Neutral Citation Number: **[2023] EWHC 234 (Comm)**

Case No: **CL-2021-000362**

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **27 January 2023**

Before :

Mrs Justice Cockerill

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Between :

INFRASTRUCTURE SERVICES LUXEMBOURG S.A.R.L. (formerly Antin Infrastructure Services Luxembourg S.A.R.L) and (2) ENERGIA TERMOSOLAR B.V. (formerly Antin Energia Termosolar B.V.)	**Claimant**
- and -	
the KINGDOM OF SPAIN	**Defendant**

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Patrick Green KC, Nick Cherryman and Richard Clarke (instructed by **Kobre & Kim (UK) LLP**) for the **Claimant**

Hearing dates: **27th January 2023**

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APPROVED JUDGMENT 1

Mrs Justice Cockerill **Friday, 27 January 2023**
(**11:49**am)

Judgment by **MRS JUSTICE COCKERILL**

1. In this matter the European Commission has applied by an application dated 25 October 2022 to be joined as a party or to be permitted to intervene in this case. It is a case in which the claimants seek to enforce an ICSID award of about €100 million against Kingdom of Spain. The Kingdom of Spain has applied to set aside registration of the award based on CJEU authority regarding the effect in EU law of the relevant provisions of the underlying treaty.

2. The only description of the background which needs to be made has been given in paragraphs 2 to 4 of the skeleton argument served on behalf of the Commission:

> "2. … the underlying dispute concerns investments made by the Claimants in solar power installations in Spain. At the time the investments were made, they qualified for certain subsidies which were reduced a series of acts between 2013 and 2014. It followed from a ruling of the Court of Justice of the European Union ("CJEU") in 2014 in relation to a similar energy sector subsidy scheme in Spain that those initial subsidies amounted to State aid within the meaning of Article 107 of the Treaty on the Functioning of the European Union ("TFEU").
>
> 3. The Claimants, which are companies registered in the Netherlands and Luxembourg alleged that the changes to the regulatory regime in Spain for subsidies to solar power damaged the value of their investments, in breach of the protection afforded to investors by the Energy Charter Treaty ("ECT") …], Article 10(1) requiring fair and equitable treatment for investments made in one contracting State by nationals of other contracting States. The ECT, Article 26(4)(a) …, provides that, in the event of a dispute, where the Contracting Party of the Investor and the Contracting Party State to are both parties to ICSID, the investor shall consent to the dispute being submitted to ICSID. The Netherlands, Luxembourg and Spain are all signatories of both the ECT and ICSID (as is the United Kingdom) and the Claimants, relying on the ECT submitted a request for arbitration to ICSID in October 2013. The Tribunal was thereafter constituted under ICSID rules and held the arbitration in Paris. Spain contested the Tribunal's jurisdiction, by reason of the rules of EU law referred to below but these arguments were rejected by the Tribunal.
>
> 4. … the Tribunal rendered its Award in June 2018, ruling essentially in favour of the Claimants, which was confirmed in annulment proceedings by an ad hoc committee on 30 July 2021. In June 2021, the Claimants applied ex parte to register the Award pursuant to the Arbitration (International Investment Disputes) Act 1966. On 29 June 2021 the Award was registered by Cockerill J and on 28 April 2022 Spain applied to set aside the registration …."

