

*This case summary was prepared in the course of research for
S Ripinsky with K Williams, Damages in International Investment Law (BIICL, 2008)*

Case summary

Autopista Concesionada de Venezuela, C.A.
v
Bolivarian Republic of Venezuela

Year of the Award: 2003

Forum: ICSID

Applicable Law: Concession Agreement, Venezuelan Law, International Law

Arbitrators	Timeline of Dispute
Prof. Gabrielle Kaufmann-Kohler - President	1 June 2000 - Request for arbitration
Dr. Karl-Heinz Boeckstiegel	16 January 2001 - Arbitral tribunal constituted
Dr. Bernardo M. Cremades	27 September 2001 - Decision on jurisdiction
	23 September 2003 – Award

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I. Executive Summary

Aucoven, a Venezuelan company owned by a US corporation, had entered into a Concession Agreement with Venezuela for the construction and general maintenance of one of the country's main highway systems. The project was to be financed primarily through an increase in relevant tolls. After a series of violent public protests, Venezuela refused to increase tolls and Aucoven was forced to abandon the project. The latter subsequently filed its request for arbitration under Clause 64 of the Concession Agreement. Even though Aucoven had not yet carried out the majority of works contemplated in the Concession Agreement, it alleged that Venezuela had breached a number of contractual provisions and thus claimed compensation for out-of-pocket expenses, lost profits and interest.

The Tribunal found that Venezuela had indeed breached the Concession Agreement, and thus had to reimburse Aucoven for a substantial part of its out-of-pocket expenses (approximately US\$ 12 million).¹ Concerning lost profits, the Tribunal decided that the amount of lost profits could not be established to a sufficient degree of certainty as the main purpose of the Agreement had not been realized. Hence, no lost profits were awarded. Given that the illegal act constituted a 'simple breach of contract', the Tribunal chose to award simple (as opposed to compound) interest on the amount of compensated out-of-pocket expenses.

II. Factual Backgrounds and Claims of the Investor

The Claimant, Autopista Concesionada de Venezuela, C.A. ('Aucoven') is a company incorporated under the laws of Venezuela, and owned by ICATECH Corporation, a United States company.² The source of the dispute was an agreement between Venezuela and Aucoven for renovation and general maintenance of the Caracas – La Guaira Highway System, which is the main artery connecting Caracas to the seacoast, the ports and the main international airport.

Aucoven and Venezuela entered into the relevant Concession Agreement ('the Agreement') in 1996 after the public tender had been won by Aucoven. The main purpose of the concession was the construction of a Viaduct ('the Bridge'), in addition to general maintenance and operation of the Highway System; the duration of the concession was thirty years. The primary source of revenue for Aucoven would come from the collection of tolls, which were to be increased by Venezuela according to a specific time plan contained in the Agreement. In the event that the toll collections would not attain a minimum level, Venezuela was to compensate Aucoven.

According to the Agreement, the first increase in tolls was due in January 1997. However, due to public resistance, the Venezuelan government did not act

¹ In the arbitral award relevant amounts are stated in Venezuelan currency [Venezuelan Bolivar (Bs.)]. The Tribunal held that damages awarded were to be converted into US\$ at the rate of Bs. 170/US\$ 1 (para. 421). For sake of simplicity, all amounts cited in this paper have been converted from Bs. into US\$ at the rate prescribed by the Tribunal.

² The fact that the Claimant is a Venezuelan company under foreign control (rather than a foreign investor itself) was addressed by the Tribunal in its decision on. See Fn 3 for further details.

accordingly. A number of further attempts were made to raise tolls, each of which resulted in a series of, often violent, protests. Despite numerous requests by Aucoven, Venezuela finally refused to adjust the tolls in accordance with the Agreement, which in turn made it impossible for Aucoven to finance the relevant construction works through tolls.

In June 2000 Aucoven terminated the Agreement pursuant to Clause 60 and filed its request for arbitration under Clause 64 of the Agreement.

