

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Gabriel Resources Ltd. and Gabriel Resources (Jersey)
Applicants on Annulment

v.

Romania
Respondent on Annulment

(ICSID Case No. ARB/15/31)
Annulment Proceeding

SECOND DECISION ON STAY OF ENFORCEMENT OF THE AWARD

Members of the ad hoc Committee

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7 March 2025

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I. BACKGROUND¹

1. On 21 January 2025, the Committee issued a decision on the Applicants' request to order the continuation of the stay of enforcement of the Award until a decision on annulment is rendered in these proceedings (the "**Stay Decision**").
2. In the Stay Decision, the Committee assessed the risks of non-payment, non-recovery, and the balance of hardship.² It found a high risk of non-payment and a low risk of non-recoupment.³ Additionally, it determined that enforcing the Award would worsen the Applicants' financial situation.⁴ Thus, the Committee decided that the stay would continue only if the Applicants provided security or a guarantee.⁵
3. Therefore, the Committee ruled as follows:⁶

(i) The Parties shall confer and agree on a form of security, to be provided by the Applicants, and on the term within which such security must be provided. If the Applicants do not comply within the time limit agreed by the Parties, the Committee will lift the stay.

(ii) If the Parties cannot agree on a form of security within two weeks from this Decision, i.e., by 4 February 2025, they shall inform the Committee of the types of security discussed and the reasons each Party believes it is appropriate or not. The Committee will determine whether a form of security proposed by a Party is acceptable or identify another form of security that the Committee considers appropriate and order its provision within a specified time limit. If the Applicants do not comply within the time limit set, the Committee will lift the stay.

(iii) The decision on costs associated with the Stay Request is deferred to a later stage of the proceedings.

¹ Capitalized terms used in this document but not defined herein shall have the meaning assigned to them in the Committee's Decision on Stay of Enforcement of the Award dated 21 January 2025 (the "**Stay Decision**").

² Stay Decision, paras. 48-49.

³ Stay Decision, para. 55.

⁴ Stay Decision, paras. 50 and 55.

⁵ Stay Decision, para. 55.

⁶ Stay Decision, para. 62.

4. On 4 February 2025, the Respondent informed the Committee that it had not received the Applicants' proposed forms of security until the night of 30 January 2025 and requested until 6 February 2025 to respond to the Applicants and the Committee.
5. On 6 February 2025, the Respondent submitted its comments on the Applicants' proposed forms of security, while the Applicants presented their proposals to the Committee. The Parties made additional submissions on 7 February. The Committee then invited further comments, which were received on 17 and 21 February, as detailed below.

A. THE FORMS OF SECURITY OFFERED BY THE APPLICANTS

6. In a letter dated 6 February 2025, the Applicants informed the Committee that they lacked the funds to pay the Cost Award, deposit its amount in escrow, or provide a bank or third-party guarantee in that sum.⁷ In that letter, the Applicants submitted the following forms of security, already presented to the Respondent, which they believe fully secure the Respondent's interests in the Cost Award:⁸

Proposal 1 – Undertaking regarding Precautionary Attachment on Gabriel Jersey's Shareholding in RMGC

On March 29, 2024, a division of Romania's Ministry of Finance unilaterally imposed a precautionary attachment on Gabriel Jersey's shares (the "Shares") in Rosia Montana Gold Corporation S.A. ("RMGC") through an administrative decision (the "Precautionary Attachment") to secure its interest in the Cost Award. The Precautionary Attachment prevents Gabriel Jersey from disposing of or transferring these assets, and is the subject of various legal proceedings before the Romanian courts that Respondent is defending vigorously. It follows that Respondent sees value in the security that the Precautionary Attachment of the Shares affords, as it provides a basis for Respondent to enforce the Cost Award, potentially through a forced sale.

In the circumstances, Gabriel Jersey is prepared to suspend all opposition to the Precautionary Attachment, provided Respondent and its agencies refrain from initiating or pursuing any further measures, including but not limited to executory measures, against

⁷ Applicants' Letter to the Committee dated 6 February 2025, p. 2.

⁸ Applicants' Letter to Respondent dated 30 January 2025, pp. 1-2; Applicants' Letter to the Committee dated 6 February 2025, pp. 2-3.

the Shares for the duration of the Annulment application proceedings.

