



School of International Arbitration

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International Arbitration Case Law

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International Arbitration Case Law

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Award Name and Date:

OI European Group B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/25)
- Decision on Stay of Enforcement of the Award - 4 April 2016

Case Report by:

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

Summary:

In the Decision rendered on 4 April 2016, the *ad hoc* Annulment Committee lifted the provisional stay of enforcement of the Award against Venezuela. In doing so, the Committee emphasized that under ICSID Convention Article 52(5) the Committee's decision to continue the stay of enforcement depends on whether it "considers that the circumstances so require," and, thus, the decision to continue the stay is left to the discretion of the Committee. Furthermore, the Committee explained that continuation of a stay of enforcement is far from automatic, and that the burden of proving circumstances requiring the continuation of a stay of enforcement rests on the party applying for annulment, Venezuela, in the case at hand. Venezuela asserted that (i) there is no risk of non-compliance if the Award is not annulled; (ii) there is a risk that Venezuela will not be able to duly recover its funds if the stay is terminated; (iii) the Application for Annulment is not dilatory; (iv) terminating the stay of enforcement of the Award would cause significant and irreparable damage to Venezuela; and (v) OI European Group would not be prejudiced if the stay of enforcement of the Award continues pending a decision on the annulment. The Committee concluded that Venezuela, as the Applicant for annulment, had not discharged its burden of proving that there is any circumstance requiring the continuation of the provisional stay of enforcement. The Committee, therefore, rejected Venezuela's request to continue the provisional stay of enforcement and lifted it.

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

Committee: Mr. Alvaro Castellanos Howell (President), Mr. Piero Bernardini (Member), Mr. David Pawlak (Member)

Claimants' Counsel: Volterra Fietta, London, U.K.; Escritorio Muci-Abraham & Asociados, Caracas, Venezuela; Lucas Bastin, London, U.K.

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 tribunal’s 10 March 2015 Final Award in favor of OI European Group B.V. (“**OI**”), the Bolivarian Republic of Venezuela (“**Venezuela**” or “**Applicant**”) filed an application for annulment of the Award on 7 July 2015 (¶ 4). 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)” (¶ 5).

On 14 October 2015, and upon constitution of the *ad hoc* Annulment Committee (the “**Committee**”), OI sent a letter to the Committee explaining that Venezuela had the burden to prove that the stay of enforcement should be maintained, and requested that the Committee either discontinue the stay of enforcement or allow it to terminate automatically within 30 days (¶ 7). The Committee ordered to be briefed on the issue by requesting Venezuela to file the first submission in support of its request to maintain the stay of enforcement, and allowing two rounds of written submissions by each Party (¶¶ 8, 12). The Committee decided to continue the stay of enforcement until it had an opportunity to review the Parties’ written submissions (¶¶ 8-9).

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 and, if so, under what circumstances (¶¶ 81-91); and (2) which party bears the burden of proof in a request for continuation of a stay of enforcement (¶¶ 92-96).

First, in requesting “continuation of the stay of enforcement of the Award until the *ad hoc* Committee renders a decision on the Application for Annulment” (¶ 15), Venezuela argued that the Committee should interpret the applicable rules under the premise that the ICSID Convention does not impose on *ad hoc* committees the obligation and responsibility to ensure compliance with a decision they issue (¶ 16). Further, Venezuela argued that, under ICSID Arbitration Rules 54(2) and 54(4), OI had the burden of proving the circumstances justifying the lifting of the stay of enforcement because OI first challenged the Secretary-General’s provisional stay of enforcement (¶ 17). According to Venezuela, since OI could not prove any

circumstances that would justify the “exceptional and burdensome termination of the stay of enforcement,” the Committee should reject OI’s request (¶ 17). Conversely, OI argued that ICSID Convention Article 52(5) and ICSID Arbitration Rule 54(2) confirm that “specific circumstances must exist that require the stay of enforcement,” and absent any such circumstances, the Committee should not stay enforcement (¶ 45). Further, OI asserted that continuing a stay of enforcement is the exception, and not the rule (*Id.*)

The Committee reviewed relevant articles of the ICSID Convention, and noted that Articles 52 and 53, which relate to annulment of awards, “must be considered in the interpretation and application of the provisions related to the issue of the stay of enforcement” (¶ 83). In particular, the Committee analysed ICSID Convention Article 52(5) and ICSID Arbitration Rule 54, as well as a number of decisions by *ad hoc* Committees, and reached the “fundamental conclusion . . . that the continuation of the stay of enforcement in the ICSID system is far from automatic” (¶ 89). The language of ICSID Convention Article 52(5) stating that “[t]he Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision,” (¶ 82), gives the Committee “wide discretion . . . to evaluate, case by case, if those circumstances are present or not, in order to continue a stay of enforcement” (¶ 89).

