

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON D.C.

IN THE PROCEEDING BETWEEN

THE ROMPETROL GROUP N.V.
(Claimant)

and

ROMANIA
(Respondent)

(ICSID Case No. ARB/06/3)

Decision of the Tribunal
on the Participation of a Counsel

Members of the Tribunal:

Sir Franklin Berman, KCMG, QC
Mr. Donald Francis Donovan, Esq.
The Honourable Marc Lalonde PC, OC, QC

Secretary of the Tribunal: Ms. Milanka Kostadinova

Assistant to the Tribunal: Mr. Jeremy Marc Brier

Representing the Claimant:

Messrs. Barton Legum
and Jeffrey Hertzfeld
SCP Salans & Associés, Paris
and
Mr. George Burn
Salans, London

Representing the Respondent:

Mr. Michael E. Schneider, Dr.
Veijo Heiskanen & Mr. Matthias
Scherer
Lalive, Geneva
and
Dr. Victor Tanasescu & Dr.
Crenguta Leaua & Ms. Carina
Tanasescu
Tanasescu Leaua Cadar &
Asociatii, Bucharest

DATE: 14 January 2010

1. This is the Tribunal's Decision on the Respondent's application dated 21 August 2009, in which the Respondent seeks an order from the Tribunal requiring the Claimant "to remove Mr. [Barton] Legum from the case and to forbid him from participating in it in any way."¹ The Respondent cites as the ground for its application that Mr. Legum was until 31 December 2008 employed by a law firm of which one of the Members of the Tribunal is a member.
2. The application is opposed by the Claimant. The background is as follows.

I. Factual Background

3. The Claimant's legal representation in the Arbitration is entrusted to the law firm of Salans & Associés (Salans), acting through their offices in Paris, New York, London, and Bucharest. The Minutes of the Tribunal's first Session, held on 28 February 2007, list by name in the usual way the persons who appeared as the Claimant's duly authorized legal representatives, at the head of them Mrs. Sarah François-Poncet of the Paris office; Mrs. François-Poncet signed the Claimant's written pleadings and appeared before the Tribunal to argue the Claimant's case at the oral hearings on the Respondent's Preliminary Objections held in September 2007. On 30 December 2008, Mrs. François-Poncet wrote to the Centre and to the Tribunal (copied to the legal representatives of the Respondent) to inform them that, on her departure from private practice, she would be withdrawing from the case with effect from the following day, but that the case would continue to be handled by Salans. There is some dispute between the Parties as to whether that event led to discussion between them of an eventual replacement for Mrs. François-Poncet, but in the Tribunal's view that is irrelevant to the question it has for decision.
4. Some months later, on 21 July 2009, Salans informed the Centre by letter out of the Paris office that the legal representation of the Claimant would from then on be in the

¹ It is not clear from the syntax whether the intention was to have the Tribunal require the Claimant to withdraw Mr. Legum, or whether it was that the Tribunal should do so directly (see further paragraph 24 below).

hands of Mr. Barton Legum and two of his colleagues at the firm. As the Respondent points out, the letter was signed by Mr. Legum himself, as a Partner in the firm.

5. On 31 July 2009 the Respondent wrote to the Tribunal, stating that Mr. Legum and the Member of the Tribunal appointed by the Claimant had until recently been members of the same law firm, and demanded that the Claimant make ‘full disclosure of all relations, past and present’ between both Mr. Legum ‘and any other member of the firm of Claimant’s counsel’ with the member of the Tribunal in question. The Respondent invoked ‘the integrity of the Tribunal and the arbitral process, as well as its total independence.’
6. On 3 August 2009 the Claimant (by letter again signed by Mr. Legum) denied the existence of any disclosure obligation or of any reasonable basis for inferring an infringement of the Tribunal’s independence. The letter disputed also that Mr. Legum had ever been more than a salaried employee of the firm in question, with no participation in the firm’s profits or losses, a position from which he had resigned at the end of 2008.
7. By letter dated 5 August 2009, the Respondent maintained its request for “full disclosure.” It did not however seek to contest the Claimant’s assertions as to Mr. Legum’s status while with the firm or that he had left that position at the end of 2008.
8. On 10 August 2009 (and without prejudice to its continued denial of any disclosure obligation) a further letter from Mr. Legum on behalf of the Claimant described what it referred to as the limited nature of Mr. Legum’s dealings with the Member of the Tribunal during a four-year period Mr. Legum had spent with the law firm in question; the period covered ran from 2004 to 2008, i.e. between Mr. Legum’s joining the firm’s employ on departure from a responsible position in the US State Department and his resignation from the firm as described in paragraph 6 above.
9. On 21 August 2009 the Respondent contested the completeness of this disclosure by reference to activities on the public record undertaken jointly by the Member of the