Proposal 2 – Undertaking regarding RMGC Real Estate Holdings

Gabriel Canada and Gabriel Jersey expended very large sums to acquire RMGC’s real estate holdings, comprising land and buildings in and around Roşia Montană. The Romanian tax authorities have valued RMGC’s real estate holdings for the purpose of assessment and have determined that the aggregate value of these holdings is materially greater than the amount of the Cost Award. RMGC will identify a list of properties from among these holdings with an aggregate value of 120% of the Cost Award, based on Romania’s valuation (the “Specified Real Estate”).

The Applicants have explored with counsel in Romania whether it would be possible to provide Respondent with a security interest over the Specified Real Estate. However, Applicants are advised that Romania’s Companies Law (law no. 31/1990) prohibits the granting of such security interest by a subsidiary in respect of a debt obligation of its shareholder. Gabriel Jersey therefore proposes to undertake not to take any action to procure the sale or disposal of any of the Specified Real Estate.

As noted above, the two proposals together provide security to Romania that, to the extent needed, it would be able to enforce against assets in Romania sufficient to cover the Cost Award. In the alternative, Applicants propose as follows.

Proposal 3 – Partial Forgiveness of Romanian State Indebtedness to Gabriel Jersey

In addition to a loan of approximately US\$ 570 million extended by Gabriel Jersey to RMGC to fund the development of the Roşia Montană project, Gabriel Jersey, under agreements dated December 13, 2004 and December 16, 2009, lent just over US\$ 39.5 million to Minvest Roşia Montană S.A. (“MRM”), a Romanian Government entity, to enable Respondent to maintain its 19.3% equity holding in RMGC (the “Minvest Loans”). Gabriel Jersey thus holds a loan receivable from MRM in the amount of the Minvest Loans.

In the event the Cost Award is not annulled, Gabriel Jersey will waive irrevocably repayment of an amount of the Minvest Loans up to 120% of the amount of the Cost Award as full and final settlement of the Cost Award.

B. THE RESPONDENT’S OBJECTIONS TO THE FORMS OF SECURITY OFFERED BY THE APPLICANTS

7. On 6 February 2025, the Respondent submitted its comments on the Applicants’ proposed forms of security, asserting that none constituted a certain or adequate form of security and that they were therefore unacceptable.⁹
8. The Respondent argues that Proposal 1 is uncertain and inadequate because (i) a suspension of court proceedings related to the precautionary attachment on Gabriel Jersey’s shares in RMGC does not provide any readily accessible funds for Romania in the event that the Award is upheld and not voluntarily paid by the Applicants;¹⁰ (ii) the value of Gabriel Jersey’s shares in RMGC is uncertain, as is their sufficiency to cover the Award, interest, and enforcement costs;¹¹ (iii) it is uncertain how these shares could be transferred to Romania if the Award is upheld;¹² and (iv) in the event of insolvency of RMGC, Romania would remain an unsecured creditor.¹³
9. Similarly, the Respondent contends that Proposal 2 is unacceptable because (i) the undertaking proposed by Gabriel Jersey not to take any action to procure the sale or disposal of any of the Specified Real Estate is unlawful under Romanian law, as the law prohibits a shareholder from securing a guarantee for its own debts from the company in which it participates, and because the undertaking could conflict with RMGC’s own interests;¹⁴ (ii) RMGC’s assets cannot be used to satisfy the Award;¹⁵ and (iii) the undertaking by Gabriel Jersey would be of no value in the event that insolvency proceedings are commenced against RMGC.¹⁶
10. As for Proposal 3, the Respondent asserts that the possibility that Gabriel Jersey will at an uncertain moment in the future waive repayment of an uncertain amount does not constitute

⁹ Respondent’s Letter to the Committee dated 6 February 2025, para. 3.

¹⁰ Respondent’s Letter to the Committee dated 6 February 2025, para. 7.

¹¹ Respondent’s Letter to the Committee dated 6 February 2025, para. 8.

¹² Respondent’s Letter to the Committee dated 6 February 2025, para. 9.

¹³ Respondent’s Letter to the Committee dated 6 February 2025, para. 10.

¹⁴ Respondent’s Letter to the Committee dated 6 February 2025, paras. 15-17.

