[LOGO] NACKA DISTRICT COURT

PROTOCOL
2019-01-23
Procedure in Nacka

File appendix 149
Case no.
Ä 2550-17

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Trial *in absentiam*

THE COURT
and Judges (reporting)

RECORDING CLERK
The Reporting Judge, aided by Drafting Assistant

PARTIES

Appellant
1.

Romania

2. S.C Multipack S.R.L

3. S.C European S.A

4. S.C Starmill S.R.L
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OTHERS
The European Commission

Counsel: litigator

IN THE MATTER OF
Impediment to enforcement

APPEALED DECISION
The Swedish Enforcement Agency's decision of March 16th, 2017 in case no. U 25445-16/0103

BACKGROUND

At the end of the 1990s, Romania introduced various investment incentives, such as tax reliefs and customs exemptions, aimed at increasing investments in disadvantaged regions in the country.

On May 29th, 2002, the governments of Sweden and Romania entered into an agreement with the purpose of promoting and guaranteeing reciprocal protection of investments (SÖ 2003:2). According to the agreement, each party was to promote

investments made within its respective territory by the other party's investors. The agreement stated that disputes ultimately were to be submitted for resolution by international arbitration to, among others, the International Centre for Settlement of Investment Disputes (ICSID) in accordance with the Washington Convention of 1965.

Negotiations regarding Romania's admission into the European Union (EU) began in February of 2000. In the EU's joint opinion of November 21st, 2001, it was stated that the investment scheme was not compliant with the EU's rules regarding state aid. On August 31st, 2004, Romania thusly repealed most of the affected investment incentives.

The appellants in this matter, who had invested in Romania, brought an action before an arbitral tribunal and demanded compensation for damages suffered owing to the repealed investment incentives. On December 11th, 2013, the tribunal obligated Romania to pay the plaintiffs' 376,433,229 Romanian lei (some 900 million SEK) plus some interest in damages.

On March 30th, 2015, the European Commission (henceforth, "The Commission") decided (decision 1470/2015) that payments under the arbitral award are considered state aid as defined in article 107(1) in the Treaty on the Functioning of the European Union (TFEU). Furthermore, the Commission decided that payments under the arbitral award are incompliant with the single market of the European Union. The Commission prescribed that Romania must abstain from paying such unlawful state aid and that Romania furthermore must recover unlawful state aid which already has been paid. The Commission's decision has been appealed and is currently being handled by the General Court of the European Union.

The appellants have applied for enforcement of the arbitral award with the Swedish Enforcement Agency. In the decision which is subject matter of this appeal, the Swedish Enforcement agency approved Romania's challenging enforcement of the arbitral award, due to impediments.

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CLAIMS

The appellants have claimed that the District Court shall overrule the Swedish Enforcement Agency's decision and instead lay down that there is no obstacle for sought enforcement. The appellants have also demanded compensation for litigation costs.

Romania has opposed an overruling of the decision. Furthermore, Romania has claimed that the District Court, should it consider overruling the Swedish Enforcement Agency's Decision, shall obtain a preliminary ruling from the European Court of Justice (CJEU), and that the District Court furthermore shall stay the proceedings until such time as the preliminary ruling is handed down. Finally, Romania has claimed that the District Court, should it consider overruling the Swedish Enforcement Agency's decision without obtaining a preliminary ruling from the CJEU, shall stay the proceedings until such time as the ruling from the General Court of the European Union is handed down. Romania has claimed compensation for litigation costs.

The Commission – which is permitted to opine – has argued that the appeal should be refused.

On March 16th, 2018, the District Court held a court session in the matter, whereupon the parties and the Commission were allowed to deliver closing arguments.

On December 13th, 2018 and January 22nd, 2019, the District Court deliberated *in camera*.

LEGAL GROUNDS

As legal grounds, the parties and the Commission have chiefly and summarily argued as follows.

The appellants

1) Sweden's obligation to enforce the arbitral award, without the award being tried formally or materially, arises from its wider obligations under international law.

The obligation to enforce the arbitral award is stipulated in The Washington Convention's 54th article. In the proposal behind the implementation of the Washington Convention into Swedish law, the following was stated.

> The arbitral ruling shall be enforced as a final ruling made by a Swedish court. The arbitral ruling is not to be tried either materially or formally. This obligation, regulated in art. 54, applies regardless of where the ruling's has been handed down, be it in Sweden or elsewhere (proposition 1966:146, pages 11-12).

The regulation precludes all possibilities for Swedish authorities and courts to try whether enforcement is to be allowed as well as to, during enforcement, consider any objections, be they material or formal in kind. This means that even if it would be possible to regard objections pertaining to EU law in the matter of enforcement of a Swedish decision, such circumstances may not be regarded when enforcing an arbitral award like the one in the matter at hand.

