to a judgment of the English court. Not only would the appellants be entitled to immediate execution in the absence of a stay, but the UK has an obligation under the ICSID Convention to enforce the Award. If that obligation cannot currently be complied with, the English court should in principle do the "next best" to permitting enforcement. The next best that can be achieved without potentially violating EU law is to order Romania to provide security. Such an order will at least assist the appellants to recover sums due to them promptly if the European courts rule in their favour.

248. The amount of security which the appellants asked the court to order was £150m, or such sum as the court may think fit (see judgment, [3]). No argument has been advanced by Romania on this appeal that, if the appeal is allowed, the security ordered should be any lesser sum than the £150m sought by the appellants. We will accordingly make an order for security to be provided in this sum. If the parties cannot reach agreement as to the time within which the security is to be provided and the form that it should take, we will receive written submissions on those matters.

H. OVERALL CONCLUSIONS ON BOTH APPEALS

249. In his stay judgment under appeal, the trial judge had to address complex issues about the interrelationship of the ICSID Convention and EU law. In his careful judgment, he refused to set aside the registration of the Award but granted a stay pending the determination of the GCEU proceedings for annulment of the Commission's Decision or (by implication) further order in the meantime. We all consider (for reasons which in some respects differ) that the judge was right in principle to grant a stay until the determination of the GCEU proceedings. We regard this as both a pragmatic and a principled conclusion.

250. If the GCEU sets aside the Commission's Decision and there is no appeal, it is difficult to see how there could be any extension of the stay. However, if for any reason the decision of the GCEU is the subject of a further appeal and the parties cannot agree what is to happen to the stay, there will have to be a further application to the Commercial Court for a stay. The grant of any further stay will then be a matter for that court.

251. So far as the legal framework for any further stay is concerned, however, Arden and Leggatt LJJ have expressed the view that any stay on the enforcement in the jurisdiction of England and Wales of an award made under the ICSID Convention could only be for a temporary purpose if the Award is enforceable under the ICSID Convention. That means that it may be necessary for the court hearing any further stay application to reach a decision on some of the points that this Court has left open, particularly whether enforcement under the ICSID Convention is a pre-accession treaty obligation of the UK which is not displaced by entry into the EU Treaties.

252. We emphasise, however, that those are matters for another day. Suffice it to say, that the ultimate conclusion on the present appeals, on which all members of the Court are agreed, is that there should be a stay on enforcement until the conclusion of the GCEU proceedings (or further order in the meantime). We also all agree that Romania should provide security in the sum of £150m as a term of such stay but on the basis that the sanction for any non-compliance with the order for security (which we would not in any way expect or encourage) will not of itself (save possibly if for instance there is some exceptional change of circumstances) lead to the termination of the stay which we have ordered.

Leggatt LJ

253. This separate judgment sets out my reasoning on the Grounds 2 and 3 Issues considered in Part F of the judgment of the Court, above. My views on other matters are set out in the judgment of the Court.

254. Romania's case is disarmingly simple. Section 2(1) of the 1966 Act provides that an award registered under section 1 "shall, as respects the pecuniary obligations which it imposes, be of the same force and effect for the purposes of execution as if it had been a judgment of the High Court given when the award was rendered pursuant to the Convention…" The Award with which this case is concerned was rendered on 11 December 2013 (see [13] above). There can be no doubt, Romania argues, that if on that date, instead of an ICSID award, the appellants had obtained a judgment of the High Court given in ordinary domestic proceedings, the High Court would have been bound to stay the enforcement of the judgment when the Commission Decision was adopted on 30 March 2015. That is because section 2(1) of the 1972 Act requires obligations under the EU Treaties to be given legal effect in the UK and, in accordance with the duty of sincere cooperation imposed by Article 4(3) TEU, a national court must refrain from taking steps which would conflict with a decision of the Commission. The Commission has decided that execution of the Award would constitute new State aid incompatible with EU law and has prohibited Romania from making any payment under the Award to the appellants. For the English court in these circumstances to lend its authority to the enforcement of the Award would conflict with the Commission Decision. It follows, argues Romania, that the English court must stay the enforcement of the Award at least until the appellants' application to annul the Commission Decision has been determined by the European courts and, if that application fails, permanently thereafter.

255. In my view, the judge was right to accept the premise of Romania's argument – that if the appellants had been seeking to enforce a judgment given in ordinary domestic proceedings in England and Wales, the court would be obliged to stay enforcement of it. The appellants have sought to challenge that premise by relying on the so-called *Kapferer* principle that EU law does not require a national court to reopen a final judicial decision even if failure to do so would make it impossible to remedy an infringement of a provision of EU law. This is Ground 1 of the Stay Appeal. But attractively as that case was put by Ms Demetriou QC for the appellants, I am unable to accept it. For the reasons given in the judgment of Arden LJ, which on this issue is the judgment of the court, I consider that the *Kapferer* principle does not apply in this case, as it cannot be used to circumvent the EU rules on State aid.

