

ICSID—developments in annulment proceedings in 2016

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Arbitration analysis: The first half of 2016 has seen a number of important developments in relation to annulment under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention). One such development was the publication of the Updated Background Paper on Annulment for the Administrative Council of the International Centre for Settlement of Investment Disputes (ICSID), which contains, among other things, ‘new data and updated charts and tables concerning developments in case law on annulment’ from 2 August 2012 through 15 April 2016. Ashique Rahman, senior associate at Fietta, explores some of the key developments and the practical implications for parties.

What do this year’s ICSID decisions to date reveal about the state of annulment as a limited mechanism of recourse against ICSID awards?

To date, six decisions on annulment have been rendered in 2016, only one of which has resulted in the partial annulment of the original award. These decisions would seem to confirm the observation in ICSID’s updated background paper that the annulment remedy is ‘limited and exceptional’ in nature.

How does the principle that annulment is ‘limited and exceptional’ in nature influence decision-making by annulment committees?

The principle that annulment is a limited and exceptional remedy is clear from the outcome in these cases (the majority of which end up rejecting the application for annulment).

This principle also informs certain interim decisions rendered by annulment committees during the course of the proceeding. For example, in *Ioan Micula, Viorel Micula and others v Romania* (ICSID Case No ARB/05/20), for the purposes of deciding a request for provisional measures, it appears that the committee took into account the fact that parties’ rights are limited in the annulment phase.

In that case, the claimants (who were the respondents on annulment) had requested that the committee recommend provisional measures that would prevent Romania from ‘implementing any seizure order’ against companies in which the claimants were shareholders. For its part, Romania had argued that neither the ICSID Convention, nor the ICSID Arbitration Rules give *ad hoc* committees the power to recommend provisional measures.

The committee dismissed the claimants’ request for provisional measures, observing that ‘the annulment proceeding, by its very nature, has a limited scope and function’ and that *ad hoc* committees cannot ‘entertain again the arguments of the parties relating to their respective rights in the dispute adjudicated by the tribunal’. The committee stated that the ‘rights of the Respondents on annulment relate mainly to the enforcement of the Award’ and that a preservation of the ‘status quo’ does not fall within the ‘scope and functions of the annulment proceedings as foreseen in Article 52’. The committee’s comments demonstrate that the principle that annulment is ‘limited [in] scope and function’ is one that permeates all aspects of decision-making in the annulment phase.

Ultimately, in this case, the committee decided that, since it had already granted a conditional stay of enforcement of the award, the claimants’ rights in the annulment proceedings were sufficiently protected. As a result, the committee was not required to decide the question of whether annulment committees have competence to recommend provisional measures.

Have there been any successful applications for annulment? If so, on what grounds was annulment granted and for what reasons?

There has been one successful application in 2016 for the partial annulment of an award. In *TECO Guatemala Holdings LLC v Guatemala* (ICSID Case No ARB/10/23), the claimant (TECO) applied for annulment of certain parts of the award relating to compensation. For its part, the respondent sought an annulment of the award in its entirety.

By way of background, in the original arbitration, TECO had sought compensation of:

- circa \$21.1m with respect to certain lost cash flows, and
- additional compensation of circa \$222m with respect to losses from the sale of its shares in a Guatemalan electricity company

In its award, the tribunal ordered, among other things, that the respondent pay TECO compensation with respect to its lost cash flows (but not for the substantially larger claim relating to losses from the sale of shares).

In the annulment phase, the *ad hoc* committee annulled the tribunal's decision not to award compensation for the loss of value from the sale of shares. The committee determined that this aspect of the tribunal's decision did not satisfy the 'reasoning requirements' of Article 52(1)(e) of the ICSID Convention.

In the committee's view, the tribunal's reasoning was 'not clear at all'. Although the tribunal had stated that it had not found 'sufficient evidence of the existence and quantum of the losses that were allegedly suffered as a consequence of the sale', this was not enough. For the purposes of the ICSID Convention, art 52(1)(e), what was required was some form of analysis or explanation as to 'why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory'. In the absence of such analysis or explanation, the committee decided that this aspect of the award had to be annulled for 'failure to state reasons'.

