



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:

Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v Democratic Republic of the Congo - ICSID Case No. ARB/10/4 - Decision on Annulment - 29 March 2016

Case Report by:

Leonard W.N. Hawkes **, editor Ignacio Torterola ***

Summary:

In its Decision on annulment issued on March 29, 2016 (the “**Decision**”), the *ad hoc* Committee constituted under the ICSID Convention dismissed the Democratic Republic of Congo’s application for annulment of the Award rendered on February 7, 2014, in its entirety. The Democratic Republic of Congo (the “**DRC**” or the “**Respondent**”) based its request on two grounds: (i) the Tribunal manifestly exceeded its powers; and (ii) the Tribunal failed to state the reasons on which its Award was based. The first ground was applied under two headings to four particular issues. The second ground was applied under two headings to six particular issues. By the Decision the DRC was ordered to pay the costs of the *ad hoc* Committee and of ICSID. The DRC was also ordered to pay one half of the legal costs of the Claimants.

Main Issues:

Annulment – Jurisdiction – ICSID Convention article 25 - Congo (2002) New Investment Code article 8 – Interpretation – Reasons for award – Procedure.

Ad Hoc Committee:

Azzedine Kettani – President, Kaj Hobér, Rolf Kneiper.

Claimant's Counsel:

Me Hamid Gharavi, Me Marie-Laure Bizeau and Me Nada Sader (Derains & Gharavi , 25, rue Balzac, 75008 Paris, France).

Respondent's Counsel:

Me. Emery Mukendi Wafwana, Me. José Ilunga Kapanda, Me. Rigobert Nzundu Mawunga, Me. Patrick Bondonga Lesambo, Me. Arnaud Tshibangu Mukendi (Emery Mukendi

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Digest:

1. Relevant Facts and Procedural Dates

On June 9, 2014, the DRC filed an application for the Annulment of the Award issued on February 7, 2014, in favour of Antoine Abou Lahoud and Leila Bounafteh-Abou Lahoud (the “**Lahouds**” or the “**Claimants**”). The DRC also requested the stay of the enforcement of the Award.

In the decision on jurisdiction, the Tribunal found that the Claimant’s had made certain investments in the DRC and declared that, with the exception of certain commercial activities which it excluded (see paragraphs 248, 256, 269-270, 277, and 307-309 of the Award), the dispute between the Lahouds and the DRC was within ICSID’s jurisdiction and the competence of the Tribunal.

In its Award the Tribunal found that the Respondent had violated its obligations under Articles 25 and 26 of the DRC’s (2002) New Investment Code. The Respondent was ordered to pay the sum of US \$ 1,728,194, together with interest, as compensation for damage suffered by the Applicants

The Secretary-General of ICSID notified the Parties of a provisional stay of enforcement of the Award on June 19, 2014 (¶ 7). On September, 30, 2014 the *ad hoc* Committee issued its Decision requiring continuation of the stay of enforcement of the Award, provided that the DRC constituted a bank guarantee for the amounts awarded, including interest, within a period of thirty days (¶ 15). On December 14, 2014, as the DRC had failed to establish the bank guarantee as required, the *ad hoc* Committee ordered the lifting of the stay of enforcement of the Award (¶ 17).

Following Respondent’s Memorial on annulment of October 23, 2014 (¶ 16) and Claimant’s Counter-Memorial of December 8, 2014 (¶ 18), Respondent’s Reply on annulment (¶ 19) and Claimant’s rejoinder (¶ 20), the hearing on annulment was held at the seat of ICSID in Washington D.C. on 28 and 29 May, 2015 (¶ 21). The Parties both submitted post-hearing memorials on July 1, 2015, including their observations on costs.

The *ad hoc* Committee declared the proceeding closed on December 21, 2015 (¶ 23). Pursuant to article 28(2) and 53 of the ICSID Arbitration Rules, the *ad hoc* Committee subsequently invited the parties to provide it with the documents in support of their claims for

costs by January 6, 2016. The Lahouds did so on January 6, the Respondent did so on January 25, 2016 (¶¶ 24-26).

