Neutral Citation Number: [2017] EWHC 1430 (Comm)

Case No: CL- 2014-000251

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building
7 Rolls Building, Fetter Lane, London

Date: 15/06/2017

Before :

MR JUSTICE BLAIR

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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/ Applicants**
- and –	
ROMANIA	**Defendant/ Respondent**
- and –	
EUROPEAN COMMISSION	**Intervener**

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Patrick Green QC and **Jonathan Worboys** (instructed by **Shearman & Sterling (London) LLP)** for the **First Claimant**
Marie Demetriou QC (instructed by **White & Case LLP**) for the **Second to Fifth Claimants**
Robert O'Donoghue QC and Emily MacKenzie (instructed by **Thrings LLP**) for the **Defendant**
Nicholas Khan for the **European Commission**

Hearing dates: 24 May 2017

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Judgment Approved

Mr Justice Blair :

1. Judgment was handed down in this matter on 20 January 2017: see [2017] EWHC 31. This decision deals with (1) the claimants' alternative application for security (see paragraphs 182-202) of the judgment, and (2) the claimants' applications for permission to appeal.

2. It is convenient to take permission to appeal first. The claimants' applications were made by letters of 17 May 2017, so shortly before this hearing, together with draft grounds of appeal. Difficult issues of law are raised in the case, and it appears that similar issues arise in other arbitral proceedings involving other parties. Both limbs of CPR r.52.6(1) are satisfied, and permission to appeal as per the draft grounds of appeal is accordingly given.

3. As to security, the claimants ask the court as a condition of the stay to order Romania to provide security in the sum of £150m, or such sum as the court may think fit.

4. In the judgment:

   i) The court recognised that there are discretionary arguments against, as well as in favour of, the claimants' application for an order requiring Romania to provide security as a term of the stay, on the assumption that there is power to make such an order (paragraph 191).

   ii) Nevertheless, having considered at that stage the parties' written submissions only, the court considered that the claimants had advanced a persuasive case for an order requiring Romania to provide security as a term of the stay. It reflects the fact 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 to enforce awards. 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 (paragraph 192).

   iii) However, before reaching a decision, the court required (i) to be satisfied that there is legal power to make an order for security, and (ii) to be assured that the making of an order for security and such steps as may be consequent on any non-compliance would not themselves be treated as a violation of EU law (paragraphs 194-198 and 199-201).

5. This decision follows further submissions from the parties addressing in particular the points identified by the court.

6. As to (i), namely whether the court has power to order security at all, Romania relies on the decision of the Supreme Court in *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2017] UKSC 16, which was handed down after judgment.

7. It is certainly right that in general terms and in the context of arbitration *IPCO* shows the importance of clarity as to the legal power under which the court orders security. On the other hand, the specific issue in *IPCO* was a different one, concerning the power to order security under s. 103 Arbitration Act 1996 (which gives effect to Arts. V and VI of the New York Convention). In that context, it was decided that the court's power to order security was limited to adjournments under s. 103(5), and that

further powers in relation to security could not be justified by reference to CPR 3.1(3). The claimants rely on CPR 3.1(3) in this case, along with the court's inherent jurisdiction.

8. However, this case arises on different facts, which are unusual, and possibly unique. Applying Art. 4(3) TEU, the court has stayed enforcement of the Award pending the resolution of the claimants' proceedings in the European Court which seek the annulment of the Commission's Final Decision prohibiting Romania from paying the Award, alternatively has stayed enforcement having regard to the risk of inconsistent decisions.

9. There is force in the claimants' contention that if there is power to order such a stay (which finds support in *Department of Trade and Industry v British Aerospace* [1991] 1 CMLR 165 where a stay was granted under the court's inherent jurisdiction), there is power to do so on terms, including the grant of security. However, because of the court's present view as to (ii), namely the requirement of assurance that the making of an order for security and such steps as may be consequent on any non-compliance would not themselves be treated as a violation of EU law, there is no need to reach a final conclusion at this stage.

10. As to (ii), the judgment records that:

> "199. … Romania submits that if the court were to order such security to be paid, that might itself fail to respect the Commission's Final Decision in a way that violates EU law.
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> 200. For obvious reasons, this is a significant issue for the court. The parties have sought to address it, but it raises a further question as to the practical consequences of making an order for security. The court should have an understanding of the steps that it would be asked to take in the event of non-compliance, and the implication of such steps. This may affect the exercise of its discretion in deciding whether or not to make the order.
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> 201. It is to be hoped that the possibility of non-compliance is academic, but in the light of the history of this dispute that cannot be taken for granted. The court needs to be assured that the making of an order for security and such steps as may be consequent on any non-compliance would not themselves be treated as a violation of EU law. The Commission went some way to providing such assurance in the oral submissions referred to above, and may be able to dispel the concerns altogether. As the jurisprudence shows, the national court is entitled to look to the Commission for assistance, and the Commission has assured the court that it will continue to provide any assistance it can."

11. The claimants take as their starting point the court's view expressed in the judgment that they have advanced a persuasive case for an order requiring Romania to provide security as a term of the stay. The court remains firmly of that view.

