



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: Bernhard von Pezold and others v. Republic of Zimbabwe (ICSID Case No. ARB/10/15) – Annulment Proceeding – AND – Border Timbers Limited and others v. Republic of Zimbabwe (ICSID Case No. ARB/10/25) – Annulment Proceeding – 22 August 2017

Case Report by: Izak C. Rosenfeld**, Editor: Diego Luis Alonso Massa***

Summary: The Applicant filed an urgent application for provisional measures including a temporary stay of execution of both the Border Timbers Award and the von Pezold Award pursuant to Articles 50(2) and 52(5) of the ICSID Convention, and ICSID Arbitration Rules 39 and 54. The Applicant requested that the Committees grant a stay of execution of the awards from 23 July 2017 through a date following the opening of the escrow account. The *ad hoc* Committees classified the application as an application for temporary stay of enforcement of the awards and set out the legal requirements for such an application, namely that such a stay may only be granted where the committee considers that the circumstances so require. The Committees highlighted the Applicant’s failure to argue both the nature and content of the requirements of its application, before considering the Applicant’s submission that the Respondents’ delays justify the seeking of measures. The Committees rejected the Applicant’s submission on this issue, identifying a lack of evidence of such delay. The *ad hoc* Committees dismissed the Applicant’s application for provisional measures, and directed the parties to establish escrow account arrangements in accordance with paragraph 99(4) of the Decisions on Stay, which must be submitted for review and approval by the Committees by 15 September 2017.

Main Issues: How do the requirements for an application for provisional measures and temporary stays of enforcement differ; whether the application meets the requirements for a temporary stay of enforcement of the awards; to what extent Committees’ jurisdiction to prolong a restitution window may persist beyond reinstatement of the window.

Ad hoc Committee: Dr Veijo Heiskanen (President), Ms Jean Kalicki (Arbitrator), Prof. Azzedine Kettani (Arbitrator)

Claimant's Counsel: Steptoe & Johnson UK, London, U.K., Charles O. Verrill, Jr., Washington, D.C., U.S.A

Respondents' Counsel: Attorney General, Kimbrough & Associés, Paris, France

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Digest:

1. Relevant Facts and Procedural Details

The Republic of Zimbabwe (the ‘Applicant’) applied for provisional measures with regards to the awards in *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15) and *Border Timbers Limited and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/25) (the “von Pezold Award” and the “Border Timbers Award”).

The Applicant filed applications for annulment and requests for stay of enforcement in respect of the abovementioned awards on 21 October 2015, pursuant to Article 52 of the ICSID Convention (¶ 1). The *ad hoc* Committees were constituted on 21 December 2015 (¶ 2). The first session was held jointly with the Parties on 1 February 2016 and a procedural order was issued on 11 February 2016, dividing the proceedings into two parts, with the first part dealing with the request for stay of enforcement for the duration of the annulment proceedings and the second part dealing with the annulment applications (¶ 2).

The hearing on the stay was held on 14 and 15 December 2016 (¶ 3). On 24 April 2017, the Committees issued their decisions rejecting the Applicant’s request for stay, providing 90 days in which the Applicant must comply with the award, and directing the parties to escrow any paid funds and documents establishing title while engaging in discussions to reach agreement on appropriate escrow arrangements (¶ 3). On 3 May 2017, the Committees issued a procedural order providing the parties with a direction to revert by 15 June 2017 to advise the Committees of the escrow agreement that had been reached and the extent of the parties’ positions on any issues upon which they have been unable to agree (¶ 4). Extensions were granted from the 15 June 2017 deadline to 23 June 2017 and again to 29 June 2017, based on joint requests of the Parties (¶ 5). On 29 June 2017, the parties filed separate reports on the progress and issues surrounding the escrow arrangement (¶ 6). On 7 July 2017, having considered the positions of the Parties, the Committees provided directions on both who the escrow agent should be and on the release of funds and documents held in escrow, before inviting the Parties to revert by 14 July 2017 (¶ 7). On 14 July 2017, the Respondents requested an extension on the reversion deadline until 19 July 2017, which the Committees granted (¶ 8).

