

**International Centre for Settlement of Investment Disputes
Washington, D.C.**

**Sempra Energy International
(Claimant)**

v.

**Argentine Republic
(Respondent)
(ICSID Case No. ARB/02/16)
(Annulment Proceeding)**

**Decision on Sempra Energy International's Request for the
Termination of the Stay of Enforcement of the Award
(Rule 54 of the ICSID Arbitration Rules)**

Members of the *ad hoc* Committee

Mr. Christer Söderlund, President
Sir David A.O. Edward, QC
Ambassador Andreas J. Jacovides

Secretary of the *ad hoc* Committee

Mr. Gonzalo Flores

Representing the Claimant

Mr. R. Doak Bishop, King & Spalding LLP
Mr. Craig S. Miles, King & Spalding LLP
Mr. Roberto Aguirre Luzi, King & Spalding LLP
Mr. Dave Smith, Sempra Energy International

Representing the Respondent

Dr. Osvaldo César Guglielmino
Procurador del Tesoro de la Nación Argentina
Procuración del Tesoro de la Nación
Buenos Aires, Argentina

Date: August 7, 2009

1. On 25 January 2008, the Argentine Republic filed an annulment application with the Secretary-General of ICSID. The application included a request under Article 52(5) of the ICSID Convention for a stay of enforcement of the Award, pending a decision by the Committee to be constituted on the application for annulment.
2. The Secretary-General of ICSID registered the application on 30 January 2008, at the same time notifying the Parties pursuant to Rule 54(2) of the ICSID Arbitration Rules that enforcement of the Award was provisionally stayed.
3. On 16 September 2008, Sempra filed a request that the provisional stay of enforcement of the Award be lifted. As agreed by the Parties, Argentina filed observations on the continuation of the stay of enforcement on 7 November 2008, while Sempra filed its observations on 21 November 2008.
4. On 8 December 2008, a hearing was held at the seat of the Centre in Washington DC, at which the Parties presented oral arguments to the Committee on the matter of the stay of enforcement. The Committee issued its decision on stay on 5 March 2009.
5. In its decision on stay on 5 March 2009, the Committee granted a continuation of the stay of enforcement of the Award subject to the condition that Argentina place in escrow an amount of USD 75 million. The Committee's decision further provided that if Argentina failed to place in escrow the sum required within 120 days from the date of the issuance of the decision, the Committee might – at the request of Sempra – order termination of the stay of enforcement with or without providing any opportunity for Argentina to make up for any failure in payment.
6. In a letter of 13 May 2009 to the Committee, Sempra requested that the stay of enforcement be lifted. The reason for the request was that Argentina had not agreed to, let alone offered, any escrow agreement, as provided by the Committee's decision.
7. In particular, Sempra referred to paragraph 119 of the Committee's decision, which provides:

In the event where Sempra considers the escrow arrangement offered by Argentina as unsatisfactory, Sempra may bring this matter to the Committee's attention by submitting a notice at the relevant time, but no later than 30 (thirty) days before expiry of the time limit set forth above. Argentina shall be entitled to submit comments and take corrective action by reason of such notice. If the Committee considers that the escrow arrangement is unsatisfactory – despite corrective action, if any – the Committee may terminate the stay pursuant to Rule 54(3) of the ICSID Arbitration Rules.

8. In a letter of 22 May 2009, the Committee invited Argentina to offer comments on Sempra's letter of 13 May 2009. In this respect the Committee referred to that part of its decision, quoted above, which entitles Argentina to “submit comments and take corrective action” in the event where Sempra considers any escrow arrangement offered by Argentina as unsatisfactory.

9. In a communication of 1 June 2009, Argentina made reference to certain discussions said to have taken place between Argentina and “counsel for Sempra” in the *Enron* case¹, *inter alia*, concerning a proposal to put an escrow agreement in place as a condition for continuing the stay in those annulment proceedings. Argentina had explained that such an arrangement as proposed would create “unacceptable risks of attachment” to Argentina, pointing to the contingency of other creditors attaching Argentina’s entitlement to lift the amount in escrow, should its application for annulment be granted. In that event, it could not be guaranteed that the funds would be repatriated to Argentina, since they might be taken to satisfy third party creditors of Argentina who had attached Argentina’s interest in the escrowed funds. Argentina noted, in particular, that the *ad hoc* committee in the *Enron* annulment proceedings had, for reasons given in paragraph 42 of that committee’s decision of 20 May 2009, granted a continuation of the stay without conditions.

