

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Carnegie Minerals (Gambia) Limited

v.

Republic of The Gambia

(ICSID Case No. ARB/09/19) – Annulment Proceeding

**DECISION ON THE GAMBIA’S REQUEST FOR A CONTINUED STAY OF
ENFORCEMENT OF THE AWARD**

Members of the ad hoc Committee

Professor Donald M. McRae, President of the *ad hoc* Committee
Professor Bernardo M. Cremades, Member of the *ad hoc* Committee
Ms. Dorothy Ufot, SAN, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee

Ms. Aurélia Antonietti

Date of dispatch: October 18, 2018

Decision on the Continued Stay of Enforcement

I. Introduction

1. On November 11, 2015, the Republic of The Gambia (“The Gambia” or the “Applicant”) filed an application for annulment of the Award rendered on July 14, 2015 (the “Award”), and requested the stay of enforcement of the Award.
2. On November 19, 2015, the application was registered, and the enforcement of the Award was provisionally stayed.
3. On January 22, 2016, the Committee was constituted.
4. On February 1, 2016, the Committee wrote to the Parties regarding the first session, and indicated that, pursuant to Arbitration Rule 54(2), it extended the stay of the enforcement of the Award until it had heard both Parties and had reached a final decision on the continuation of the stay.
5. On March 21, 2016, the Committee decided to postpone the first session scheduled on March 23, 2016, until it had resolved representational issues raised by The Gambia.
6. On March 28, 2016, the Centre notified The Gambia’s default to pay the required advances.
7. On April 12, 2016, the Committee authorized The Gambia to pay the required advances in instalments.
8. On June 3, 2016, upon receipt of a partial payment of the required advances, the Parties were invited to confirm their availability for a first session.
9. On October 7, 2016, the Committee issued its decision on the representation of Carnegie Minerals (Gambia) Limited (“Carnegie”) in this case (the “Decision on Representation”), finding that Clyde & Co is the representative of Carnegie in this annulment proceeding.
10. On December 20, 2016, the Committee, while still discussing holding a first session with the Parties, fixed a timetable for the submissions of written observations on The Gambia’s request for a stay of enforcement. The Gambia was invited to submit its Memorial on the stay of enforcement by January 9, 2017.
11. On January 8, 2017, The Gambia presented a request for disclosure aiming at: “[the] immediate disclosure by Clyde & Co of (1) all corporate documents and correspondence concerning Carnegie’s alleged decision to transfer/assign the Award, including in a trust, and the transfer/assignment/trust documentation itself and (2) all documents creating and/or governing the trust which Clyde & Co describes in its above-mentioned submissions.” The Gambia specified that its submission on the stay of enforcement could not be made without this information.
12. On January 11, 2017, Carnegie replied asking for the dismissal of the annulment application for failure to comply with the agreed timetable.

Decision on the Continued Stay of Enforcement

13. On January 13, 2017, the Committee held its first session with the Parties, and issued Procedural Order No. 1 on January 23, 2017. It was decided that the Committee would rule first on The Gambia’s request of January 8, 2017.
14. On March 7, 2017, the proceeding was suspended for non-payment of the required advances pursuant to ICSID Administrative and Financial Regulation 14(3)(d).
15. On April 17, 2018, the proceeding resumed following the payment of the required advances.
16. On May 21, 2018, following the resignation of Prof. Chen, the Committee was reconstituted with Ms. Dorothy Ufot as a Member.
17. On May 23, 2018, the Committee invited The Gambia to indicate by May 28, 2018, whether (i) its request dated January 8, 2017, regarding Clyde & Co’s disclosures, and (ii) its request for the stay of enforcement of the Award, were maintained.
18. On May 28, 2018, The Gambia indicated that it was maintaining its January 8, 2017 request.
19. By letter of June 13, 2018, the Committee set forth a schedule for the request for disclosure, indicating that it would deal with the request for the stay of enforcement subsequently.
20. On August 20, 2018, the Committee issued a Procedural Order No. 2 whereby it rejected The Gambia’s request of January 8, 2017 and ordered the Parties to file observations on The Gambia’s request regarding the stay of enforcement.
21. On September 4, 2018, The Gambia filed its Application for the continued stay of enforcement (“Application”).
22. On September 18, 2018, Carnegie filed its Response on the continued stay of enforcement (“Response”).
23. On September 26, 2018, The Gambia filed its Reply on the continued stay of enforcement (“Reply”).
24. On October 5, 2018, Carnegie filed its Rejoinder on the continued stay of enforcement (“Rejoinder”).