¹⁵ Respondent’s Letter to the Committee dated 6 February 2025, para. 18.

¹⁶ Respondent’s Letter to the Committee dated 6 February 2025, para. 19.

a proper form of security, given its lack of liquidity and certainty.¹⁷

C. THE COMMITTEE'S REQUEST FOR ADDITIONAL INFORMATION

11. On 13 February 2025, the Committee invited the Parties to provide additional information in order to assess the forms of security offered by the Applicants. Specifically, the Committee invited the Parties' comments on the value of the shares held by Gabriel Jersey in RMGC, the legality or illegality of the steps that seem to be required to implement the proposals, the likelihood of the commencement of insolvency proceedings against RMGC and the effects thereof in the proposed forms of security, and the transfer of the shares to Respondent if the Award is not annulled.¹⁸
12. The Committee invited the Applicants to submit, by 17 February 2025, comments on (a) the reasons offered by the Respondent in its letter of 6 February 2025 to reject the Applicants' proposals, and (b) the reasons to reject the Respondent's proposal of a guarantee issued by a third party (the "**Applicants' Comments**"). The Committee also invited the Respondent to submit a reply to the Applicants' comments by 21 February 2025 (the "**Respondent's Reply**").

D. THE APPLICANTS' COMMENTS

13. On 17 February 2025, the Applicants submitted their comments to (a) the Respondent's objections to the securities offered by the Applicants, and (b) the reasons to reject the Respondent's proposal of a third-party guarantee.¹⁹
14. Regarding Proposal 1, the Applicants submit that (i) there is no basis to suggest that the Respondent is entitled to security in the form of "readily accessible funds," particularly where the Applicants cannot provide a security in that form;²⁰ (ii) although the value of the shares in RMGC has been diminished, RMGC's application for exploitation licenses for the Bucium Project remain pending and RMGC retains assets which would be "more than sufficient to cover the Cost Award;"²¹ (iii) if the Cost Award is not paid after 15 days and the Parties do not reach an agreement, the precautionary attachment against the RMGC shares would become enforceable and Romania would obtain a court order of

¹⁷ Respondent's Letter to the Committee dated 6 February 2025, para. 24.

¹⁸ Committee's Email to the Parties dated 13 February 2025.

¹⁹ Applicants' Comments dated 17 February 2025, p. 1.

²⁰ Applicants' Comments dated 17 February 2025, p. 1.

²¹ Applicants' Comments dated 17 February 2025, pp. 1-2.

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- enforcement;²² (iv) the Respondent would have a priority right of payment on all amounts due and payable by RMGC to Gabriel Jersey up to the full amount of the Cost Award.²³
15. Regarding Proposal 2, the Applicants assert that (i) RMGC's asset valuation is based on the valuation which serves as the basis for property taxes paid, which includes the valuation report filed with Romania's fiscal authorities and the land registry database;²⁴ (ii) although Gabriel Jersey may not obtain a guarantee from RMGC to cover its obligations, the law does not prevent Gabriel Jersey from providing the proposed undertaking;²⁵ (iii) there is no basis to conclude that such undertaking would run against RMGC's interests; conversely, it would benefit RMGC by providing certainty to Gabriel Jersey which has been the source of RMGC's operational funding;²⁶ (iv) RMGC's assets can be used to satisfy the Award since it would be paid from payables to Gabriel Jersey on account of the inter-company loan;²⁷ and (v) as Gabriel Jersey is RMGC's principal creditor, in an insolvency scenario, Romania would have a first right of payment on amounts due and payable to Gabriel Jersey on account of the inter-company loan.²⁸
16. Regarding Proposal 3, the Applicants believe that combining Proposal 1 and Proposal 2 is preferable for Romania, making it unnecessary to consider Proposal 3.²⁹
17. With respect to the Respondent's proposal of a third-party guarantee, the Applicants submit that (i) they do not have cash or collateral sufficient to obtain one;³⁰ (ii) the Committee can only require the Applicants to provide security and there are no third parties willing to provide a guarantee without collateral;³¹ (iii) imposing said requirement would force the Applicants to abandon this annulment proceedings and would jeopardize the Applicants' right to pursue the annulment remedy;³² and (v) Gabriel is attempting to address cash flow needs and is pursuing financing options to maintain its essential activities.³³

²² Applicants' Comments dated 17 February 2025, p. 2.