256. Yet although I accept the premise of Romania's argument, I do not accept the conclusion that the court must stay enforcement of the Award. That is because I do not accept Romania's "equivalence argument" – that is to say, the argument that the effect of section 2(1) of the 1966 Act is to make an ICSID award registered under section 1 of the Act equivalent for all purposes to a judgment of the High Court given in ordinary domestic proceedings.

257. My reasons for rejecting the equivalence argument are substantially those given by Arden LJ in part F of her judgment, which addresses Grounds 2 and 3 of the Stay Appeal. In particular, I agree with Arden LJ that the equivalence argument fails to pay proper regard to the purpose of the 1966 Act, which is to implement the ICSID Convention. To give effect to that purpose, section 2(1) of the 1966 Act must so far as possible be interpreted in a manner which is consistent with the ICSID Convention. It would, in my opinion, be inconsistent with Article 54 of the ICSID Convention for a national court to refuse to enforce the pecuniary obligations imposed by an award on the ground that, had the award been an ordinary domestic judgment, giving effect to it would be contrary to a provision of national law.

258. The equivalence argument, in my view, interprets the words used in Article 54(1) ("as if it were a final judgment of a court in that state") in too mechanistic a way. It is an important feature of the ICSID Convention that it does not permit an award to be impugned or its enforcement to be resisted in national courts even in circumstances where a foreign judgment, or even a domestic judgment, could be challenged. Thus, in contrast, for example, to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a contracting state cannot decline to enforce an ICSID award even on the ground that its enforcement would be contrary to public policy in that state. Under the scheme of the ICSID Convention the only powers to contest the validity or enforceability of an award are those contained in the ICSID Convention itself (in Articles 50-52). Subject to those provisions, enforcement is intended to be automatic. Understood in that light, it can be seen that the purpose of equating an award with a final judgment of a court in the state where enforcement is sought is to give legal force to an award for the purpose of executing it and to provide machinery for that purpose. It is not to determine <u>whether</u> an award is to be enforced. That is determined exclusively by the procedure set out in the ICSID Convention. Hence, the equiparation in Article 54 of an award with a final judgment of the national court cannot be used as a basis for refusing to enforce an award.

259. A similar interpretation can and should accordingly be given to section 2(1) of the 1966 Act, which implements Article 54(1) in UK law. Properly interpreted, the analogy with a judgment of the High Court is limited to defining the force and effect of a registered award for the purpose of execution. It does not give the High Court power to refuse to enforce an award for a reason that would justify staying enforcement of an ordinary domestic judgment.

260. That said, in agreement with Arden LJ I do not interpret Article 54 of the ICSID Convention as completely constraining the national court and depriving it of any discretionary power. Article 54(3) provides that execution of the award "shall be governed by the laws concerning the execution of judgments in force in the state in whose territories such execution is sought." This gives the national court control over the <u>process</u> of execution of the award, which I would interpret as including its manner and timing. However, as stated in the Schreuer Commentary on the ICSID Convention, para 112:

> "The drafting history and context of Art 54(3) make it clear that the laws of the enforcing State that govern execution of an

> ICSID award are of a procedural nature only. Art 54(3) does not detract from the obligation of every State party to the Convention to enforce awards. In particular, laws of the enforcing State may not serve as a standard for review of awards. Art 54(3) does not affect the finality and non-reviewability of awards."

261. Again, a similar interpretation is to be given to section 2(1)(c) of the 1966 Act, which implements Article 54(3) and states that "the High Court shall have the same control over the execution of the award, as if the award had been such a judgment of the High Court." The control over the process of execution conferred by this provision would, in my view, extend to exercising the court's procedural powers to grant a (temporary) stay of execution if in the particular circumstances of the case it is just to do so – in the same way as the court may grant a stay of execution of a domestic judgment, for example pending an appeal. But this power cannot extend to declining to enforce an award because of a substantive objection to it or staying enforcement of an award permanently or indefinitely.

262. I conclude that the UK has an international obligation under the ICSID Convention transposed into domestic law by the 1966 Act to enforce the Award made against Romania, subject only to the limited discretion to control the process of execution conferred by section 2(1)(c) of the 1966 Act.

Article 351

263. The next question is whether there is a conflict between the obligation of the English court under section 2(1) of the 1966 Act to enforce the Award and the court's obligation to apply EU law. As Arden LJ has explained, no such conflict will arise if, pursuant to Article 351 TFEU, the UK's obligations under the ICSID Convention are not affected by the provisions of the EU Treaties.