Tribunal and Mr. Legum during a much earlier period ending in January 2000, when Mr. Legum had also been employed at the firm prior to joining the US State Department; and launched the present Application (see paragraph 1 above).

10. The Tribunal thereupon permitted a further round of short submissions from each Party. These focussed on the existence and scope of any disclosure obligation, whether there was a time limit for applications of the present kind, whether it was open to a Party to challenge the other side's counsel (as opposed to an arbitrator), and whether the circumstances disclosed any threat to the integrity of the arbitration.
11. The Tribunal should preface its decision on the application presented to it by saying that the circumstances underlying the application, including the information put on the record by the series of letters from the parties beginning very shortly after Mr. Legum's appearance in the proceeding, have been discussed in detail between the Members of the Tribunal, who are unanimously of the view that these circumstances do not now – and (once the Parties had registered the matter in their letters of 31 July and 3 August 2009 described in paragraphs 5 & 6 above) did not at the time – call for any further disclosure on the part of the Member of the Tribunal whose professional association with Mr. Legum has been put at issue.
12. The Tribunal also notes that the Respondent has stressed from the outset that it seeks only Mr. Legum's disqualification and does not, either directly or indirectly, challenge the Tribunal itself or any of its Members. There could in any event have been no possible basis for a retrospective challenge of that kind in respect of the past activity of the Tribunal, notably its Decision of 18 April 2008 on the Respondent's Preliminary Objections on Jurisdiction and Admissibility. So far as prospective effect is concerned (prospective, that is, from the time of Mr. Legum's appointment to represent the Claimant in these proceedings), the Tribunal understands the Respondent to have made its election: namely, to challenge Mr. Legum's position on the basis that the composition of the Tribunal is established and uncontested, rather than to challenge the continued functioning of the Tribunal or any of its members on the basis that Mr. Legum's participation is *fait accompli*.

13. It will be evident that to grant the relief sought by the Respondent in the present application would presuppose the following:

- 1) that an ICSID Tribunal does in principle possess an inherent or implied power to control a Party's representation before it in arbitral proceedings;
- 2) an understanding as to the scope and extent of such a power;
- 3) acceptance that the particular circumstances met the necessary requirements for the exercise of such a power.

We consider each of these points in turn.

II. The Power to Control a Party's Representation

14. It is common ground between the Parties that the rules governing the present arbitration proceedings, i.e. the ICSID Convention and Arbitration Rules, contain no provision allowing in terms for a challenge to the appointment by a Party of counsel to represent it in an ICSID arbitration. Some other source for such a challenge must therefore be found, which the Respondent seeks to do by implication from the general tenor of the Arbitration Rules, and by invoking an inherent general power on the part of any tribunal to police the integrity of its proceedings. The only authority the Respondent cites in support of the existence of a power to exclude counsel and its exercise in specific circumstances is the recent decision of another ICSID Tribunal (in the case of *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*²), read in conjunction with the IBA Guidelines of 2004 on Conflicts of Interest in International Arbitration (themselves considered in that decision).³

15. The *Hrvatska* decision is not of course a binding precedent. The Tribunal observes simply that, if it indeed be correct to attribute to an ICSID Tribunal the powers implied by the *Hrvatska* Tribunal, they would remain powers to be exercised only in

² Ruling of 6 May 2008, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC950_En&caseId=C69). See also the Note in *Arbitration International*, Vo. 25, no. 4, at p.615, which appeared after the Parties had made their submissions.