²³ Applicants' Comments dated 17 February 2025, p. 2.

²⁴ Applicants' Comments dated 17 February 2025, p. 3.

²⁵ Applicants' Comments dated 17 February 2025, p. 3.

²⁶ Applicants' Comments dated 17 February 2025, pp. 3-4.

²⁷ Applicants' Comments dated 17 February 2025, p. 4.

²⁸ Applicants' Comments dated 17 February 2025, p. 4.

²⁹ Applicants' Comments dated 17 February 2025, p. 4.

³⁰ Applicants' Comments dated 17 February 2025, p. 4.

³¹ Applicants' Comments dated 17 February 2025, p. 4.

³² Applicants' Comments dated 17 February 2025, p. 4.

³³ Applicants' Comments dated 17 February 2025, p. 5.

E. THE RESPONDENT’S REPLY

18. On 21 February 2025, the Respondent submitted its Reply.
19. The Respondent asserts that Proposal 1 remains uncertain and inadequate because (i) the precautionary attachment of Gabriel Jersey’s shares does not provide Romania with “readily accessible funds”;³⁴ (ii) the Applicants fail to provide evidence of the value of Gabriel Jersey’s shares in RMGC, nor do they explain why this value should correspond to RMGC’s application for exploitation licenses or its assets, and Romania does not have a valuation of the shares;³⁵ (iii) the Applicants fail to explain how Gabriel Jersey’s shares would be transferred to Romania; they rather explain how Romania could obtain an enforcement order, which does not guarantee funds to satisfy the Award;³⁶ (iv) the Applicants did not comment on the likelihood of insolvency proceedings being initiated against RMGC, as the Committee had requested.³⁷ Moreover, the Applicants have not established the conditions under which the loans to RMGC for project development will be repaid to Gabriel Jersey³⁸ and even if the latter was a secured creditor, it would only obtain satisfaction provided that RMGC’s assets are liquidated and that a buyer exists, which is uncertain.³⁹
20. As for Proposal 2, the Respondent contends that (i) the Applicants do not explain why the valuations it relies on would provide an adequate amount for present purposes and the Applicants did not reconcile their proposal with publicly available information which suggests that RMGC’s assets are insufficient to cover the amount of the Award;⁴⁰ (ii) under Romanian law, RMGC’s assets cannot be used, directly or indirectly, as security for Gabriel Jersey’s debt as it is RMGC’s shareholder;⁴¹ (iii) as RMGC’s shareholder, Gabriel Jersey cannot lawfully obstruct an asset sale to serve its own interests;⁴² (iv) there is no evidence of the loans to RMGC to fund project development and the payment terms and conditions of payment have not been established;⁴³ and (v) there is no indication as to other

³⁴ Respondent’s Reply dated 21 February 2025, para. 10.

³⁵ Respondent’s Reply dated 21 February 2025, para. 14.

³⁶ Respondent’s Reply dated 21 February 2025, paras. 15-16.

³⁷ Respondent’s Reply dated 21 February 2025, para. 18.

³⁸ Respondent’s Reply dated 21 February 2025, para. 20.

³⁹ Respondent’s Reply dated 21 February 2025, para. 20.

⁴⁰ Respondent’s Reply dated 21 February 2025, paras. 23-24.

⁴¹ Respondent’s Reply dated 21 February 2025, para. 25.

⁴² Respondent’s Reply dated 21 February 2025, para. 27.

⁴³ Respondent’s Reply dated 21 February 2025, para. 20.

creditors with receivables against RMGC.⁴⁴

21. As regards the option to combine Proposals 1 and 2, the Respondent asserts that the Applicants fail to explain how they are compatible. It contends that they are not as Proposal 1 implies that RMGC's assets are sold to pay back the Applicants' loans and the second is an undertaking not to sell RMGC's assets.⁴⁵
22. The Respondent reiterates its proposal that the Applicants post a security issued by a third party or other undertaking in authentic form, accompanied by a real guarantee. In this regard, the Respondent contends that (i) the Applicants' claim that no third parties are willing to provide a guarantee without collateral and that the Committee cannot compel one to do so, is precisely why they must be ordered to provide security/guarantee,⁴⁶ and (ii) the Applicants' announcements in support of their efforts to meet cash flow needs clearly indicate that they have access to funds.⁴⁷
23. Finally, the Respondent asserts that (i) the prospects of Romania obtaining satisfaction of the Award diminish as the indebtedness of the Applicants increase,⁴⁸ and (ii) the Applicants have failed to explain how lifting the stay would impede the continuation of the annulment proceedings.⁴⁹