3. Before me this morning there has been a certain amount of argument in relation to the underlying points which may or may not arise. This is said potentially to be relevant to the underlying purpose of the intervention. In particular, the parties made submissions on the issue of the relevance of:
    a. *Slovak Republic v Achmea BV v PCA* Case C-284/16
    b. *Republic of Moldova v Komstroy LLC* Case C-741/19
    c. the Supreme Court's decision in *Micula v Romania (European Commission intervening)* [2020] UKSC 5, [2020] 1 W.L.R. 1033.
4. The Commission says that the *Komstroy* argument goes beyond being a contention and that their interest cannot be simply swept away by reference to the Supreme Court's decision in *Micula*, not least because *Komstroy* and the *Achmea* case, which preceded it, effectively started before *Micula.* It is also said that the *Achmea* point was not in issue before the Supreme Court because permission had been refused on that. So the particular issue which arose in the *Achmea* case was not dealt with. It is said, therefore, that the point about prior accession, which is at the heart of the *Micula* decision, is a distinct point which does not directly impact on the decision in *Achmea* and then subsequently in *Komstroy*.
5. It is said that *Micula* is very different from the point which would arise here, which was that there has never been any valid consent. So one is not looking at a contest between obligations between an EU treaty and another treaty. It is not, therefore, a case of overlooking *Micula*, but of an entirely differently configured case. That is obviously a contentious submission, with the claimants saying that the Supreme Court approach in *Micula* to the pre-existing ICSID obligations does impact the range of arguments in the invalidation argument pointing to two hurdles. First, that the arguments have been run before the ICSID tribunal and have been effectively dismissed and the UK's obligation to provide automatic enforcement means that the matter has been finally resolved.
6. Secondly, there is a hurdle that, as a result of *Micula*, there is no scope for any EU obligation to trump the international law obligations as incorporated in the 1966 Act to accord enforcement.

7. I rehearse those arguments simply so that it is clear that there has been that debate on them and that there is a vibrant argument between the parties to the application before me today as to the scope of the arguments which may be before this court ultimately. I will revert to those arguments as I deal with the application before me, but I can just pause to say that I am not persuaded that, however interesting those arguments are and however understandable it is that the focus of those involved in them is very much on those arguments, the arguments themselves have a major impact on the application which I have to consider.

8. The principal basis for the argument which I have to consider is CPR 19.2(2)(a). That provides that:

> "The court may order a person to be added as a new party if -
>
> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings ..."

9. There is a second sub-paragraph to CPR 19.2(2), but the Commission does not rely on that and so I need not consider it.

10. When looking at the court's power to add parties under CPR 19.2, a starting point is obviously the decision of Etherton MR in *Pablo Star* [2017] EWCA Civ 1768 (Ch). In that case he made clear that the words are to be given a wide interpretation and at paragraph 60 he noted that on this question:

> "... the two lodestars are the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case and the overriding objective in CPR Pt 1."

11. In this matter it is not a question of rights being affected as such. I think it would be common ground between the parties, so they did not particularly look at it in this terms, that one must be looking at the slightly broader approach. So although I identified a two-stage test in the *Uganda* case, I am not sure to what extent that two-stage test is as useful as it is in relation to sub-paragraph (b).

12. One may perhaps best look at the citation from *PDVSA Servicios SA v Clyde & Co*, a decision of Snowden J (as he then was) [2020] EWHC 2322 (Ch), where the question which was posed of the party who makes the application that:

> "... its presence before the court is desirable in the broader interests of justice and the overriding objective so that the court can resolve all the matters in dispute in the proceedings between the existing parties."

13. Now, that question and the formulation that is within CPR 19.2(2)(a) is effectively a fact-specific question. It is, therefore, a question on which authorities and other cases should not really be necessary be cited and are unlikely to be helpful.

14. One has to look at this as a matter of first principles. As I have indicated, although I identified a two-stage test in the *Uganda* case, either it is not particularly useful in this case to look at the first stage or it is not really in issue that one might say that it falls within (2)(a) jurisdictionally. One is really looking at the desirability in the light of those points identified by the Master of the Rolls and by Snowden J.

