



School of International Arbitration

IACL
International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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Award Name and Date: Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited (TANESCO) (ICSID Case No. ARB/10/20) - Decision on Applicant's request for a continued stay on enforcement of the Award rendered on 12 September 2016, dated and dispatched to the Parties on 12 April 2017.

Case report by: Artemis Malliaropoulou**, Editor Diego Luis Alonso Massa***

Summary:

In the Decision on Stay of Enforcement of the Award (the "Decision") rendered on 12 April 2017, the *ad hoc* Annulment Committee (the "Committee") ordered the continuation of the stay of enforcement of the Award, on the condition that TANESCO provided, within 30 days of the Decision of the Committee, an unconditional and irrevocable bank guarantee or security bond issued by a first-tier reputable international credit institution for the full amount of the Award rendered against TANESCO, inclusive of all interest accrued to the date of issuance of said irrevocable bank guarantee or security bond, and immediately payable to or cashable by SCB HK upon the issuance of a final Decision of the Committee rejecting the annulment, or if the annulment proceedings were withdrawn or discontinued. In the event that TANESCO declined to issue such guarantee and informs the Secretary-General of ICSID within 30 calendar days following the notification of this Decision, the termination of the stay on enforcement would be automatic.

In doing so, the Committee addressed the legal standard for the continuation of the stay and illustrated the factors that were relevant for issuing the Decision. The Committee concluded that the ICSID Convention provided discretionary power to grant a stay and to issue a condition to continuing a stay of enforcement. Further, the Committee stated that the award debtor should advance grounds, supported as necessary by evidence, for the stay, while the award creditor should also advance evidence in support of its own "positive allegations". In line with a fact-based approach, the Committee opposed the view of the applicant that the *prima facie* grounds for annulment were relevant to support the maintenance of the stay and focused on the risk of non-compliance with the award and the prospects of enforcement if the award were upheld as well as on the risk of possible irreparable injury to the award debtor in case of immediate enforcement.

Main issues:

Stay of Enforcement of Award; Burden of Proof; Circumstances; Requirements; Conditions; Annulment; Balance of interests.

Committee: Claus von Wobeser, President; Christoph Schreuer, Member; Bertha Cooper-Rousseau, Member; Secretary of the ad hoc Committee: Aurélia Antonietti.

Applicant’s Counsel: Representing Tanzania Electric Supply Company Limited (TANESCO): Clyde&Co, Mr. Richard K. Rweyongeza, Prof. Bonaventure Rutinwa R.K. Rweyongeza & Co. Advocates; Mr. Beredy Malegesi, Crax Law Partners; Dr. Florian Baumann, Mr. Martin Molina, Dr. Bernhard Berger, Ms. Marlen Eisenring, Kellerhals Carrard.

Respondent’s (on Annulment) Counsel: Representing Standard Chartered Bank (Hong Kong) Limited: Mr. Iain Maxwell, Mr. Dominic Kennelly, Ms. Naomi Lisney, Herbert Smith Freehills LLP; Mr. Matthew Weiniger QC, Linklaters LLP.

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Digest:

1. Relevant Facts and Procedural Dates

Following the Award rendered by the Tribunal on 12 September 2016 in favor of Standard Chartered Bank (Hong Kong) Limited (“SCB HK” or “Claimant” or “Respondent on Annulment”), Tanzania Electric Supply Company Limited (“TANESCO” or “Respondent” or “Applicant”) filed an application for annulment of the Award on 6 January 2017. The application for annulment included TANESCO’s request to stay the enforcement of the Award.

On 13 January 2017, the Secretary-General of ICSID registered the application for annulment and, at the same time, notified the parties that enforcement of the Award was provisionally stayed, pursuant to ICSID Arbitration Rule 54(2).

On 10 February 2017, in accordance with ICSID Arbitration Rule 52(2), the Secretary General notified the Parties that an ad hoc Committee (the “Committee”) had been constituted.