³ It may be worth remarking that the IBA Guidelines direct themselves to the position of an arbitrator, and say nothing about a power on the part of a tribunal to intervene over the nomination of counsel.

extraordinary circumstances, these being circumstances which genuinely touch on the integrity of the arbitral process as assessed by the Tribunal itself; the mere subjective claim by one Party to an arbitration that a professional association between counsel and an arbitrator might be misunderstood can clearly not suffice, unless the claim is found by the Tribunal itself to be well grounded on some objective and dispassionate assessment of the circumstances of the individual case. As the matter was put in a leading decision of the UK House of Lords, the test is “whether [a] fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”⁴ It is not without significance that this decision was delivered in the context of Article 6 of the European Convention on Human Rights (right to a fair trial), and takes account of the jurisprudence of the European Court of Human Rights on that article (see further below).

16. A power on the part of a judicial tribunal of any kind to exercise a control over the representation of the parties in proceedings before it is by definition a weighty instrument, the more so if the proposition is that the control ought to be exercised by excluding or overriding a party’s own choice. One would normally expect to see such a power specifically provided for in the legal texts governing the tribunal and its operation. Absent express provision, the only justification for the tribunal to award itself the power by extrapolation would be an overriding and undeniable need to safeguard the essential integrity of the entire arbitral process. It plainly follows that a control of that kind would fall to be exercised rarely, and then only in compelling circumstances.

17. Quite what would constitute such a threat to the essential integrity of the arbitral process, as for example in arbitral proceedings under the ICSID Convention, is however not entirely easy to discern. In the case of a challenge (as now) based upon a prior association alleged to exist between counsel for a party and an individual member of an arbitral tribunal, the argument would presumably be that the party was gaining for itself,

⁴ *Porter v. Magill* [2002] 2 WLR 37, per Lord Hope. See also general standard 2(c) in the IBA Guidelines (‘if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision’).

through its choice of counsel, an automatic (and unfair) advantage in the litigation. And the advantage would presumably have to reside in an assumption that the arbitrator in question would have a natural sympathy, because of the prior association between them, for the arguments put forward in the litigation by the counsel in question as spokesperson for his or her client. Or at the very least there would have to be an appreciable risk of that happening, severe enough so as to jeopardize public confidence in the arbitral process.

18. To restate the underlying proposition in that way immediately shows, however, that the apprehension is one of potential bias on the part of the tribunal leading to a possible advantage to one litigating party. If such a risk did genuinely exist in a particular case it might provide grounds for a challenge to the composition of the tribunal under Articles 57 and 58 of the ICSID Convention (read together with Rule 9 of the Arbitration Rules), leading ultimately to the possible ‘disqualification’ of one or more of the members of the tribunal; the use of the term ‘disqualification’ in the Convention shows that the challenge would have to be based on the allegation that the member or members in question do not meet the *qualifications* required of an arbitrator under Article 14(1) of the Convention. Those qualifications, as is well known and widely understood, are that the arbitrator must be a person ‘of high moral character and recognized competence ... who may be relied upon to exercise independent judgment.’ So the question is: does a person acknowledged to have possessed those qualifications at the time of appointment (as, for example, in the *Hrvatska* case itself) lose them because from now onwards some or all of the argument presented to him, while still the argument of the same litigating party, will be delivered through the mouth of a different counsel with whom he has had some form of prior association?
19. If that be the regime applying to an arbitrator, the ICSID Convention contains nothing of a remotely similar kind in respect of the persons representing a Party in a dispute duly brought before the Centre, and remitted to a Tribunal under the Convention. Nor

do either the Institution Rules or the Arbitration Rules.⁵ This silence cannot be accidental, and surely derives from the fundamentally different duties inherent in the roles of arbitrator and of counsel. The duty of the arbitrator is to judge independently and impartially, free from any influence other than the strength of the cases presented to him. Counsel, on the other hand, is not required to be ‘impartial’ at all, nor ‘independent’ in the sense demanded of an arbitrator, since counsel will by definition be retained, and paid, by one of the Parties. Counsel’s duty is to present *his Party’s* case, with the degree of dependence and partiality that the role implies, so long as he does so with diligence and with honesty, and in due compliance with the applicable rules of professional conduct and ethics.