264. The effect of Article 351 was in issue before the judge. The appellants argued that Article 351 plainly applies in this case. Romania and the Commission disputed that contention. They argued (amongst other things) that Article 351 does not apply because it is not applicable in a case of "intra-community relations" and that this is such a case since Romania, Sweden (the appellants' home state) and the UK are all member states of the EU. The judge did not decide that issue for the reason that the effect of Article 351 is in issue before the GCEU and the judge considered that there would be a risk of conflicting decisions if the English court were now to rule on it.

265. The appellants have not appealed from the judge's decision on this point. They made it clear that the application of Article 351 is deliberately not in issue in this appeal (see para 36g of the first appellant's skeleton argument on the stay appeal). Although I accept that the issue could, if necessary, be raised by the court of its own motion, we have not heard argument on the question of whether, as a matter of EU law, Article 351 applies in this case. In these circumstances I do not think it appropriate to express any view on that question. I agree in any event with Hamblen LJ that there is no reason to disagree with the judge's conclusion that the issue of whether Article 351 applies in these

proceedings is sufficiently similar to an issue raised in the annulment proceedings to give rise to a risk of conflicting decisions if the English court were now to rule on it. In these circumstances, *prima facie* at least the principle of sincere cooperation under EU law requires the English court to refrain from taking any steps to enforce the Award until the proceedings before the GCEU have been concluded.

The appropriate course

266. What ought the English court to do in these circumstances? Mr Green QC on behalf of the first appellant urged us to cut the Gordian knot by deciding that, if the European courts were to hold that, notwithstanding what is said in Article 351, the UK is prevented by EU law from giving effect to its pre-accession international obligation under the ICSID Convention to enforce the Award, such an interpretation would exceed the competencies conferred on EU institutions when the UK acceded to the Treaties, with the result that the English court would not be obliged by section 2(1) of the 1972 Act to follow such a decision.

267. I do not doubt the fundamental principles which underpin this argument. First, that under the UK constitution Parliament is sovereign and that European law has domestic effect in the UK only because and to the extent that it has been given such effect by section 2(1) of the 1972 Act: see e.g. *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324, para 79; *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591, [80], [90]; *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] A.C. 61, [41]-[42]. Second, section 2(1) of the 1972 Act refers to rights, powers etc "created or arising by or under the Treaties". It is ultimately for the UK courts to determine the scope of section 2(1) and, in principle, a UK domestic court could decide that an EU measure or decision is so clearly outside the powers conferred by a Treaty provision that it would not be "created or arising by or under the Treaties" within the meaning of section 2(1): see *Shindler v Chancellor of The Duchy of Lancaster* [2016] EWCA Civ 469; [2017] QB 226, [58]- [59]; and the *Pham* case, [90].

268. Where that point would come, however, and in particular whether a decision which treated a pre-accession obligation of the UK under the ICSID Convention as affected by the EU Treaties would be outside the scope of section 2(1) of the 1972 Act are very difficult and sensitive questions. It would be wrong, in my view, even to embark on addressing those questions unless there is plainly no alternative to doing so and as a last resort. Both UK law and EU law have a variety of methods available for avoiding conflict and those methods need to be exhausted before a court entertains the possibility that it is not required by section 2(1) of the 1972 Act to apply EU law. As Lord Mance wisely counselled in the *Pham* case, para 91, "the recipe for avoiding any problem is that all concerned should act with mutual respect and with caution in areas where member states' constitutional identity is or may be engaged." The power of a member state to implement its pre-existing obligations under international treaties may be seen as an aspect of its constitutional identity.

269. In the present case the methods available for avoiding conflict have not been exhausted, not least because it is not yet apparent whether there is an irreconcilable conflict between EU law as interpreted by the European courts and the UK's international obligation under the ICSID Convention to enforce the Award. In particular, there would be no such conflict if the GCEU (or the CJEU on an appeal) were to annul the Commission Decision or were otherwise to interpret Article 351 in a way which is consistent with the UK giving priority to its obligation under the ICSID Convention.

270. I agree with Arden LJ that the point has also not yet been reached at which the UK is in breach of its obligation under the ICSID Convention if it does not take immediate steps to facilitate execution of the Award. In accordance with the power of the court discussed above to control the process of execution, it is open to the court to grant a stay of execution pending the outcome of the proceedings in the European courts. That, in my opinion, is the right course to take in circumstances where enforcing the Award would conflict with the Commission's Decision and that Decision is currently under consideration by the GCEU.

271. I therefore agree with Arden and Hamblen LJJ in the result that this court should uphold the judge's decision to stay the execution of the Award pending the determination of the annulment proceedings in the GCEU (or further order in the meantime).

Arden LJ

272. For the reasons given above, it is the judgment of this Court that the Stay Appeal shall be dismissed and that the Security Appeal allowed.