Second, the Committee then addressed the issue of which Party bears the burden of proving the existence of relevant circumstances militating for continuation of the stay of enforcement. For its part, Venezuela explained that arbitral decisions show an “unquestionable trend” of an “almost automatic” continuation of the stay of enforcement, “unless the party requesting the termination proved exceptional circumstances” (¶ 18). In OI’s view, however, it is the party requesting continuation that bears the burden of proving that there are circumstances requiring continuation (¶ 46). The Committee rejected Venezuela’s argument and explained that it required Venezuela to submit the first written argument on this issue because Venezuela has the burden of proving that there are circumstances that, in the discretion of the Committee, require the continuation of the stay of enforcement (¶¶92-94).

Having addressed these two preliminary issues, the Committee proceeded to analyse the particular circumstances presented by the Parties. Venezuela asserted, in particular, that in this case “(i) there is no risk of non-compliance by Venezuela of the Award in the event it is not annulled, and, in addition, such failure to honor the Award should not be presumed; (ii) there is a risk that Venezuela will not be able to duly recover its funds if the stay is terminated; (iii) the Application for Annulment is not dilatory; (iv) terminating the stay of enforcement of the Award would cause significant and irreparable damage to Venezuela; . . . (v) OI would not be prejudiced if the stay of enforcement of the Award continues pending a decision on the annulment”; and (vi) the *ad hoc* Committee should not require Venezuela to provide security as a condition to the maintenance of the stay (¶¶ 19-20, 95). OI responded to these arguments, and the Committee analysed each one in turn:

i. Risk of non-compliance by Venezuela

OI argued that there was a risk that Venezuela would not comply with the payment ordered in the Award should the Committee deny the annulment application, and that the risk of non-compliance should be a factor to be taken into account when deciding whether the Committee should lift the stay of enforcement or not(¶ 50). In support, OI listed a series of factors, including 2012 statements made by then President Chavez indicating that the country would not comply with ICSID awards; the number of annulment, revision, and interpretation

proceedings initiated by Venezuela; a 2012 letter signed by President Maduro denouncing the ICSID Convention; decisions by Venezuelan courts concluding that decisions of international tribunals would not be enforced in Venezuela if they are considered to violate the country's Constitution; and indicia of Venezuela taking measures to shield its assets (¶¶ 51-57).

Venezuela argued that a decision to lift a stay of enforcement must not be based on the mere presumption that a State would not comply with an award and rejected all of OI's factors (¶¶ 22-24). In particular, Venezuela explained that former President Chavez's unilateral statements could not be considered legally binding, but rather political statements (¶ 24); there is nothing wrong with availing itself of the ICSID system of annulment (¶ 25); the fact that Venezuela has continued to participate in ICSID proceedings after its denunciations shows Venezuela's willingness to comply with its international obligations (¶26); Venezuela has never failed to comply with its obligations (¶ 27); and courts in Venezuela are committed to complying with awards as demonstrated by the fact that "to date there is no award under the ICSID Convention whose enforcement was attempted in Venezuela and that could not be enforced therein" (¶ 28).

The Committee rejected Venezuela's arguments and agreed with OI that the risk of non-compliance is a relevant circumstance when deciding whether to grant Venezuela's request for continuation of the stay of enforcement (¶ 98). The Committee further explained that it had discretion to determine whether the factors raised by OI could raise reasonable concerns as to Venezuela's compliance with the Award (¶ 102). The Committee concluded that there was a risk of non-compliance with the Award because (a) statements made by high-ranking Government officials are legally binding; (b) the letter of denunciation stating that "the provisions of the [ICSID] Convention have become unconstitutional under Venezuelan law" raises concerns as to Venezuela's compliance; and (c) the Committee could not find evidence that any award had been fulfilled in Venezuela, but rather Venezuela referred to a decision by the Constitutional Chamber of the Supreme Court of Justice finding that "the conditions for arbitration provided by a treaty have to be 'not contrary to the Constitution'" (¶ 107). The Committee concluded, based on these three factors, that Venezuela failed to meet its burden of proof demonstrating the absence of risk of non-compliance (¶ 108).

ii. Risk of non-recovery

OI explained that there was no risk that Venezuela would be unable to recoup any payment made to OI in the case the Award is ultimately annulled because OI has been a model litigant throughout the proceedings and is part of a corporate group worth billions of U.S. dollars (¶ 63). Moreover, OI stated that the Committee could make the continuation of the stay of enforcement conditional on Venezuela paying a sum of money into an escrow account (¶ 65).

Venezuela disagreed with OI and explained that OI had not provided any evidence of its creditworthiness and that the relevant financial position is that of OI and not the business group to which it belongs (¶ 31). Further, Venezuela argued that recovering any payments would increase its legal costs and there was a risk that a third party could seize any amount paid by Venezuela, making it impossible to recover the amount in the event the Award was annulled (¶ 30).

