

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**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**

**DECISION ON THE APPLICANT’S URGENT APPLICATION FOR PROVISIONAL
MEASURES REGARDING THE TEMPORARY STAY OF EXECUTION AND THE
ESCROW ARRANGEMENT**

Members of the *ad hoc* Committees

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I. BACKGROUND

1. On 21 October 2015, the Republic of Zimbabwe (the “**Applicant**”) filed applications for annulment (the “**Annulment Applications**”) and requests for stay of enforcement in respect of the awards in the conjoined cases *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**,” respectively, and together the “**Awards**”) pursuant to Article 52 of the ICSID Convention.
2. The *ad hoc* Committees (the “**Committees**”) in these matters were constituted on 21 December 2015. The Committees conducted a joint first session with the Parties on 1 February 2016 and issued Procedural Order No. 1 on 11 February 2016, setting out the procedural framework and the timetable for the present annulment proceedings. Section 15.1 of Procedural Order No. 1 provides:

“The proceedings shall consist of two parts. The first part (‘Part I’) shall deal with the Applicant’s request that the enforcement of the Awards be stayed for the duration of the annulment proceedings. The second part (‘Part II’) shall deal with the Applicant’s applications to annul the Awards. Each part of the proceedings shall consist of a written phase followed by an oral hearing before the Committees.”

3. Following the Parties’ submissions in Part I of the proceedings, the hearing on stay held on 14 and 15 December 2016 and the filing by the Parties of their post-hearing memorials, on 24 April 2017, the Committees issued their Decisions on Stay of Enforcement of the Awards (the “**Decisions on Stay**”). In their Decisions on Stay the Committees decided that:

“(1) The Applicant’s request for the continued stay of the enforcement of the Award rendered on 28 July 2015 is rejected;

(2) The provisional stay is lifted as of the date of this Decision;

(3) The Applicant has 90 days as of the date of dispatch of this Decision to comply with paragraph 1020.1 of the Award;

(4) Any funds paid by the Applicant or collected by the Respondents in consequence of the Award, and any documents establishing title to the Claimed Properties, be placed in escrow until the conclusion of these annulment proceedings;

(5) The Parties are directed to engage in discussions with a view to agreeing on an appropriate escrow arrangement; and

(6) The decision on the allocation of costs is reserved until the conclusion of these annulment proceedings.”¹

4. On 3 May 2017, the Committees issued Procedural Order No. 2, providing the Parties with procedural directions regarding the escrow arrangement and requesting the Parties to revert by 15 June 2017 “advising the Committees of the agreement reached and, to the extent there are any issues on which the Parties have been unable to agree, of their respective positions on any such issues.”
5. Following a joint request from the Parties on 14 June 2017, the Committees granted an extension until 23 June 2017 for the Parties to report on their agreement and/or positions on the escrow arrangement. On 23 June 2017, after a further joint request from the Parties, the deadline was again extended until 29 June 2017.
6. On 29 June 2017, the Respondents filed a report on the progress and outstanding issues concerning the escrow arrangement together with exhibits VPB-51 through VPB-58. On the same date, the Applicant sent its own report together with a draft v11 of the escrow agreement. On 30 June 2017, the Respondents sent a letter following up on the previous

¹ *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15), Decision on Stay of Enforcement, 24 April 2017, para. 99. In *Border Timbers Limited and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/25), the Committees similarly decided, in paragraph 99 of the Decision on Stay:

(1) The Applicant’s request for the continued stay of the enforcement of the Award rendered on 28 July 2015 is rejected;

(2) The provisional stay is lifted as of the date of this Decision;

(3) The Applicant has 90 days as of the date of dispatch of this Decision to comply with paragraph 1012.1 of the Award;

(4) Any funds paid by the Applicant or collected by the Respondents in consequence of the Award, and any documents establishing title to the Claimed Properties, be placed in escrow until the conclusion of these annulment proceedings;

(5) The Parties are directed to engage in discussions with a view to agreeing on an appropriate escrow arrangement; and

(6) The decision on the allocation of costs is reserved until the conclusion of these annulment proceedings.

day's correspondence together with exhibits VPB-59 through VPB-62, which the Applicant responded to in its correspondence dated 3 July 2017.

