

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
(ADDITIONAL FACILITY)**

In the interpretation proceeding between

DAVID MINNOTTE AND ROBERT LEWIS

Claimants

and

REPUBLIC OF POLAND

Respondent

ICSID Case No. ARB(AF)/10/1

DECISION ON THE REQUEST FOR INTERPRETATION OF THE AWARD

Members of the Tribunal

Professor Vaughan Lowe, QC, President
Professor Maurice Mendelson, QC, Arbitrator
Professor Eduardo Silva Romero, Arbitrator

Secretary of the Tribunal

Ms Geraldine R. Fischer

Date of dispatch to the Parties: October 22, 2014

REPRESENTATION OF THE PARTIES

Counsel for the Claimants:

Colson Hicks Eidson, P.A.

Mr. Joseph M. Matthews
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and

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Counsel for the Respondent:

K&L Gates Jamka Sp.K.

Mr. Maciej Jamka and
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and

State Treasury Solicitors' Office

Ms. Katarzyna Szostak-Tebbens
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I. PROCEDURAL HISTORY

1. On June 20, 2014, the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received a Request for Interpretation of the Award rendered on May 16, 2014 in ICSID Case No. ARB(AF)/10/1, *David Minnotte and Robert Lewis v. Republic of Poland* (the “Request”), submitted by the Claimants pursuant to Article 55 of the ICSID Arbitration (Additional Facility) Rules. On the same day, the Centre also confirmed its receipt of the prescribed lodging fee.
2. Article 55(2) of the ICSID Arbitration (Additional Facility) Rules provides that “[t]he Tribunal shall determine the procedure to be followed” in relation to requests for interpretation. By letter of June 24, 2014, the Tribunal invited both parties to provide their views on certain procedural proposals made by the Tribunal in that letter.
3. Having received and considered the parties’ respective responses to the Tribunal’s letter on June 27, 2014, and having noted that there was agreement that the interpretation proceeding should proceed on the basis of written pleadings and without an oral hearing, on July 10, 2014 the Tribunal issued Procedural Order No. 1, concerning the procedure to be followed in this phase of the case.
4. In accordance with Procedural Order No. 1, Claimants submitted their Supplement to the Request for Interpretation (the “Supplement”) by July 18, 2014, and Respondent submitted its Observations on the Request for Interpretation of the Final Award of 16 May 2014 (the “Observations”) by August 1, 2014.

II. THE TRIBUNAL’S DECISION

5. Having read and considered these submissions and deliberated, the Tribunal has decided as follows.

A. THE PARTIES’ SUBMISSIONS

6. The Request and Supplementary Request for interpretation were based solely upon

ICSID Arbitration (Additional Facility) Rule 55.¹ Questions of jurisdiction and of the admissibility of the Request must therefore be determined by reference to ICSID Arbitration (Additional Facility) Rule 55, which reads as follows:

Article 55 Interpretation of the Award

- (1) Within 45 days after the date of the award either party, with notice to the other party, may request that the Secretary-General obtain from the Tribunal an interpretation of the award.
- (2) The Tribunal shall determine the procedure to be followed.
- (3) The interpretation shall form part of the award, and the provisions of Articles 52 and 53 of these Rules shall apply.

7. The actual request for interpretation was summarized as follows in paragraph 2 of the Request:

INTERPRETATION REQUESTED BY CLAIMANTS

2. Claimants seek an Interpretation of the Final Award as follows:

A. In order to properly effectuate the stated principle that the costs of this proceeding should follow the events, Claimants request that the Tribunal take more care to evaluate the numerous decisions contained within the Award as well as interim decisions and conduct prior to the Award in order to determine whether an Award of the entire sum of costs sought by Respondent actually complies with the principle that the costs follow the event.

B. In light of the Tribunal's rejection of Respondent's jurisdictional defense based on the alleged fraud (paragraphs 128-140) Claimants request that the Tribunal specifically exclude the extensive fees and costs that were incurred by virtue of this defense, which was specifically not sustained.

C. In light of the Tribunal's conclusions rejecting Respondent's other jurisdictional and admissibility defenses (paragraphs 141-

¹ Request, ¶ 1; Supplement ¶ 20.

151) Claimants request that the Tribunal specifically exclude fees and costs that were incurred by virtue of this defense, which was specifically not sustained.

D. In light of the Tribunal's conclusions rejecting Respondent's defense on the merits of the BIT claims on the basis of fraud and deceit (paragraphs 153-164) Claimants request that the Tribunal specifically exclude fees and costs that were incurred by virtue of this defense, which was specifically not sustained.

E. In light of the Tribunal's conclusion that it does not question that Claimants initiated and presented the claims in good faith, and specifically in light of the obligation under Article IX(2) of the BIT that the parties should seek initially to settle the dispute by consultation and negotiation and the absolute refusal of the Respondent to even meet with Claimants prior to commencement of the ICSID proceeding, Claimants request that the Tribunal reconsider the award of costs in their entirety or, in the alternative, make a significant adjustment to the costs sought by Respondent based on its pre-arbitration conduct in violation of the BIT.

F. In light of the absence of recitation of several procedural matters from the Award that had significant impact on the cost of the proceedings, including specifically the Respondent's refusal to meet with Claimants prior to commencement of this proceeding and the tardy disclosure by one of the Tribunal members of a significant relationship that required careful investigation and analysis of the privilege to challenge said arbitrator, Claimants request that the Tribunal reconsider and exclude fees and costs for such proceedings.

G. In light of Respondent's refusal to accept Claimants' proposal of a single arbitrator, including the proposal that such arbitrator be Professor Vaughan Lowe, and subsequent agreement to Professor Lowe as President of the Tribunal, Claimants request that the Tribunal reduce the amount awarded for arbitrator compensation.