II. Positions of the Parties

25. The Gambia argues that it would suffer irreparable harm if the stay is not maintained. If the stay is lifted, the Gambia submits that “the Award sum would be paid to the unknown company within the Astron group”¹ with “a considerable risk that efforts to recoup the

¹ Application, para. 9.

Decision on the Continued Stay of Enforcement

- Award sum in the event of annulment would be highly complicated, if not impossible.”² The Committee, the Gambia argues, does not have sufficient information regarding the Astron Group, the trust agreement or the existence and location of the assets. Therefore, there is a risk that the beneficiary company “is a mail box company without sufficient assets to be attached in any recoupment action.”³
26. In addition, The Gambia argues that lifting the stay would cause it economic hardship, as “the enforcement of the Award sum would amount to at least 2% of The Gambia’s entire GDP”⁴, and “[p]aying the Award while the possibility of annulment exists—along with the risk of non-recoupment—would put a significant, unnecessary, and unavoidable impediment upon those development efforts.”⁵
27. According to the Applicant, it is for Carnegie to prove that there is “an established substantial or serious risk that The Gambia will not comply with the Award or that it would not be enforced in the Gambia.”⁶ Carnegie has not proven that the Gambia has failed to honor an arbitral award.
28. The Gambia argues that Carnegie has not demonstrated either that it would suffer any prejudice if the stay continued. “Prejudice based on mere delay alone is not sufficient.”⁷
29. Finally, The Gambia submits that it files its Application for annulment in good faith.
30. Carnegie for its part requests that the stay be lifted or alternatively that the Gambia be ordered to provide security for the whole amount of the Award in the form of a bank guarantee.⁸
31. Carnegie considers that it is for The Gambia, the party seeking the continuation, to show that circumstances requiring the continuation exist.⁹
32. Carnegie points out that already two and a half years have passed since the registration of the Application for annulment, and that maintaining the stay would cause prejudice as the Award does not include post-Award interest. “[T]he beneficiary of the Award suffers the devaluation of the Award with the passage of time.”¹⁰
33. Carnegie submits that lifting the stay of enforcement would not cause The Gambia to “suffer catastrophic immediate and irreversible consequences on its ability to conduct its affairs.”¹¹

² Application, para. 10.

³ Reply, para. 6.

⁴ Application, para. 12.

⁵ Application, para. 13.

⁶ Reply, para. 9.

⁷ Reply, para. 15.

⁸ Response, para. 2.

⁹ Rejoinder, para. 7.

¹⁰ Rejoinder, para. 11. Rejoinder, para. 20.

¹¹ Response, para. 19.

Decision on the Continued Stay of Enforcement

34. Carnegie argues that there is a risk that The Gambia will not comply or enforce the Award if it is upheld, since (i) The Gambia has shown that it has no intention to comply with the Award,¹² (ii) it has an history of non-compliance with ICSID payments, (iii) “[t]he Gambia’s own statements in its Stay Application regarding its limited resources are a cause for concern,”¹³ and (iv) there is no guarantee that the Award could be enforced against The Gambia in the Gambian legal framework. The fact that an award could be enforced through the New-York Convention confirms that the Award may be subject to judicial review, contrary to Article 54 of the ICSID Convention.¹⁴
35. Carnegie considers that there is no risk of non-recoupment if the stay is lifted and the Award annulled. “[N]otwithstanding that the Award is held on trust, the financial standing and established reputation of the Astron group eliminates any alleged risk of non-recoupment of the Award in the event of annulment.”¹⁵
36. Finally, Carnegie argues that whether annulment proceedings are “brought in good faith is not a relevant factor to determine whether the Stay ought to be continued.”¹⁶
37. Alternatively, Carnegie requests that The Gambia provide security in the form of an unconditional and irrevocable bank guarantee for the whole amount of the Award issued by a first-tier reputable international credit institution (outside of The Gambia and with no principal establishment branch in The Gambia) immediately payable upon the issuance of a final decision of the Committee rejecting the Application for annulment, or if the Annulment Proceedings are withdrawn or discontinued, or a security in such other form as the Committee may consider appropriate.¹⁷
38. The Gambia objects to the provision of security, as the conditions to provide such security are not met in this case. The party seeking annulment should not be placed in a worse position than it would be had it not sought annulment.¹⁸

