



School of International Arbitration

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International Arbitration Case Law

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

*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date: Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v Kingdom of Spain (ICSID Case No. ARB/13/31) – Annulment Proceeding – Decision on the Continuation of the Provisional Stay of Enforcement of the Award - 21 October 2019

Case Report by: Diana Itzel Santana Galindo**, Diego Luis Alonso Massa***

Summary: This Decision addresses the Applicant’s application for the continuation of a provisional stay of enforcement of an ICSID award, as rectified by the Tribunal’s Decision on Rectification of the Award on 29 January 2019. Followed by the Parties’ Position, the Committee proceeded to analyse whether the circumstances required the stay to be continued and whether a security should be ordered. Finally, the Committee decided that that there were no circumstances requiring the Award to continue being stayed and that there was no need for the Committee to consider the Parties’ submission on whether security should be ordered.

Main Issues: Decision on the continuation of the provisional stay of enforcement of the ICSID award rendered on 15 June 2018.

Ad Hoc Committee: Mr. Cavinder Bull SC (President), Prof. Dr. Nayla Comair-Obeid (Member), Mr. José Antonio Moreno Rodríguez (Member).

Applicant’s Counsel: Mr. Diego Santacruz Descartin, Mr. Antolin Fernández Antuña, Mr. Javier Torres Gella, Ms. Mónica Moraleda Saceda, Ms. Amaia Rivas Kortazar, Ms. Elena Oñoro Sainz, Mr. Roberto Fernández Castilla, Ms. Patricia Froehlingsdorf Nicolás, Mr. Yago Fernández Badía (Abogacía General del Estado, Ministry of Justice of the Government of Spain, Madrid, Spain).

Claimant’s Counsel: Ms. Judith Gill, Ms. Marie Stoyanov, Ms. Virginia Allan, Mr. Ignacio Madalena, Ms. Lauren Lindsay, Ms. Naomi Briercliffe, Mr. Tomasz Hara, Ms. Stephanie Hawes (Allen & Overy LLP, London, United Kingdom) and Mr Jeffrey Sullivan (Gibson Dunn & Crutcher LLP).

* Directors can be reached by email at ignacio.tortorola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Diana Itzel Santana Galindo is a current intern at the Korean Commercial Arbitration Board (KCAB INTERNATIONAL). She is a recent graduate of the LLM in Comparative and International Dispute Resolution at Queen Mary University of London and Qualified Lawyer in Mexico. Ms. Santana can be contacted at disg1807@gmail.com

*** Lawyer, University of Buenos Aires, admitted to practice law in the City of Buenos Aires; Sworn Translator, University of Buenos Aires, Argentina. LLM holder in International Relations – with a specialization in Private International Law – Institut de Hautes Études Internationales, University of Geneva, Switzerland; Ph.D. candidate at the Université du Québec à Montréal (UQAM). Mr. Alonso Massa can be contacted at: alonso@arbitrage-transnational.com

Digest:

1. Procedural Background

This decision relates to the Applicant’s submission to the continuation of a provisional stay of enforcement of the ICSID award rendered on 15 June 2018, ICSID Case No. ARB/13/31 (the “Arbitration”) as rectified by the Tribunal’s Decision on Rectification of the Award on 29 January 2019 (the “Award”) (¶ 1).

On 3 September 2019, the Applicant filed its submission in Support of the continuation of a Provisional Stay of Enforcement of the Award (¶ 2).

On 9 September 2019, the Claimants filed their Response to Spain’s Submission in Support of the Continuation of the Provisional Stay of Enforcement of the Award (¶ 3).

On 12 September 2019, the Applicant filed its Reply to the Claimant’s Response (¶ 4).

On 16 September 2019, the Claimants filed their Rejoinder to Spain’s Submission in Support of the Continuation of the Provisional Stay of Enforcement of the Award (the “Rejoinder”) (¶ 5).

On 18 September 2019 the Committee heard the Parties’ representatives at a teleconference, followed by the issuing of the Procedural Order No. 1 on 20 September 2019 (¶ 6).

On 30 September the Applicant filed its further submissions and on 7 October 2019 the Claimants filed their response to the Applicant’s further submissions (¶ 7).

2. The Applicant’s Position

The Applicant sought the continuation of the provisional stay of the Award. The Applicant argued that the common practice of ICSID *ad hoc* annulment committees has been to stay enforcement of an award during the pendency of annulment proceedings. For that, the Applicant rejected the notion that a stay of enforcement may only be granted in “exceptional circumstances” (¶¶ 10, 12).

