



School of International Arbitration

IACL
International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law**

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Award Name and Date:

Flughafen Zürich A.G. and Gestión de Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/19) - Decision on Stay of Enforcement of the Award - 11 March 2016

Case Report by:

Maria I. Pradilla Picas,** Ignacio Torterola***

Summary:

In the Decision on Stay of Enforcement of the Award rendered on 11 March 2016, the *Ad Hoc* Annulment Committee (the “**Committee**”) ordered the continuation of the stay of enforcement of the Award, so long as Venezuela provides a bank guarantee within 45 days of the Decision. In the event Venezuela does not satisfy the Committee’s conditions on the bank guarantee within 45 days, the stay of enforcement shall be lifted. In doing so, the Committee concluded that the ICSID Convention grants it the power to issue a condition to continuing a stay of enforcement; neither the ICSID Convention nor the ICSID Arbitration Rules establish a presumption in favor of a stay of enforcement and, in any event, a stay of enforcement cannot be considered automatic; and, Venezuela bears the burden of proving circumstances that require the continuation of the stay of enforcement. Further, the Committee stated that some of these circumstances affecting whether to continue or lift a stay of enforcement are, among others, the dilatory nature of the annulment application; the risk of Venezuela’s non-compliance in the event the Award is not annulled; the risk that Venezuela will not be able to duly recover its funds if the stay is lifted; and the risk that lifting the stay would cause significant and irreparable damage to Venezuela. The Committee concluded that there was not sufficient evidence warranting the lift of the stay of enforcement of the Award without condition, and, therefore, it made the continuation of the stay of enforcement conditional on the fact that Venezuela provides a bank guarantee within 45 days of notification of the Committee’s Decision.

Main issues: Stay of Enforcement of Award - Burden of Proof, Circumstances, bank guarantee; Requirements; Annulment

Committee: Mr. Alvaro Castellanos Howell (President), Mr. Carlos Urrutia (Member), Prof. Shoschana Zusman (Member)

Claimants’ Counsel: Bofill Mir & Alvarez Jana, Santiago, Chile

Respondent’s Counsel: Procuraduría General de la República, Caracas, Venezuela; Guglielmino & Asociados, Buenos Aires, Argentina

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Digest:

1. Relevant Facts and Procedural Dates

Following the Award rendered by the Tribunal on 18 November 2014 in favor of Flughafen Zürich A.G. and Gestión de Ingeniería IDC S.A. (“**Claimants**”), the Bolivarian Republic of Venezuela (“**Venezuela**” or “**Respondent**”) filed an application for annulment of the Award on 17 March 2015 (¶ 3). The application for annulment included Venezuela’s request to stay the enforcement of the Award (¶ 5). Ten days later, the Secretary-General of ICSID registered the application for annulment and, at the same time, notified the parties that enforcement of the Award was provisionally stayed, pursuant to ICSID Arbitration Rule 54(2) (¶ 6). On 31 August 2015, after constitution of the *ad hoc* Annulment Committee (the “**Committee**”), Claimants submitted a letter to the Committee requesting termination of the stay of enforcement or, alternatively, the imposition of a bank guarantee as a condition for continuation of the stay (¶¶ 8, 15). The Parties then exchanged written submissions and a hearing was held in Washington, D.C. on 9 November 2015 where the Parties presented their positions on the stay of enforcement (¶¶ 9-12).

2. The *Ad Hoc* Committee’s Analysis

As a preliminary matter, the Committee addressed the issues of (1) whether an *ad hoc* annulment committee has the power to continue or lift a stay of enforcement (¶ 51) and whether there is a presumption in favor of continuing a provisional stay of enforcement (¶¶ 52-57); and (2) which party bears the burden of proof when making a request for continuation of a stay of enforcement (¶ 58).

First, Claimants argued that neither the ICSID Convention nor the ICSID Arbitration Rules establish a presumption in favor of a stay of enforcement and, in any event, a stay of enforcement cannot be considered automatic (¶ 16). Claimants further explained that for the Committee to order continuation of the stay of enforcement, it must conclude that the “circumstances so require” (¶ 17). Venezuela disagreed, stating that the Committee should interpret the applicable rules according to the premise that the ICSID Convention does not impose on *ad hoc* committees the obligation and responsibility to ensure compliance with an award (¶ 30). Further, Venezuela argued that ICSID Arbitration Rules 54(3) and 54(4) do not establish a presumption in favor of lifting a stay of enforcement order, but rather committees

should weigh the circumstances of each case (¶ 31). In Venezuela’s view the continuation of a stay of enforcement has become “nearly automatic” (¶ 32).

The Committee reviewed relevant articles of the ICSID Convention, and noted that Article 53(1) and Arbitration Rule 54 indicate that if the Committee considers that the circumstances so require, it can stay the enforcement of the Award until the annulment proceeding has concluded, but that this stay is not automatic and there is no presumption in favor of continuation of the stay (¶¶ 49-56). The Committee explained that there is a presumption in favor of the validity of an award “except” where there is a stay of enforcement (¶ 57).

