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# Pecunia Non Olet: Why Do We 'Smell a Rat' in ICSID Financial Regulation 14(3)(e)?

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Our interest on this topic has been provoked by a reading of the *Repsol v. Petroecuador* Stay Orders (*See* ICSID Case No. ARB/01/10, Procedural Order No. 1 (Unofficial translation), 22 December 2005; Procedural Order No. 4 Termination of Stay (Unofficial translation), 22 February 2006) in the context of a research on conditional stay of enforcement in annulment proceedings under the ICSID Convention.

In this case, Petroecuador applied for annulment of the award rendered in favor of Repsol. The Secretary-General of the ICSID granted provisional stay of enforcement. The first meeting of the Annulment Committee, however, was not held as scheduled since Petroecuador failed to pay the advance on fees and expenses as required by Financial Regulation 14(3)(e). The requisite payment was made by a one-year delay during which time Petroecuador benefited from provisional stay *mala fide* in that it was able to 'buy time' to the detriment of the award creditor.

The present note discusses why in this case provisional stay was not lifted after expiry of the 30-day time limit provided for in Arbitration Rule 54(2) and what are the remedies available to the party opposing the stay in like situations.

For present purposes, stay of enforcement in annulment proceedings may be defined as a procedure available at the request of the unsuccessful Respondent pending disposition of the application for the award's annulment.

It must be noted that annulment, although it may be employed as a purely dilatory tactic, is a remedy open to the Respondent and has an 'important confidence-balancing function for State parties' (*See Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 28 December 2007, ¶ 31). Without this safeguard some States parties might not have accepted the ICSID Convention (*See Enron Corporation Ponderosa Assets, L.P. v. Argentina Enron Corporation* and *Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3*, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 7 October 2008, ¶ 39)

The procedure is regulated by Article 52(5) of the Convention and Article 54 of the Arbitration Rules. Stay has temporary suspensory effect over the award.

In general, there are two types of stay:

– provisional stay granted by the Secretary-General which may be followed by
– stay granted by the *ad hoc* committee.

The first type is granted, if the application for annulment contains a request to that effect. In contrast to the second type of stay, this one may be characterized as automatic. This is so because the Secretary-General has no discretion but is rather obligated under Article 52(5) of the ICSID Convention to provisionally suspend enforcement pending constitution of the Annulment Committee.

Once this organ has been constituted, it will take up the matter and decide on whether the second type of stay shall be allowed. In effect, the *ad hoc* committee will continue or terminate the stay granted by the Secretary-General (we do not concern ourselves here with the hypothesis where stay is requested for the first time before the committee). The stay granted by the *ad hoc* committee is not an automatic entitlement of the applicant for annulment since the *ad hoc* committee has discretion and will grant stay 'if the circumstances so require'.

Reading Arbitration Rule 54(2) one may easily be deceived that the 30-day time limit provided there would apply automatically leading to termination of the provisional stay after expiry of this term.

However, as shown by the *Repsol v. Petroecuador* experience, this is not the case.

The 30-day time limit will apply only if the interested party files a request for the continuation (or termination) of the provisionally granted stay. (*See* Schreuer, Chr., *The ICSID Convention: A Commentary* (2009) at p. 1068; Polasek, M., 'Introductory Note to Three Decisions on the Stay of Enforcement of an ICSID Award', 20:2 *ICSID REV. – F.I.L.J.* 581 (2005) at p. 582; Email from the ICSID Secretariat to the authors).

It is therefore advisable that the interested party files such a request in order to prevent a recurrence of the situation in *Repsol v. Petroecuador*. Otherwise, provisional stay will continue until the ad hoc committee finally pronounces on the question.

Seemingly, in *Repsol v. Petroecuador*, Repsol had not filed such an application which would make the 30-day time limit operative. After the work of the committee was suspended owing to Petroecuador's non-payment of the advance on costs, the pendency of the annulment request was maintained whereby provisional stay retained effect for a whole year.