On 19 July 2017, the Parties informed the Committees of their inability to reach agreement on escrow arrangements, with draft arrangements attached, and the Applicant requested an extension of the deadlines for compliance with the von Pezold Award and the Border Timbers Award (¶ 9). On 23 July 2017, the Committees informed the Parties of their lack of jurisdiction

to grant the Applicant's extension request, as this constitutes varying the Awards, which differs from a stay of enforcement, where the Committees do have jurisdiction. However, the Committees had already decided the stay of enforcement issue on 24 April 2017, rejecting the application for a stay (¶ 10). On 24 July 2017, the Applicant filed an urgent application for provisional measures including a temporary stay of execution pursuant to Articles 50(2) and 52(5) of the ICSID Convention and the ICSID Arbitration Rules 39 and 54 (¶ 11). On 28 July 2017, the Respondents submitted its response to the Application (¶¶ 15-16). On 7 August 2017, the Parties submitted their updates on the status of the escrow arrangement discussions (¶ 19). On 18 August 2017, the Respondents submitted changes to the escrow agreement that were, in their view, necessary for the agreement to comply with French legal requirements (¶ 20).

2. Positions of the Parties

2.1 Applicant's Position

The Applicant submitted that the request for a stay was reasonable, proportionate, and required under the circumstances, in light of the Respondents' delays in finalizing discussions on the escrow agreement before the requisite deadline (¶ 13).

2.2 Respondents' Position

The Respondents submitted that the Applicant's application for a stay should be dismissed based on a failure to meet the tests for a stay of execution of awards, the inability of the Committees to reopen the 23 July 2017 decision, the failure to meet tests for the grant of provisional measures, and a failure to establish the circumstances justifying a stay (¶ 16).

3. The *ad hoc* Committees' analysis

3.1 Application for Temporary Stay of Enforcement under Article 52(5)

The *ad hoc* Committees concluded that the Applicant's submission was not an application for provisional measures, but rather an application for a temporary stay of enforcement of the Awards, which have different legal requirements. The Committees found that a temporary stay of enforcement, under Article 52(5) of the ICSID Convention, may be granted if the committee considers that "the circumstances so require" (¶ 23). The Committees noted that the Applicant did not argue for any applicable requirements or attempt to establish that those requirements have been met (¶ 24). The Committees did consider the Applicant's argument that the Respondents' delays in finalizing the escrow arrangement have created circumstances in which a stay of execution is required, but found that the Applicant produced no evidence in support of this argument to establish the delays as a sufficient basis for granting the stay (¶ 24). As a result, the Committees dismissed the Applicant's application (¶ 25). The Committees did not consider it necessary to determine the competence of an ICSID *ad hoc* committee to recommend provisional measures (¶ 21).

3.2 Committees Jurisdiction to Extend/Modify Award Deadlines and Compliance Timeframes

The Committees noted that the Applicant's request for an extension had already been denied by the 23 July 2017 decision (¶ 26). Although the Applicant argued that the award had been modified previously via the extension of the deadline for compliance with the awards, the Committees found that this was not an addition of time or modification of the award, but instead

a reinstatement of the timeframe for compliance so as to allow for the exercise of a right to seek annulment of the awards (¶ 26). The Committees stated that since the compliance timeframe had passed, the Committees had no power to extend the deadline for compliance with the awards (¶ 26).

3.3 Direction Regarding Escrow Arrangements and Parties' Agreement

The *ad hoc* Committees noted that the Parties have been unable to reach agreement on the escrow arrangement and are likely to continue to be at odds on issues arising in the course of discussions (¶¶ 28-29). As a result, the *ad hoc* Committees directed the Parties to establish individual escrow accounts with internationally reputable banks and submit their proposed arrangements for prior review and approval by the Committees by 15 September 2017 (¶¶ 29-30).