ICSID (INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES)

ICSID Case No. ARB/84/4

MARITIME INTERNATIONAL NOMINEES ESTABLISHMENT V. REPUBLIC OF GUINEA

INTERIM ORDER NO.1 : GUINEA’S APPLICATION FOR STAY OF ENFORCEMENT OF THE AWARD

12 August 1988
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I

1. On January 6, 1988, the Arbitral Tribunal rendered its award in the above proceedings (the Award). The Secretary-General dispatched the Award on the same day by notifying it to counsel of the parties.

2. On March 28, 1988, Guinea submitted an Application for Partial Annulment of the Award pursuant to Article 52 of the Convention, alleging the grounds for annulment defined in sub-paragraphs (e), (b) and (d) of Article 52(1).

3. In its application Guinea requested a stay of enforcement of the Award until the ad hoc Committee to be constituted by the Chairman of the Administrative Council of the Centre would issue its ruling on the Application for Partial Annulment. Pursuant to Article 52(5) of the Convention enforcement was stayed provisionally until the Committee would rule on the request for a stay. In accordance with Arbitration Rule 54(5) the Secretary-General promptly notified both parties of the provisional stay of the Award.

4. Upon its constitution the ad hoc Committee on May 17, 1988, adopted Procedural Order No. 1 which, among other things, invited MINE to submit its observations (if any) on Guinea’s request for stay of enforcement by May 27, 1988. and further provided that both parties might, if they so desired, submit additional observations no later than June 7, 1988. MINE’s observations under the heading “Claimant’s Memorandum in response to the Committee’s Procedural Order No. 1” were duly received on May 27, 1988. On June 7, 1988. Guinea submitted additional observations under the heading “Reply in response to MINE’s Memorandum regarding the stay of enforcement”, MINE did not submit additional observations on Guinea’s request.

5. On June 16, 1988, at the meeting of the Committee at the Peace Palace in The Hague, both parties supplemented their written submissions by oral presentations, including exchanges between counsel. Counsel for Guinea stated that as a result of an oversight Guinea’s observations had failed to address an argument to which Guinea attached great importance. He stated further that he would accept any decision which would give MINE an adequate opportunity to reply to this new argument. After consulting counsel for both parties the Committee ruled that Guinea might submit written observations on the new argument no later than June 27, 1988, and that MINE might submit its reply in writing no later than July 7, 1988. The Committee’s ruling was included in its Procedural Order No. 2 of June 17, 1988, as nr. 8. Guinea submitted its Supplemental Memorandum on the Issue of Security on June 27, 1988, and MINE’s Reply to Guinea’s Supplemental Memorandum on the Issue of Security was submitted on July 6, 1988.
The Committee's authority to stay enforcement of the Award is stated in Article 52(5) of the Convention in the following terms:

The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

Arbitration Rule 54(4) provides that a request for a stay of enforcement "shall specify the circumstances that require the stay". It further provides that the request shall only be granted after each party has been given an opportunity of presenting its observations.

The Committee considers it useful for avoidance of confusion to state the effect of a stay on the obligations of a party pursuant to Article 53 of the Convention, and on the obligations of a Contracting State pursuant to its Article 54(1).

Article 53(1) provides that the award is binding on the parties and that each party "shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention". Article 52(4) is one of those relevant provisions. Thus, if an ad hoc Committee grants a stay of enforcement, the obligation of the party against whom the Award was rendered to abide and comply with the terms of the Award is pro tanto suspended.

The first sentence of Article 54(1) provides that each Contracting State shall recognize an Award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that Award within its territories as if it were a final judgment of a court in that State. Although the Convention does not explicitly so provide, it seems to be clear that suspension of a party's obligation to abide by and comply with the award necessarily carries with it suspension of a Contracting State's obligation (and for that matter its authority) to enforce the Award, even though during the pendency of the Committee's examination of the application for annulment the validity of the Award remains unaffected.

A few words will suffice to explain the relation between Articles 53 and 54. on the one hand, and Article 55 on the other. The latter qualifies the obligation to enforce and execute the Award by expressly reserving the integrity and applicability of "the law in force in any Contracting State" relating to the immunity of States from execution.

