

ICSID Trumps State Aid in the UK but uncertainty remains regarding enforcement of New York Convention awards in post-Brexit UK

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On 19 February 2020, the UK Supreme Court unanimously held that by virtue of Article 351 TFEU UK's obligations under the ICSID Convention trump its duty of sincere co-operation under Article 4(3) TFEU to give effect to a state aid decision of the European Commission. In doing so, the UK Supreme Court also made clear that ICSID arbitral awards rendered by arbitral tribunals established pursuant to intra-EU BITs and ECT will be enforced in the UK. Whether in post-Brexit UK enforcement of intra-EU BITs and ECT arbitral awards will be refused on the grounds of being contrary to EU state aid law if sought pursuant to the terms of the New York Convention remains unclear given that state aid currently forms part of the on-going negotiations between the UK and EU regarding their future relations.

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I. The UK Supreme Court's decision in *Micula*

In its unanimous decision in *Micula and others v Romania*¹ (*Micula*) the UK Supreme Court on 19 February 2020 held that '[b]y virtue of article 351' of the Treaty on the Functioning of the European Union (TFEU) the UK's obligations under the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)² trump its duty of sincere co-operation as per Article 4(3) TFEU to give effect to a state aid decision of the European Commission (Commission).³ It, therefore, overturned the

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¹ *Micula and others v Romania* [2020] UKSC 5.

² ICSID Convention, available at:

<https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf>, accessed 25 May 2020.

³ *Micula* (n 1) [85] and [90–108].

decision of the Court of Appeal and lifted the stay on proceedings to enforce the arbitral award rendered in the case of *Ioan Micula et al v. Romania*⁴ (*Micula Award*) by an arbitral tribunal constituted under the auspices of the ICSID Convention and a bilateral investment treaty (BIT) between Sweden and Romania. It did so even though the appeal against the General Court's decision⁵ annulling the Commission's state aid decision⁶ was pending before the Court of Justice of the European Union (CJEU) at the time.

In doing so, the Supreme Court has ended the debate, at least from the point of view of English law, as to the inter-relationship between EU state aid law and the ICSID Convention. As discussed by Matei in '*SA.38517 – Commission Decision of 30 March 2016 on State Aid Granted by Romania to Micula*' this debate has been raging since 2015 when the Commission issued the *Micula State Aid Decision*⁷ declaring the circa €177 million damages awarded to the Micula brothers pursuant to the *Micula Award* as illegal state aid.⁸ By forbidding Romania from complying with the *Micula Award* and obliging it to recover any compensation paid to the Micula brothers as damages to date the Commission was, it is argued by public international and investment lawyers, prohibiting Romania from complying with its express obligations under the ICSID Convention.⁹ As discussed below, the Supreme

⁴ ICSID Case No. ARB/05/20, *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, Final Award of 11 December 2013, available at: <https://www.italaw.com/cases/697>, accessed 25 May 2020 (*Micula Award*).

⁵ Cases T-624/15, T-694/15 and T-704/15 *European Food SA and Others v European Commission*, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=215106&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10387732>, accessed 25 May 2020 (*Micula General Court Decision*). For a detailed discussion of the General Court's decision annulling the Commission's State Aid Decision see M Momic, *Can an ICSID Arbitral Award for the Compensation of Damages Be Regarded as State Aid?*, 2019 Eur. St. Aid L.Q. 346 (2019).

⁶ European Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award *Micula v Romania* of 11 December 2013 (OJ 2015 232/43) (*Micula State Aid Decision*).

⁷ *ibid.*

⁸ E Matei, '*SA.38517 – Commission Decision of 30 March 2015 on State Aid Granted by Romania to Micula*' (2016) 2016 Eur St Aid LQ 134.

⁹ Over the years, many articles have been written on whether investor-state arbitrations and EU state aid rules conflict or can be reconciled. See for example K Struckman and G Forwood and A Kadri and A Wallin, '*Enforcement of Investor-State Arbitral Awards: More Questions than Answers*' (2017) 2017 Eur St Aid LQ 316; C Saavedra Pinto, '*The Narrow Meaning of the Legitimate Expectation Principle in State Aid Law Versus the Foreign Investor's Legitimate Expectations*' (2016) 2016 Eur St Aid LQ 270.