7. Having considered the Parties' positions, on 7 July 2017, the Committees provided the Parties with directions as to who the escrow agent under the escrow agreement should be, as well as directions for the release of funds and/or documents held in escrow, and invited the Parties to revert again by 14 July 2017.
8. On 14 July 2017, the Respondents wrote to update the Committees on the status of the discussion between the Parties and requested an extension until 19 July 2017 for the Parties to revert to the Committees. The Committees granted the extension on the same day.
9. On 19 July 2017, both Parties informed the Committees separately that they had not been able to reach an agreement regarding the escrow arrangement, each Party attaching a draft escrow arrangement. The Applicant submitted additional exhibits ZA-228 through ZA-234 in support of its position. The Applicant also requested that the Committees extend the deadlines (the "**Restitution Window**") to comply with paragraph 1012.1 of the Border Timbers Award and paragraph 1020.1 of the von Pezold Award. Upon invitation from the Committees, the Respondents submitted additional comments on the Applicant's letter on 20 and 21 July 2017. The Applicant responded to the Respondents' additional comments on 21 July 2017.
10. On 23 July 2017, the Committees wrote to the Parties noting "that they do not have jurisdiction to grant the Applicant's request as this would require the Committees to vary the Awards. While the Committees do have jurisdiction to stay the enforcement of the Awards, this matter was already decided in the Committees' Decisions on Stay of Enforcement dated 24 April 2017." The Committees extended the deadline fixed by the Committees in ICSID's letter of 7 July 2017 for the Parties to engage in further discussions with a view to reaching an agreement on the terms of the escrow arrangement, until 7 July 2017. The Committees noted that if the Parties were unable to reach an agreement by that date, they would make a final decision on the escrow arrangement.
11. On 24 July 2017, the Applicant filed an Urgent Application for Provisional Measures including Temporary Stay of Execution pursuant to pursuant to Articles 50(2) and 52(5), of the ICSID Convention and the ICSID Arbitration Rules 39 and 54 (the "**Application**"). The Applicant enclosed with its Application a confirmation of its election of restitution in accordance with paragraph 1012.1 of the Border Timbers Award and paragraph 1020.1 of the von Pezold Award, in the form of a "General Notice" signed by Hon. P.A. Chinamasa, the Acting Minister of Lands and Rural Settlement, which was to be published and take effect 120 days after the issuance of the Committees of their decision on annulment (the "**General Notice**"). In its Application, the Applicant requested the Committees to confirm that:

"i) Zimbabwe elected to reconstitute the Properties before 23 July 2017;

ii) the Escrow Agreement per Directions of the Committees of 7 July 2017 is to be opened with the Bâtonnier of the Paris Bar serving as Escrow Agent;

iii) no Agreement has been signed to date as issues raised by the Paris Bar remain unanswered;

iv) the Bâtonnier has not informed the Parties of the bank account references into which to deposit Escrow Funds;

v) Zimbabwe is legally and practically prevented from implementing Restitution with the Bâtonnier Escrow Agent for those reasons (i.e., no Agreement has been signed to date – no account number).”²

12. The Applicant further requested the Committees “to grant a stay of Execution of the Awards from 23 July 2017 through the date five Paris Business Days following opening of Bâtonnier Escrow Account and to order VPB to maintain confidentiality of Zimbabwe’s elect[ion] to reconstitute the Properties until the release of these Title documents from Escrow upon Final Decision on the Merits of the Annulment Applications.”³

13. The Applicant argued that the measures requested were reasonable and proportionate and required under the circumstances, in particular because the Respondents had not acted sufficiently promptly to finalize the discussions on the escrow agreement before the 90-day deadline provided for in the Awards.⁴

14. On 25 July 2017, the Committees invited the Respondents to provide their comments on the Application by 28 July 2017.