Aucoven claimed the following:

- Venezuela performed none of its obligations under the Agreement. It did not raise tolls (Clause 31-33), issue the guarantee (Clause 22), pay the Minimum Guaranteed Income (Clause 23), pay Aucoven for additional and excess works (Clauses 25 and 46), exempt Aucoven from taxes (Clauses 27-28), maintain the Economic-Financial Equilibrium (EFE) (Clauses 44-46 and Annex A), timely approve the trust agreement (Clause 6 and 40); it furthermore breached the agreement to arbitrate and its obligation to perform the Concession Agreement in good faith (Clause 64), and failed to refrain from initiating proceedings in Venezuela in order to annul or terminate the Agreement. (paras. 83, 84)
- Under Clause 60(2), Aucoven was therefore entitled to unilaterally terminate the Agreement and may claim all its damages. These included *out of pocket expenses*, *lost profits* and *interest*, as well as *costs and fees*.
- Aucoven claimed damages of approximately US\$ 155,000,000 plus interest. (para. 84)

III. Findings on Merits³

A. Breach of Clause 31

Under Clause 31 of the Agreement, Venezuela was obliged to increase tolls according to a specific timeframe. Venezuela argued that it was unable to act accordingly due to riots, which were an event of *force majeure* and therefore provided an excuse for Venezuela of its contractual obligation. The Tribunal, in applying Venezuelan and international law (para.108) assumed that the following three conditions had to be met for a *force majeure* excuse to hold: firstly, the *force majeure* event made performance impossible to achieve, secondly, the *force majeure* event was unforeseeable, and thirdly, the *force majeure* event was not attributable to the defeating party. The Tribunal decided that Venezuela failed to show convincingly that the event was

³ Prior to the proceedings concerning the substance of the case, the Tribunal addressed issues of jurisdiction in a separate decision. This is not discussed in the present summary; details can be found at <http://www.worldbank.org/icsid/cases/decjuris.pdf>.

unforeseeable and thus could not be excused of its contractual obligation because of *force majeure*. (para.119)

The Tribunal held that its conclusion with respect to *force majeure* was sufficient in and of itself to declare that Aucoven was entitled to terminate the Agreement and thus claim damages pursuant to Clause 60(2) of the Agreement. However, since expressly requested, the Tribunal also addressed other claims of Aucoven. (para.130).

B. Breach of Clause 22

According to the Agreement, Venezuela was obliged to issue a guarantee at Aucoven's request, should it decide to take up a loan in Venezuela in connection with the works covered by the Agreement. When Aucoven negotiated to obtain a loan of US\$ 50 million from ING Bank, the latter required that the loan be secured by a satisfactory governmental guarantee, which Venezuela failed to provide.

Venezuela was therefore found to have breached its obligation to issue the guarantee according to Clause 22 of the Agreement (para. 143).

C. Breach of Clauses 6, 23, 25, 27-28, 32, 40, 44-46, 64 and the Obligation to act in Good Faith

Aucoven requested declaratory relief in this respect, but did not raise separate damages claims based on these breaches. Therefore, having already ruled that Venezuela breached its contractual obligations to raise the tolls and deliver the guarantee, the Tribunal chose not to determine whether the additional breaches allowed Aucoven to terminate the Agreement and/or claim damages. (para. 215) A breach of contract was found only with respect to Clauses 23, 32, and 64 (section V. of the Award).

D. Termination of the Agreement pursuant to Clause 60

Clause 60(2) of the Concession Agreement provided that Aucoven may terminate the agreement in the event of non-fulfilment of any of the obligations undertaken in the Agreement by Venezuela. The Tribunal found that Aucoven met all the conditions of Clause 60(2) and was therefore entitled to terminate the Agreement.

IV. Findings on Damages

A. Applicable Law

The principal applicable legal provision for the award of damages was Clause 60(2) of the Concession Agreement (reprinted below under B.). (paras. 235, 243) Concerning

supplementary sources of law, the Tribunal referred to Article 42(1) of the ICSID Convention:

‘The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.’

The parties disagreed on whether they had entered into a choice of law agreement and which law should govern the dispute failing such an agreement. The Tribunal ruled that except for matters covered by Decree Law Nr. 138 and Executive Decree Nr. 502,⁴ no explicit and unequivocal choice of law that should be applicable (Venezuelan Law or International Law) had been made. (para.100)

The role of international law as discussed in this article is not entirely clear in ICSID practice. The Tribunal chose to attribute a complimentary and corrective function to international law, meaning that international law may fill lacunae where national law lacks rules and will prevail over national law where it is in violation of international law. The Tribunal held that there was no reason considering especially that it was dealing with a contract and not a treaty arbitration, to go beyond the corrective and supplementary functions of international law. (Para.102)

B. Standard of Compensation

Clause 60(2) provided that in the event of lawful termination of the Concession Agreement by the Concessionaire (Aucoven):

‘the MINISTRY shall compensate and indemnify the CONCESSIONAIRE, pursuant to the same terms stipulated [...] for early repossession’ namely:

‘(i) the *fair value of the assets and works* [...]