Court acknowledged that the ICSID Convention has its own self-contained mechanism for the review of arbitral awards¹⁰, and that States signatories thereto are obliged to enforce an ICSID arbitral award as if it were a final judgment of its own national court. In overturning the decision of the Court of Appeal, the Supreme Court found that it ‘made use of powers to stay execution granted by domestic law in order to thwart enforcement of an award which had become enforceable under the ICSID Convention’.¹¹

II. *Micula Award* enforceable despite *Achmea*

In order to understand the broader implications of the Supreme Court’s decision, it is important to recall that the *Micula Award* concerned the cancellation by Romania of tax incentives it had granted before joining the European Union (EU) in 2007 and that the arbitral proceedings under the auspices of the ICSID Convention were started pursuant to the BIT between Romania and Sweden before Romania joined the EU. Accordingly, even on the most expansive interpretation of the temporal effect of *Slowakische Republik (Slovak Republic) v Achmea BV (Achmea)*¹² as set out in the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the EU dated 5 May 2020 (BIT Termination Agreement)¹³, it was unlikely that the Supreme Court would consider *Achmea* as a valid basis for rendering the *Micula Award* unenforceable.

It may be recalled that *Achmea* concerned an investment treaty award (*Achmea Award*) in which an arbitral tribunal seated in Frankfurt found that Slovakia had breached the provisions

¹⁰ Romania exercised its right to have the *Micula Award* reviewed by an *ad hoc* ICSID Annulment Committee. However, the award was upheld. See ICSID Case No. ARB/05/20, *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, Decision on Annulment of 26 February 2016, available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7161.pdf>, last accessed 25 May 2020.

¹¹ *Micula* (n 1) [84].

¹² Case C-284/16 *Achmea* [2018] ECLI:EU:C:2018:158.

¹³ The BIT Termination Agreement is available at https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200505-bilateral-investment-treaties-agreement_en.pdf, last accessed 25 May 2020. As of the date this article is published the agreement is not in force. The agreement will enter into force 30 calendar days after the date on which the Secretary-General of the Council of the European Union receives the second instrument of ratification, approval or acceptance from an EU Member State, available at:

of the BIT between The Netherlands and the Czech and Slovak Republic when it prohibited the distribution of profits generated by private health insurance activities and awarded the Dutch investor, Achmea BV, damages of EUR 22.1 million.¹⁴ Slovakia challenged the *Achmea Award* before the German courts on the grounds *inter alia* that upon its accession to the EU in 2004 the investor-state dispute resolution mechanism set out in Article 8 of the above-mentioned BIT was incompatible with EU law. The Oberlandesgericht Frankfurt am Main (the Higher Regional Court in Frankfurt) dismissed the challenge. When Slovakia appealed to the Bundesgerichtshof (the German Federal Court of Justice), the court made a request to the CJEU for a preliminary ruling pursuant to Article 267 TFEU.

In its preliminary ruling in *Achmea* the CJEU found that ‘Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.’¹⁵ Consequently, it held that an ISDS resolution provision in BITs between two EU Member States (known as ‘intra-EU BITs’) is incompatible with EU law and *ipso facto* invalid thereunder.

Shortly after CJEU’s ruling in *Achmea*, the Commission noted that ‘[a]s a consequence [of Achmea] national courts are under the obligation to annul any arbitral award rendered on ... basis [of such dispute resolution clauses] and to refuse to enforce it’.¹⁶

Since the Micula brothers commenced arbitral proceedings on 2 August 2005 that is, before Romania joined the EU in 2007, even on the most expansive interpretation of the retrospective effect of *Achmea* under EU law the ISDS provision as set out in the BIT between Romania and Sweden is valid. According to Article 4(1) of the BIT Termination

¹⁴ PCA Case No. 2008-13, *Achmea B.V. v The Slovak Republic*, Final Award of 7 December 2012, available at: <https://www.italaw.com/cases/417>, accessed 25 May 2020 (*Achmea Award*).

¹⁵ *Achmea* (n 12) [62].

¹⁶ Commission, ‘*Protection of Intra-EU Investment*’, COM (2018) 547 final.

