



School of International Arbitration

IACL
International Arbitration Case Law

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International Arbitration Case Law

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Award Name and Date: Gambrinus, Corp. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/31) - Decision on Annulment of the Award - 3 October 2017

Case report by: Artemis Malliaropoulou **, Editor: Ignacio Torterola ***

Summary: An *ad hoc* ICSID annulment Committee ruled on the application made by the Gambrinus, Corp. (“the Applicant”) seeking the annulment of the Award of damages made in the arbitral proceedings between Gambrinus, Corp. and the Bolivarian Republic of Venezuela (“the Respondent”) dated 15 June 2015. The Applicant raised three broad grievances against the aforementioned Award, invoking grounds under Art 52(1) (b), (d) and (e) of the ICSID Convention. The Committee rejected the application for annulment in its entirety.

Main issues: Annulment; Manifest excess of powers; Failure to state reasons; Serious departure from a fundamental rule of procedure; procedural equality; right to be heard; burden of proof.

Committee: Tan Sri Dato’ Cecil W.M. Abraham (President), Ambassador Hussein A. Hassouna, (Arbitrator), Doctor Michael C. Pryles (Arbitrator)

Secretary of the *ad hoc* Committee: Sara Marzal Yetano

Applicant’s Counsel: Mr. Timothy G. Nelson, Mr. Barry H. Garfinkel, Ms. Julie Bédard, Mr. Gunjan Sharma (Skadden, Arps, Slate, Meagher & Flom LLP, New York), Ms. Karyl Naim, Q.C. (Skadden, Arps, Slate, Meagher & Flom LLP, London).

Respondent’s Counsel: Dr. Reinaldo Enrique Muñoz Pedroza (Procurador General de la República, Procuraduría General de la República Bolivariana de Venezuela), Mr. Luis Bottaro, Mr. Bruno Ciuffetelli, Mr. Gonzalo Rodríguez-Matos, Mr. Carlos Rodríguez (Despacho de Abogados Miembro de Hogan Lovells, Caracas), Mr. Laurent Gouiffès, Mr. Thomas Kendra, Ms. Melissa Ordonez (Hogan Lovells, Paris).

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Digest:

1. Relevant Facts and Procedural Dates

The dispute related to the alleged expropriation by the Respondent of Gambrinus' ten percent (10%) equity interest in a group of four Venezuelan companies, jointly referred to as "Fertinitro," which produced nitrogen fertilizers (ammonia and urea) for export and internal use in Venezuela, through the operation and maintenance of four petrochemical plants. In the Award, the Tribunal reached the conclusion that Gambrinus did not own an investment in Venezuela at the time of the alleged BIT breaches and, therefore, declined jurisdiction (¶¶24-39).

On 9 October 2015, Gambrinus filed with the Secretary - General of ICSID an Application for annulment of the abovementioned Award. On 16 October 2015, the Secretary-General of ICSID informed the Parties that the Application had been registered on that date and that the Chairman of the Administrative Council of ICSID would proceed to appoint an *ad hoc* committee pursuant to Article 52(3) of the ICSID Convention. By letter of 15 January 2016, in accordance with ICSID Arbitration Rule 52(2), the Secretary-General notified the Parties that the *ad hoc* Committee had been constituted and that the annulment proceeding was deemed to have begun on that date. The first session of the Committee was held by teleconference on 10 March 2016. Following the first session, on 16 March 2016, the Committee issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Committee on disputed issues. On 26 January 2017, the Committee issued Procedural Order No. 2 in which it ruled on certain pending procedural matters related to the organization of the hearing on annulment. A hearing on annulment was held at the seat of the Centre in Washington D.C. on 9 and 10 February 2017. By letter of 14 March 2017, the Applicant requested leave to introduce into the record the recent annulment decision in Venezuela Holdings. After having considered the Respondent's observations of 5 April 2017, the Committee granted the request and invited both Parties to submit their observations. The Parties' observations were received by the Committee on 24 April 2017. The proceeding was closed on 4 August 2017 (¶¶1-22).