(ii) the amounts corresponding to other assets allocated to the Concession [...]

(iii) the current value of other assets related to the Concession or the fulfilment of this Agreement that are different from the Allocated Assets [...]

(iv) *all other updated costs and expenses pursuant to the terms of this Concession* [...]

(v) all losses or damages, *including lost profits and damnun emergens.*’ (para. 237)

This clause lists both the heads of recoverable damages and the standards of compensation (‘fair value’, ‘current value’.)

C. Burden of Proof

The Tribunal held that as a matter of principle each party had the burden of proving the facts upon which it relied. (para. 110) Specifically, the Tribunal found that, in order to be granted compensation for lost profits, a claimant must prove the amount of its loss. Only these proven amounts will be awarded (para. 347).

⁴ In April 1994, Venezuela enacted Decree Law Nr. 138, which set the framework for granting concession of public works and services to private companies. The bid for improvement and maintenance of the Highway system was issued as Executive Decree Nr. 502.

D. Issues of Evidence

Aucoven used its financial statements for the calculation of out-of-pocket expenses. This method was never disputed as such by Venezuela. Venezuela did, however, challenge the *reliability* of Aucoven's financial statements on a number of grounds (e.g. errors, lack of supporting documents). Aucoven responded by arguing that its financial statements had been audited by Deloitte & Touche, and that all revenues and costs on the financial statement properly reflected revenues and costs for its work on the Concession. The Tribunal agreed with Venezuela in that there appeared to be a number of errors in Aucoven's financial statements. It found nevertheless that these errors were not significant enough to discard Aucoven's financial statements entirely as proper evidence. It stated that **audited financial statements benefited from a prima facie presumption of reliability**. Venezuela's criticism did not provide sufficient elements to rebut that presumption. Hence, subject to rectifying certain errors, the Tribunal relied on the financial statements in order to establish the amount of out-of-pockets costs owed to Aucoven. (para. 247)

E. Heads of Damages and Valuation Methods

Aucoven's main submission was that Clause 60(2) of the Agreement explicitly entitled it to recover all its damages in the event of a valid termination. Aucoven claimed damages which included **out-of-pocket expenses, lost profits and interest**.

1. Out-of-pocket expenses

Concerning out-of-pocket expenses, Aucoven's claim, before interest, totalled approximately US\$ 19,138,518. This claim comprised:

- losses incurred prior to the termination of the Agreement (pre-termination losses);
- pre-termination assets contributed;
- post-termination losses incurred;
- post-termination assets contributed.

Venezuela agreed that Aucoven was entitled to recover its out-of-pocket expenses in accordance with Clause 60(2) of the Agreement, but differed with Aucoven on the scope and amount of the recoverable expenses (para. 239). It disputed Aucoven's claims on a number of grounds, including the following:

- Aucoven claimed US\$ 1,700,000 for *bidding and negotiation costs*.⁵ Subsequently, Aucoven excluded bidding costs from its claims, which was held to be correct by the Tribunal. Concerning negotiation costs, Venezuela contended that they were not recoverable pursuant to the Agreement, the Bidding documents and Venezuelan law; this was not found to be convincing by the Tribunal, which

⁵ These included pre-contract expenses related to bidding for and negotiation of the agreement (see Fn 17 of the Award).

decided in favour of Aucoven, given that ‘all losses and damages’ were recoverable according to Clause 60(2)(v). (para.264)

- Aucoven was compelled to defend itself against legal and administrative challenges brought against it by Venezuelan authorities and competing bidders in connection with the award of the Concession and hence claimed ‘*legal fees in actions not related to this arbitration*’. Specifically, Aucoven’s claim related to enquiries of the Venezuelan National Assembly into the validity of the Concession Agreement. Venezuela claimed that legal costs were not allowable in the absence of an explicit contractual provision. However, in the Tribunal’s view, Clause 60(2) of the Agreement represented a sufficient basis to allow legal costs, subject to the Condition that these costs must be ‘the direct and foreseeable result of Venezuela’s failure to perform in good faith the Concession Agreement’. (para. 272) Furthermore, the Tribunal found that Venezuela was responsible for the conduct of members of its National Assembly. Thus, Aucoven had to be reimbursed for legal costs incurred to resist parliamentary challenge. This differed, however, from legal costs for the proceedings initiated by competing bidders, as this constituted a regular commercial risk, which must be borne by Aucoven. (para. 275)

- Aucoven had undertaken *soil studies* as part of the Agreement; Venezuela challenged these claims on the grounds that only 80% of soil studies had been completed, and that the Agreement provided for reimbursement only for completed studies. Aucoven argued that the studies had not been completed due to an unreasonable refusal of the Venezuelan government to approve them, a claim which the Tribunal agreed with. Hence, Aucoven had to be reimbursed for all costs incurred in connection with soil studies which it had undertaken. (para. 281)

- Venezuela furthermore contested three items of ‘*interest*’ expense asserted by Aucoven as part of its claim for out-of-pocket costs.