Furthermore, the matter of Sweden's obligations under the Washington Convention is not a matter of a conflict of law between EU law and Swedish national law. Rather, EU law, according to article 351 TFEU, permits the arbitral awards enforcement even though it might be considered incompliant with EU regulations regarding state aid.

2) The arbitral award's legal force encompasses the objection regarding state aid and legal force is respected by EU law, even if EU law might be prioritized before the Washington Convention.

The arbitral award's legal force encompasses all objections which have been presented, or could have been presented, during the procedure and means that the award's legal consequences stand firm. During the procedure Romania objected, claiming that damages – if any - would constitute unlawful state aid. Even if EU law, wrongfully, would be given priority before the Washington Convention and even if the damages did constitute unlawful state aid or even if the award was to be materially flawed, the award's legal force would still encompass the matter at hand.

The matter of legal force is central within international law and is respected by EU law since the opposite would create considerable legal uncertainty. This applies even if it means that the impact of EU law is lessened. For that same reason, and being that the exceptions presented by the counter party are not applicable, in the matter of enforcement importance may not be placed on the Commission's decision, which was handed down after the arbitral award.

3) The regulation in Chapter 3, Section 21 of the Swedish Enforcement Code is not applicable on enforcements such as the one in this matter.

Since the Commission's decision is only addressed at Romania – and affects Romania's obligations vis-à-vis the EU (third party) with regards to the decision – it is not such a circumstance which pertains to the parties' dealings. The regulation in the Enforcement Code furthermore focuses on material relations for the time after the award. Application of the regulation would, furthermore, as has been remarked upon above, contravene Sweden's obligations under the Washington Convention, as well as it would contravene the special provisions set up for enforcements of this kind.

4) No requirement for proof of entry into legal force of the award exists, and in any case the submitted certificate of authenticity is to be considered proof of legal force.

The arbitral award is a final decision which immediately enters into legal force. It is, furthermore, not possible to get proof of legal force or a declaration of enforceability for an ICSID award.

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5) Romania has not fulfilled its obligations under the arbitral award.

The lightened burden of proof under Chapter 3, Section 21, Paragraph 2 of the Enforcement Code is not applicable regarding claims of performance, which are expressly supposed to be scrutinized under Section 1 of that same regulation. Romania has, through enforcement actions in 2015, paid 40 million Romanian lei of the adjudged amount in capital.

The alleged offset has not taken place and has furthermore been declared invalid by a Romanian court of appeal. The setoff is to be considered valid only if the Romanian Court of Cassation, which is currently trying the matter, hands down a decision saying that the setoff has taken place. According to Romanian internal law, the claims must be of the same kind in order to be deemed as setoff against a party's will.

The transfers between various government-controlled accounts are not valid payments under Romanian internal law. During 2015, a government-controlled account was opened in the appellants' names. To this account, 473 million Romanian lei were transferred. After the Commission's decision that the damages were to be deemed as state aid, the funds were transferred to another government-controlled account, without the appellants gaining prior access to the funds.

The transfer of 101,000 Romanian lei to an executor has not been a payment, as the funds were never paid to the appellants.

6) Ongoing enforcement procedures in other jurisdictions are not impediments to the sought enforcement in Sweden.

7) Staying of proceedings is not possible in the matter.

According to the Law (1966:735) on Recognition and Enforcement of Arbitral Rulings in Certain International Investment Disputes, the only exception for immediate enforcement is a decision of suspension. No such decision has been

made. Furthermore, it is not possible for such a decision to be made. A decision to stay the proceedings would contravene applicable *lex specialis*.

8) Since the appellants have suffered unnecessary costs due to Romania's procedural actions, Romania shall, regardless of the outcome in the matter, be obligated to compensate the appellants for their litigation costs with a sum total of 150,000 SEK.

Prior to the court session, Romania handed in a submission, not only regarding the submission with attachments Romania was obligated to opine on, but as a complete answer to the appellants' submission of December 15th, 2017. Romania's actions forced the appellants to cancel their planned final remarks. The appellants were thusly forced to further correspond in the matter. Had Romania instead notified the court that Romania planned to hand in a submission regarding matters entirely different from the ones the court had obliged them to opine on, it would have been possible to cancel the court session or for the appellants to hold off on spending time on summarizing the case as well as writing a manuscript with closing remarks based on Romania's actions as formulated prior to the lengthy submission.

Romania

1) The Commission's decision in and of itself – but also EU regulations on unlawful state aid – constitute impediments to enforcement of the arbitral award.

According to the Washington Convention, Sweden is to enforce an ISCID award as if it is a Swedish ruling which have entered into legal force. This means that the award is to be given the same status as a domestic ruling – it is not to be treated more or less advantageously. Under similar circumstances the Commission's decision – as well as EU regulations on unlawful state aid - would have constituted impediments to enforcement of a Swedish ruling. The fact that the award is not to be tried formally or materially means that it should not be tried in a similar vein as foreign rulings in *exequatur* proceedings.