2. Positions of the Parties

2.1. Applicant's Position

Gambrinus sought annulment of the Award on three of the five grounds set forth in Article 52(1) of the ICSID Convention, namely: (i) that the Tribunal manifestly exceeded its powers; (ii) that there was a serious departure from a fundamental rule of procedure; and (iii) that the Award had failed to state the reasons on which it was based (¶67).

2.1.1. *The Tribunal's manifest excess of powers and the Award's failure to state the reasons upon which it was based*

2.1.1.1. *The Tribunal's treatment of the 2008 Transfer as being void ab initio*

Gambrinus argued that, under Venezuelan law, a contractual transaction could only be viewed as absolutely null and void if it failed to satisfy very basic conditions and a lawful end, and if it violated an absolute norm of public policy. In that sense, the non-adherence to a technical legal condition of transfer, such as the cash equivalency requirement under the Joint Investors Agreement ("JIA"), could not make that transfer null and void *ab initio*. The Tribunal's excess of powers was considered to be

“manifest” since applicable Venezuelan law had been articulated in the record and it was undisputed that the JIA was subject to Venezuelan law, including the distinction between relative and absolute nullity (¶¶82-87).

2.1.1.2. The Tribunal’s application of the cash equivalency clause to inter-affiliate transfers

The Applicant argued that the Tribunal had acknowledged that the text of Article VI of the JIA contained obscurities, ambiguities, or deficiencies that would lead to illogical results never contemplated by the parties to the JIA. Faced with such obscurities, ambiguities or deficiencies, according to Venezuelan law, the Tribunal should have given effect to the actual intent of the parties - which would have led to the conclusion that the cash equivalency requirement did not apply to inter - affiliate transfers. The Tribunal failed to do so (¶¶88-92).

2.1.1.3. The Tribunal’s conclusion on whether the 2008 Transfer involved cash/cash-consideration

The Applicant argued that, even assuming that the Tribunal was correct in applying the cash equivalency requirement to inter-affiliate transfers, its analysis of whether the 2008 Transfer had actually met such requirement incurred an “annullable error”, as the Tribunal took only account of the International Accounting Standards, which were introduced into the record by the Respondent without seeking prior permission and thus, in breach of Procedural Order No. 2, and it disregarded Venezuelan law under which a set-off of monetary obligations would comply with the cash equivalency requirement provided in the JIA. Furthermore, the Applicant argued that by failing to explain why the law of set-off could not apply or why a legal analysis could not be accepted, the Award failed to state the reasons upon which it was based (¶¶93-97).

2.1.1.4. The Tribunal’s conclusion regarding the Common Share Subscription Agreement

The Applicant contended that, while the Tribunal applied a strict literalist approach to the JIA, it applied a non-textual approach when it construed the Common Share Subscription Agreement. If a strict literalist approach had been adopted in the second case, then, as a consequence, the cash equivalency requirement would have been considered to be satisfied. The failure to reconcile these different approaches led to an unexplained inconsistency in its treatment of the cash equivalency requirement which represented a failure to state reasons, as well as a manifest excess of powers (¶¶98-101).

2.1.1.5. The Tribunal’s failure to address and apply the 5-year prescription period

For the Applicant, the Tribunal’s failure to address the prescription period for declaring nullity in Venezuelan law, and to apply its finding of good faith to the prescription period under Venezuelan law, represented a failure to give reasons and a manifest excess of powers (¶¶102-104).

2.1.1.6. The Tribunal’s failure to apply and address relevant international law

According to the Applicant, who cited a number of ICSID decisions, the Tribunal failed to address the argument made by Gambrinus during the arbitration proceedings that international legal principles clearly hold that jurisdiction should not be denied on the basis of a minor, non-prejudicial noncompliance with contractual or regulatory provisions, such as the cash equivalency requirement. That failure to apply the relevant international legal principles constituted a manifest excess of powers, while the absence of any discussion of that non-application of the relevant principles constituted a failure to give reasons on behalf of the Tribunal (¶¶105-107).