2.1 *The standard for granting a stay of enforcement*

The Applicant argued that there is no reason to depart from the ICSID *ad hoc* annulment committee’s usual practice to grant stays of enforcement. In support, the Applicant cited the *ad hoc* committee’s holding in *Occidental v Ecuador* that “[t]he prevailing practice in prior

annulment cases has been to grant the stay of enforcement;” and the statement of the *ad hoc* committee in *Victor Pey Casado* that “absent unusual circumstances, the granting of a stay of enforcement pending the outcome of the annulment proceedings has now become almost automatic” (¶ 11).

On the issue of the burden of proof, the Applicant cited the holding of the annulment committee in *Standard Chartered Bank v Tanzania* that “[no] particular party [in a stay application] bears the burden of establishing circumstances requiring a stay.” The burden of proving issues such as the existence of any prejudice to the Claimants caused by the stay rested on the Claimants and not the Applicant (¶ 13).

2.2 Whether the circumstances require a stay

The Applicant’s annulment application is well-founded

The Applicant argued that even a depthless analysis of its annulment application shows that its argument was well-grounded. The Applicant then exposed that:

- a. The need for a Tribunal to rectify the Award by 11 million euros is evidence that the Award is flawed;
- b. the Tribunal acted in manifest excess of its power by exceeding its jurisdiction under the Energy Charter Treaty and EU law;
- c. the Tribunal failed to allow the Applicant to fully present its case by preventing the Applicant from introducing into the record the European Commission’s (“EC”) Decision on State Aid issued in November 2017 and rejecting the intervention of the EC as *amicus curiae* in the arbitration;
- d. the award fails to state the reason for the Tribunal’s disregard for EU law and the calculations for the damages are unreasonable and incoherent (¶ 16).

The Applicant submitted that the Claimants will not be prejudiced if the stay is continued because:

Under the terms of the Award, the Claimants were entitled to compound interest of 2.07% per month from the date of the Award to the date of payment of all sums due under the Award (¶17).

There is little risk that the Claimants will be unable to obtain payment under the Award. It is the fifth-largest economy in the European Union and the 13th in the world in terms of GDP (¶18).

Furthermore, the Applicant rejected the Claimant’s argument that they would have been prejudiced by being pushed to the back of a long line of award-creditors in the event of a stay (¶19).

The Applicant will be prejudiced if the stay is not continued

Firstly, the Applicant argued that if the Award is annulled after its enforcement, the Applicant will need to initiate proceedings in various jurisdictions to recover the monies paid out under the Award (¶ 20).

Secondly, the Applicant submitted that it may not be able to recover the amounts paid to the Claimants if the Award is annulled after its enforcement (¶21).

Thirdly, the Applicant argued that the granting of a stay addresses the Applicant’s conflict between (i) its obligation under the Treaty on the Functioning of the European Union (“TFEU”) to avoid making payments that might constitute incompatible State Aid, and (ii) its obligation to make payment of the Award under the ICSID Convention (¶ 22).

The Applicant argued that, as stated by the EC in Decision C (2017) 7384 dated on 10 November 2017 (“EC’s Decision), the payment of the Award constitutes a notifiable State Aid. The Applicant stated that, contrary to the Claimant’s position, the EC had reviewed Spain’s original renewable energy policy regime governing the Claimant’s investments and concluded that the payments made under the regime constituted State Aid. (¶ 24).

The Applicant argued that its obligation under the TFEU superseded its public international law obligations under the ICSID Convention and the ECT, under article 30 of the Vienna Convention of the Law of Treaties (“VCLT”). The Applicant contended that article 53 of the ICSID Convention is a general rule that should give way to the provisions of the TFEU which regulate specific obligations of the Member States regarding particular aspects of the Union’s internal market. The Applicant then argued that the TFEU should take precedence over the ECT and the ICSID Convention due to the “primacy” of the EU law over the provisions of other treaties (¶¶ 26-27).

2.3 Whether security should be ordered

The Applicant submitted that a security order should only be ordered in cases where the award creditor would be prejudiced by the continuation of the stay. Thus, no security ought to be ordered as a condition for continuing stay as such an order would put the Claimants in a better position than they would be in if no annulment proceeding was commenced. The provision of interest is sufficient to compensate for any delay in the enforcement of the Award (¶ 28).