Second, the Committee then addressed the issue of which Party bears the burden of proving the existence of relevant circumstances militating against continuation of the stay of enforcement. For its part, Venezuela argued that each Party has the burden of proving the circumstances upon which its request is based (¶ 31). In Claimants’ view, however, it is the Party requesting continuation that bears the burden of proving that there are circumstances requiring continuation (¶ 17). The Committee explained that Venezuela bears the burden of proving circumstances that require the continuation of the stay of enforcement (¶ 58), and that unless the “circumstances so require,” the stay of enforcement must be lifted (¶ 59).

Having addressed these preliminary issues, the Committee explained that it would not take into account the merits of the annulment application, but it would look at whether there are circumstances that require continuation of the stay (¶ 60). The Committee stated that some of these circumstances may be the dilatory nature of the annulment application; the risk of Venezuela’s non-compliance with the Award in the event it is not annulled; the risk that Venezuela will not be able to duly recover its funds if the stay is terminated; and the risk that terminating the stay of enforcement of the Award would cause significant and irreparable damage to Venezuela (¶ 61).

With respect to Venezuela’s argument that lifting the stay of enforcement will force it to divert public funds that could be used for other public services, causing Venezuela grave injury (¶42), the Committee concluded that the alternative use of public funds is not an issue that should concern the Committee (¶¶ 62-63). Further, the Committee noted that Venezuela had indicated, in several occasions, that it was able to meet all of its financial commitments and international obligations (¶ 63).

Another factor the Committee considered was Venezuela’s argument that there is a risk that Venezuela could not recover any sums paid to Claimants in the event the Award was ultimately annulled (¶¶ 41, 64). The Committee agreed with Claimants and found that Claimants financial position did not pose a risk that Venezuela could not recoup any sums paid (¶¶ 25, 64). Conversely, the Committee was not satisfied that Claimants presented sufficient evidence to prove their claim that there was a risk that Venezuela could not paid the Award in the future (¶¶ 23-24, 65-66).

As for the dilatory nature of Venezuela’s annulment application, Claimants argued that although the Committee should not delve into the merits of the application, an exception exists where the application is of a dilatory nature (¶ 21). In this case, Claimants viewed Venezuela’s application as dilatory because Venezuela allegedly was attempting to re-litigate issues that are not reviewable in annulment and because of Venezuela’s other annulment applications and proceedings in other cases (¶ 22). Venezuela argued that for the Committee to consider lifting the stay on the dilatory nature of the application, the application must be

“manifestly” dilatory, and Claimants have made nothing more than general and imprecise statements to that regard (¶¶ 35-36). Further, Venezuela countered that it had merely availed itself of arbitral proceedings that constitute a legitimate exercise of its rights under the ICSID Convention (¶ 37). The Committee agreed that the merits of the annulment application are not relevant to its decision of whether to continue the stay of enforcement, but stated that whether the application is “manifestly dilatory” is an important factor (¶¶ 67-68). In the Committee’s opinion, however, it could not conclude that Venezuela’s application for annulment in this case was dilatory (¶ 68).

Based on the analysis of these factors, the Committee stated that it was inclined to lift the stay of enforcement of the Award, but, in an effort to balance the interests of the Parties, it would consider the possibility of ordering termination of the stay conditioned upon the provision of a financial guarantee (¶ 69). In the Committee’s view, a financial guarantee would balance the presumption of validity of the Award with the time that the annulment proceeding would take (*id.*). The Committee disagreed with Venezuela’s argument that it did not have the power to condition the stay of enforcement, and it explained that Article 52(5) of the ICSID Convention grants it this power (¶ 71) and, further, that ordering a condition is not equivalent to a provisional measure (¶¶ 73-74). Further, for the Committee a condition is only applicable in those cases where the Committee does not find sufficient reasons to continue the stay without requiring a guarantee, so long as the cost of issuing such guarantee is not extremely onerous and no other circumstances are present that would make it advisable (¶ 72).

The Committee noted that Venezuela asserted in various occasions that it consistently fulfils its financial and international obligations and, therefore, a guarantee would be unnecessary (¶¶ 38-40, 76), but Venezuela never argued that the cost of providing a financial guarantee would be prohibitive (¶ 78). The Committee, therefore, concluded that, in this case, requiring Venezuela to provide a guarantee was not onerous, even less, prohibitive (*Id.*). Further, taking into account and balancing the effects of the guarantee on both Parties—no injury (irreparable or otherwise) or risk to either Venezuela or Claimants—the Committee explained that a guarantee was not punishment (¶¶ 79-82).

3. The *Ad Hoc* Committee’s Decision

The Committee concluded that the evidence presented was insufficient to warrant the lifting of the stay of enforcement of the Award without a condition (¶ 83). The Committee, therefore, decided as follows:

1. To maintain the stay of enforcement subject to Venezuela providing an irrevocable and unconditional financial guarantee in favor of Claimants from an internationally recognized financial institution, with its main branch being located outside of Venezuela, Chile, or Switzerland, for the full amount of the Award (¶ 84).
2. To require Venezuela to issue the financial guarantee within 45 days of the notification of the Committee’s Decision and to keep it open until a final decision on the annulment application is rendered.
3. Claimants may only execute the bank guarantee in the case that the application for annulment is rejected.

4. If Venezuela fails to provide the guarantee within the time indicated or the guarantee does not meet the Committee's requirements, the stay of enforcement shall be lifted.
5. Venezuela is responsible for the costs of issuing a bank guarantee.