15. So looking at the test on the basis of first principles, one might put it this way. Question one: will the presence of the Commission ensure the resolution of all issues where those would not be resolved otherwise? The answer to that is plainly no. There is no suggestion that Spain is going to be unable to deal with any. The points which that the Commission outlines itself as being in a position to wish to make will be amply dealt with by Spain. Despite careful submissions, I am not persuaded that the background or the ambit of the dispute between the parties and the contentious areas of EU law matters for the purposes of this hearing. Whether or not the Commission is right as to the impact of *Micula* or the absence of impact of *Micula*, there are plainly arguments, but those are arguments for which there is ample opportunity for Spain to take and run them. As has been identified by the claimants, and as has not been disputed by the Commission, Spain has an excellent and expert legal team. Spain also is well familiar with the issues, having participated in the other

cases. To the extent that there might be formulated some point which Spain personally could not take, not that it was formulated, that is not going to be a point which is in issue in this case.

16. Now, this point as to the need for the presence of the Commission was effectively conceded. Mr Khan referred me to the case of *LB Holdings Intermediate No.2* [2018] EWHC 2017 at paragraph 10, a judgment of Mann J, saying that:

> "It is not conclusive against joinder that there is another party who might be capable of advancing the same arguments ..."

17. Although that is a quote which was prayed in aid, when one reads it carefully one can see that what Mann J is saying is not that the fact that there is another party who might be capable of advancing the arguments is irrelevant, it just means that it is not conclusive. Inherent within that is the suggestion that generally if there is somebody who might be capable of advancing the argument, you would not join an extra party. In this case it is not merely a case of another party who might be capable of advancing the arguments, you have a situation where there is another party who nobody is saying will not be able to, i.e. who plainly will be able to. So, in those circumstances, the question as to why one would add a party is very much to the fore.

18. That then leads into the next question, which is: will the presence of the Commission improve the resolution of the matters in dispute? There might be a case for joining the Commission where, even if the issues would be resolved with or without them, they bring something to the table which would improve the resolution of the matters in dispute. As to this, again, I answer that question no. As Mr Green has pointed out during the course of argument, there is no evidence to show impairment of the resolution of the dispute without the Commission or improvement of the resolution of the dispute with the Commission.

19. Turning back to the *LB* case cited by Mr Khan, the second citation on which he relied at paragraph 15, was a passage within that judgment where Mann J said in that case on the facts of that case:

> "The matter is at this stage as much a matter of impression as it is of analysis and my impression and analysis are that Deutsche Bank has, just, established a

> sufficiently different and differentiated 'perspective' ... to make it appropriate to join them to the proceedings."

20. That is a useful cross-check. There is no suggestion here that there is a point on which the Commission has a properly different and differentiated perspective to enable improved resolution. That they bring a different slant to the same issues, such that they would improve the material available to the court to decide the matter, for example. The mere fact that the issues are controversial cannot make it desirable to add the Commission unless there is some such different or differentiated perspective.

21. The point which was really made in reply by Mr Khan is one which then feeds into the next question, which is: is there some broader interests of justice reason? Because what Mr Khan effectively said in reply - candidly and very helpfully - was that the real reason for the Commission's seeking to intervene was because this is a very influential jurisdiction and, in a situation where these issues are very controversial, a decision in this jurisdiction may assist to clarify matters for the Commission. So it is said effectively to be desirable and to improve matters from the perspective of the Commission. There is no broader "interests of justice" reason from the domestic perspective, there is no broader "interests of justice" from the perspective of the parties. So far as the Commission is concerned, the detailed and thorough consideration which will inevitably be given to this case with the expert team that Spain brings to the table and their history in engagement in these issues ensures that there will be clarification of these issues by this court in due course.

22. Finally: would the joinder of the Commission be supported by the overriding objective? To this question I answer emphatically no. The joinder of the Commission would inevitably increase complication and costs. Although the Commission's assurance has been given that they would not run independent arguments and so forth, that can only be achieved by a good deal of (time-consuming and costly) behind-the-scenes work. In fact, it is tacitly accepted at paragraph 17 of the Commission's skeleton that there would be an increase in the work done and the cost and so forth,

because Mr Khan concedes, "*it should not cause any significant increase in the main parties' costs*". The reality is that, in order to engage the proportionality arguments indicated, it would still be necessary for the Commission to bring something extra to the table, which has not been demonstrated.