Agreement, which was signed by twenty three EU Member States¹⁷, *Achmea* has the effect of rendering investor-state dispute settlement (ISDS) provisions in the Swedish-Romania BIT inapplicable as from the date on which Romania became a member of the European Union (EU), that is from 1 January 2007. This explains why no reference is expressly made to *Achmea* in the Supreme Court decision.

III. Interrelationship between Article 351 TFEU and Article 4(3) TEU at the heart of the *Micula* case

Instead, the Supreme Court considered the question of the interrelationship between Article 351 TFEU and Article 4(3) TEU as ‘the issue [going] to the heart of the present dispute’.¹⁸ Romania had objected to the Supreme Court considering submissions on this point since the claimants had not appealed the decision of Blair J in the High Court to the Court of Appeal on this point. It was, in fact, Lady Justice Arden in paras. 190 to 198 of her separate opinion to the Court of Appeal decision (rather than the parties in their submissions) who highlighted the importance of Article 351 TFEU in resolving the conflict between the UK’s obligations under EU law and international law. In particular in para. 198 she noted that in her view the duty of sincere co-operation ‘is only engaged if [the English courts], as an emanation of the UK in its capacity as a member state, has some obligation under EU law’¹⁹. She then suggested that Article 351 TFEU, which expressly provides that ‘[t]he rights and obligations arising from agreements concluded ... 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’, may be construed to mean that such a duty does not apply in respect of the ICSID Convention, it being a multilateral treaty.

The Supreme Court agreed with Arden LJ that it had the power to consider the issue of its own motion having been ‘persuaded that this issue [goes] to the heart of the present dispute and that the parties cannot by their conduct withdraw it from the court’s consideration’.²⁰

Having carefully reviewed the *travaux préparatoires* of the ICSID Convention, the working

¹⁷ Interestingly Austria, Ireland, Finland, Sweden, and the UK have not signed the agreement.

¹⁸ *Micula* (n 1) [96].

¹⁹ *Micula & Ors v Romania* (Rev 1) [2018] EWCA Civ 1801.

²⁰ *Micula* (n 1) [96].

papers leading up to its conclusion and the writings of Professor Schreuer and acknowledging that ‘ultimately’ the scope of the provisions of the ICSID Convention could ‘only be authoritatively’ interpreted by the International Court of Justice, the Supreme Court found that the ‘grounds of objection raised by the Commission, even if upheld before the EU courts, were not valid objections to the *Micula Award* or its enforcement under the ICSID Convention’.²¹ In particular, it noted that in staying the enforcement of the *Micula Award*, the Court of Appeal had ‘disregarded’²² the following provisions of the ICSID Convention: (i) Article 53(1), which provides that ‘awards are binding on the parties and are not subject to any appeal or other remedy except those provided under the Convention’²³; (ii) Article 54(1), which obliges the UK to ‘recognize 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’²⁴; and (iii) Article 54(3), which provides that ‘[e]xecution 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’²⁵. In turn, it found that the obligations imposed on the UK pursuant to Articles 54 and 69 were owed by the UK to all signatories thereto and thus also to states which are not parties to the EU²⁶. Since the UK had become a signatory to the ICSID Convention before it joined the European Communities (as the EU was known then) in 1973, the Court held that ‘[A]rticle 351 TFEU has the effect that any obligation on the UK courts to give effect to a decision such as the Commission Decision pursuant to the duty of sincere co-operation which might arise under the Treaties in other circumstances does not arise in this case’.²⁷

IV. No need to stay proceedings although appeal pending in the CJEU

Although the appeal against the *General Court’s Micula Decision* annulling the *Micula State Aid Decision* was still pending at the time the Supreme Court rendered its judgment, the Supreme Court refused to stay proceedings on this basis. In particular, it rejected Romania’s

²¹ *Id.*, [84].

²² *ibid.*

²³ ICSID Convention (n 2).

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ *Micula* (n 1) [104].