III. Decision of the Committee

39. The Committee notes that the Applicant, The Gambia, bases its request for a continuation of the stay of enforcement on the ground of the prejudice that would result to it from lifting the stay and economic hardship. The prejudice arises out of the claim that if it were to pay the award The Gambia would run the risk of having difficulty recovering any amounts paid if the Award were to be annulled, particularly in light of the fact that the benefit of the Award is being held on trust and the Claimant has not disclosed information about that trust that The Gambia has requested. The economic hardship is due to the impact that payment of the Award would have on the economy of The Gambia.

¹² Rejoinder, para. 26.

¹³ Response, para. 30.

¹⁴ Rejoinder, para. 24 a.

¹⁵ Response, para. 36.

¹⁶ Response, para. 40.

¹⁷ Response, paras. 43-47.

¹⁸ Reply, paras. 18-23.

Decision on the Continued Stay of Enforcement

40. The Claimant, Carnegie, argues by contrast that continuing the stay will cause prejudice to the beneficiary of the Award given the amount of time that has elapsed since the Award was handed down and the fact that the Award does not carry post-judgment interest. It also argues that there is a risk that The Gambia will not comply with the Award. In response to The Gambia's argument that lifting the stay will cause irreparable harm Carnegie argues that the harm claimed by The Gambia does not meet the standard applicable to such claims. It also denies that there is any risk of recoupment if the Award is annulled. It further argues that if the stay of enforcement is continued, it should be done on the provision by The Gambia of security for the payment of the Award.
41. The Committee notes that a variety of factors have been taken into account by annulment committees in considering requests for the continuation of a stay of execution, including those argued by the parties in this case. However, ICSID Article 52(5) provides simply that "the Committee may, if it considers that the circumstances so require, stay enforcement of the Award pending its decision." Thus, the decision is a discretionary one for an annulment committee on the basis of the facts and circumstances before it. In this regard, decisions of other annulment committees and the reasons they adopt, while illustrative, must be read in the light of their own particular facts and circumstances.
42. The Committee also notes that a request to stay enforcement is like any other request before it. A party making the request must bear the burden of establishing the basis for the request. In this regard, the Parties appear to be in agreement. The question for the Committee is whether that burden has been discharged.

The Question of Prejudice and Hardship

43. Both Parties have argued that the result of this request can be prejudicial to them and cause hardship. The Committee understands the concerns raised by The Gambia about the lack of clarity in relation to the beneficiary on trust of the Award and this might have implications for recoupment if the damages are paid and the Award is annulled. However, the assurances of Carnegie that recoupment will not be a problem goes some way to alleviating that concern.
44. The Committee also appreciates the concerns of Carnegie about delay and the time that has elapsed since the Award including the difficulties in getting this annulment proceeding fully on track. Carnegie points out that there is no award of post-judgment interest in the decision of the Tribunal. However, the Committee does not see this as a relevant consideration since, as the Tribunal observed, no request was made to it for post-judgment interest.¹⁹
45. The Committee also understands the concerns raised by The Gambia about the economic hardship that would result from having to pay the Award. While such hardship does not meet the "catastrophic, immediate and irreversible consequences" posited by Carnegie, it nevertheless poses a burden on a country facing the economic and political difficulties that The Gambia has had to and continues to face. However, the Committee does not

¹⁹ Award, para. 51.

Decision on the Continued Stay of Enforcement

consider that this point should be taken too far. If the Award is not annulled, The Gambia will be faced precisely with the economic challenge of complying with the Award that it would face today if the stay were to be lifted. What The Gambia is asking for is a contingent postponement of having to face those economic consequences.