12. The claimants submit that the court's concerns as to what happens on non-compliance with an order only arise if Romania states expressly that it will not comply. The claimants characterise Romania's tactic as being one of delay. They describe the present impasse as one in which they are forced to keep operating their business "six hundred miles from Bucharest", whilst not being allowed any of the regional aid incentives which encouraged them to set up there in the first place, and say that they are suffering major prejudice as a result of non-payment of the Award.

13. In response, Romania denies delaying tactics, and submits that there is no evidence supporting the claimants' case that the delay in meeting the Award is causing the claimants prejudice. As to delay, the claimants' case is deposed to in its evidence, so it is not mere assertion, and as to prejudice, the court agrees with the claimants that this is something which can be assumed given the size of the unpaid Award.

14. So all other things being equal, the claimants have made out their case for security. The question remains, however, as to what would happen on non-compliance, and how the court should take that into account in exercising its discretion. Here, it is necessary to note that the position has moved on since the last hearing.

15. The judgment records that the "Commission appeared to accept in oral argument that the court had power to order security" (paragraph 184(i), and see paragraph 201 set out above). The claimants relied, and continue to rely, on that statement.

16. In its written submissions for this hearing, the Commission has clarified its position in this respect. It takes the view that so far as power to order security under European law is concerned, the conditions for the grant of interim relief do not apply. However, the claimants are not seeking interim relief of this kind, and it is unnecessary to consider this issue further.

17. More relevantly, the Commission states that, "The Commission's Final Decision would regard the provision of the security sought as a payment under the Award made 'to the Claimants' (and would trigger Romania's obligation to recover those sums)".

18. As to enforcement, the Commission's case is that because enforcement of the Award falls within the prohibition in its Final Decision, "Any enforcement measures taken by the Claimants would therefore be liable to be unwound immediately by way of recovery of aid pursuant to Romania's obligations under the Final Decision. The Court should not be persuaded to make an order which would lead to such absurd results".

19. Although Romania has been careful itself not to intimate any intention not to comply with an order for security should it be made by the court, it emphasises these statements by the Commission, arguing that it should not be placed "between the devil and the deep blue sea" by being subject to conflicting decisions of the English court and the Commission. It is sufficient for these purposes, it submits, that there is a material risk of a conflict with the Commission decision.

20. The court does not accept the claimants' submission that this issue only arises if Romania states expressly that it will not comply. Given the Commission's position, it is clearly necessary at this stage to consider what would happen on non-compliance with an order. The draft order submitted with the claimants' application of 29 September 2016 provides that unless Romania provides security, the claimants may enforce the Award without further direction from the court.

21. However payment under the Award is prohibited under the Commission's Final Decision, and as explained in the judgment, if the court proceeds to enforce the Award against the assets of Romania, it would be acting in direct contradiction with the Commission's Final Decision. In other words, there is a circularity, in that upon non-provision of the security, the position reverts to that which the court has held should not happen.

22. The claimants seek to meet that difficulty by submitting that in the event of non-compliance, the parties could come back before the court to consider what the consequences should be. These could fall short of enforcing the Award, and could for example require Romania to disclose its assets within the jurisdiction. This would speed up the enforcement process, should the claimants succeed on their appeal to the European Court against the Commission's Final Decision, or to the Court of Appeal against this court's decision.

23. Attractively though this argument is put, there are a number of matters which militate against such a course:

    i) First, it does not address the Commission's assertion, correct or incorrect, that the provision of security would itself amount to a breach of the Final Decision. Romania submits with some force that this may not be a straightforward issue, and that its resolution is not necessary, since it can at least be said with confidence that there is a material risk in that respect (*Air Canada v Emerald Supplies* [2015] EWCA Civ 1024 at [70]).

    ii) Second, there is a timing issue, because of the prospect that this court could be asked to take action to enforce the condition of the stay by one means or another whilst the appeal is pending. As is submitted on behalf of Romania, parallel proceedings in this court could be a recipe for confusion. This is so particularly since the claimants' position (taking the claimants together) is that the court has no power to order a stay at all, with or without security, on the grounds that enforcement under the 1966 Act is automatic, and this is not overridden by section 2 of the ECA 1972 (and that is their case on appeal).

    iii) Thirdly, and importantly, following a request by the Commission, by letter of 22 May 2017, the GCEU notified the Commission that it has given the claimants' annulment action priority. The Commission says that it will almost certainly be heard before the end of the year, and that even allowing for the possibility of a further appeal to the CJEU, the matter will be dealt with more speedily than had originally been anticipated. This is a welcome development, since delay in resolving this matter runs counter to the policy of the effective resolution of investor disputes through the ICSID process which all relevant states concerned in this matter have signed up to.

24. Although (as indicated above) the court can assume that the claimants are prejudiced by the delay, it is of some significance that the prejudice does not extend to the risk of the diminution of Romania's assets in the same way as might be the case with a non-state party. In all the circumstances, the balance at the present time appears to be against making the stay conditional on the provision of security. There is no need to rule it out definitively for the future. That is the court's decision on the application.