20. The importance of the interests at stake can readily be illustrated by reference to Article 6 (right to a fair trial) of the European Convention on Human Rights.⁶ It is not simply that that Article provides, in its paragraph (1), that “[i]n the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”, but also that the same Article lays down in its paragraph (3), as one of the individual’s basic rights in this connection, the right “to defend himself in person *or through legal assistance of his own choosing*” (emphasis supplied). Admittedly, this is put in the context of defence against criminal charges, but that arises from the overall context of the Convention, and there is no room for any suggestion that the provision is not simply one illustration of a more fundamental principle still about a litigant’s basic rights in pursuing or defending legal proceedings.⁷ The fact that the two elements appear side by side in the same Article shows that each goes hand in hand with the other as essential elements of what constitutes a fair trial.

⁵ Nor is there even a corresponding rubric in the Second Edition (just published) of the leading Commentary on the Convention by Schreuer et al.

⁶ See paragraph 15 above.

⁷ Cf. also the exactly similar provisions in Article 14 of the International Covenant on Civil and Political Rights of 16 December 1966.

21. The Tribunal is not therefore convinced that there is any necessary tension between the two basic principles: the independence and impartiality of the tribunal (coupled with the associated principle of the immutability of a tribunal duly established) *vs.* the litigant's right to be represented by persons of his or her own free choice. If special circumstances were to arise in a specific case such that these two basic principles did come into collision with one another, it would be the tribunal's duty to find a way of bringing them into balance, not to assign priority to either over the other. To put the matter bluntly, there should be no room for any idea to gain ground that challenging counsel is a handy alternative to raising a challenge against the tribunal itself, with all the consequences that the latter implies.
22. The decision of the *Hrvatska* Tribunal cites the doctrine and practice supporting the inherent authority of an international court or tribunal to exercise such powers as are necessary to preserve the integrity and effectiveness of its proceedings. Whether such general authority does or should extend to the exclusion of counsel is however a more open question. The domestic court decisions on the matter are directed to a different issue, namely the possibility that counsel for one party might have gained (or might have been able to gain) access to privileged information of the other party. As the Tribunal has already pointed out (paragraph 17 above), the only justification for such extension in the arbitral context would be a clear need to safeguard the essential integrity of the arbitral process, on the basis that that integrity would be compromised were the exclusion not ordered. For that, there is however very little support, if any, in the established practice in international litigation involving States.⁸ It is by no means uncommon, for example, that a State appearing before the International Court of Justice as Applicant or as Respondent might quite properly be represented before the Court by an Agent, or by Counsel, who until recently had been working in close and continuing association with a person who had in the meanwhile been elected to serve as Judge on the Court; similar situations can readily be envisaged before the European Court of Human Rights or the European Court of Justice, in litigation pitting a private party

⁸ See, for example, "Article 17", in the Commentary on the Statute of the International Court of Justice (ed. Zimmermann, Tomuschat & Oellers-Frahm).

against the State.⁹ But, as the Tribunal understands matters, there is no trace of this being regarded by those standing judicial organs as a circumstance impugning either the proper composition of the Court itself or the right of the State's chosen representatives to audience before it. Similarly, but in the converse direction, the Tribunal is reluctant to lend encouragement to any practice over and above the accepted rules of professional conduct and ethics that might end up casting a blight over the investor's freedom to find the most appropriate person to represent it in promoting its claims within the ICSID system.

III. The Extent of a Tribunal's Powers

23. The Tribunal turns now to the second point in paragraph 13 above: assuming that there does exist in some limited circumstances a power to control a party's choice of counsel, how far does the power extend, and what remedies is an ICSID tribunal authorized to grant? This seems to the Tribunal to be a separate question in its own right – although it may be that the answer to it casts some reflected light on the underlying assumption as to whether the power itself should be admitted. The point may be illustrated by reference to the *Hrvatska* case mentioned above. There, it would appear that the Claimant asked the Tribunal to “recommend to the Respondent” that it “refrain from using the services of the counsel in question at the hearing” (the term “recommend” no doubt being borrowed by analogy from Rule 39 of the Arbitration Rules on provisional measures). In its Decision, the Tribunal rephrases this so as to read that the Claimant seeks an order from the Tribunal that the Respondent “refrain from using the services of” the counsel in question, *tout court*. When it comes to its final decision on the point, though, what the Tribunal in fact rules is that the barrister in question “may not participate as counsel in this case.”
24. That progression may well evidence an underlying uncertainty over just what it is that an ICSID tribunal is empowered to do when confronted with sufficiently compelling circumstances. So, to take an obvious example, the differences between “refrain from