²⁷ *ibid* [85].

and the Commission's submission that it was 'precluded from deciding the issue of the extent of the obligations of the United Kingdom and to whom those obligations are owed because there would be a risk of a conflict between such a ruling and a future ruling by an EU court in the present dispute'²⁸ for the following reasons. First, noting that '[n]either the EU courts nor domestic courts have competence to give an authoritative decision, binding as between States, as to the existence and extent of obligations under a prior multilateral convention' as such 'function is reserved to the International Court of Justice by [A]rticle 64 of the ICSID Convention', it found, after a review of EU case law including *Levy*²⁹ and *Evans Medical*³⁰, that it had competence 'to consider and rule upon the effect of a multilateral treaty, insofar as it may bear upon the outcome of the proceedings before' it.³¹ Second, that the duty of sincere cooperation did not require it 'to decline to decide this issue pending its resolution by the EU courts, or otherwise to defer to the EU courts on this issue'³² in the present case because (i) the questions as to the existence and extent of obligations under prior treaties, in the context of Article 351 TFEU, are not governed by EU law and the CJEU was in 'no better position than a national court to answer them';³³ (ii) there was 'no congruence of the issues' before it and the CJEU since before the CJEU the claimants had invoked Article 351 TFEU as a ground for the annulment of the Commission's *Micula State Aid Decision* on the ground of the primacy of Romania's pre-EU accession obligations under the BIT and the ICSID Convention (and in particular Article 53 thereof), whereas it was asked to determine the nature and scope of UK's obligations under Articles 54 and 69 of the ICSID Convention,³⁴ and (iii) the '[t]he preliminary reference to the CJEU made by the Belgian court [in respect of the *Micula Award*] d[id] not raise any issue in relation to article 351 TFEU' since Belgium ratified the ICSID Convention after it joined the EU.³⁵

V. The possibility of Commission bringing infringement proceedings against UK remote

²⁸ *ibid* [109].

²⁹ Case C-158/91 *Levy* [1993] ECLI:EU:C:1993:332, see [21] in particular.

³⁰ Case C-324/93 *Evans Medical* [1995] ECLI:EU:C:1995:84, see [29] in particular.

³¹ *Micula* (n 1) [110].

³² *ibid* [111].

³³ *ibid* [112].

³⁴ *ibid* [113].

³⁵ *ibid* [115].

Finally, and importantly, the Supreme Court also examined, without mentioning Brexit, whether the duty of sincere cooperation required it to stay the enforcement of the *Micula Award* due to the possibility that at some point in the future the Commission may commence infringement proceedings against the UK should the Supreme Court conclude that a stay of enforcement of the *Micula Award* was not required by virtue of Article 351 TFEU. It concluded that although ‘conceivable’, such possibility seemed contingent and remote because (i) the ‘Commission ha[d] given no indication that it is contemplating any such proceedings’ and so the ‘possibility [wa]s entirely speculative’; and (ii) such infringement proceedings ‘would have no realistic prospect of success in disputing the existence of (...) obligations’ under the ICSID Convention.³⁶

VI. Intra-EU BIT and ECT ICSID Arbitral Awards will be enforced in UK

Surmising from the Supreme Court’s decision, it is clear that intra-EU BIT and Energy Charter Treaty ICSID arbitral awards will be enforced in the UK. Consequently, going forward the UK is more likely to be chosen as the seat of intra-EU BIT and Energy Charter Treaty (ECT) arbitrations than Sweden, Germany and other EU Member States who became signatories to ICSID after they joined the EU. It will also be more likely to be chosen as the place for the enforcement of such awards going forward.

VII. No clarity yet on whether *Micula*-type New York Convention arbitral awards will be enforced in the UK

What is also clear is that the Supreme Court’s reasoning cannot be applied by analogy to ensure that New York Convention arbitral awards, whether pursuant to a BIT or ECT, will be enforced in the UK in *Micula*-type circumstances. Firstly, because the UK joined the EU before it ratified the New York Convention³⁷ Article 351 TFEU cannot be invoked to have the obligations on the UK under the New York Convention trump the duty of sincere cooperation as per Article 4(3) TEU to enforce the Commission’s state aid decisions. Secondly, and more importantly, because the New York Convention grants a discretion to UK courts

³⁶ *ibid* [116] and [117].