Argentina has requested that this Committee do likewise.

10. In a letter of 10 June 2009, Sempra expressed its disagreement with the *Enron* committee’s reasoning on the point of third-party attachment risk, emphasizing that, taking such a risk into account “encourages recalcitrant debtors [---] to continue repudiating their international monetary obligations”, and questioning why Sempra should suffer the consequences of “Argentina’s unilateral decision to renege on its prior international monetary obligations”.
11. In the same letter, Sempra reiterated its request that the Committee lift the stay of enforcement, noting that Argentina had not only failed to “offer” an escrow arrangement but had not even responded to a draft escrow agreement proposed by Sempra, let alone committed any funds into such escrow.
12. The Parties have volunteered additional submissions on this matter, Sempra on 16 July and Argentina on 17 July 2009.

The Committee’s assessment

13. The Committee’s decision to grant a continuation of the stay of enforcement subject to conditions was made in its decision of 5 March 2009. Considering the 120 days allowed to the Parties to finalize an escrow arrangement, the Committee notes that this time limit expired as at 3 July 2009. Sempra brought the matter of Argentina’s failure to offer any escrow arrangement – let alone a satisfactory one – to the Committee’s attention on 13 May 2009, i.e. before the time limit of 30 days set out in paragraph 119 of the decision had expired.
14. In its letter of 17 June 2009 to the Parties, the Committee stated that it would consider the Parties’ arguments on the matter of the currently ongoing stay and issue a decision in respect of the Sempra’s request that the stay now be lifted. Further, the Committee invited the Parties to communicate “any new development or other circumstances, which may be relevant for the matters presently pending”. No such further information has been communicated to the Committee.

¹ Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3) – Annulment Proceeding.

15. In essence, Argentina's defence is based on the following: the placing of funds in escrow (or issuing a letter of credit) would cause prohibitive cost to Argentina, *inter alia*, because procurement of a bank guarantee or letter of credit would incur prohibitive cost and the cost "for Argentina of setting up an escrow account would be equal to the cost of obtaining a letter of credit".
16. The Committee notes that the evidence relied on by Argentina in this respect rests on the assumption that the amount to be placed in escrow is to be borrowed in the international financial markets and that such borrowing has to be secured by a "potential guarantor" (Marx opinion, paragraph 12). The Committee does not accept that this assumption constitutes a valid consideration when deciding whether to continue or terminate the stay. In any event, the cost implications for Argentina of any arrangement for security or – as this Committee finally decided – committing funds into an escrow account as tangible proof of future performance, should the annulment application be denied, has already been addressed by the Committee (paragraphs 77 - 79 of its decision). It need not be reopened here.
17. Further, Argentina – in its letter of 1 June 2009 – has relied heavily on a decision of 20 May 2009 by the Enron *ad hoc* committee, which decided to continue the stay without the imposition of any conditions. In this regard, Argentina has submitted that placing funds in escrow would create "unacceptable risk of attachment to Argentina". The implication is that the funds, if and when released, would run the risk of being applied to satisfy third-party creditors' claims against Argentina rather than be repatriated to Argentina. Such contingency, were it to come to pass, would, in the view of Argentina, render the escrow arrangement irreversible.
18. This Committee is prepared to accept that a payor's conditional or residual interest in escrowed funds could, as a matter of fact and law, be attached by third-party creditors in most national jurisdictions (provided the funds would not, in the case of a sovereign state, be held to be immune from such measures).
19. This Committee fails, however, to see the relevance of the eventuality that a third-party creditor might attach assets if, and to the extent that, those assets were available for enforcement. 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. Nor does the Committee consider that such a contingency would make the envisaged escrow arrangement "irreversible". In the event that annulment is granted by the Committee, the funds will revert to Argentina and will be available for purposes of satisfying creditors or otherwise (payment to an insolvent award creditor, on the other hand, may well prove to be irreversible in the event of that creditor's bankruptcy or dissolution).²
20. As stated, the Committee does not see why its decision should be influenced by any desire to shield assets from being attached to satisfy any indebtedness to third parties.