23. If that is not demonstrated, there is a real danger of arguments being run which are not relevant. So if the Commission does not bring anything to the extant arguments, there is a danger that something slightly off the range of relevant arguments will inevitably creep in or be sought to be crept in, with the result of either mission creep or increasing costs.

24. Finally, the question of comity was floated and to an extent comity was inherent in what Mr Khan said in terms of "it would be of assistance more generally", though he did not specifically pray in aid comity.

25. I am not persuaded that comity is relevant. Even if it were relevant to any extent, it could not, on the facts of this case, where nobody was saying that it was a particularly acute factor, outweigh the balance thus reached.

26. So, so far as concerns CPR 19.2(2)(a), I reach the clear conclusion that the test is not met in the sense that, balancing all the factors, it is not desirable to add the Commission as a new party so that the court can resolve all the matters in dispute in the proceedings, because essentially the desirability test is not met.

27. I have said that I do not think that other cases are particularly helpful. Only one authority was said by the Commission to be analogous and that was the *PDVSA* case. That was not urged orally by the Commission, but I will just say briefly in any event that I do not regard the position as being analogous. The POCA regime which the court had to enforce in that case is domestic legislation. The person who is going to know the most of the ins and outs of that is the NCA and that is in relation to the nitty-gritty, how it works in practice.

28. Here we are looking at an entirely different sort of thing, where the dispute is either about the application of settled Supreme Court authority relating to primary legislation here into which the Commission can have no particular perspective or abstract rules under the EU treaties and so not looking at practical application. So there is no real analogy with the *PDVSA* case.

29. That takes us to the fallback argument advocated by Mr Khan, which was in relation to the inherent jurisdiction by reference to *ITV Broadcasting v TV Catchup* [2014] EWCA Civ 1071. Sir Timothy Lloyd accepted at paragraph 31 that even if the requirements of CPR 19.2(2) were not met, if "*it is put at a slightly less high level justifying intervention rather than joinder as a party*" the court could allow an intervention if it was desirable that the court should hear from a party liable to be substantially affected by the interpretation of the law to be given in the proceedings at hand.

30. There are a couple of reasons why I am not attracted by this. It is not, the claimants say, consistent with the *PDVSA* case. I agree with Mr Khan that that is not really the same point because the *PDVSA* case says you cannot join <u>as a party</u> unless the test is being met. What is being said here is that there is an inherent jurisdiction to allow an intervener, which is a separate point, and I accept that. However, in order then to engage the principle, firstly, the Commission would need to say how the principle is applicable here. Bearing in mind the facts that I have already rehearsed as regards desirability, I am not persuaded that it is desirable and weighing all the factors I would not be prepared to exercise the discretion to permit intervener. There was nothing really that Mr Khan said specifically that took the exercise of the discretion in relation to the inherent jurisdiction into a different category to 19.2.

31. I also see force in the submission made by Mr Green that the court should not lightly circumvent the rules which have been made in order to effectively join someone who does not meet the test in CPR 19.2(2)(a), and he pointed also to the specific provisions that there are for interveners in particular different areas, such, as, for example, the Supreme Court. I see force in that but I can decide this

point simply on the application of the test as stated in *ITV Broadcasting* and the facts in this case, and a consideration of a weighing of the factors in the exercise of the discretion.

32. I would finally note, however, that I would, for myself, tend to doubt that there is much scope for that inherent jurisdiction to operate in the modern world. That is bearing in mind:

    a. that it is pegged to desirability;

    b. that desirability is essentially the key consideration within CPR 19.9(2)(a);

    c. that the authorities which post-date the judgment of Sir Timothy in the *ITV* case include *Pablo Star*, *PDVSA* and so forth, all of which then say that the CPR 19.2(2)(a) jurisdiction is a broad one.

    Therefore, I slightly doubt that there is any scope outside the rules-based areas for the joinder of an intervener for that inherent jurisdiction. But that is purely an expression of an opinion and is not something which makes a difference to my decision.