3. The Claimant’s Position

3.1 The standard for granting a stay of enforcement

Firstly, the Claimants highlighted the principle of finality enshrined in Article 53 of the ICSID Convention. (¶ 30).

Secondly, the Claimants pointed out that the remedy of annulment is an exemption. Consequently, the Claimants cited the *ad hoc* committee in *Burlington v. Ecuador* that “the stay of enforcement is an exception in the context of the remedy of annulment that is itself limited and exceptional” (¶ 31).

Thirdly, the Claimants stated that the Applicants needed to show the existence of relevant circumstances which require the stay to be continued and cannot presume that a stay would normally be granted. Moreover, the Claimants pointed out that the meaning of the word “require” under article 52 of the ICSID Convention means “not just any circumstances”. Thus, the circumstances must be sufficiently compelling so as to ‘require’ a stay. (¶ 32).

Fourthly, the Claimants disagreed with the Applicant's suggestion that it is a common practice for ICSID annulment committees to grant stays of enforcement. The Claimants cited various recent ICSID decisions rejecting the notion that there is a presumption in favour of granting request for a stay in such proceedings (¶ 33).

Fifthly, the Claimants submitted that the Applicant bears the primary burden of establishing that the circumstances exist which requires a stay. In this connection, the Claimants cited *Standard Chartered v. Tanzania* for the proposition that “[no] one particular party bears the burden of proof”. Further the Claimants noted that the committee in *Standard Chartered* also observed that the stay applicant is required to “specify the circumstances requiring the stay” and to “advance grounds (supported as necessary by evidence) for the stay” (¶ 34).

3.2 *Whether the circumstances require a stay*

The Claimants will be prejudiced by the granting of a stay

Firstly, the Claimants submitted that there is a real risk that the Applicant will fail to comply with the Award, based on i) the Applicant's history of non-compliance with past ICSID awards rendered against it, and ii) the Applicant's position that the payment of the Award is contingent on the EC's authorization (¶ 37).

Secondly, the Claimants argued that any delay in the enforcement of the Award would reduce their chances of being able to recover the limited number of the Applicant's assets that can be seized outside the Applicant's territory. In that regard, the Claimants argued that the Applicant is defending over 39 pending international arbitration cases, most of which arise from the same set of measures at issue in the underlying Arbitration. Among these, at least eight have resulted in final awards against the Applicant amounting to a total of almost EUR 690 million plus interest (¶ 40).

Thirdly, the Claimants argued that the payment of interest is an inadequate remedy for the prejudice that they would suffer as a result of any delay in enforcement. A post-award interest is compensatory and not an excuse to undermine the Award's finality or affect its enforcement (¶ 41).

The Applicant will not be prejudiced by the lack of a stay

The Claimants argued that the Applicant has failed to prove that it will face irreparable harm or particular economic hardship if a stay was not granted (¶ 43). Further, the Claimants noted that, in cases where a stay is granted because of a considerable risk of non-recoupment, the award-creditor was insolvent or a natural person. However, the Claimants stated to be a solvent corporation, in this sense, any concerns of non-recoupment can be addressed by ordering for the Award to be paid into an escrow account pending the outcome of the annulment proceedings (¶ 44).

Firstly, The Claimants argued that the Applicant's alleged obligation to refrain from paying the Award under EU law is irrelevant to the question whether a stay should be granted. The Committee derives its mandate from the ICSID Convention and not EU law. (¶ 46).

Secondly, the Claimants submitted that the Applicant's argument that it cannot pay the Award absent the EC's authorization fails under public international law. The Claimants argued that

under the principle of *lex posteriori*, the provisions of the ICSID Convention post-dates and take precedence over those of the TFEU (¶ 47).

The Claimant also argued that under the principle of *lex specialis*, the provisions of the ICSID Convention likewise take precedence over those in the TFEU. They specifically govern the granting of stays of enforcement in ICSID proceedings and the enforcement of ICSID awards. (¶ 49).

Thirdly, the Claimants submitted the Award does not constitute State Aid under EU law as it does not (i) confer an economic advantage; (ii) appear to be granted selectively; (iii) use State resources; and (iv) distort competition and affect trade between Member States (¶ 51).

The merits of the annulment are irrelevant

The Claimants argued that the merits of the annulment application should not intervene with the Committee's decision on whether to grant a stay (¶ 54).