2.1.2. Serious departure from a fundamental rule of procedure

The Applicant reiterated that the right to procedural equality and the right to be heard, which also included the right to have a meaningful opportunity to rebut a new argument or claim, constituted fundamental procedural rules. It was also argued that the failure to properly apportion the burden of proof between the parties could constitute a breach of a fundamental procedural rule. The Applicant argued that the Respondent was allowed to raise an allegedly entirely new defense (the issue of whether or not the 2008 Transfer complied with the JIA's cash equivalency requirement) during the first day of the hearing on jurisdiction and the merits, in violation of the Tribunal's Procedural Order No. 1. It was added that the Respondent's "ambush tactics" created fundamental imbalances during the oral procedure (¶¶108-114).

2.2. Respondent's Position

Venezuela opposed the Application by bringing forward the following arguments:

2.2.1. The Tribunal's manifest excess of powers and the award's failure to state the reasons upon which it was based

The Respondent contended that Gambrinus' allegations regarding the Award's alleged failure to state the reasons and the Tribunal's manifest excess of powers constituted an attempt to completely re-litigate its case on jurisdiction and to introduce new jurisdictional arguments that had never been raised before the Tribunal (¶¶127-129).

2.2.1.1. The Tribunal's treatment of the 2008 Transfer as being void ab initio

The Respondent contended that the Applicant's argument -in relation to manifest excess of powers on behalf of the Tribunal that had concluded that the 2008 Transfer had been void *ab initio*- must fail because it was based on a defense that Gambrinus had never raised before the Tribunal. Furthermore, the irrelevance of the Occidental case was developed as the applicable law was different and no essential contractual requirement was at stake (¶¶130-139).

2.2.1.2. The Tribunal's application of the cash equivalency clause to inter-affiliate transfers

The Respondent argued that the Tribunal had applied the proper law to the interpretation of Section 6.7(i) of the JIA and arrived to the conclusion that this provision applied to inter-affiliate transfers. It also assessed the weight that should have been given to the intention of the parties to the JIA, having applied the relevant rule of contract interpretation set forth in Venezuelan law. The line of reasoning of the Tribunal was clearly developed as well (¶¶140-144).

2.2.1.3. The Tribunal's conclusion on whether the 2008 Transfer involved cash/cash-consideration

The Respondent contended that the Tribunal had applied the proper law when it assessed whether the 2008 Transfer had been made in accordance with the cash equivalency requirement set forth in the JIA and added that any challenge on this point went beyond the scope of the annulment procedure (¶¶145-146).

2.2.1.4. The Tribunal's conclusion regarding the Common Share Subscription Agreement

It was noted that unconvincing reasons did not amount to lack of reasons and thus it was not within the power of an *ad hoc* Committee to decide whether it agreed or disagreed with the reasons expressed by the tribunal (¶¶147-148).

2.2.1.5. The Tribunal's failure to address and apply the 5-year prescription period

The Respondent argued that a tribunal could not have reasonably been expected to respond in its reasoning to a defense which had never been articulated by any of the parties. The Respondent pointed out that the Tribunal had invited the Parties to submit a list of the questions that should have been addressed in the Award and that Gambrinus had not included the prescription period issue in that list (¶¶149-151).

2.2.1.6. The Tribunal's failure to apply and address relevant international law

The Respondent contended that the Tribunal had no reason to address the Awards cited by Gambrinus, since such Awards dealt with the scope of the provision contained or implied in some investment treaties that investment must be made in accordance with the host State law and were thus irrelevant and immaterial to the Tribunal's decision (¶¶152).

2.2.2. The serious departure from a fundamental rule of procedure

The Respondent argued that the procedure had been fair to both Parties, having guaranteed the right to be heard and the equality between both Parties. The Respondent noted that the Parties had been given the opportunity to submit specific written submissions and a legal opinion having exclusively dealt with the JIA Defense and that Gambrinus had yet another opportunity to supplement that submission or to rebut the points made by Venezuela in two rounds of post-hearing briefs and reply briefs. Lastly, the Respondent contended that Arbitration Rule 29 expressly contemplated the possibility for the Parties to agree that all or some issues could have been addressed on a document only basis, with no hearing (¶¶153-159).

