



School of International Arbitration

School of International Arbitration, Queen Mary, University of London

# International Arbitration Case Law

Academic Directors: Ignacio Torterola  
Loukas Mistelis\*

## COMMERCE GROUP CORP. AND SAN SEBASTIAN GOLD MINES, INC. V. THE REPUBLIC OF EL SALVADOR, ICSID CASE NO. ARB /09/17 (ANNULMENT PROCEEDINGS) DECISION ON EL SALVADOR'S APPLICATION FOR SECURITY FOR COSTS

Case Report by Gloria Maria Alvarez \*\*  
Edited by Natasha Dupont \*\*\*

In a decision rendered on September 20, 2012, under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) the *Ad Hoc Committee* denied Respondent's requested application for security for its costs.

**Tribunal:** Emmanuel Gaillard (President), Professor Michael Pryles and, Professor Christoph Schreuer.

**Claimants' Counsel:** Mr. John E. Machulak, Ms. Susan R. Robertson, Mr. Eugene Bykhovsky, MACHULAK, ROBERTSON & SODOS, S.C.

**Respondent's Counsel:** Lic. Romeo Benjamin Barahona, FISCAL GENERAL DE LA REPÚBLICA DE EL SALVADOR; Mr. Derek Smith, Mr. Luis Parada, and Mr. Tomás Solís, FOLEY HOAG LLP.

\* Directors can be reached by email at [ignacio.torterola@internationalarbitrationcaselaw.com](mailto:ignacio.torterola@internationalarbitrationcaselaw.com) and [loukas.mistelis@internationalarbitrationcaselaw.com](mailto:loukas.mistelis@internationalarbitrationcaselaw.com)

\*\* Gloria Maria Alvarez (Mexico) is Research Assistant of the School of International Arbitration at Queen Mary, University of London, and can be contacted: [alvarez.gloriamaria@gmail.com](mailto:alvarez.gloriamaria@gmail.com)

\*\*\* Natasha Dupont is a Senior Associate with *The Brattle Group* focusing on the estimation of damages and other economic questions arising in international arbitrations. She was previously a litigation attorney.

## **Index of Matters Discussed**

1.	Facts of the Case .....	2
2.	Legal Issues Discussed in the Decision.....	2
3.	Decision .....	3

## *Digest*

### **1. *Facts of the Case***

On July 12, 2011 the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received an Application for Annulment of the ICSID Award from Commerce Group Corp. and San Sebastian Gold Mines, Inc (the “Applicants” or the “Claimants”). After the *Ad Hoc Committee* was constituted on August 17, 2011 the Centre requested the Applicants to pay the amount of US\$150,000.00 pursuant to the Administrative and Financial Regulation 14(3)(e).

The Applicants presented delays on payment and requested an extension from the ICSID Secretariat; to this El Salvador (the “Respondent”) noted that if the ICSID Secretary-General granted an extension for the payment to the Applicants, El Salvador would request that the continuation of the proceedings shall be conditioned to the Claimants ability to provide security for costs.

After a 10-day extension granted by the Centre to the Applicants, the payment was made by the Claimants and on July, 23, 2012 the *Ad Hoc Committee* resumed proceedings. However, on August 10, 2012, El Salvador filed its Application for Security of Costs.

The Respondent requested the *Ad Hoc Committee* to order the Applicants to pay security corresponding to estimated legal fees and costs of the proceeding as well as all the estimated fees and costs of ICSID and the Committee under ICSID Administrative and Financial Regulations (Regulation 14) and the ICSID Convention (Article 61 (2)). The present digest is regarding the Ad Hoc Committee’s decision on the Respondent’s request.

### **2. *Legal Issues Discussed in the Decision***

The Respondent argued that the Claimants initiated an annulment proceeding without having enough funding to remain in the proceedings, as evidenced by the delay of the \$US150,000.00 payment. The Respondent contends that an order for the posting of security for costs will support *Committee’s* duty on preserving the integrity of the proceedings. Claimants’ position is that by asking for this measure El Salvador is creating an economic bar for the continuation of the annulment proceeding and is a disguised request for provisional measures,

which the *Committee* lacks power to make, in order to safeguard Respondent's interest.

The *Ad Hoc Committee* remarked that the parties agreed on its power to preserve the integrity of the arbitration proceedings while they disagree on the *Committee's* whether the power includes ordering a party to post security that covers legal costs and expenses.

The *Committee* stated that a tribunal's power to preserve the integrity of the proceedings applies only under "compelling Circumstances." (§44) The power to order security for costs should only be exercised in "extreme circumstances," such as when abuse or serious misconduct has been evidenced. (§45) For this the *Committee* quoted *Libananco v. Turkey* case where the Tribunal rejected Turkey's application for security for costs stating that this would be applied only when "an essential interest of either Party stood in danger of irreparable damage."<sup>1</sup>

The *Ad Hoc Committee* determined that in the instant circumstances no extreme case was presented, and if granted, the order would seriously affect the capacity of the Applicants to seek the annulment and remain in proceedings.

### **3. Decision**

Having not found any evidence that Applicants' conduct threatens the integrity of the proceedings, the *Ad Hoc Committee* denied El Salvador's requested application for security for its cost.

---

<sup>1</sup> *Libananco Holdings Co. Ltd. V. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues of June 23, 2008, ¶57.