The Committee was not persuaded by Venezuela's argument because, in this case, "OI is a large international company with the considerable solvency and liquidity of the corporate group of which it is a member," and whether OI would cease being part of the group is "only

speculative” (¶ 113). Likewise, the Committee concluded that there was no evidence indicating that “a third party’s possible attachment of its assets may affect the company to such extent as to impede payment to Venezuela” if the Award were annulled (*id.*). On this factor, the Committee did not find convincing evidence of actual circumstances indicating a risk of non-recovery.

iii. Considerations on whether the application for annulment is well founded or dilatory

Venezuela first explained that although analysing whether the application is dilatory may be a relevant factor to make a determination as to the continuation of the stay of enforcement, the Committee should not analyse the merits at this stage of the proceedings (¶ 32). The standard, Venezuela argued, is “extremely high” because the dilatory nature of the application must be “manifest” such that “the application itself ‘must contain irrefutable evidence of its manifest abuse, that it was filed for the sole purpose of postponing enforcement and that it is not based on the grounds set forth in the Convention’” (¶ 32). Here, according to Venezuela, OI had not met the extremely high standard (¶ 33).

OI agreed that the dilatory nature of an application is relevant, but rejected the “excessively high threshold” adopted by Venezuela (¶¶ 58-59). Rather, OI argued that the Committee must look at the totality of the evidence and must consider all relevant circumstances (¶ 59). In OI’s view, Venezuela had engaged in a dilatory strategy in other proceedings, as illustrated by the fact that Venezuela has not complied with several awards rendered against it recently, but has rather sought to further delay payment, and engaged in other tactics such as challenging arbitrators (¶ 60). For OI, Venezuela engages in a “pattern of behavior” that is relevant to the Committee (¶¶ 61-62).

The Committee agreed that the merits of the annulment application are not relevant to its decision on whether to continue the stay of enforcement, but that the appropriate inquiry at this stage is whether the application is “manifestly dilatory” (¶ 115). Conversely, the Committee explained that “the mere fact that the application is not dilatory is not sufficient to grant the extension of the stay” (*id.*). The Committee concluded that the application for annulment could not be considered dilatory, but that Venezuela’s compliance with the minimum duty of filing “a serious good faith application” does not require an extension of the stay of enforcement (¶ 116).

iv. Irreparable harm

According to Venezuela, termination of enforcement would cause irreparable harm because it would force it “to divert a significant amount of public funds for the payment of the Award,” which would affect funding for a series of basic Government services and would force Venezuela to incur additional legal costs to defend itself against enforcement while the annulment proceeding is on-going (¶¶ 36-37). The irreparable harm is clear, in Venezuela’s view, because the Award is likely to be annulled (¶ 38).

OI rejected these arguments stating that there was no case law supporting Respondent’s contention to the effect that it would have to divert funds from other public services and that such argument is contrary to States’ international obligations to make reparations for their wrongful acts (¶ 66). OI further argued that, even if the Committee were to accept Respondent’s contentions, satisfaction of the Award would not lead to “catastrophic consequences” for Respondent (¶ 67). The size of the award, OI explained, represented only

0.09% of Venezuela's 2014 GDP (¶ 70), and Venezuela had expropriated OI's plants and had benefited from 5 years of profits and had repeatedly promised to pay compensation to OI (¶ 69).

In the Committee's view, payment of the Award, whether voluntary or as a result of enforcement, would invariably come from public funds (¶ 118). The Committee found that Venezuela had not provided evidence demonstrating that termination of the stay would result in deductions from specific budgetary items involving the "people's needs" (¶ 119). In addition, the Committee found that Venezuela's offer to pay OI compensation in July 2011 and Venezuela's failure to contest that it benefited from profits earned from OI's plants militated against a finding of irreparable harm (¶ 121). The Committee, therefore, was not persuaded that the evidence on the record showed that termination of the stay of enforcement would cause "irreparable harm, even less, catastrophic consequences" (¶ 122).

v. Prejudice if the stay of enforcement of the Award continues pending a decision on the annulment

Venezuela argued that continuation of the stay of enforcement would not prejudice OI or cause any damage because, if the Award is not annulled, OI could recover interest (¶ 40). According to OI, however, continuation of the stay of enforcement would put OI at a disadvantage in eventually receiving payment on the Award because it would move OI to the back of the line of creditors seeking to enforce awards against Venezuela, and that, with Venezuela's available assets dwindling, every day of delay reduces the likelihood that OI could enforce the Award (¶ 71).

The Committee agreed with OI that the delay of payment of the Award is not the only prejudice that OI may suffer, but that the growing number of awards against Venezuela puts OI in a long line of creditors wishing to collect awards against Venezuela (¶¶ 124-25). The Committee concluded that Venezuela had not convincingly shown circumstances requiring an extension of the stay of enforcement (¶ 126).

3. The *Ad Hoc* Committee's Decision

The Committee concluded that Venezuela had not discharged its burden of proving any circumstance requiring continuation of the provisional stay of enforcement and, therefore, the Committee ordered the termination of the stay (¶¶ 127-28). Having so decided, the Committee saw no need to consider the Parties' arguments on whether continuation of the stay could be conditioned on Venezuela posting security (¶ 129).