3. The Committee's Analysis

In light of the Parties' positions, the Committee addressed the following issues:

3.1. The annulable errors identified by the Applicant under the ground of manifest excess of powers.

3.1.1. The Tribunal's treatment of the 2008 Transfer as being void ab initio

The Committee noted that the question of whether failure to comply by the cash equivalency requirement would have rendered the contract voidable as opposed to it having been void *ab initio* had not been in the Joint List of Questions submitted to the Tribunal. Hence, the Tribunal could not have been reproached for not having addressed the issue that it had not been asked to consider. It was also highlighted that the Occidental decision was distinguishable on the facts and in law and was, therefore, not applicable to the present case (¶¶169-178).

3.1.2. The Tribunal's application of the cash equivalency clause to inter-affiliate transfers

The Committee considered that the proper applicable law was Venezuelan law and that the Tribunal had been mandated to interpret the provisions of the JIA and the Fertinitro By-Laws to ensure that the transfer of the Fertinitro shares to the Applicant had complied with Venezuelan law and that was exactly what the Tribunal had done. Thus, the Tribunal could not be faulted in its application of Venezuelan law and its interpretation of the latter did not give rise to a manifest excess of power (¶¶179-188).

3.1.3. The Tribunal's conclusion on whether or not the 2008 Transfer involved cash/cash consideration

The Committee held that the Tribunal had considered in the Award whether the 2008 Transfer complied with the cash equivalency requirement under Venezuelan law and its interpretation had not given rise to a manifest excess of powers (¶¶189-193).

3.1.4. The Tribunal's conclusion regarding the Common Share Subscription Agreement

The Committee held that the Tribunal had given reasons as to the manner in which it construed the JIA, the Fertinitro By-Laws and the Common Share Subscription Agreement and that the reasons had not been frivolous. It was added that it was not within the powers of the Committee to decide whether it agreed or not with the conclusion of the Tribunal (¶¶194-197).

3.1.5. The Tribunal's alleged failure to address and apply the 5-year prescription period

The Committee was of the view that the Tribunal could not have been faulted in not having addressed the issue of prescription period or limitation when it had not been raised specifically as an issue or argued *in extensor* by the Applicant before the Tribunal (¶¶198-199).

3.1.6. The Tribunal's alleged failure to apply and address relevant international law

The Committee held that contractual provisions of an underlying agreement may not be minor technical defects which could be disregarded. The Tribunal did not make a manifest error in not dealing with the international law argument of the Applicant related to a principle of public international law that purported minor technical non-compliance with contractual or regulatory provisions could not deprive an investor of its treaty rights under international law, as it was not relevant and, therefore, not applicable (¶¶200-203).

3.2. The annulable errors identified by the Applicant under the ground of failure to state reasons

The Committee stated that in reading the Award one was able to proceed from Point A to Point B and it did not find that the reasons given by the Tribunal for holding that it had no jurisdiction were frivolous or contradictory. In the Committee's view, the Tribunal had painstakingly construed the provisions of the JIA, the Fertinitro By-Laws and Venezuelan law, in order to conclude that the provisions of the JIA and the By-Laws had not been complied with by Gambrinus in respect of the transfer of shares (¶¶210-225).

3.3. The annulable error identified under the ground of serious departure from a fundamental rule of procedure

Following an examination of what had transpired before, during and after the Arbitration Hearing, the Committee held that the Applicant had consensually agreed to the procedure by which the JIA Defense had to be addressed by the Tribunal. There was, therefore, no basis for the Applicant to characterize the procedure they had agreed on as one in which they had been "ambushed". It was highlighted that Gambrinus had been accorded ample opportunity to address the JIA Defense. Lastly, the Committee stated that the conduct of the Tribunal in permitting a new argument to be raised with the consent of both Parties was not a ground for annulment under Article 52(1)(d) of the ICSID Convention (¶¶233-265).

4. The Committee's Decision

The Committee dismissed in its entirety Gambinus' Application for annulment.

The Committee ordered each party to bear its own legal costs and expenses incurred in connection with the annulment proceeding, and the Applicant to bear the total costs of the proceedings, consisting of the fees and expenses of the members of the Committee and the charges for the use of the ICSID facilities (¶¶268-280).