46. In short, the Committee does not consider that the arguments of either party on prejudice and hardship are conclusive; on balance they slightly favor The Gambia.

The Risk of Non-Compliance

47. Carnegie’s arguments about the likelihood of The Gambia’s compliance with the Award relate largely to the conduct of The Gambia during the course of the original proceedings before the Tribunal as well as its conduct in respect of payment of advances in these proceedings. However, Carnegie produces no evidence of any failure by The Gambia to comply with an arbitral award. This is not a case where a State has shown that in practice it does not promptly comply with arbitral awards. Instead, the arguments of Carnegie are rather speculation – because of its actions in respect of other matters The Gambia might not comply with the Award.
48. The Committee equally does not find persuasive the argument of Carnegie that there is no guarantee that the law of The Gambia will allow for the enforcement of ICSID awards. The Gambia cites to legislation under which enforcement might be brought and to litigation in The Gambia on the enforcement of awards. Clearly the matter of enforcement would have to be determined eventually under the law of The Gambia if enforcement were sought in The Gambia, but it does not appear to the Committee that a conclusion can be drawn at this stage that enforcement is not possible under Gambian law. Nor is it clear why uncertainty under Gambian law should be a factor in maintaining or lifting the stay of enforcement.
49. In short, the Committee does not find that arguments relating to the risk of non-compliance are conclusive in determining whether the stay of enforcement should be lifted.

The Claim that the Stay should be Continued only if Security is Provided

50. Carnegie argues, in the alternative, that if the stay is continued then The Gambia should be required to provide “an unconditional and irrevocable bank guarantee for the whole amount of the Award.” The Gambia opposes the ordering of such security arguing that the circumstances of this case do not warrant the continuation of the stay subject to a condition.
51. As a general matter, the Committee has some reservations about ordering a stay subject to the provision of security. The function of an annulment committee is to determine whether an award should be annulled, and it can stay the enforcement of an award pending its decision. Apart from this, an annulment committee has no role in the enforcement of awards. Yet requiring security from the party against which an award has been made is an engagement in the enforcement process. It provides the beneficiary of an

Decision on the Continued Stay of Enforcement

award with better protection than beneficiaries of awards that are not tested in the annulment process. Provision for security amounts to a guarantee of enforcement something that is not provided for in the Convention, which provides only for a process for enforcement.

52. In any event, even if the Committee were inclined to consider ordering the provision of security, the circumstances of this case are not appropriate for doing so. Carnegie argues that security has been ordered in circumstances where there is a prospect of non-compliance or there is real prejudice from the continuation of a stay. However, the Committee has concluded that there is no evidence of a real likelihood of non-compliance with the Award by The Gambia. Nor has it found that there is evidence of real prejudice to Carnegie from continuing the stay. The apparent failure of Carnegie to request an award of post-judgment interest from the Tribunal cannot become a justification for claiming relief in respect of the stay of enforcement.

Conclusion

53. The Committee has concluded that while the matter is not clear cut, the considerations in this case go on balance towards continuing the stay. The particular economic situation of The Gambia argues in favor of not requiring it to undertake financial expenditures when there remains a possibility that such expenditures are not necessary.
54. However, the Committee recognizes that the possibility of continuing delay works to the disadvantage of Carnegie. Further, the Committee notes that The Gambia has taken the position that “the annulment proceedings are likely to be concluded well within 1 year.”²⁰ As a result, continuing the stay will only mean effectively a further year before the issue of annulment will be resolved and thus the stay would no longer have effect.
55. In light of this, the Committee decides, in the circumstances of this case, to continue the stay of enforcement for one year to allow the annulment process to work its course. In the Committee’s view this represents an appropriate balance in the interests of the two Parties.

THEREFORE, THE COMMITTEE:

- Decides to continue the stay of enforcement for a period of one year from the date of this Decision.
- Defers any decision on costs until a later date.

²⁰ Reply, para. 16.

[Signed]

Professor Donald M. McRae, C.C.
President of the *ad hoc* Committee
Date: October 18, 2018