The committee also decided to annul the part of the award that contained the tribunal's decision relating to interest on historical losses. In the original award, the tribunal had not granted certain interest claimed by TECO on the grounds that it 'would result in an unjust enrichment of the Claimant'. In the annulment phase, TECO alleged that the tribunal had relied on a 'legal concept' (ie, unjust enrichment), which neither the parties, nor the tribunal, raised in their discussions on interest throughout the course of the arbitration. The committee agreed with TECO. It determined that the tribunal had employed a legal concept without affording the parties the 'right to be heard on the issue'. In the committee's view, this was sufficient grounds to annul this aspect of the award under the ICSID Convention, art 52(1)(d) (ie, on the basis of a serious departure from a fundamental rule of procedure).

Finally, in the award, the tribunal had ordered that Guatemala reimburse 75% of TECO's legal costs. The tribunal's decision had taken into account the fact that Guatemala had been 'partially successful on quantum'. Given that this was no longer the case (as the committee had decided to annul the quantum parts of the award relating to the loss of value claim and interest on historical losses), it followed that the tribunal's decision on costs had to be annulled.

Guatemala's application to annul the award in its entirety was unsuccessful.

Have there been any recent developments in relation to stays of enforcement during annulment proceedings?

2016 has already seen important developments in relation to stays of enforcement, a number of which have arisen in the context of cases involving Venezuela as the respondent state.

For example, on 11 March 2016, the annulment committee in *Flughafen Zürich A.G. y Gestión e Ingeniería IDC S.A v Venezuela* (ICSID Case No ARB/10/19) ordered a continuation of the stay of enforcement of the award, subject to Venezuela posting an unconditional and irrevocable bank guarantee in favour of the claimants. By contrast, shortly thereafter, on 4 April 2016, the annulment committee in *OI European Group B.V. v Venezuela* (ICSID Case No ARB/11/25) rejected Venezuela's request to continue the stay of enforcement, clearing the way for the investor to seek an immediate enforcement of the award.

Another important development occurred on 29 February 2016, when the annulment committee in *Tidewater Inc., et al v Venezuela* (ICSID Case No ARB/10/5) granted a continuation of the stay of enforcement of a part of the award. The committee did not accept Venezuela's argument that 'it is not possible' for annulment committees to lift the stay of enforcement with respect to only a part of the award. The committee decided that, in this case, there was 'an unchallenged portion of the damages awarded by the Tribunal, which amounts to US\$27.407 million'. This was an aspect of the calculation of compensation on which the parties were agreed and which was not challenged by Venezuela in the annulment phase. The committee decided that it would lift the stay of enforcement with respect to the part of the calculation that was 'undisputed'.

What are the practical implications of these stay of enforcement decisions for parties to ICSID arbitrations and annulment proceedings?

The recent stay of enforcement decisions in the Venezuelan cases have a number of practical implications for parties.

For example, if Venezuela does not post a bank guarantee in *Flughafen*, the stay of enforcement would be lifted and the claimants would be free to seek enforcement of the award.

Conversely, if the bank guarantee is provided by Venezuela, the claimants in *Flughafen* arguably would be placed in a better position to the claimant in *OI European Group* (in which the stay of enforcement was lifted). That is because, assuming that the claimants in *Flughafen* are successful in the annulment phase, they could call on the bank guarantee to satisfy the award. By contrast, although OI European Group is now free to enforce its award, it faces the challenge of having to compete against several other foreign investors seeking enforcement of awards against Venezuela.

The decision of the annulment committee in *Tidewater* also has important implications for parties. As mentioned above, in that case, the tribunal decided not to continue the stay of enforcement of the part of the award that was not disputed by the parties. This decision raises a number of questions. For example, could the decision in *Tidewater* provide an incentive for parties to disagree on even the most basic aspects of their damages calculations (to guard against the risk that, in a subsequent annulment proceeding, enforcement will not be stayed with respect to those aspects of the award that contain damages calculations that are agreed between the parties)? Could it in fact encourage parties to formulate annulment applications that are sufficiently broad to cover all aspects of the award? It remains to be seen how these questions will be answered in practice.

Interviewed by Hannah Thompson.

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