The Commission – which has an exclusive right to decide in such matters – has determined that payment under the arbitral award is to be considered unlawful state aid. The Commission's decision is directly binding for Romania. Per Article 4(3) TFEU, the principle of loyal cooperation applies, and Sweden thusly has an obligation to not rule out Romania's possibilities to comply with its obligations. The obligation to loyally cooperate also applies vis-à-vis the Commission. The principle of loyal cooperation therefore precludes Sweden to hand down decisions which risk undermining the Commission's decision.

Should the District Court still find that enforcement is not precluded by the Commission's decision, the court has an obligation to independently try if the procedure contravenes the regulations on unlawful state aid per Article 107 TFEU. In Sweden, EU law has priority before the Washington Convention and Swedish courts must uphold EU law and act for its effective impact.

Article 351 TFEU is not applicable in matters concerning obligations between two Member States. A third nation's rights are also not relevant in the matter of enforcement of an ICSID award between Romania and Swedish investors.

2) The arbitration and the award have not with legal force as effect ruled whether payment – in accordance with the ICSID award – would constitute unlawful state aid, and should that be the case, the principle of *res juridicata* must be considered secondary to the rules regarding unlawful state aid.

An ICSID award cannot gain legal force in matters of unlawful state aid, since such trial would go beyond the tribunal's area of competence. The tribunal has merely ruled on the repeal of the incitement program, and has expressly abstained from the questions whether payment under the award could be considered unlawful state aid.

If a ruling should be awarded legal force under domestic rules, it must simultaneously not preclude effective impact of the regulations on unlawful state aid. Domestic courts thusly have a duty to abstain from applying procedural rules which potentially could award legal force to an arbitral award if it contravenes the

rules on state aid. EU law is thusly to be prioritized before the domestic principle of *res juridicata.*

Furthermore, the Commission's decision has been handed down after the arbitral award. Hence, the award cannot possibly constitute a ruling with legal force in respect of the matter if payment of the damages would be unlawful state aid.

3) The regulation in Chapter 3, Section 21 of the Enforcement Code is applicable in matters like the one currently being tried, and it lies therefore with the District Court to interpret the enforcement regulations in light of EU law.

The Commission's decision, which directly precludes Romania from paying damages to the appellants, is such a decision which regards the parties' dealings. The decision, in and of itself, means that Romania may not pay damages to the appellants and that Romania has an obligation to recover damages already paid. Furthermore, it lies with the District Court to abstain from applying or alternatively interpreting rules relevant for the sought enforcement in light of EU law which may adventure the aim with the Union's treaties.

4) Since there is no certificate of legal force attached to the award, it is not possible to enforce it per Chapter 2, Section 6 of the Enforcement Ordinance.

5) Romania has fulfilled its obligation to pay under the award. Romania has transferred a total of 472,788,675 Romanian lei to an account opened in the appellants' names. At the time of the transactions, the method constituted valid payment under Romanian internal law, which is why the transfers are to be credited to Romania as payment.

6) Simultaneous enforcement in other jurisdictions should preclude enforcement in Sweden.

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The appellants have applied for enforcement in several different jurisdictions. Hence, there is a significant risk that simultaneous enforcement will lead to that the appellants will receive a sum which exceeds their current claim.

7) Romania objects to the claim that the Washington Convention means that the District Court is precluded from deciding on a stay of proceedings in the matter at hand.

8) Romania shall not, regardless of outcome in the matter, be obligated to pay for a part of the appellants' litigation costs.

Romania has not acted negligently in its litigation or procedural actions. Being that the court session was held in order to investigate the parties' opinions, Romania cannot be held responsible for the appellants' flawed perception that the case would be closed after the session. Furthermore, Romania did not cause the need for further written correspondence.

The Commission

Article 54 of the Washington Convention obligates party states to enforce arbitral awards awarded to the benefit of an investor in another party state. The obligation to enforce the award does in this case not include Sweden, as the investor's home state was Sweden and Sweden was therefore not a party in the arbitral proceedings.

Furthermore, a party state shall, when enforcing a ruling under the Washington Convention, treat it in the same vein as a decision handed down in the state of enforcement. A Swedish ruling, though it may have entered into legal force, would not have been enforceable either. The Commission's decision is in and of itself an obstacle for enforcement of the arbitral award, just as it would have been an obstacle for enforcement of a Swedish ruling. The Commission's decision is directly binding for Romania. The Commission's decision is directly, and in any circumstance, indirectly, binding for other EU Member States. It is of no significance that the Commission's decision has been appealed since it is directly enforceable and in force until such time as it is declared invalid.