2. Position of the Parties

2.1. The DRC's position

The DRC requested the annulment of the Award on the basis that: (i) the Tribunal manifestly exceeded its powers (Article 52(1)(b) of the ICSID Convention); (ii) the Award failed to state the reasons on which it was based (Article 52(1)(e) of the ICSID Convention) (¶ 29).

The specific matters raised by the DRC and the ad hoc Committee's evaluation of its arguments are summarised in part 3 below.

2.2. The Lahoud's position

The Lahoud's rejected all of the DRC's arguments for the annulment of the Award alleging that the DRC was seeking a *de novo* review of substance of the Award in order to overturn the Tribunal's decisions on such basis (¶ 73).

3. Review and Analysis by the ad hoc Committee

3.1 Role of the ad hoc Committee – legal context

The *ad hoc* Committee recalled that grounds for annulment under Article 52(1) of the ICSID Convention are limited as, annulment is an exceptional remedy (¶ 108) and an *ad hoc* Committee is not a court of appeal (¶ 111). For an excess of power to be manifest within the meaning of Article 52(1)(b) such excess should be both serious and substantial (¶ 128). The requirement that the reasons for the Tribunal's Award should be stated required 'motivation' of the Award. That standard was met provided that the logic by which the Tribunal reached its decisions could be understood (¶ 131). Clearly, contradictory reasoning within an Award could substantiate a lack of reasoning (¶ 134) but it was not the role of the *ad hoc* Committee to review the Tribunal's reasoning in minute detail (¶ 136).

3.2 Preliminary remarks on the substantive issues

The *ad hoc* Committee noted that the argument of the DRC that it was only the company IMPOREX, and not its sole shareholders, the Lahouds, that was entitled to be a party before ICSID should be set aside for two reasons: first, because it had not been raised previously; and, second, because the new argument was directed to the Tribunal's jurisdiction in relation to the persons before it, a matter on which the Tribunal had already decided. The ad hoc Committee did not have an appellate role and would not re-examine that question on the basis of new arguments (¶ 142).

*3.3 Manifest excess of power in respect of the Tribunal's jurisdiction *ratione personae**

This ground for annulment, based on the argument that the company IMPOREX alone and not the Lahouds (its sole shareholders) had standing under the ICSID Convention, was rejected for the reasons explained in 3.2 above (see further (¶ 149)).

3.4 *Manifest excess of power and / or lack of reasoning regarding the existence of the investment*

1. *Article 25 of the ICSID Convention:*

a) *Manifest excess of power*

With regard to the alleged failure by the Tribunal to apply the fourth criteria indicative of the existence of an investment (contribution to economic development) identified in Salini (*Salini v. Morocco*, ICSID Case No Arb/00/04) the *ad hoc* Committee found that the Tribunal did not state that it felt bound by the criteria put forward in Salini – and could not therefore commit an excess of power by failing to apply such criteria. Indeed, at para. 313 of its Award, the Tribunal had doubted the applicability and utility of the fourth Salini criteria (¶ 154).

b) *Lack of reasoning*

Nevertheless, the *ad hoc* Committee found that the Tribunal had addressed the Salini criteria, which had been put forward by both Parties, and had found that the activities of the Lahouds in the DRC were "in line" with the development objectives set by the DRC's New Investment Code (¶ 156).

2. *Article 8 of the DRC New Investment Code:*

The DRC alleged that by failing to take account of the requirements of article 8 of the DRC's (2002) New Investment Code (the "NIC") as regards applicability of the NIC itself the Tribunal had acted in manifest excess of its power and/or had failed to reason its Award.