On 25 February 2017, the Committee asked the Parties to indicate whether they would agree to the following procedural issues: (i) the 30-day deadline would be extended for an additional period of 30 days in order for the Committee to rule on the continuance of the stay; (ii) the stay would remain in effect within that extended period; (iii) the Parties would file one round of submissions conferring among themselves to determine the dates for them; and (iv) the First Session would be held in London on 29 March 2017 to discuss both procedural aspects and the continuation of the stay.

On 28 February 2017, the ICSID Secretariat transmitted to the Committee the communications whereby the Parties reached an agreement on the timetable for the proceeding, as follows: 10 March 2017: TANESCO's deadline to file its submission in support of the continuation of the stay; 21 March 2017: SCB HK's deadline to file its response; 29 March 2017: date of an in-person Hearing in London, which was rescheduled for 30 March 2017. The Parties further agreed that the 30-day deadline should be extended for an additional period of 30 days in order for the Committee to rule on the continuance of the stay, the stay remaining in effect within this period.

On 3 April 2017, the Committee issued procedural Order No.1.

2. Positions of the Parties

2.1. Applicant's Position

TANESCO brought forward the following arguments (¶¶ 13-24):

- (i) The balance of both Parties' interests supported the maintenance of the stay, taking into account the agreement of the Parties to stay the proceedings before the Courts pending the determination of the Application before the Committee.
- (ii) A lift of a stay would expose TANESCO to an irreparable harm deriving from double payment, since:
 - a. It had already paid tariffs totalling more than US\$120 million to Independent Power Tanzania Limited ("IPTL").
 - b. It had been paying additional tariffs under the Power Purchase Agreement dated 26 May 1995 ("PPA") to IPTL from October 2013 onwards to date.
 - c. Any additional payments diverted from IPTL would cause irreparable harm, leaving millions of Tanzanian residents without electricity.
 - d. SCB HK would recover sums exceeding from four to twelve times the amount of its original alleged investment.
- (iii) A lift of the stay could also entail unjustified multiple recovery for SCB HK, as two sets of proceedings (the first one before the High Court of England and Wales and the second one before an ICSID tribunal in the context of an arbitration against the United Republic of Tanzania), currently ongoing, were ultimately linked.
- (iv) The existence of serious grounds for annulment clearly supported the maintenance of the stay, taking into account previous Decisions of ICSID Committees.

2.2. Respondent's (on Annulment) Position

SCB HK opposed the Stay Request by bringing forward the following arguments (¶¶ 25-46):

- (i) TANESCO had no automatic right to a continuation of the stay, as there was no presumption in favor of a continuation of the provisional stay on enforcement, while TANESCO, which bore the burden of proof, failed to produce the necessary evidence.
- (ii) Termination of the stay on enforcement would not cause severe prejudice to TANESCO, since:
 - a. TANESCO was repeatedly reminded by SCB HK, and ultimately by the ICISD Tribunal, which rendered the Award in relation to disputes under the PPA, that payment to anyone other than SCB HK would not discharge TANESCO's obligation to pay SCB HK under the PPA and, thus, could not be used to reduce the amount that TANESCO owed SCB HK.
 - b. TANESCO was aware from 2013 onwards that PAP had usurped SCB HK's interest in IPTL and, despite that, it procured the release of the funds in the "Escrow Account" [into which TANESCO and the Government of Tanzania ("GoT") made payments due under the PPA] and made further payments to PAP-controlled IPTL.
 - c. TANESCO's position on its capacity to pay the Award was unclear and in any case, inability to pay was not a circumstance justifying a stay any more than it would justify non-payment of any award.
- (iii) SCB HK would suffer severe prejudice if the provisional stay on enforcement remained in place, due to risk of non-compliance that was justified by TANESCO's previous conduct, as TANESCO had conspired with PAP and the GoT to dissipate the Escrow Account.
- (iv) If the stay were continued, it should be made conditional upon the provision of security, as the "sufficient doubt" test was satisfied, taking into account that "asset stripping" had already occurred through the raiding of the Escrow Account.
- (v) There was no risk of multiple recovery by SCB HK, as SCB HK was seeking to recover only the amount due under the loan and it had an obligation to account to IPTL for any balance recovered above the amount due under the loan, while there was no risk of non-recoupment from SCB HK in the event that the award was annulled, taking into consideration its substantial assets and position as a subsidiary of a global financial institution with offices in Tanzania.
- (vi) The merits of TANESCO's application for annulment were irrelevant to the question of whether a stay should have been granted.