The circumstances justifying a stay of enforcement are summarized follows in Guinea's Application:

Any seizure of assets by MINE would cause Guinea irreparable injury even if they were eventually relumed to Guinea after a decision annulling the Award. And it is not unlikely that
13. In corroboration of the first ground Guinea points out that its foreign currency resources are so scarce that “[E]ven a temporary freeze or seizure of Guinea's bank accounts or other assets would be a financial and irreparable catastrophe for the country” (p. 19).

14. As to the second ground Guinea states that MINE is a corporation controlled by a single individual who would be able to thwart any recoupment by Guinea of assets seized by MINE by transferring those assets out of MINE. Guinea's concern under this heading focuses on its shares in Compagnie de Bauxites de Guinee (CBG) as to which there is now in effect a preliminary injunction ordered by the U.S. District Court for the District of Delaware enjoining Guinea from alienating or encumbering its interest in the shares and any rights appertaining thereto. Guinea states that it demonstrated its good faith by consenting to the restriction throughout the annulment proceedings. Guinea concludes that for that reason and since interest on the Award will continue to accrue at the rate of 9% per annum, the balance of equities weighs heavily in favor of granting a stay.

15. In its Memorandum in Response MINE states that it does not oppose Guinea's request for continuation of the stay provided that it is conditioned upon the posting by Guinea of adequate security in the form of a bank guarantee (pp. 2-3). Apparently recognizing that continuation of the stay under that condition is essentially equivalent to a refusal to continue the stay without any condition, MINE argues (pp. 8 et seq.), that Guinea's request does not meet the conditions for a permanent stay.

17. One statement in van den Berg's opinion with which one may easily agree is that a request for a stay made for dilatory reasons only is not a proper basis for a stay. Such a request could not be considered as based on circumstances requiring the continuation of a provisional stay. However, in its Reply in response to MINE's Memorandum Guinea has demonstrated to the Committee's satisfaction that the delays in the settlement of its dispute with MINE cannot be ascribed to Guinea, and that its request for continuation of the provisional stay is justified exercise of its procedural rights of defense.

18. MINE submits that Guinea "has not even argued" that the Award is tainted by fatal defects. That submission flies in the face of Guinea's Application which alleges defects that go far beyond "mere errors of fact or law" and, if proved, would indeed justify annulment. The Committee can therefore find no support for the first half of MINE's arguments in opposition to Guinea's request for continuation of the stay of execution.

19. The second half of MINE's argument is addressed to the requirement of irreparable harm" as justification for continuation of the stay. Such harm is claimed by Guinea and denied by MINE. For the present Committee, its central task is to exercise its discretion to determine whether the "circumstances" require continuation of the provisional stay. Before reaching that determination
the Committee finds it necessary to deal with two matters raised by MINE, to wit: revision of a Bank guarantee by Guinea as a condition for continuation of the provisional stay or, in the alternative, termination of the stay on condition that MINE provide an effective guarantee that should Guinea be successful in its application for annulment Guinea will be able to recover any moneys paid to satisfy the Award.

20. The imposition of the requirement of a bank guarantee or similar security is resisted by Guinea on two grounds: Guinea argues in the first place that an ad hoc Committee's authority is limited to granting or denying a stay and that it has no power to attach conditions to this decision. For that reason alone Guinea considers that the ad hoc Committee's decision in the Amco v Indonesia case was in error. Guinea suggests in addition that there is in any event a significant distinction between the present case and Amco in that the Amco award carried a 6% rate of interest while the T-bill rate at the time was some 2% higher so that postponement of payment of the award benefited Indonesia, the present Award carries a 9% rate while the current T-bill rate is some 2% lower. In oral argument MINE contended in reply that in the present case the basis of comparison should be the rate at which Guinea could raise short-term money to replace funds paid on the Award, and that this showed a substantial saving for Guinea consequent pon a stay of enforcement. Guinea denied that the borrowing rate was the proper basis for comparison. It also rejected MINE's arguments based on the 1958 New York Convention and on United States law and practice. In the considered opinion of the Committee these arguments are largely irrelevant.