The *ad hoc* Committee considered that the Tribunal had carefully addressed the question of the applicability of the ICSID Convention under article 38 of the NIC by reference to an interpretation of the NIC viewed as a whole. It had come to the conclusion (having regard to a detailed analysis of articles 1, 2, 3, 5, 6, 36 and 39 of the NIC) that Article 8, relied on by the DRC, was not applicable to the situation of the Lahouds. As the Tribunal had identified the provisions of the law that were applicable the non-application of Article 8 could not amount to a manifest excess of power. (¶¶ 166-167; and footnote 156, *Continental Casualty Company v. Argentine Republic* ICSID Case No Arb/03/9). Neither, as the Tribunal's reasoning was sufficiently clear, was there any lack of reasoning of the Tribunal's Award (¶ 170).

3.5 *Lack of reasoning and / or manifest excess of power regarding the DRC's obligation to treat the Lahouds fairly and equitably*

The *ad hoc* Committee considered arguments related to abuse of power and/or lack of reasoning in relation to specific matters raised in relation to: 1. *The Registrar of Real Estate Titles*; 2. *OBMA (Office of illegally obtained assets / Office des Biens Mal Acquis)*; 3. *a judgment of February 25, 2005*; 4. *the eviction of the IMPOREX company*; and 5. *the inertia of OBMA and Congolese state bodies* (pp. 40-50, ¶¶ 171-209).

In summary, the *ad hoc* Committee found that the DRC appeared to have misread the Tribunal's Award by suggesting that the Tribunal had found that each act or omission

constituted in itself a violation of the requirement to provide fair and equitable treatment (¶ 173). It noted that the Tribunal had in fact found that the acts and omissions, attributable to the Congolese state, when considered as a whole, led to the disruption of the Lahouds' business and the sharp decline of its activities, until their general cessation. This was a violation of the requirement for fair and equitable treatment provided for by article 25 NCI (¶ 172). The *ad hoc* Committee found that the Tribunal had properly addressed each of the issues raised in detailed and coherent reasoning. It therefore rejected each and every allegation of excess of power and /or lack of reasoning with respect to these matters.

3.6 *Expropriation*

1. *Excess of power*

The DRC failed to establish its claim with regard to excess of power. It was clear from the face of the Decision that the Tribunal had considered the applicable law, namely article 26 of the NCI, in making its decision regarding the expropriation of the IMPOREX company's property (¶ 214).

2. *Lack of reasoning*

The contradiction between the alleged finding that the DRC had impounded IMPOREX's property in order to protect it and the finding that the DRC had destroyed the same property was not established. The Tribunal had clearly set out three stages of expropriation in its Award. It had qualified this as indirect expropriation by reference to established arbitral case law. (¶ 218).

3.7 *Damages*

Contrary to the argument that the Tribunal had failed to take into account the financial evidence presented to it, the *ad hoc* Committee found that the Tribunal had considered the documents put forward by the DRC, and had motivated its decision refusing to accept them as proof regarding the issue of damages (¶ 223). The DRC also criticised the Tribunal for excess of power by taking into account activities that were not investments within the meaning of the NCI when assessing the damages. The *ad hoc* Committee found that the Tribunal had not done so. On the contrary, the Tribunal had carefully analyzed the various activities of the Plaintiffs to distinguish investments under the NCI from other commercial activities (¶ 227).

Contrary to the DRC's claims, the Tribunal had carried out its assessment of damages in accordance with the applicable law (¶ 232). In any event, whereas the DRC merely alleged an incorrect application of the NCI, it failed to prove (or even allege) that such incorrect application was so serious that it constituted a failure to apply the law (and therefore amounted to an excess of power) (¶ 233).

Decision

The *ad hoc* Committee entirely dismissed the DRC's Application for Annulment of the Award issued on February 1, 2016 (¶ 241). The *ad hoc* Committee ordered the DRC to bear the costs of the annulment proceedings, including the fees and expenses of the Committee Members and the costs of ICSID as previously determined and notified to the Parties (¶ 242). It further ordered that the DRC should pay one-half of the Claimant's costs and expenses of

the annulment proceedings (with interest from the date of its decision until the date of payment) (¶ 243).