

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Carnegie Minerals (Gambia) Limited

v.

Republic of The Gambia

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

PROCEDURAL ORDER NO. 2

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: August 20, 2018

I. Introduction

1. On November 11, 2015, the Republic of The Gambia (“The Gambia”) 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 4, 2016, The Gambia informed the Secretary-General of ICSID that Carnegie Carnegie Minerals (Gambia) Limited (“Carnegie”) had been placed in liquidation by order of the High Court of The Gambia on August 6, 2015, and requested to be provided with the power of attorney authorizing Clyde & Co to act for Carnegie. The Gambia argued that in light of the liquidation, the sole person representing Carnegie was the liquidator. By contrast, Carnegie’s position was that the liquidator had no authority in this proceeding and the authorization from Carnegie’s Board of Directors, provided to ICSID for the arbitration proceeding on September 14, 2009, sufficed.
4. On January 22, 2016, the Committee was constituted and Ms. Natali Sequeira, ICSID counsel, was appointed Secretary of the Committee.
5. 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.
6. On March 8, 2016, in a letter to the liquidator, Clyde & Co indicated inter alia that “*the Award made in the arbitration is held on trust by a foreign trustee for the benefit of Carnegie’s controlling shareholder, and is not an asset in the purported liquidation.*”
7. On March 18, 2016, The Gambia submitted that the first session could not be conducted in the absence of the liquidator and in the presence of Clyde & Co, a situation to which Clyde & Co objected on March 24, 2016.
8. On March 21, 2016, the Committee decided to postpone the first session scheduled on March 23, 2016, until it had resolved the representation issue.
9. On March 28, 2016, the Centre notified The Gambia’s default to pay the required advances.
10. On April 12, 2016, the Committee authorized The Gambia to pay the required advances in installments.
11. 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.
12. On June 8, 2016, The Gambia raised the issue of Carnegie’s representation with the Committee and addressed the subsequent steps of the proceeding.

13. On July 8, 2016, further to various exchanges between the Parties, the Committee fixed a timetable for the Parties to submit observations on the question of representation.
14. On August 19, 2016, Clyde & Co further indicated that: “[...] *a trust structure has been established whereby the Award is now held on trust for Astron Limited, with another company within the Astron group acting as trustee. This underscores the position that has always been the case: the Award and payments pursuant to the Award are not now and never have been assets within the national jurisdiction of The Gambia, and they do not fall within any purported estate over which the purported liquidator would have control.*”
15. On September 21, 2016, the Parties were informed that the Secretary of the Committee was Ms. Mairée Uran Bidegain.
16. On October 7, 2016, the Committee issued its decision on the representation of Carnegie in this case (the “Decision on Representation”), finding that Clyde & Co is the representative of Carnegie in this annulment proceeding.
17. On December 9, 2016, the Parties were informed that the Secretary of the Committee was Ms. Aurélia Antonietti.
18. 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.
19. On January 8, 2017, The Gambia presented a request 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.*”
20. The Gambia specified that its submission on the stay of enforcement could not be made without this information. It aimed at finding out the following information: “*(1) when did the alleged transfer to a trust take place, (2) at the request of whom, (3) pursuant to which (corporate or otherwise) decisions, (4) whether that request or that alleged transfer/assignment is allowed under inter alia Gambian law and/or international law, (5) whether that request or that alleged transfer/assignment carries the effects that Clyde & Co says it does under both Gambian law and/or international law.*”
21. On January 11, 2017, Carnegie replied asking for the dismissal of the annulment application for failure to comply with the agreed timetable.
22. On January 13, 2017, the Committee held its first session with the Parties, and issued Procedural Order No. 1 on January 23, 2017 (“PO1”). It was decided that the Committee would rule first on The Gambia’s request of January 8, 2017.
23. 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).

24. On April 17, 2018, the proceeding resumed following the payment of the required advances.
25. On May 21, 2018, following the resignation of Prof. Chen, the Committee was reconstituted with Ms. Dorothy Ufot as a Member.
26. 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.
27. On May 28, 2018, The Gambia indicated that it was maintaining its January 8, 2017 request.
28. 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.
29. On June 28, 2018, The Gambia filed its observations on its request of January 8, 2017.
30. On July 12, 2018, Carnegie filed a response.
31. On July 18, 2018, The Gambia filed a reply.
32. On July 25, 2018, Carnegie filed a rejoinder.