3.3 Whether security should be ordered

The Claimants proposed that the Applicant be ordered to pay the full amount of the Award, plus interest, into an escrow account in the United States and payable to the Claimants immediately upon receipt of a Committee decision rejecting annulment. Further, the Applicant may also be ordered to provide a binding and unconditional written undertaking to pay the Award promptly and in full upon the dismissal of its annulment application (¶¶ 55-56).

4. Tribunal's analysis

4.1 The applicable legal standard

The Committee found that, the language of Article 52(5) of the ICSID Convention makes clear that a stay should be continued only if there are circumstances *requiring* such a stay. Such an approach is consistent with the positions taken by other ICSID annulment committees (¶¶ 57-58).

The Committee then exposed that the Applicant argued that “a stay should be granted unless it is obvious that the application is ‘*without any basis under the Convention*’ and is ‘*dilatory*’ in nature” (emphasis in original). The Respondents, on the other hand, argued that the stays are exceptional measures that run against the principle of finality undergirding ICSID awards (¶ 59).

The Committee analyzed then that Article 52(5) of the ICSID Convention requires the Committee to apply its mind to “consider” if the circumstances require a stay to be granted. However, the said requirement would be irrelevant if there was a presumption in favour of granting requests for a stay. Under such presumption, the Committee’s primary consideration would be whether the circumstances require a stay to be *refused*, not whether they require one to be granted (¶ 61).

Thus, the Committee regards such a presumption as being inconsistent with the language of Article 52(5). To support this, the Committee noted ICSID jurisprudence suggesting that the continuation of a stay cannot be presumed. Recent ICSID annulment committees does not

reflect the Applicant's argument that ICSID annulment committees have historically been generous in granting stays of enforcement (¶¶ 62-63).

In light of the above, the Committee did not accept that there was a prevailing practice amongst ICSID annulment committees which supports the existence of a presumption, whether *de jure* or *de facto*, in favour of granting a stay (¶ 64).

For the foregoing reasons, the Committee concluded that there was no presumption in favour of granting a request for a stay. Circumstances that are usual to most annulment applications cannot, even if relevant, be sufficient to justify the continuation of a stay (¶ 67).

4.2 Whether the circumstances require the stay to be continued

The Committee noted that the Parties generally fell into the following three categories: (¶ 68)

Prejudice suffered by the Applicant if a stay is not granted

In the Committee's view, the burdens and risks raised by the Applicant are common to virtually all annulment applications. As the Claimants put it, they are a natural consequence of the annulment proceedings. Further, in the absence of any allegation that the Applicant bears an unusually high financial burden or risk in connection with the recovery of the award monies, the Committee could not consider the Applicant's situation to be a circumstance requiring a stay to be granted (¶¶ 72-73).

On the issue of conflicting international obligation raised by the Applicant, the Committee resolved that the Applicant failed to prove how a stay of enforcement would help the Applicant to resolve any alleged conflict between the Applicant's international obligations (¶ 74).

The Committee did not regard the Applicant's possible conflict of obligations as a circumstance requiring the granting of a stay (¶ 77).

Prejudice suffered by the Claimants if a stay is granted

In the Committee's view, there was insufficient evidence to show that the continuation of the stay would occasion significant prejudice to the Claimants. For these reasons, the Committee was not satisfied that either party would suffer serious prejudice whether the stay is lifted or continued (¶ 80).

Notwithstanding, the Committee observed that the payment of interest should not be considered a sufficient remedy for any prejudice caused by a delay in the Award's enforcement. The Committee agreed with the observation in *Eiser* that the payment of post-award interest is to "compensate for the deprivation of the principal until payment of the award, but they are not directly related to the issue of enforcement of the award." Given that the prejudice complained of by the Claimants directly related to difficulties in enforcement, the Committee concluded that the payment of interest is not an adequate remedy (¶¶ 81-82).

Merits of the Applicant's annulment application

The Committee concluded that it did not consider the merits of the Applicant's annulment application to be a relevant circumstance showing that a stay is required. It supported its

decision with *Patrick Mitchell v. Democratic Republic of Congo*, where the committee, in the context of stay proceedings, stated that “any discussion on the merits and on the chances of annulment of the Award would be misplaced” (¶ 83).

4.3 Whether security should be ordered

In light of the Committee’s view, there were no circumstances requiring the Award to continue being stayed, there would be no need for the Committee to consider the Parties’ submission on whether security should be ordered (¶ 84).

5. Decisions and Orders

The Committee decided that (a) the stay of enforcement of the Award should not be continued, and (b) reserved the issue of costs on this Application to a further order or decision (¶ 85).