⁹ It seems not inappropriate to cite these European examples in a Netherlands/Romania context.

using the services of X at a hearing” and “order that X may not participate as counsel in the case” are stark; and it may be questioned what possible risk of bias could be created by, say, the provision of private advice by X on the party’s handling of its case, or even X’s participation in settling the terms of submissions to be put before the tribunal in writing or orally. But there seems to be no persuasive logic in admitting that an individual might advise the litigating party, draft its pleadings and submissions, interview the witnesses, and retain the experts – so long as that individual doesn’t sign the pleadings or appear to present the argument in person. The Respondent, to its credit, accepts the logic of the situation, by asking the Tribunal (see paragraph 1 above) to “remove Mr. Legum from the case and to forbid him from participating in it in any way,” but at the cost of framing its request in strikingly absolute and sweeping terms.

IV. The Circumstances of the Present Case

25. Having reached this point in its analysis, the Tribunal does not consider, for the reasons that follow to do with the actual circumstances of the present case, that it is called upon to decide definitively what the limits are of any power an ICSID tribunal might possess to exclude counsel, beyond its finding in paragraph 16 above that any such power as may exist would be one to be exercised only rarely, and in compelling circumstances. The Tribunal is however conscious of the fact that its analysis above might imply that the *Hrvatska* Tribunal was in some way not sufficiently attuned to the several principles at issue in situations of this kind, and would like to make it clear that that is emphatically not the case. There are ample indications on the face of its Decision that the *Hrvatska* Tribunal tried to look at matters in the round and, having done so, balanced out the particular circumstances that were before it in the way we can now see. It is obviously not for this Tribunal to second-guess that assessment, or to express its own view on a professional association between counsel and arbitrator in that case which both of them had affirmed to be nominal and not of a kind to affect the arbitrator’s independence of judgement. It may also be that the *Hrvatska* Tribunal was influenced by the secondary role that was to have been played by the newly appointed

counsel,¹⁰ as well as by the somewhat surprising remark that the objecting Party had indicated that withdrawal of the counsel in question would “eliminate the problem entirely” from its standpoint.¹¹ What is however plain beyond a shadow of doubt is that the *Hrvatska* Tribunal was influenced to a material degree by the late announcement of the new appointment as counsel, coupled with the light that had been cast on the surrounding circumstances by the adamant refusal of the appointing Party’s representatives to make any disclosure until the very last minute – which they themselves acknowledged before the Tribunal had been an error of judgement. Viewed from this perspective, the *Hrvatska* Decision might better be seen as an *ad hoc* sanction for the failure to make proper disclosure in good time than as a holding of more general scope.

26. At all events, whatever amongst these factors might have been the one that most moved the *Hrvatska* Tribunal, none of them is present in this case. In the present case, the Tribunal has taken the opportunity available to it to consider with full and due reflection the explanations offered by both parties of the association between Mr. Legum and one of its Members, and cannot as a result find anything in it that might, on the *Porter v. Magill* standard of the UK House of Lords,¹² raise “a real possibility that the tribunal was biased,” or that might provide a reasonable basis, in terms of Article 14 of the ICSID Convention and Article 6 of the Rules, for questioning the ability of the Tribunal or any of its Members to judge fairly or exercise independent judgment. There is moreover no dispute that the association in question is in the past and raises no issue as to either person having a present or future financial or material interest in the other’s professional activity. Finally, the circumstances were put on the record within a short time after new counsel’s appearance, and well before the hearing was to take place or other decisions needed to be made.

¹⁰ Relating to quantum only, so it would seem.

¹¹ With its overtones that the object of the exercise was to satisfy the objector’s concerns rather than to arrive at the Tribunal’s own dispassionate assessment.

¹² See paragraph 15 above.

27. In sum, the Tribunal can find in the circumstances before it no basis for any suggestion that it should interfere in the choice by Claimant of its counsel for these proceedings, or indeed for any suggestion that the preservation of the integrity of these proceedings requires it to consider doing so. The Respondent's application is accordingly denied.

/signed/

Mr. Marc Lalonde, P.C., O.C, Q.C.
Arbitrator

/signed/

Mr. Donald Francis Donovan, Esq.
Arbitrator

/signed/

Sir Franklin Berman, KCMG, Q.C.
President