³⁷ UK joined the EU on 1 January 1973. It acceded to the New York Convention on 24 September 1975. For details see <http://www.newyorkconvention.org/countries>, last accessed 25 May 2020.

pursuant to Article V(2)(b) to refuse enforcement of an arbitral award which is ‘contrary to [its] public policy’.

Accordingly, there is no doubt that English Courts are, at present (during the Brexit transition period), required to refuse to enforce arbitral awards which are contrary to EU public policy if enforcement is sought pursuant to the New York Convention. In particular, in paragraph 54 of *Achmea*, the CJEU emphasised the importance of the courts of EU Member States being able to refuse the enforcement of arbitral awards on account of EU public policy in ensuring the effectiveness of EU law. It is also beyond doubt that state aid is considered a fundamental principle of EU law. By way of example in *Klausner* the CJEU held that ‘...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’.³⁸

There is, however, at present no clarity on whether an arbitral award can *per se* amount to new state aid prohibited by EU law. As noted in Section I, the Commission’s *Micula State Aid Decision* found so in the case of *Micula Award*. And the Commission has asserted so repeatedly since then. In particular, the Commission has said that arbitral awards pursuant to which compensation is awarded to investors ‘on the basis that Spain has modified the premium economic scheme by the notified scheme would constitute in and of itself State aid’ even though it has never found such schemes *per se* to amount to state aid.³⁹ It was hoped that the General Court of the CJEU would in the *Micula General Court’s Decision* clarify that arbitral awards *per se* cannot amount to state aid relying on *inter alia Asteris AE and Others v Hellenic Republic and EEC*. In that case the ECJ (as the CJEU was then known) held that ‘damages which the national authorities may be ordered to pay to individuals in compensation for damage they have caused to those individuals do not constitute [state] aid’.⁴⁰ Although annulling the Commission’s *Micula State Aid Decision* on grounds of

³⁸ Case C-505/14 *Klausner* [2015] ECLI:EU:C:2015:742 (*Klausner*) [45].

³⁹ See para 165 of European Commission, ‘*State aid SA.40348 (2015/NN) – Spain: Support for electricity generation from renewable energy sources, cogeneration and waste*’ (Letter to the Member State) C(2017) 7384 final, available at: https://ec.europa.eu/competition/state_aid/cases/258770/258770_1945237_333_2.pdf, last accessed 25 May 2020.

⁴⁰ Joined cases 106/87 to 120/87, ECLI:EU:C:1988:457 [24]. For discussion of why an arbitral award cannot *per se* amount to state aid see Carlos Lapuerta and Jack Stirzaker, ‘EU State Aid as a Ground for Non-Enforcement of Arbitral Awards’ in Crina Baltag and Ana Stanič (eds), *The Future of Investment Treaty Arbitration in the*

ratione temporis, by way of obiter dictum the General Court accepted in paragraph 103 the Commission's argument that compensation for damages can be regarded as aid if "it has the effect of compensating for the withdrawal of unlawful or incompatible aid".⁴¹ With the *Micula General Court's Decision* now on appeal, it is expected the CJEU will clarify whether arbitral awards in *Micula*-type circumstances are *per se* state aid imputable to an EU Member State. With over forty *Micula*-type cases pending under the ECT just against Spain alone and more than €7.8 billion in damages being claimed against it for changes to its feed-in tariffs much is at stake.⁴²

VIII. Enforcement of *Micula*-type awards post-Brexit is also not clear

The situation regarding the enforcement of New York Convention intra-EU BIT and ECT awards once the UK leaves the EU is not clear. The UK is at present on course to leave the EU on 31 December 2020, when the transition period is expected to end. It is possible that the transition period may be extended due to the coronavirus pandemic.

