



School of International Arbitration

IACLC  
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:**

Venoklim Holding B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/22) – Decision on the Respondent’s Preliminary Objection under ICSID Arbitration Rule 41(5). (March, 8 2016).

**Case Report by:**

Magdalena Bulit Goñi \*\*, editor Victoria Ritah Nalule\*\*\*

**Summary:**

In the Decision on the Respondent’s Preliminary Objection under ICSID Arbitration Rule 41(5) rendered on March 8, 2016, the Ad Hoc Committee found that the Arbitration Rule 41(5) was applicable to the annulment proceedings *mutatis mutandis* through Arbitration Rule 53.

The Committee rejected Venezuela’s preliminary objection on consideration that, failure to comply with the detail requirement of Rule 50(1)(c) could not be the basis of a preliminary objection as this did not allow the determination of the claim's manifest lack of legal merits and that the cost of rejecting it would be less significant for Venezuela than the impact on Venoklim's rights under the ICSID Convention.

**Main Issues:**

Annulment Proceedings - Preliminary Objections- Arbitration Rule 41(5) - Arbitration Rule 50 (1)(c) - Lack of Legal Merits -Requirement of Detail –

**Committee:**

Álvaro Rodrigo Castellanos Howell (President); Piero Bernardini, José Antonio Moreno Rodríguez.

## **Claimant's Counsel:**

Procuraduría General de la República Bolivariana de Venezuela, Caracas, Venezuela; Mr. George Kahale III, Ms. Gabriela Álvarez-Ávila, Mr. Eloy Barbará de Parres and Dr. Claudio Frutos-Petersen (Curtis, Mallet-Prevost, Colt & Mosle LLP).

## **Respondent's Counsel:**

Mr. Gerardo Jiménez Umbarila and Mr. Juan Pablo Liévano Vegalara (Jiménez & Liévano Abogados, Bogotá, Colombia).

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## **Digest:**

### **1. Relevant Facts and Procedural Dates**

On July 30, 2015 Venoklim Holding B.V. ("Venoklim" or "Claimant") filed an application for annulment of the award ("Application for Annulment") (¶16) rendered on April 3, 2015 in ICSID Case No. ARB/12/22 ("Award"), brought by Venoklim (¶1).

In this regard the Bolivarian Republic of Venezuela ("Venezuela" or "Respondent") requested on October 13, 2015, a preliminary objection under the ICSID Arbitration Rule 41(5), stating that the Claimant's request for annulment was manifestly without legal merit as the Claimant merely listed three annulment causes without specifying its application to the case or reasoning and legally justifying its request (¶9).

The annulment proceeding began on September 3, 2015. (¶23). The first session of the Ad Hoc Committee was fixed, by agreement of the parties, for November 13, 2015(¶27). One month prior to the first session of the Ad Hoc Committee, the Respondent presented its preliminary objection (¶28).

In accordance with the agenda fixed by the Ad Hoc Committee, both parties presented their briefs in relation to the preliminary objection (¶¶29-34) and the first session of the Ad Hoc Committee took place on November 13, 2015 (¶35).

### **2. The Analysis of the Committee**

The Committee began its analysis by identifying the ICSID Convention Articles and provisions applicable to the annulment proceedings through Article 52(4) and the Arbitration

Rules applicable to the annulment proceedings, Rule 53, and to preliminary objections, Rule 41 (§§66-68).

The Committee continued by stating that Rule 53 of the Arbitration Rules, including Rule 41(5), shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the tribunal or Committee (§70). Consequently, as both parties agreed (§71), this *mutatis mutandis* application allowed them to present a preliminary objection within the annulment proceedings (§73). The Committee also recalled the *Elsamex* case, where another Committee recognized and resolved a preliminary objection (§72).

In this line, the Committee analyzed the limits of the applicability of Rule 41(5) to annulment proceedings (§71) considering particularly that, in the arbitration proceedings, the decision on preliminary objections could be subsequently reviewed by an Ad Hoc Committee as in the case (§76) but within the annulment proceedings none of the parts will be able to have a similar later annulment (§77).

As was in the *Elsamex* case, the Committee considered this circumstance as a special concern, being that the parties lacked an ulterior remedy (§78) and further stated that the rejection of the preliminary objection did not preclude any other opportunity of the Respondent to question the Committee's jurisdiction or even for the Committee to find itself that it lacked jurisdiction (§79). The Committee made an analogous analysis regarding the examination of the annulment merits (§80).

Consequently the Committee found that the certainty standard in the annulment proceedings needs to be more strict than in the arbitration proceedings (§81) and thus, for the preliminary objection to be accepted, the manifest lack of legal merit should be determined regarding the form in which the causes were invoked in the application for Annulment (§82). The Committee next noted that, this analysis was different from the analysis required by the Arbitration Rule 50 and that, given the state of the proceedings, the Committee should do it with much more limited information than it would have if the annulment process continued (§82).

Stating specifically that analyzing the preliminary objection did not imply the studying of the merits of each of the annulment causes claimed by Venoklim (§83), the Committee recognized that the Annulment request invoked the annulment causes established in the Arbitration Rule 50 but did not explain them nor their motives (§85).

The Committee next observed that, as other committees have found, Arbitration Rule 50 (1) (c) did not specify the level of detail that the annulment request must contain (§87). Thus the Committee concluded that failure to comply with the requirement of Rule 50 (1) (c), in itself, might not be the basis of a preliminary objection unless it also allows to determine a "claim's manifest lack of legal merits" under Rule 41(5) (§87).

Distinguishing between the lack of details and the lack of legal merits of the annulment causes, the Committee found that the first did not import the Committee' lack of jurisdiction (§90). In this sense, the Committee noted that the requirement of "detail" in the content of Rule 50(1)(c) is not included in the ICSID Convention but in the Rules and therefore it should not be understood as a mandatory condition for the validity of an application for annulment (§92).

Furthermore, to determine the extent of the detail requirement, the Committee recalled the previous redaction of Rule 50 and underlined that the actual version only demands the parties to "[...] detail ... the grounds on which it is based..." (¶93).

The Committee counterbalanced the impact of rejecting and admitting the preliminary objection on Venoklim's and Venezuela's rights under the ICSID Convention (¶95) and considered that, the Applicant in accordance with Rule 14(3) of the Administrative and Financial Regulations, was funding the annulment proceedings and that Award whose annulment was sought, did not impose obligations to Respondent (¶97). As a result, the Committee concluded that the only cost of rejecting the preliminary objection for Venezuela was its legal defense cost which could be ultimately beared by its counterparty depending on the result of the dispute (¶97).

### **3. *Decision***

The Ad Hoc Committee decided to reject Venezuela's preliminary objection and to reserve the decision on cost until a final decision is issued regarding the annulment of the Award (¶100).