- The first item involved interest incurred for a **loan involving an affiliate**. Both parties agreed that it ‘should not have been included in the calculation’ (para.288). The Tribunal found, however, that the alleged interest was still included in Aucoven’s calculations, and thus had to be deducted accordingly.

- The second item of interest expense disputed by Venezuela referred to an ‘**error**’ of the calculation of inflation identified by Venezuela, which resulted in an alleged overcharge of US\$ 216,000. The error resulted from use of a yearly Venezuelan Consumer Price Index (‘CPI’) instead of the more precise monthly CPI. Aucoven argued that using this method was not ‘unreasonable’. The Tribunal found that the fact that a calculation was not unreasonable did not mean that it was acceptable, and if a more precise method of calculation was possible, it would have to be used as it reflects the costs incurred more accurately (paras. 291, 292).

- The third item of interest expense contested by Venezuela was related to interest Aucoven incurred on short term **loans which it had had to obtain in order to finance a serious liquidity crisis** during September 1998.

Aucoven contended that the liquidity crisis was a direct result of Venezuela's failure to comply with the Agreement, whereas Venezuela asserted that this was wholly attributable to the actions or inactions of Aucoven (para. 294), particularly the fact that Aucoven's main shareholder failed to pay for the shares it had acquired. The Tribunal found that the damage was not attributable to the Respondent as Aucoven failed to show convincingly that its liquidity crisis was a direct result of Venezuela's actions. (para.295)

- Aucoven claimed *administrative costs*, (e.g. for expenses incurred through an 'administrative gauntlet' in attempting to persuade Venezuela to comply with its contractual obligations), which allegedly were the direct result of Venezuela's failure to comply with the Agreement. Venezuela objected that the claims brought forth in this matter by Aucoven were extortionate. The Tribunal was satisfied that Aucoven had incurred additional costs, but agreed that the sum claimed by Aucoven was 'very substantial', and thus reduced the amount accordingly. (para. 302)

2. Lost Profits

Citing a significant number of international decisions, Aucoven based its lost profits analysis on 'the general principle that the claimant must be made whole, i.e. must be awarded damages such as to place it in the position it would be in had the contract been performed in accordance with its terms.' (para. 307)

Aucoven argued that it was entitled to claim lost profits according to Clause 60(2) of the Agreement (reproduced above under IV.B.) as well as general principles of international and Venezuelan law (para. 333). It alleged that this should be determined through using the **discounted cash flow (DCF)** analysis. The Economic and Financial Plan (EFP) included in the Agreement indicated the parties' joint projections of Aucoven's net cash flows for each semester of the 30 year Concession period and thus mirrored the parties' estimate as to the cash flows due to Aucoven if the Agreement had been performed as stipulated. (para. 335)

The Tribunal addressed the issue by applying contractual and national provisions and merely referred to international practice as a 'matter of additional guidance' (para. 340). The Tribunal found that under Venezuelan law in order to be granted compensation for lost profits, a claimant must **prove the amount of its loss to sufficient certainty**, lost profits could not be awarded on the basis of speculative assessments; this was held to be consistent with the practice of international tribunals. (paras. 347, 351) The Tribunal found that Aucoven did not show loss of future profits to a sufficient degree of certainty, particularly given the fact that the main purpose of the Agreement had been the construction of the Bridge, which had never been built. For these reasons, the Tribunal was not convinced that the figures set forth in the original EFP represented a sufficient basis to assess Aucoven's lost profits in a non-speculative way.

Aucoven contended that cases existed where tribunals had awarded lost profits even if the project had only been in its initial stage; however, the Tribunal stated that those

only dealt with situations where a **substantial part of the project had been realized**.⁶ The Tribunal held that this condition was not fulfilled in the present case. Additionally, the Tribunal found that Aucoven had not established that, once discounted at an appropriate rate (that should reflect country, project and capital risks) and time, the cash flows would have yielded a positive result. All in all, evidence showed that the project was unlikely to generate profits. (paras.361-364).