It may be true that during the period of stay the award creditor is compensated for the withholding of the award amount with post-award interest, however, since the ICSID system is not tied to any marked post-award interest falls below commercial rates (*See Azurix Corp. v. The Argentine Republic*, *supra*, at p. 16, fn. 18).

As a consequence, the value of the award diminishes over time. In this regard it must be noted that the mere constitution of the committee may well take up to eight months as in the case of *Sempra v. Argentina* and additional six months will pass until it pronounces on continuation of stay.

Financial Regulation 14(3)(e) makes these Regulations applicable mutatis mutandis to annulment proceedings. Based on Financial Regulation 14(3)(d) and since the Centre will not provide any

service, unless sufficient advance payment is made, in case of default the annulment proceedings may be stayed and eventually discontinued.

Importantly, Financial Regulation 14(3)(e) makes the applicant for annulment solely responsible for paying the advance on costs.

Does this mean that in cases such as *Repsol v. Petroecuador* the successful Claimant will find himself in a legal *impasse* with no means to lift the stay of enforcement thus imposed?

In our view and *per* argument from Financial Regulation 14(3)(d) which relevantly reads: 'the Secretary-General shall inform both parties of the default and give an opportunity *to either of them* to make the required payment' the solution is for the award creditor to propose payment of the deposit instead of the defaulting party in order for the proceedings to continue. Then the award creditor may request termination of stay.

On average, the *initial* advance needed ranges from US$100,000 to US$150,000.

As a follow-up question and given the significance of the financial burden would the non-defaulting party be able to recover the advance payment and how?

It emerges from the practice of ICSID committees that they have the power to discontinue the proceedings for failure of one of the parties to make the requisite advance payments and issue an order for costs in favor of the non-defaulting party. (*See*, e.g., *S&T Oil Equipment and Machinery Ltd. v. Romania*, ICSID Case No. ARB/07/13, Order of Discontinuance of the Proceeding, 16 July 2010, ¶ 4; *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica*, ICSID Case No. ARB (AF)/08/1, Order of the Tribunal Taking Note of the Discontinuance of the Proceeding and Allocation of Costs, 27 October 2010, ¶ 65)

In *RSM Production Corporation v. Grenada*, the Committee affirmed that:

> 'The Committee is conscious of the fact that orders for costs are not normally made on the discontinuance of proceedings. Nonetheless, […] the Committee considers that it is appropriate to render a Decision awarding the Respondent its fees and expenses incurred in connection with these annulment proceedings, in view of the exceptional circumstances of this case.'

(See *RSM Production Corporation v. Grenada*, ICSID Case No ARB/05/14, Order of the Committee Discontinuing the Proceeding and Decision on Costs, 28 April 2011, online: ¶ 60;)

Finally, it is apt for us to see whether the non-defaulting party is entitled to recover its own costs from the defaulting party apart from reimbursement of the advance payment.

ICSID Tribunals do not, in general, follow the 'loser pays' approach and costs are shared equally by the parties absent bad faith.

Similarly, the Committee in *RSM Production Corporation v. Grenada* endorsed the approach taken in *Quadrant v. Republic of Costa Rica* and reiterated that:

> ‘Although the termination of this arbitration cannot be understood in terms of success or failure for either side, the Tribunal may proceed to a decision on the allocation of costs on the basis of other factors, such in a case where a party’s bad faith, lack of cooperation, dilatory or otherwise improper conduct justifies that the costs of the proceedings be assessed against such party.’

(See Quadrant ¶ 67; RSM Production ¶ 61.)

It results from the above that in the interest of finality the award creditor shall make the advance payment instead of the defaulting applicant for annulment and seek discontinuance of the proceedings together with an order for reimbursement of the advance payment and costs. The present contribution seeks to provoke further discussion.

The above issues leave us in uncharted waters. Specifically, it remains uncertain whether right after making the advance payment (instead of the applicant for annulment) the award creditor may seek discontinuance.

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