Once the UK is outside the EU after the transition period, English courts will no longer be bound by a duty of sincere co-operation as per Article 4(3) TEU nor will they be entitled to seek a preliminary ruling from the CJEU as per Article 267 TFEU. Instead, English courts will have to enforce arbitral awards which raise questions of EU law by reference to the terms of the European Union (Withdrawal Agreement) Act 2020 (discussed below) and the provisions of the Agreement on the withdrawal of the United Kingdom of Great Britain and

EU (Kluwer forthcoming). See also Kai Struckmann, Genevra Forwood & Aqeel Kadri, 'Investor-State Arbitrations and EU State Aid Rules: Conflict or Co-Existence' (2016) 2016:2 European State Aid L Q (ESTAL) 258, 264-

⁴¹ Interestingly the General Court quotes paragraphs 23 and 24 of *Asteris* as supporting this proposition albeit those paragraphs state the contrary. In particular '[23] It follows that State aid, that is to say measures of the public authorities favouring certain undertakings or certain products, is fundamentally different in its legal nature from damages which the competent national authorities may be ordered to pay to individuals in compensation for the damage they have caused to those individuals . [24] It must therefore be stated in reply to the first part of the third question that damages which the national authorities may be ordered to pay to individuals in compensation for damage they have caused to those individuals do not constitute aid within the meaning of Articles 92 and 93 of the EEC Treaty.'

⁴² UNCTAD, 'IIA Issues Note, Fact Sheet on Intra-European Union Investor-State Arbitration Cases' (United Nations 2018), 8.

Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement)⁴³. In particular, Article 89 of the Withdrawal Agreement provides that the ‘judgments and orders of the Court of Justice of the European Union handed down before the end of the transition period (...) shall have binding force in their entirety on and in the United Kingdom’.⁴⁴ In addition, Article 4(5) of the Withdrawal Agreement provides that ‘[i]n the interpretation and application of this Agreement, the United Kingdom’s judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period’.

Giving effect to these provisions of the Withdrawal Agreement in domestic law, section 6(1) of the European Union (Withdrawal Agreement) Act 2018, as amended by the Withdrawal Act 2020, provides that English courts are ‘not bound by any principles laid down, or any decisions made, on or after exit day by the European Court’; section 6(2) provides that courts ‘may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal’; and section 6(4) clarifies that the Supreme Court is not bound by any retained EU case law.⁴⁵ The obligation of the courts in respect of EU law as in force as at the end of the transition period is further watered-down in section 26(5)(A) of the European Union (Withdrawal Agreement) Act 2020 which gives the British government the power to adopt regulations (i) to provide for inter alia the ‘extent ... and circumstances in which, a relevant court or relevant tribunal is not to be bound by retained EU case law’; (ii) ‘to prescribe the test which a relevant court or relevant tribunal must apply in deciding whether to depart from any retained EU case law’; or (iii) lay down the considerations which such courts or tribunals should consider relevant in deciding whether to depart from EU case law.⁴⁶

Whether a decision by the Commission and/or the CJEU that an arbitral award amounts to

⁴³ *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* of 19 October 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf, accessed 25 May 2020.

⁴⁴ *ibid.*

⁴⁵ *European Union (Withdrawal) Act 2018*, available at: <http://www.legislation.gov.uk/ukpga/2018/16/section/6/enacted>, accessed 25 May 2020.

⁴⁶ *European Union (Withdrawal Agreement) Act 2020* which entered into force on 23 January 2020, available at: http://www.legislation.gov.uk/ukpga/2020/1/pdfs/ukpga_20200001_en.pdf, accessed 25 May 2020.

illegal state aid will be a ground which can successfully be invoked before UK courts to refuse enforcement on account of public policy as per Article V(2)(b) of the New York Convention is at present uncertain. It will largely depend on the provisions of the agreement currently being negotiated between the EU and the UK concerning their future relations as the EU is insisting that such agreement must cover state aid and competition law.

IX. The battle between ICSID and EU state aid rages on elsewhere in the world

With the *Micula* saga now over in the UK, the focus turns to other countries where the battle between ICSID and EU state aid continues to rage including in Switzerland, Sweden and the USA.⁴⁷

⁴⁷ For a discussion how courts in these jurisdiction are approaching these issues see Nathalie Voser and Sebastiano Nesi, 'The Consequences of *Achmea* on Arbitrations Seated in Switzerland' in Baltag and Stanič (eds) (n 36); James Hope and Therese Åkerlund, 'All Eyes on Sweden: Swedish Challenge Cases post *Achmea*', *ibid* (n 36); and Jennifer Thornton, 'How Do You Solve a Problem Like *Achmea*?: The Enforcement of Intra-EU Investment Agreement Awards in U.S. Courts', *ibid* (n 40).