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Sempra greenlighted to execute against Argentine assets

Luke Eric Peterson (Investment Arbitration Reporter) · Tuesday, August 11th, 2009

In the latest twist in the ongoing war between foreign investors and the Republic of Argentina, a panel at the International centre for Settlement of Investment Disputes (ICSID) has lifted a stay on a $128 Million arbitral award.

US energy company, Sempra, won its arbitration with Argentina in 2007, when arbitrators ruled that measures taken by Argentina in response to its financial crisis served to breach the US-Argentina bilateral investment treaty.

However, when Argentina applied to annul the arbitral award – a limited form of in-house review administered by ICSID – a three-member review panel was tasked with deciding whether the award should be stayed while the annulment process runs its course.

(Some observers may recall that this issue has arisen in a string of ICSID cases involving Argentina. In a nutshell, foreign investors question whether Argentina will ever honor these arbitral awards, and they want to begin collection efforts immediately; meanwhile Argentina insists that it will honor such awards – assuming they are not annulled – provided that foreign investors present them to an Argentine court. I`ve chronicled the stand-off between foreign investors and Argentina in a recent feature for the American Lawyer magazine.)

In the latest development at ICSID, the annulment committee convened to review the Sempra award has ruled in a decision dated August 7, 2009 that Sempra can seek to collect upon its 2007 arbitral award even while the review process runs its course.

The committee`s ruling hardly comes as a shock – although (as noted further below) it does diverge from the approach taken in another ongoing ICSID case.

Certainly, the writing appeared to be on the wall in the Sempra case as far back as March of this year.

At that time, the committee reviewing the Sempra award opined that Argentina appeared unlikely to honor the arbitral award. Thus, the 3 panelists gave Argentina 120 days in which to put $75 Million (US) into an escrow account – or expose itself to the possibility that the stay would be lifted.

In the months thereafter, Argentina failed to finalize an escrow arrangement. Rather, the government complained of the high cost of escrowing funds – and of the further risk that such

funds might be targeted by other creditors (including holders of other arbitral awards).

Hence, when the 120 days lapsed, the committee determined that Argentina had failed to make the necessary escrow arrangements, and ordered the stay to be lifted.

Strikingly, the committee in the Sempra case gave short shrift to concerns voiced by Argentina as to the potential for other creditors to target any funds which the government placed in escrow.

Indeed the committee emphasized that there is no reason why their "decision should be influenced by any desire to shield assets from being attached to satisfy any indebtedness to third parties."

In this respect, the committee`s ruling marks a sharp contrast with a decision rendered earlier this year in a separate ICSID case: Enron v. Argentina.

In the Enron case, a separate ICSID review committee also expressed doubts as to Argentina`s willingness to honor the arbitral award in question. However, in a surprise move, the committee ruled in May of this year that it would continue to stay the enforcement of the relevant award.

In its ruling, the Enron committee reasoned that interim measures – such as stays of enforcement – are designed to be temporary measures, and it would be inappropriate for such measures to "have an irreversible effect for one of the parties" to an arbitration proceeding.

Citing the "very high risk" that third-parties might target any funds posted by Argentina, the committee worried that it might "undermine confidence" in the ICSID system if "an award subject to annulment proceedings might be used by strangers to the arbitration proceedings as a procedural vehicle to secure enforcement of their own unrelated claims against the respondent".

Notably, the committee reviewing the Sempra award acknowledges the different conclusion reached in the Enron proceeding. However, in a ruling that is sure to be debated in the weeks and months to come, the Sempra committee took a very different view of the roles and responsibilities of ICSID annulment committees:

"The Committee does not see as its function to create safeguards against the possibility of third-party creditors generally obtaining satisfaction in respect of outstanding claims."

(While stressing its philosophical differences with the approach taken by the Enron committee, the Sempra committee also appears to distinguish its decision by alluding somewhat obliquely to the different fact-pattern in the Enron case: with the Enron Corporation`s bankruptcy posing unique complications. In this vein, the Sempra committee appears to suggest that if the stay in the Enron case were lifted, and Argentine assets were attached, but the award was ultimately annulled, Argentina might have a more difficult time getting its money back from the creditors of the bankrupt Enron Corporation. By contrast, in the Sempra case, the committee pointedly noted that Sempra had argued for a lifting of the stay, so that Sempra could begin to attach Argentine assets around the world – but Sempra offered to stow any such assets in a special escrow account of its own, so that Argentina would get them back if the award should later be annulled).

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