Should States be required to post a security as a condition for the stay of enforcement of an ICSID Award during Annulment Proceedings?

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Earlier this year, the ICSID ad hoc committee in the Sempra v. Argentina annulment proceedings decided to continue the stay of the enforcement of the tribunal's award in that case for the duration of the annulment proceedings on the condition that Argentina pay USD 75 million into an escrow account. After Argentina failed to make any escrow payment, the ad hoc committee terminated the stay. In requiring Argentina to make the escrow payment, the ad hoc committee departed from a recent trend not to condition the continued stay of enforcement on the posting of a security.
Under Article 52(5) of the ICSID Convention, a party seeking the annulment of an award may request a stay of the award's enforcement. The enforcement will then be stayed provisionally until the ad hoc committee established to hear the annulment request rules on whether to continue the stay. Unsurprisingly, States requesting the annulment of a damage award typically have requested a stay of enforcement.

In exercising their discretion on whether to continue the stay of enforcement, ad hoc committees have given particular attention to the question of whether the stay should be conditioned on the posting of a security, such as a letter of guarantee or an escrow payment.

From 1985, the year of the first decision on a stay of enforcement, through 2004, all ad hoc committees except one required the award debtor to post an irrevocable and unconditional bank guarantee as a condition for the continued stay of the enforcement. In one case, the award debtor itself agreed to post a bank guarantee in exchange for a stay of enforcement. The reasoning in support of requiring a security for the performance of the award generally was that the security served as a fair and reasonable counter-balance to the continuation of the stay.

That jurisprudence changed in 2004 when ad hoc committees, starting with the committee in Mitchell v. DRC, focused more closely on the likelihood that the award debtor would comply with its obligation to pay the award. Over the following years, a series of committees, with one notable exception, concluded that no security was required, so long as the committee had "comfort" or "reasonable assurances" that the award debtor would comply with its payment obligation in the event that the award would be upheld. The committees derived that comfort largely from the award debtor's obligations under Article 54 of the ICSID Convention and the effective implementation of these

obligations into the award debtor's domestic law.

That approach was severely tested in a series of annulment proceedings initiated by Argentina. In CMS v. Argentina and Azurix v. Argentina, claimants voiced specific concerns that Argentina would not comply with Article 54 of the ICSID Convention, pointing to publicly reported statements of Government officials that ICSID decisions would be subject to review by the Argentine Supreme Court. The ad hoc committees in both proceedings nevertheless continued the stay of enforcement without requiring Argentina to post a security. The CMS committee based its decision in part on a written declaration Argentina had provided on the committee's request (which became known as a "comfort letter") in which Argentina expressed its commitment to recognize the award and enforce its payment obligations, if its annulment application failed.

When the Enron v. Argentina committee considered Argentina's request for a stay of enforcement last year, Argentina took the position that ICSID award creditors had to enforce their awards before Argentina's domestic courts. The Enron committee was unequivocal in stating that Argentina's position violated the ICSID Convention. It nevertheless granted a stay of enforcement without requiring Argentina to post a security, but gave Argentina the opportunity to submit a "comfort letter" indicating that it had changed its position. If Argentina did not provide such a letter within 60 days, Enron could request the committee to terminate the stay. Argentina did not provide that letter – but there is also no public record of Enron having applied for termination.

A month later, the ad hoc committee in Vivendi v. Argentina held that the stay of enforcement would be automatically terminated, unless Argentina either provided a "comfort letter," in which it explicitly undertook to fully pay the award within a fixed period of time, or provided an unconditional and irrevocable bank guarantee. Argentina reportedly neither provided the comfort letter nor a bank guarantee. As a result, the stay of enforcement was automatically terminated pursuant to the terms of the decision.

The March 2009 decision in Sempra v. Argentina is the fifth decision on stay of enforcement in annulment proceedings initiated by Argentina, and the last stay-of-enforcement decision published until the date of this posting. The Sempra committee no longer requested a comfort letter, as it believed that such a letter would merely confirm and restate existing obligations under the ICSID Convention. Based on Argentina's record of non-compliance, the committee concluded that it was unlikely Argentina would comply with the Sempra award, if it were upheld, and conditioned the continued stay of enforcement upon Argentina placing USD 75 million into an escrow account. Argentina did not do so. The committee accordingly terminated the stay of enforcement two months ago, in August 2009.

It is too early to say whether the recent decisions in Vivendi and Sempra signal a return to the pre-2004 jurisprudence, which generally conditioned the continued stay of enforcement on the posting of a security. The Vivendi and Sempra committees specifically based their decisions on Argentina's negative track record in complying with ICSID awards and Argentina's unique legal position that ICSID award creditors had to resort to Argentine domestic courts to enforce their awards. Ad hoc committees deciding on future requests by other award debtors may have to consider different circumstances. However, there can be no doubt that the stay-of-enforcement decisions in the five Argentina cases offer valuable lessons to any ad hoc committee in future annulment proceedings.

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