II. THE COMMITTEE'S CONSIDERATIONS

24. The Committee has carefully reviewed the three proposals submitted by the Applicants, including the combination of Proposals 1 and 2.
25. In its Stay Decision, the Committee indicated the considerations for maintaining the stay, subject to the Applicants providing security, and invited the Parties to negotiate its terms.
26. The Respondent has insisted that the Applicants grant a type of security that provides the Respondent with "readily accessible funds" if the Award is not annulled.⁵⁰ The Applicants, in turn, submit that there is no requirement for that type of security and that, in any event,

⁴⁴ Respondent's Reply dated 21 February 2025, para. 17.

⁴⁵ Respondent's Reply dated 21 February 2025, para. 22.

⁴⁶ Respondent's Reply dated 21 February 2025, para. 31.

⁴⁷ Respondent's Reply dated 21 February 2025, para. 33.

⁴⁸ Respondent's Reply dated 21 February 2025, para. 33.

⁴⁹ Respondent's Reply dated 21 February 2025, para. 34.

⁵⁰ Respondent's Reply dated 21 February 2025, para. 10.

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the Applicants are not able to grant a security that provides for immediate access to funds.⁵¹

27. The Committee considers that, given the circumstances of this case, any security provided by the Applicants to maintain the stay should ensure that the Respondent has a clear and unobstructed path to recover the amounts owed under the Award if it is not annulled. The securities offered by the Applicants do not provide such a clear and unobstructed path. On the contrary, the proposals contain serious gaps and uncertainties that, in the Committee's view, make the offered securities inadequate. Maintaining the stay under these conditions would risk the Applicants' financial deterioration or insolvency over time, ultimately placing the Respondent in a more precarious position when seeking to enforce the Award if it is not annulled.
28. Indeed, the securities proposed by the Applicants are uncertain in key aspects relevant to any security, including the value of the underlying assets (shares and real estate), the mechanism for transferring the shares to the Respondent if the security is enforced, the duration of proceedings to collect on the securities, the risks of insolvency, and whether and how the securities would grant the Respondent priority over other creditors. Moreover, there are also doubts about the legality of certain structures within the proposed securities.
29. In sum, maintaining the stay based on the offered securities could ultimately leave the Respondent in a more challenging and burdensome position than pursuing enforcement of the Award now.
30. At the same time, the Committee is not persuaded that the Applicants are absolutely unable to obtain security from a third party or that the securities they have proposed are their only available option to maintain the stay of the Award. The Applicants' own submissions indicate that they have access to funds and credit, suggesting they may be able to secure a third-party guarantee for payment of the Award if it is not annulled.⁵²
31. Accordingly, the Committee will require the Applicants to provide an unconditional and irrevocable guarantee from a bank or a third party with proven solvency for the amount of the Cost Award, plus accrued interest, as a condition for staying the enforcement of the Award.

⁵¹ Applicants' Comments dated 17 February 2025, p. 1.

⁵² See, e.g., Applicants' Comments dated 17 February 2025, p. 5.

III. DECISION

32. Based on the aforementioned considerations, the Committee:

- (i) Does not accept the forms of security offered by the Applicants;
- (ii) Orders the Applicants to provide, within 30 days of the day of this Decision, a guarantee from a bank or a third party with proven solvency for the amount of the Cost Award, plus accrued interest; and
- (iii) Orders that if the Applicants fail to provide the guarantee within the specified period or if the Committee deems the offered guarantee unacceptable, the stay of the Award shall be automatically lifted.

[signed]

Prof. Dr. Maxi Scherer
Member of the *ad hoc* Committee
Date: 7 March 2025

[signed]

Prof. Lawrence Boo
Member of the *ad hoc* Committee
Date: 7 March 2025

[signed]

Dr. Eduardo Zuleta
President of the *ad hoc* Committee
Date: 7 March 2025