3. The Committee's Analysis

In light of the Parties' positions and following a fact-based approach provided in Article 52(5) of the ICSID Convention, the Committee addressed the following issues: (1) whether the stay on the enforcement of the Award should be maintained pending a Decision on the Application; (2) whether the ordering of such stay should be made subject to conditions, if the Committee decided to maintain the stay on the enforcement of the Award; (3) what the conditions should be, if the Committee decided to impose conditions on the granting of the stay.

1) The granting of the stay on enforcement of the award

As far as the first question is concerned, the Committee illustrated the legal standard for the continuation of the stay (1.1.) and the relevant factors for issuing the Decision of the stay on enforcement of the Award (1.2.).

1.1. Following a grammatical interpretation of ICSID Convention Article 52(5) and taking into account prior relevant ICSID Decisions as well as the particular circumstances of the case, the Committee confirmed its discretionary power to continue or lift a stay of enforcement (¶52). Furthermore, the Committee stated that the award debtor should advance grounds, supported as necessary by evidence, for the stay, while the award creditor should also advance evidence in support of its own "positive allegations" (¶54).

1.2. In deciding on whether to maintain or terminate the stay on enforcement, the Committee took into consideration the adverse economic consequences on both Parties and the balance of the Parties' interests. In this context, the Parties' arguments were taken into account: a. strength of the case for or against annulment; b. risk of non-compliance with the Award and prospect of enforcement; and c. possible irreparable injury to the award debtor in case of immediate enforcement: (i) hardship if the stay were lifted; and (ii) problems with recovering payment if the award were later annulled.

- a) The Committee reviewed relevant ICSID Decisions and confirmed its view that the *prima facie* grounds for annulment were not relevant to support the maintenance of the stay, having noted that there was no reason to consider that the institution of the annulment proceeding was purely dilatory *in casu* (¶¶ 59-61).
- b) Following previous ICSID Decisions, the key test applied by the Committee was whether there was sufficient doubt that the Applicant on annulment would comply with the Award, if upheld. Based on i) TANESCO's unclear position on whether it would be able to pay the Award, ii) TANESCO's argument that should the "Capacity Payment" be paid into Court the same amount could not be paid to Independent Power Tanzania Limited, jeopardizing, therefore, IPTL's supply of electricity, iii) SCB HK's allegations on conspiracy on behalf of TANESCO with PAP and the GoT to dissipate the Escrow account, as well as iv) the previous conduct of TANESCO that characterized the amount of the dispute as colossal, the Committee concluded that the risk of non-compliance with the Award on behalf of TANESCO was substantial (¶¶ 62-68).
- c) (i) With respect to hardship if the stay were lifted, the Committee followed the test for hardship set out in *MINE vs. Republic of Guinea* Decision and assessed whether termination of the stay or granting of security would have catastrophic, immediate and

irreversible consequences for the award debtor's ability to conduct its affairs. The Committee reiterated SCB HK's position to request lifting of the stay before the Courts, if there were no stay granted in the annulment proceeding, while it denied any possibility of unjustified multiple recovery for SCB HK, as SCB HK would seek recovery of the amount due under the loan and it was clear that it has an obligation to account to IPTL for any balance recovered above the amount due under the loan (¶¶ 69-72).