F. Interest

Since no lost profits were awarded, interest was limited to out-of-pocket expenses.

Aucoven claimed **pre- and post-award** interest, arguing that interest on out-of-pocket expenses should run from the date when those expenses were incurred. Concerning post-award interest, Aucoven claimed interest ‘until the date of the effective payment of the award by Venezuela’. In support of its position, it relied on Clause 26 of the Agreement and referred to an ICSID precedent, *S.P.P. (Middle East) Limited, Southern Pacific Properties, Ltd. V. the Arab Republic of Egypt*. Venezuela opposed that Venezuelan law did not allow post award interest on inflation-adjusted awards. (para. 366).

The Tribunal found that interest should generally run from the date on which the **principal amount to which it applies became due**. (para. 370). Claims 60(2) entitled Aucoven to recover the damages it suffered in the event it validly terminated the Agreement. Consequently, Aucoven’s claim could not become due before the termination had taken place. (para. 371)

With regard to post-termination out-of-pocket expenses, the Tribunal found that Aucoven’s assumption that interest should run from the date when those expenses were incurred is applicable. (para. 375). The Tribunal held that Venezuela’s claim that Venezuelan law forbids post-award interest on inflation adjusted awards did not appear logical and was not precluded under Venezuelan law. (paras. 380, 381)

As for the **applicable interest rate**, the Tribunal applied the so called ‘Bank Rate Method’ (interest to be calculated monthly at a rate equal to the average lending rate of the five principal Banks in the country) in accordance with Clause 26 of the Agreement, (para. 382).

On the subject of **compound interest**, Aucoven argued that the Agreement, Venezuelan and international law all required the award of compound interest. The Tribunal examined the case firstly with regard to Venezuelan law, and secondly under international law. It found that according to Clause 26 of the Agreement, no clear intent of the parties to apply compound interest could be established. Furthermore, ‘the Tribunal bears in mind that compound interest may have a very significant economic impact, especially when high interest rates are applicable. Therefore, in the Tribunal’s view, an agreement on compound interest must be sufficiently clear and cannot be too easily implied.’ Hence Venezuelan law combined with the Agreement did not allow an award of compound interest.

⁶ *Karaha Bodas* arbitration, *Delagoa Bay* arbitration.

Aucoven argued, that even if Venezuelan law prohibited compound interest, international law would require such an award, and cited an ICSID case in which the tribunal awarded compound interest notwithstanding Egyptian law to the contrary (*Wena Hotels Ltd. v. Arab Republic of Egypt*). (para. 393) However, the Tribunal stated that *Wena* was an expropriation case, and in another ICSID precedent which Aucoven had cited in support of its claim for compound interest (*Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*), the Tribunal expressly drew a distinction between expropriation cases and cases of ‘simple breach of contract’. The Tribunal deciding on *Wena* had stated that ‘there is a tendency in international jurisprudence to award only simple interest [...] in relation to cases of [...] simple breach of contract’ and found it necessary to emphasize that it was not dealing with a case of breach of contract but with an expropriation case. The Tribunal dealing with *Autopista* agreed with this line of reasoning and therefore awarded only simple interest. (para. 396)

G. Legal Costs

The Tribunal found that the cost burden should be shared equally between the parties, each bearing its own legal expenses and 50% of the arbitration costs. Even though the Tribunal acknowledged Aucoven’s argument that, according to principles of both international and Venezuelan law a party injured by a breach must be fully compensated for its losses and damages, it found that such a ‘loser pays’ principle is not absolute, in particular in cases where the claimant succeeded only partially. Given that a significant part of Aucoven’s claims was dismissed, equal cost sharing seemed appropriate.

V. Implications / Initial Analysis

- **Lost profits:** The Tribunal found that in order to be granted compensation for lost profits, a claimant must prove the amount of its loss to **sufficient certainty**, lost profits could not be awarded on the basis of **speculative assessments**. The Tribunal’s subsequent analysis implies that ‘sufficient certainty’ of future profits depends on whether is the relevant project has been realized to a ‘**substantial degree**’.
- **Evidence:** The Tribunal held that audited financial statements benefited from a **prima facie presumption of reliability**. It is for a Respondent to rebut this presumption.
- **Contract negotiation costs:** The Tribunal held that the contract negotiation costs (incurred after award of the bid) were recoverable. This may have to do with the fact that the pre-contract expenses were incurred after the claimant had acquired legitimate expectations in relation to the project.