² Apart from generally pointing to the risk of non-recoupment from an award creditor (Memorial on the Continued Stay of Enforcement of the Award of 7 November 2008, paragraphs 33 and 34), Argentina has not offered any specific indication that this would represent an actual risk in respect of Sempra. Sempra has undertaken – most recently in its letter of 16 July 2009 – to keep any funds received in satisfaction of the Award in a separate escrow account pending the decision in the present annulment proceedings.

Such contingencies are outside the scope of considerations which an *ad hoc* committee should take into account.

21. As was expressed in the Committee's decision on continuation of the stay, the condition imposed by the Committee upon continued stay of enforcement was motivated by the Committee's consideration that a continued stay would require some "tangible demonstration of good faith" that Argentina would comply with its obligations under Article 53 of the ICSID Convention.
22. The Committee has no option other than to conclude, under the present circumstances, that it has received no indication that Argentina's position on Articles 53 and 54 of the Convention has changed, or that it will comply with its obligations under Article 53 of the ICSID Convention.
23. The Committee notes that Argentina has failed to place in escrow the amount of USD75 million within 120 days from the Committee's decision and that this situation has remained despite Sempra's bringing the unresolved situation to the attention of the Committee. Furthermore, the Committee notes that Sempra, in its letter of 10 June 2009, has requested that the Committee order the termination of the present stay of enforcement. In these circumstances, the Committee must conclude that Argentina has not complied with the condition imposed by the Committee for continuing the stay for the duration of these annulment proceedings. For this reason the currently ongoing stay of enforcement of the Award will be terminated.
24. In its letter of 29 April 2009, Argentina raised the issue of "execution measures" taken by Sempra in France and Spain. In particular, Argentina referred to a notification by the Tribunal de Grand Instance in Boulogne-sur-Mer concerning conservatory measures registered in respect of real estate property, belonging to Argentina, dated 19 January 2009, and an application for conservatory measures together with summons to a hearing before the Juzgado de Primera Instancia No. 83 in Madrid on 5 May 2009.
25. In its letter of 29 April 2009 Argentina alleges that "Sempra's actions have meant a *de facto* termination of the stay of enforcement of the Award".
26. In a response of 13 May 2009, Sempra has argued that efforts to obtain conservatory relief is not comparable to enforcement actions, and that, additionally, the Spanish request will be acted upon only after the deadline for the escrow has elapsed. In this respect, Sempra has emphasized that it has voluntarily re-scheduled the initial hearing in the Spanish application until 15 September 2009.
27. In its letter of 1 June 2009, Argentina again claims that Sempra's actions constitute a manifest violation of the stay of enforcement, and considers that those actions imply that the stay has effectively been terminated.
28. The Committee notes that the matter of enforcement issues was discussed on the occasion of the hearing on stay,³ and that the Committee required that "[o]nce the escrow arrangement is established the Committee requires that whatever enforcement, attachment or conservatory measures Sempra ha[d] so far initiated should not be pursued" (paragraph 116 of the Decision).

³ Decision of 5 March 2009, paragraphs 86 and 87

29. As regards Argentina's reference to "execution measures", the Committee considers that such measures must be distinguished from conservatory measures which will normally be effected where a judicial decision has not yet become final (or judicial proceedings even initiated).
30. From the materials available to the Committee, and based on Sempra's affirmation that a hearing on the Spanish application has been scheduled for 15 September 2009, the Committee finds no basis to conclude that Sempra, in breach of the Committee's requirement, has "pursued" any request for conservatory measures. Additionally, the Committee considers that, in view of its decision to discontinue the stay on the basis of the absence of any implementation of an escrow arrangement by Argentina, the matter of conservatory or enforcement measures will lose its relevance.
31. On the basis of all the foregoing considerations, this Committee renders the following

DECISION

The stay of enforcement of the Award is terminated as of the date of this decision.



Christer Söderlund
President of the *ad hoc* Committee