21. With respect to Article VI of the New York Convention which, unlike the ICSID Convention, provides that a court when adjourning the decision on the enforcement of the award “may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security”, Guinea observes:

... the most that can be said is that courts have discretion to order security. Having discretion to order by definition includes having discretion not to order.

and argues that the sound exercise of discretion is not to order that Guinea post security. The reasons adduced in support are twofold: first, the heavy financial burden that obtaining a bank guarantee would impose on Guinea and second, absence of harm to MINE in delay since it will continue to earn 9% on the Award.

22. Regardless of its power to do so, the present Committee remains unconvinced that Guinea should be required to provide a bank guarantee in return for a continuation of the provisional stay of enforcement of the Award. To require such a guarantee would, in addition to involving what might turn out to be very heavy expenditure for the fees of the guaranteeing bank and possibly making it necessary’ to freeze the amount of the Award and the interest accruing thereon, place MINE in a much more favourable position that it enjoys at the present time and also in a more favourable position that it enjoyed prior to the provisional stay. The Committee does not feel that such a one-sided change in the relative position of the parties is justified.

23.
Claimant's Memorandum in response to Guinea's request (p. 19) suggests that it is entitled to a guarantee that in case the Award is not annulled the Award will be promptly paid since MINE would otherwise run the risk that during the annulment proceedings Guinea would "move its assets to avoid honoring its just debts". As became clear during the oral argument MINE's reference was to obstacles to forcible execution based on the immunity of States from execution.

24. It is necessary to recall at this point that while the Convention imposes an obligation on parties to abide by and comply with an award and on Contracting States to enforce the pecuniary obligations imposed by an ICSID Award, the question of forcible execution is left expressly subject to the law of the State of the execution forum, including in particular the immunity from execution which a foreign State might enjoy under that law.

25. It is therefore not for an ICSID tribunal, nor for an ad hoc Committee like the present one, to go beyond the confines of Article 55 of the Convention. It should be clearly understood, on the other hand, that State immunity may well afford a legal defense to forcible execution, but it provides neither argument nor excuse for failing to comply with an award. In fact, the issue of State immunity from forcible execution of an award will typically arise if the State party refuses to comply with its treaty obligations. Non-compliance by a State constitutes a violation by that State of its international obligations and will attract its own sanctions. The Committee refers in this connection among other things to Article 27 and 64 of the ICSID Convention, and to the consequences which such a violation would have for such a State's reputation with private and public sources of international finance.

26. In response to Guinea's expressed fear that MINE might take measures to frustrate recoupment by Guinea of amounts paid on the Award in the event Guinea is successful in the annulment proceeding, MINE states (Claimant's Memorandum in response, p. 12) that it would accept a requirement by the Committee that, as a condition for terminating the stay, MINE deposit the amount on the Award in an escrow account or protect Guinea by a bond in that amount. If satisfactory security were provided this would be a "circumstance" to be taken into account by the present Committee. It would, however, not be decisive if payment of the Award prior to a decision by the Committee on its annulment would for other reasons expose Guinea to irreparable harm. It is to this issue that the Committee now turns.

27. In its written as well as its oral submissions Guinea has pleaded its strained foreign exchange resources as a "circumstance" requiring a continuation of the provisional stay of enforcement. Poverty as such is not a circumstance justifying a stay any more than it would justify non-payment of an award. The criterion is, rather, whether termination of the stay would have what Guinea calls "catastrophic" immediate and irreversible consequences for its ability to conduct its affairs. The parties have submitted conflicting evaluations of the significance for this purpose of the amount of the Award and accrued interest (on the necessary assumption that it would be promptly paid).

IV

28. Having reviewed the circumstances of the case, the Committee is of the view that termination of
the stay at this time would impose hardships on Guinea whose interests would be severely affected. This prospect of hardships combined with the risk of frustration of recoupment, in case of Guinea's success in this annulment proceeding, have led the Committee to decide that the provisional stay of enforcement of the Award should continue for the time being.