(ii) With respect to the risk of non-recoupment, the Committee observed that there was no relevant proof on record submitted by TANESCO, while it pointed out SCB HK's assets, profits and its position as a subsidiary of a global financial institution.

2) The question concerning the discretionary power of the Committee and the necessity to impose conditions on the granting of the stay

As far as the second question is concerned, guided by Articles 31 and 32 of the Vienna Convention on the Law of the Treaties, non-binding precedent of ICSID Decisions and in line with the preparatory work of the ICSID Convention, the interpretation carried out in *Enron v. Argentina*, as well as with the letter (the silence in the provision), the object and the purpose of Article 52(5), which is designed to enable the *ad hoc* committee to balance the rights of the Parties, the Committee concluded that the discretionary power to allow or deny a remedy could include a power to allow the remedy subject to conditions and, thus, it had the discretionary power to make the continuation of the stay on enforcement conditional (¶¶ 74-85).

The Committee considered it necessary to grant the stay on enforcement of the Award, given the possible risk of TANESCO suffering considerable financial stress, before the decision on annulment, which could jeopardize its ability to continue fulfilling its obligations vis-à-vis IPTL and its other contractual counterparties with the possible consequence that IPTL would no longer be in a position to supply electricity to TANESCO under the PPA, leaving millions of Tanzanian residents without electricity. Given TANESCO's own assertions that it would be in considerable financial stress should the Award be enforced, that element raised a valid concern on the part of SCB HK that there is uncertainty as to TANESCO's ability and willingness to fulfil the Award. Conditioning the stay was the equilibrium achieved by the Committee in order to protect both Parties' interests. The Committee rejected the argument that security could constitute betterment and explained that the lifting of the provisional stay or imposition of a guarantee were not punishments (¶¶ 86-87).

3) Conditions to be imposed on the granting of the stay on the enforcement of the award

The Committee held that the most efficient condition in this particular case was an unconditional and irrevocable bank guarantee or security bond issued by a first-tier reputable international credit institution (outside of Tanzania and with no principal establishment branch in Tanzania) for the full amount of the Award rendered against TANESCO, inclusive of all interest accrued to the date of issuance of said irrevocable bank guarantee or security bond, and immediately payable to or cashable by SCB HK upon the issuance of a final Decision of the Committee rejecting the annulment, or if the annulment proceedings were withdrawn or discontinued.

4. The Committee's Decision

The Committee concluded that it was necessary to grant the stay on enforcement of the Award, given the possible risk that prior to the Decision on annulment, TANESCO may suffer considerable financial stress, which could risk undermining its ability to continue fulfilling its obligations vis-à-vis IPTL and its other contractual counterparties with the possible consequence that IPTL would no longer be in a position to supply electricity to TANESCO under the PPA, leaving millions of Tanzanian residents without electricity.

The Committee added that given TANESCO's own assertions that it would be in considerable financial stress should the Award be enforced, a valid concern on the part of SCB HK was raised in relation to uncertainty as to TANESCO's ability and willingness to fulfil the Award. By conditioning the stay, the interests of both Parties were balanced.

The Committee ordered the continuation of the stay of enforcement of the Award, on the condition that TANESCO provided, within 30 days of the Decision of the Committee, an unconditional and irrevocable bank guarantee or security bond issued by a first-tier reputable international credit institution (outside of Tanzania and with no principal establishment branch in Tanzania) for the full amount of the Award rendered against TANESCO, inclusive of all interest accrued to the date of issuance of said irrevocable bank guarantee or security bond, and immediately payable to or cashable by SCB HK upon the issuance of a final Decision of the Committee rejecting the annulment, or if the annulment proceedings were withdrawn or discontinued. In the event that TANESCO declined to issue such guarantee and informed the Secretary-General of ICSID within 30 calendar days following the notification of this Decision, the termination of the stay on enforcement would be automatic. In the case that the Committee annulled the Award, the bank guarantee or security bond granted would be released (¶¶ 88-90).