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INVESTOR WILL REMAIN SHIELDED FROM ADVERSE COSTS ORDER AS ANNULMENT PROCEEDING PLAYS OUT

Apr 02, 2018 | *By Jarrod Hepburn*



An annulment committee has preserved a provisional stay on enforcement of an adverse costs order against two Spanish claimants, in a long-running case flowing from the 1970s shutdown of a newspaper by Chile. The development comes in a heretofore-unpublished March 15, 2018 Decision on the Request for the Stay of the Enforcement of the Award (click to download (https://www-iareporter-com.proxy.library.nyu.edu/wp-content/themes/iareporter/download.php?post_id=30006)) rendered by the committee of Rolf Knieper (<https://www-iareporter-com.proxy.library.nyu.edu/arbitrator/Knieper>) (chair), Yuejiao Zhang and Nicolas Angelet.

The claimants, Victor Pey Casado and the Foundation President Allende are seeking annulment of a September 2016 award (see here (<https://www-iareporter-com.proxy.library.nyu.edu/articles/berman-led-tribunal-agrees-to-rectify-2016-award-confirming-finding-of-satisfaction-as-remedy-for-denial-of-justice-but-hits-claimants-with-costs-order-annulment-application-now-in-motion/>)) in their case against Chile.

As we've reported (see here (<https://www-iareporter-com.proxy.library.nyu.edu/articles/analysis-pey-casado-tribunal-sees-no-basis-for-new-compensation-order-but-pointedly-reminds-chile-of-its-bit-breach/>)), the September 2016 award was unusual in that it ruled on certain questions of compensation that arose anew, after the compensation findings of an initial 2008 award in the case had been annulled in 2012.

Readers may recall that Chile was held liable in the earlier 2008 award for breach of the FET standard, but when the original tribunal's compensation order was annulled (in 2012), it fell to a new tribunal to rule on any compensation owed to the claimants. Ultimately, the resubmission tribunal, in its 2016 award, deemed that no compensation was owing.

Moreover, the claimants were ordered to pay certain of Chile's costs since the latter had prevailed in this resubmission phase of the case. (A further costs order arose out of a subsequent October 2017 decision on rectification of that 2016 award. Thus, the claimants owe Chile approximately \$182,000 (US).)

Because the claimants moved in 2017 to annul the 2016 award, enforcement of the award (including its costs order) was provisionally stayed. It then fell to the annulment committee to decide whether to retain this temporary stay.

(While the ICSID annulment drama plays out, the claimants are elsewhere pursuing a new case against Chile (<https://www-iareporter-com.proxy.library.nyu.edu/articles/pey-casado-files-a-new-uncitral-arbitration-against-chile-meanwhile-arbitrator-challenge-is-rejected-in-parallel-long-running-icsid-claim/>) under the same Spain-Chile bilateral investment treaty, but this time relying on the UNCITRAL arbitration rules.)

Stay on enforcement does not affect *res judicata* or binding nature of award

Ruling on the Pey Casado claimants' request to stay the enforcement of the 2016 award, the ICSID annulment committee firstly addressed the claimants' argument that a stay on enforcement was required 'in order to guarantee the *res iudicata* effect' of the original 2008 award and Chile's 'obligation to compensate financially' the claimants.

In the committee's view, staying the enforcement of an award did not remove its binding force or its *res judicata* effect; Article 53 of the ICSID Convention ensured that an award remained binding (until annulled). Thus, the claimants' effort to restore the *res judicata* effect of the 2008 award could not be achieved via annulment of the 2016 award, and 'even less' through a request to stay the enforcement of that 2016 award.

Even if the 2016 award was eventually annulled, the committee said, the 'only possible effect' of this would be to extinguish the *res judicata* effect of that award. Annulment would not automatically re-establish the binding force of the parts of the 2008 award that were themselves annulled in 2012.

No point staying enforcement of declaratory parts of award

The committee then observed that most of the *dispositif* of the 2016 award only made certain declarations (namely, that Chile committed a breach, but that no compensation was due). According to the committee, there was no point in staying the enforcement of these findings, since they conferred no enforceable rights on Chile anyway.

The only finding made in the 2016 award that *could* be stayed, the committee said, was the adverse costs order against the claimants. Agreeing with the Libananco annulment committee (see here (<https://www-iareporter-com.proxy.library.nyu.edu/articles/annulment-committee-rejects-turkeys-bid-to-lift-stay-of-enforcement-on-15-million-costs-award-against-investor/>)), the committee held that it could stay this costs order even if enforcement of the rest of the award was not stayed.

Chile received stay in original annulment proceedings; claimants should receive one here

Chile then argued that, although earlier cases had almost automatically granted a stay of enforcement during annulment proceedings, the practice had shifted more recently, requiring a more careful analysis before granting a stay. However, the annulment committee downplayed this, finding that, while some recent cases had indeed lifted stays of enforcement, most annulment committees continued to grant it without major scrutiny.

The committee noted that the annulment committee that was established to review the original 2008 award had granted a stay of enforcement in favour of Chile. There were ‘strong arguments’ of procedural fairness and equality to apply the same approach in this proceeding, this time in favour of the claimants, the committee said. In any case, it would generally be inappropriate to reject a stay where claimants were exercising their legitimate right to have an award examined ‘in good faith and absent dilatory intentions’.

Parallel UNCITRAL proceedings relate to separate claims, unaffected by a stay in the ICSID case

The committee then considered whether there were any unusual circumstances in this case that would justify a different result. The committee dismissed Chile’s concerns over the fact that the claimants had declined to pay the adverse costs order before filing for annulment of the 2016 award. For the committee, the claimants had been pursuing this case against Chile for twenty years and had met their obligations during

that period. Further, there was no major risk to Chile in ordering a stay; conversely lifting the stay would place a financial burden on the claimants.

Chile had also argued that the claimants were trying to ‘game the system’ with ‘dilatory intentions’, seeking a stay purely in order to try to convince the parallel UNCITRAL tribunal that the 2016 award was not binding since its enforcement had been stayed. However, the committee recalled its conclusion that the 2016 award would remain binding regardless of whether a stay was ordered, leaving no possibility for the claimants to use the stay for this purpose.

Moreover, the claimants had insisted that the UNCITRAL proceedings related to a new claim (namely, an alleged denial of justice occurring after the original 2008 ICSID award had been issued). The committee noted that the 2016 tribunal had explicitly held that it could not deal with this denial of justice claim. Since Article 26 of the ICSID Convention barred the claimants from presenting the same claim to several tribunals, this suggested to the committee that the UNCITRAL claim was in fact new. To the extent that this was true, the committee said, Chile could not contend that the claimants were seeking a stay of enforcement purely for dilatory reasons, since the ICSID and UNCITRAL proceedings were distinct.

Thus, the annulment committee ordered that the stay of enforcement of the 2016 award would continue, pending the award’s possible annulment.

No grounds to grant security over stayed obligations

Finally, Chile requested security for the adverse costs order, asking the claimants to pay the amount ordered by the resubmission tribunal into an escrow account, notwithstanding the continued stay of enforcement. However, the committee held that the stay of enforcement meant precisely that the claimants did not have to pay these costs now. Chile’s entitlement to any lost interest on the costs depended on Chile’s success in the annulment proceeding, the committee observed, meaning that Chile could not secure this lost interest via the escrow account at the present juncture.

Costs of the stay application were reserved for later determination.

Garcés y Prada and Gide Loyrette Nouel represent the claimants in the annulment proceedings, together with Rob Howse. The law firms Arnold & Porter and Carey represent Chile, together with government lawyers.

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