15. On 28 July 2017, the Applicant submitted comments on the Respondents’ draft v15 of the escrow agreement, together with a new draft v16.

16. On the same day, the Respondents submitted their response to the Application (the “**Response**”) together with exhibit VPB-63. The Respondents opposed the Application and requested that the Committees dismiss the Application on the following grounds:

“9.1.1 Zimbabwe has not sought to establish that it has met the tests it has set itself – there is simply no legal analysis whatsoever to support the Application;

² Application, para. 12.

³ Application, para. 13.

⁴ Application, paras. 15 and 16.

9.1.2 Further or alternatively, Zimbabwe seeks to reopen the 23 July Decision (which the Committees cannot do);

9.1.3 Further or alternatively, Zimbabwe has not met the test for the grant of provisional measures; and

9.1.4 Further or alternatively, Zimbabwe has not established sufficiently compelling (or any) circumstances to justify a stay.”⁵

17. The Respondents further contended that the “General Notice does not purport to reconstitute the Zimbabwean Properties as required by the terms of the Awards.”⁶

18. The Respondents separately commented on the Applicant’s comments of the same date on the escrow arrangement and reserved their right “to advise the Committees by 7 August 2017 on their positions as to those issues on which the parties cannot agree, as per the Committees’ direction of 23 July 2017.”

19. On 7 August 2017, the Respondents submitted their update on the status of the Parties’ discussions and the outstanding issues concerning the escrow arrangement together with draft v15 of the escrow agreement and exhibits VPB-64 through VPB-66. On the same day, the Applicant submitted its update on the status of the discussions on the escrow arrangement. The Applicant also commented on the Respondents’ further argument on the Application.

20. On 18 August 2017, the Respondents informed the Committees of certain changes that in their view had to be introduced to drafts v15 and v16 of the escrow agreement, in order for the drafts to comply with French legal requirements.

II. THE *AD HOC* COMMITTEES’ ANALYSIS

A. The Application

21. In their Decisions on the Applicant’s Applications for Provisional Measures dated 17 March and 13 October 2016, the Committees observed that the Applicant’s applications “raised an issue that has also arisen before other *ad hoc* committees, but which has not yet been decided, as to whether an ICSID *ad hoc* committee is competent to recommend provisional measures in the first place.”⁷ The Committees further noted that, while the Parties agreed that the Committees “would have, at the very least, an inherent power to recommend provisional measures necessary to protect the integrity of the present

⁵ Response, paras. 9.1.1 – 9.1.4.

⁶ Response, para. 1.2.

⁷ Decision on the Applicant’s Application for Provisional Measures, 17 March 2016, para. 30; Decision on the Applicant’s Application for Provisional Measures, 13 October 2016, para. 36.

proceedings,” in view of the conclusions reached in their Decisions, the Committees did not consider it necessary to rule on the issue.

22. The Committees have considered the Parties’ submissions on the Application and, for the reasons set out below, have concluded that it is not necessary to rule on this issue in this Decision either.
23. The Applicant has termed its submission as an application for provisional measures, but what it seeks is, in substance, a temporary stay of enforcement of the Awards, together with a confirmation by the Committees of a number of statements set out in paragraph 12 of the Application. The Committees note at the outset that the legal requirements for the two types of relief – provisional measures and temporary stay – are not the same. While Article 52(5) of the ICSID Convention provides that an *ad hoc* committee *may* stay enforcement of an ICSID award provisionally, pending its decision on the annulment application, “if it considers that the circumstances so require,” ICSID tribunals typically require, and the Parties in their previous submissions in these cases have argued, that an application for provisional measures must meet the requirements of urgency, necessity and risk of irreparable harm.⁸
24. The Committees note that the Applicant has not argued in its Application what the applicable requirements, in its view, are and has not sought to demonstrate that the Application meets those requirements. However, the Applicant does argue that “[t]he circumstances require” the measures it requests, particularly because, in the Applicant’s submission, the Respondents have not acted sufficiently promptly to finalize the discussions on the escrow arrangement.⁹ However, the Applicant does not appear to suggest that the alleged delay alone is a sufficient basis to grant its application, and in any event, there is no evidence before the Committees to show that either Party has sought to delay the discussions on the escrow arrangement.
25. In the circumstances, as the Applicant has failed to demonstrate that its Application meets either the requirements for provisional measures or the requirements for a temporary stay of enforcement of the Awards, in accordance with Article 52(5) of the ICSID Convention and ICSID Arbitration Rules 39 and 54, the Committees dismiss the Applicant’s Application.
26. To the extent that the Applicant seeks to reinstate its request of 21 July 2017 for an extension of time of the 90-day period to comply with paragraph 1012.1 of the Border Timbers Award and paragraph 1020.1 of the von Pezold Award (see paragraphs 10, 11, 14 and 18 of the Application), the Committees note that the Applicant’s request for such an