Even if the arbitral award in theory could mean *res juridicata* in the matter of state aid, the question whether the arbitral award *in and of itself* constitutes such aid is not, with following taken into consideration, decided in such a way that it might not be tried in a later trial. The tribunal expressly abstained from taking a position in that matter. When applying EU law, an arbitral award is not given the same status as a "court ruling" in the matter of *res juridicata.* Finally, the arbitral tribunal lacks competence to make final decisions in matters of EU law.

The District Court hands down the following

FINAL DECISION

1. The District Court dismisses the appeal.

2. S.C. Multipack S.R.L, S.C European S.A, S.C Starmill S.R.L and are jointly obligated to compensate Romania for its litigation costs with 90,000 euro as regards counsel fees. To this sum, interest shall be added according to section 6 of the Swedish Interest Code as of the date of this decision.

GROUNDS FOR THE DECISION

The principle of loyal cooperation applies within the EU. According to this principle, the Union and its Member States shall respect and aid each other in their fulfilling of the tasks laid down in the treaties. This is evident from article 4(3) in the Treaty on the European Union (TEU). The obligation to cooperate in said ways does not apply to Member States only, but also to their authorities as well as their courts (see for instance the CJEU's judgment in cases C-213/89 Factorame, C-453/00 Kühne & Heitz, C-119/05 Lucchini, C-505/14 Klausner and C-284/16 Achmea). National courts which are to apply EU law are obliged to make sure that EU law is given full impact and, when necessary, abstain from applying domestic regulations which contravene EU law (see C-441/14 DI).

Through its decision on March 30th, 2015, the Commission has determined that all payments under the arbitral award are state aid which contravenes the single market. In that same decision, the Commission determined that Romania must not pay this unlawful state aid.

According to article 108(3) TFEU, support schemes must not be carried out without final approval from the Commission. Thusly, it is prohibited to carry out such schemes. Although the Commission decision has been appealed, there is no approval in higher court. It shall be noted that the Commission's decision is aimed at Romania, meaning that it is Romania which is not allowed to pay as obligated in the award. There is no doubt that enforcement in Sweden would mean that Romania, through the actions of the Swedish Enforcement Agency, would be made to pay and thusly contravene the Commission's decision prohibiting such payment. That in turn would force Romania to instantly recover that which the Enforcement Agency had repossessed.

Enforcing the arbitral award would thusly mean that a Swedish authority would aid in effectively disregarding the Commission's decision. Due to the principle of loyal cooperation, it is not possible to allow the sought action as long as the Commission's decision is valid. The obligation for a national court to abstain from making decisions which are incompatible with or contravene Commission decisions is far-reaching (compare with C-284/12 Deutsche Lufthansa). EU law prohibits application of the principle of *res juridicata* if such an application would mean that EU regulations on state aid were disregarded (C-119/05 Lucchini, C-505/14 Klausner and C-284/16 Achmea).

The District Court notes that Sweden, under art. 54 of the Washington Convention, is obliged to enforce the award in the same way as a Swedish decision with legal force. However, enforcement of a Swedish decision contravening EU law would not have been enforceable either. Thusly, there is no difference here between the arbitral award and domestic decisions with legal force. Sweden's obligations under article 4(3) TEU means that sought enforcement may currently not be permitted.

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Application of article 351 TFEU cannot not lead to a different conclusion (C-241/91 P and C-242/91 P). The appeals are therefore dismissed.

Due to the outcome in the case, the question of compensation for litigation costs arises.

According the Section 32 of Act on Court Matters (1996:242), the court may, in cases where individuals are parties, apply Chapter 18 of the Judicial Procedure Code and obligate a party to compensate the counter party's litigation costs. In this matter, Romania is the debtor and is therefore to be considered an individual party. Furthermore, a conflict of interest has been the subject matter in the errand which has led the court to handling the case as a civil case. Therefore, the rules in chapter 18 of the Judicial Procedure Code may be applied.

The appellants are in this respect to be considered the losing parties and are hence as starting point obligated to compensate Romania for its litigation costs. The Distrct Court does not find that Romania's litigation leads to a different conclusion. The appellants are therefore jointly obligated to pay Romania's litigation costs, insofar as that cost has been reasonable for Romania to protect its right.

Romania has claimed compensation for litigations costs to the sum of 302,729 euros, of which 291,286 euro are counsel fees and 11,443 euro are for Romania's own work.

Romania has not described the actions for which compensation regarding its own work is claimed. Under these conditions, it is not possible for the District Court to judge whether the actions have been necessary and reasonable for Romania to protect its rights. The claim regarding Romania's own work is therefore dismissed.

Taking the matter's complicated nature and scope into consideration, the District Court nonetheless finds that reasonable compensation for counsel fees cannot exceed 90,000 euros including value added tax.

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HOW TO APPEAL, see appendix 1 (TR-12)

Appeal due 2019-02-13 (Svea Court of Appeals)

Protocol shown/

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