H. In light of the secret criminal proceedings against Claimants and the extensive fees and costs that were necessitated by the need for Claimants to request and be granted in part emergency measures that resulted in the change of venue of the proceedings, Claimants request that the Tribunal reconsider and exclude fees and costs for such proceedings.

8. In the Conclusion of the Request, Claimants stated that:

CONCLUSION

28. For all of the foregoing reasons, Claimants respectfully request that the Tribunal enter an order interpreting the Award pursuant to ICSID Arbitration (Additional Facility) Rule 55.

29. Pursuant thereto, Claimants respectfully request that the Tribunal establish an appropriate procedure to consider a proper cost allocation that will follow all of the events decided by this Tribunal and the Award, not merely allocate every dollar of the costs incurred against Claimants.

30. Alternatively, Claimants respectfully request that the Tribunal reverse its Award of Costs entirely based upon the failure of Respondent to comply with the BIT obligation to meet and attempt to resolve disputes.

9. In the Supplement, Claimants put forward further arguments in support of their position. The Conclusion of the Supplement stated that:

20. For all of the foregoing reasons, Claimants respectfully request that the Tribunal enter an order interpreting the Award pursuant to ICSID Arbitration (Additional Facility) Rule 55.

21. Pursuant thereto, Claimants respectfully request that the Tribunal adjust its Cost allocation and reduce the sum awarded against Claimants to effect the true intent that the costs should follow all of the events in this proceeding, not just the outcome on the merits of a claim pursued in good faith.

10. In the Respondent's Observations, it moved that the Tribunal dismiss the Request and Supplement with costs. As well as (among other things) challenging the Claimants' characterisation of the Award, it observed:

Both the Request and the Supplement aim to reverse the dispositive part of the Award with respect to the ruling on costs of arbitration. Such action manifestly exceeds the purpose and confines of the procedure instituted by Claimants under Article 55 of the ICSID (Additional Facility) Arbitration Rules.²

11. The Tribunal considers that, as it was put in the *Wena Hotels* case, there are:

² Observations, ¶ 2(a).

two main conditions for the admissibility of an application for interpretation: first, there has to be a dispute between the original parties as to the meaning or scope of the award; second, the purpose of the application must be to obtain an interpretation of the award.³

12. In the present case, the complaint is not that it is unclear what this Tribunal decided: it is that on the basis of the facts in this case the Tribunal could and should have come to a different conclusion, even applying the principles that the Tribunal's award indicated that it was applying. That is not a request for interpretation of its decision. It is a request that the Tribunal reconsider and alter its decision.
13. This request plainly falls outside the scope of ICSID Arbitration (Additional Facility) Rule 55. The Tribunal has no legal power to do what the Claimants request of it, even if it were minded to do so. It accordingly declines the "request for interpretation" of its award.

B. COSTS OF THE INTERPRETATION PROCEEDING

14. In its Observations, the Respondent requested that the Tribunal order the Claimants to reimburse the Respondent for: (i) its legal fees, and (ii) the costs of this proceeding, as established by the Tribunal.⁴
15. Because there is no genuine dispute over interpretation, it is appropriate that the Claimants, as the unsuccessful applicants, should bear all reasonable costs of this interpretation proceeding.⁵

³ *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application for Interpretation of the Award dated 8 December 2000 issued on 31 October 2005, ¶ 76. Although the interpretation proceeding in the *Wena* case was conducted in accordance with Article 50 of the ICSID Convention, the same requirements are useful guidance for interpretation proceedings initiated pursuant to Article 55 of the ICSID Arbitration (Additional Facility) Rules.

⁴ Observations, ¶ 38.

⁵ The costs of the interpretation proceeding include, *inter alia*, the arbitrators' fees, the Tribunal's expenses and the Secretariat's fees and expenses. At the time of the Decision this amount is US\$14,368.75, which consists of the interpretation proceeding costs of US\$14,148.75 and estimated charges of US\$220.00 for the costs incurred in connection with the dispatch of the Decision (*e.g.*, costs related to courier services, binding and photocopying). The ICSID Secretariat will provide the parties with a detailed Financial Statement as soon as all invoices are received

16. On September 22, 2014, the Tribunal invited the Parties to submit a statement of their costs and fees incurred with respect to the preparation of this interpretation proceeding. After reviewing Respondent's letter of September 26, 2014, the Tribunal has determined that the legal representation costs referenced in this letter are reasonable.

17. Consequently, the Claimants are ordered to pay the Respondent: (i) the Respondent's share of the interpretation proceeding costs, *i.e.* one half of the total costs for the interpretation proceedings, amounting to US\$7,184.38; and (ii) US\$15,915.08 for the Respondent's costs for legal representation for the interpretation proceeding. Therefore, the Claimants are ordered to pay to the Respondent a total amount of US\$23,099.46.

III. OPERATIVE PART

FOR THE REASONS STATED ABOVE

18. The Tribunal decides:

- (1) That the Claimants' request for the interpretation of the Award is dismissed;**
- (2) That the Claimants should bear all reasonable costs of the interpretation proceedings, including all the ICSID arbitration costs and expenses, reasonable costs and expenses incurred by the Respondent in the preparation of its legal case related to the interpretation proceeding and their own expenses; and**
- (3) As a consequence, the Claimants shall pay US\$23,099.46 to the Respondent.**

and the account is finalized. Any remaining balance in the case account will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

[Signed]

Professor Maurice Mendelson, QC
Arbitrator

Date: [6 October 2014]

[Signed]

Professor Eduardo Silva Romero
Arbitrator

Date: [13 October 2014]

[Signed]

Professor Vaughan Lowe, QC
President

Date: [22 October 2014]