II. Position of the Parties

33. The Gambia argues that the information requested is needed because “*the fate of the award*” is relevant to these annulment proceedings and it is important to know who are the “*real parties*” to these proceedings (Letter of June 29, 2018). It further asserts that the Committee has to be concerned with the impact of assignment on the stay of enforcement and any potential enforcement of the Award or of costs and that the assignment may be illegal under Gambian law (Letter of July 18, 2018). More broadly, it is concerned with a potential threaten to the integrity of the proceedings (*ibid.*).
34. Carnegie argues that the documents requested are irrelevant to the grounds for annulment in these proceedings. They are not relevant to the issue of a stay of enforcement and domestic courts would respect any stay of enforcement ordered by the Committee (Letter of July 12, 2018). According to Carnegie, the Committee is not concerned in the annulment proceedings with issues pertaining to enforcement. Furthermore, whether the request falls within the scope of documents that may be requested in annulment proceedings is queried (Letter of July 25, 2018).

III. Decision of the Committee

35. The Committee notes that the authority given to it under Article 52(3) of the Convention is “*to annul the award or any part of it*” on the specific grounds set out in the Convention. It also notes that certain provisions of the Convention applying to the operation of investment tribunals, including those relating to the production of documents, also apply to the Committee *mutatis mutandis* (Article 52(4)).
36. While there is no doubt that the Committee can order the production of documents it would be justified in doing so only if those documents were relevant to the issues before the Committee on annulment. These relate to claims that there was a manifest excess of power by the Tribunal, a deviation from a fundamental rule of procedure and a failure to state reasons. However, in looking at the reasons given by The Gambia in its request for document production the Committee sees reasons that are related to other objectives than annulment. The Committee is, of course concerned with the integrity of its process, but this does not include taking a position on issues that may arise in any potential enforcement of an award or matters of domestic law such as the legality of any assignment.
37. The Committee has before it the Award of the Tribunal in *Carnegie Minerals (Gambia) Ltd. v. Republic of The Gambia* (ICSID Case No. ARB/09/19). The Parties before the Tribunal are the Parties before the Committee. The grounds for annulment and the claims made are clear. What the Committee has to decide is clear – should the Award be annulled or not. Whether there is any dispute over who might be entitled to the benefits of the Award is not a matter to be resolved by the Committee. Equally, any question of a stay of enforcement can be dealt with on the basis of the Award as it stands and the parties before the Committee. Nothing more is necessary for the Committee to make a decision on stay of enforcement after considering the arguments of the Parties to be filed in accordance with the agreed timetable.
38. In short, The Gambia has requested documents that may or may not be relevant to any future potential enforcement of the Award, including the enforcement of costs, or to any question of beneficial entitlement to the Award. These are matters that may well come before courts or other tribunals in the future. But they are not matters for this Committee. While, as The Gambia points out, the Committee does have an interest in the integrity of the annulment proceedings and it has at least an abstract interest in the “*fate of the award*”, this does not extend to taking on, considering and ruling on issues that are for a different court or tribunal on another occasion.
39. Accordingly, the Committee does not see the production of the documents requested by The Gambia to be justified and rules against the request for production.
40. The Committee hereby confirms the schedule on the stay of enforcement set forth in the letter of the Secretary of June 13, 2018.
41. The Committee will revert to the Parties shortly regarding a schedule for submission on annulment and a hearing date.

THEREFORE, THE COMMITTEE:

1. Rejects The Gambia's request of January 8, 2017;
2. Reserves any decision on costs;
3. Orders the Parties to file observations on The Gambia's request regarding the stay of enforcement as follows:
 - Submission from The Gambia within 2 weeks from this Order;
 - Response by Carnegie 2 weeks later;
 - Reply from The Gambia 1 week later;
 - Rejoinder from Carnegie 1 week later.

[Signed]

Professor Donald M. McRae, C.C.
President of the *ad hoc* Committee
Date: August 20, 2018