⁸ See Response, para. 6.1; Decision on the Applicant’s Application for Provisional Measures, 17 March 2016, paras. 12 to 14 and 22 (summarizing the Parties’ arguments on the requirements for provisional measures); Decision on the Applicant’s Application for Provisional Measures, 13 October 2016, paras. 16 to 19 and 27 (summarizing the Parties’ arguments on the requirements for provisional measures).

⁹ Application, para. 16.

extension was denied by the Committees' ruling of 23 July 2017, on the basis that granting such a request would amount to varying the Awards, which is beyond the Committees' jurisdiction. The Applicant argues in its Application that the Committees, in their Decisions on Stay, "did modify the Awards a first time as it added time to the Restitution Window fixed in the Awards," and that "the Committees have the same jurisdiction to do so again."¹⁰ However, when determining in the Decisions on Stay that the 90-day Restitution Window within which the Applicant was to comply with its restitution obligation should start running from the date of dispatch of the Decisions on Stay, the Committees did not "add time" to, or extend, the Restitution Window, as fixed in the Awards; the Committees merely reinstated it, in order not to "penalize the Applicant for the exercise of its right to seek annulment of the Award[s]."¹¹ Now that the Restitution Window, as reinstated by the Committees, has closed, the Committees have no power to extend it.

27. The Committees note that the Applicant remains free to deposit the relevant property documents in escrow, even if the Restitution Window has closed, in furtherance of an amicable settlement of the dispute between the Parties.

B. Escrow Arrangement

28. The Committees note that, as set out in the Parties' correspondence of 7 August 2017, despite further directions provided by the Committees on 7 July 2017 and several extensions of time, the Parties have been unable to agree on the escrow arrangement, and that there are still numerous points, which do not appear to be minor, on which the Parties continue to disagree.
29. In the circumstances, and considering that, even if the Committees were now to provide further directions to the Parties on the outstanding points, there is no guarantee that no further issues will arise in the course of the further discussions that prevent the Parties from reaching an agreement, the Committees direct each of the Parties to individually establish escrow accounts of their own devise. The Parties are directed to submit their proposed escrow account arrangements for the Committees' prior review and approval by 15 September 2017. This arrangement will allow the Applicant to deposit the funds payable under the Awards (and the relevant property documents should it so wish), and the Respondents to deposit any funds they may be able to collect on the Awards, in escrow. The escrow accounts must be established with an internationally reputable bank.

¹⁰ Application, para. 18.


¹¹ Decisions on Stay, para. 96.

III. DECISION

30. For the reasons set out above, the Committees decide as follows:

- (a) The Applicant's Application for Provisional Measures including Temporary Stay of Execution is dismissed;
- (b) The Parties are directed to individually establish escrow accounts of their own devise, with an internationally reputable bank, in accordance with paragraph 99(4) of the Decisions on Stay; and
- (c) The Parties are directed to submit their proposed escrow account arrangements for the Committees' prior review and approval **by 15 September 2017**.

On behalf of the *ad hoc* Committees



Dr Veijo Heiskanen
President of the *ad hoc* Committees
Date: 22 August 2017