

JUDGEMENT OF THE COURT OF FIRST INSTANCE OF BRUSSELS

(71st Chamber)
23 November 2006
R.G. 2005/14005/A
(free translation)

Final judgement in the presence of both parties

In re :

The Republic of Poland represented by its Prime Minister and in so far as required by the Minister of the Treasury, having elected domicile at the address of its advisors;

Claimant,

Represented by Mr. Paul Alain Foriers and Mr. Rafaël Jafferali loco Mr. Lucien Simont and Mr. Vanessa Marquette, attorneys at law, avenue Louise 149/20, 1050 Brussels;

Versus :

Eureko by, a limited liability of Dutch law, having its seat at 3707 NH Zeist (The Netherlands) Handelsweg, 2, registered with the chamber of commerce of Utrecht under number 33235189;

Defendant,

Represented by Mr. Marc van der Haegen, attorney at law, chaussée de la Hulpe 177/6, 1170 Brussels;

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In this case taken into consideration on 19 October 2006, the Court pronounces the following judgement;

Having seen the procedural documents, namely :

(...)

Having heard counsels for the parties in their explanations and submissions at the public hearing of 19 October 2006;

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I. Object of the dispute

The Republic of Poland requests annulment of the arbitral award rendered on 19 August 2005 in the context of a dispute opposing the Republic of Poland to the Dutch company Eureko.

The Republic of Poland requests the benefit of an immediately enforceable judgement, notwithstanding any appeal and without prior payment into court or guarantee.

III. The legal basis for the institution of the arbitral procedure

Eureko BV has decided to start an arbitral procedure against the Republic of Poland on the basis of the Treaty signed on 7 September 1992 between the Netherlands and the Republic of Poland on Encouragement and reciprocal Protection of Investments.

The Treaty ensures a mutual protection for any national of the contracting States investing on the territory of the other contracting State.

This Treaty provides, in its article 8, the settlement of disputes arising between one Contracting State and an investor of the other Contracting State :

"1. Any dispute between one Contracting Party and an investor of the other Contracting Party relating to the effects of a measure taken by the former Contracting Party with respect to the essential aspects pertaining to the conduct of business (this is being translated as "en rapport avec les aspects essentiels relatifs à la conduite des affaires" while the Republic of Poland uses the following translation : "En rapport avec les aspects essentiels relatifs à la gestion de l'entreprise"), such as the measures mentioned in Article 5 of this Agreement or transfer of funds mentioned in Article 4 of this Agreement, shall to the extent possible, be settled amicably between the parties concerned.

"2. If such dispute cannot be settled within 6 months from the date either party requests amicable settlement, it shall upon request of the investor be submitted to an arbitral tribunal. In this case, the provision of paragraphs 3-9 of Article 12 shall be applied mutatis mutandis (...)".

In accordance with Article 12.6 of the Treaty,

" The tribunal shall decide on the basis of respect for the law, including particularly this Agreement and other relevant agreements existing between the two Contracting Parties, and the universally acknowledged rules and principles of international law. (...)".

IV. The award subject to this annulment procedure

Eureko asked the arbitral tribunal to declare that the Republic of Poland has violated articles 3 (1), 3 (2), 3 (5) and 5 of the Treaty.

The Republic of Poland considered that the arbitral tribunal was without jurisdiction to decide on the dispute, in view of the jurisdiction clause contained in the share purchase agreement and its two addenda, and in addition it disputed having violated the provisions of the Treaty.

By a partial award of 19 August 2005, the arbitral tribunal, having assumed jurisdiction, has decided :

- "That the Government of Poland is in breach vis-à-vis Eureko BV of its obligations under articles 3.1, 3.5 and 5 of the treaty between the Kingdom of The Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments.
- That the second phase of the proceedings on remedies for these breaches shall be the subject of a subsequent Order, to be made in consultation with the Parties".

1.2.1.

The motivation of an arbitral award (Art. 1701, 6, C.J.) must have the same quality as the one that is required for judicial decisions; it must be complete, precise, clear and adequate. However, the arbitrator, no more than the judge, must respond to a defence that has become without relevance because of a finding of its decision or because of the solution given by him to the litigation.

In this case, it necessarily results from the terms of article 8 than any breach of article 5 of the Treaty is a "measure with respect to the essential aspects pertaining to the conduct of business", in the meaning described to those terms by the Republic of Poland before the arbitral tribunal.

It results that it was not necessary for the arbitral tribunal to respond to the argument of the Republic of Poland, as the arbitral tribunal sufficiently justifies its jurisdiction under article 8 in concluding to the existence of a violation of article 5.

Arguably, the arbitral award has also admitted a violation of articles 3.1 and 3.5 of the Treaty, but the same facts were lying on the basis of this finding so that these facts, which constituted a violation of article 5, necessarily constitute a measure "with respect to the essential aspects pertaining to the conduct of business" (see the two translations mentioned above).

It was consequently indeed useless, because of the violation that was found of article 5, to determine, on the basis of the same facts of the case, if these facts effectively had the nature of affecting notably the conduct of the enterprise or of the business.

The argument is ill-founded.

2.

The arbitral tribunal has allegedly exceeded its powers by not having regard to the jurisdiction clause contained in the agreement. The second argument is therefore based on the absence of jurisdiction or excess of power, - article 1704.2,d) of the judicial code.

2.1.

The Republic of Poland argues that the arbitrators have concluded to a violation of the Treaty exclusively on the basis of an interpretation of the agreement and on the finding of a violation of this same agreement.

The dispute was a purely contractual dispute which, because of the jurisdiction clause accepted by the two parties, should have been submitted to the Polish courts.

2.2.

Eureko argues rightly that the argument derived from article 1704, 2, d) of the Judicial Code, which is the provision cited by claimant, only covers violations of provisions accepted by the parties for the conduct of the arbitration and which affect the contractual link. To examine an argument based on article 1704, 2, d) of the judicial code, one only has to determine whether the arbitrators have decided in conformity with the arbitration agreement (M. Huys and G. Keutgen, *L'arbitrage en droit belge et international*, Bruylant, Bruxelles, 1981, n° 529, p. 355; D. Matray and F. Moreau, *Les voies de recours contre les sentences arbitrales*, in *Arbitrage en mode alternative de règlement des conflits*, n° 26, p. 290 and 291).

Article 1704, 2, d) can therefore not serve as a basis for a recourse when the arbitral tribunal, in assessing its jurisdiction, commits an error of law, which is independent of the arbitration agreement.

Without it being necessary for the arbitral tribunal to say so explicitly, it may be deduced from this paragraph that the parties to the first addendum have expressed the will to attach a firm deadline to the promise relating to the IPO :

- either on 31 December 2001;
- or a new schedule to be adopted by the parties.

The sole relevant question, concerning the interpretation of the effects of the share purchase agreement and the first addendum under Polish law, was whether or not there existed a final date for the performance of the undertakings underwritten.

The arbitral tribunal has responded to this question in § 156 of the arbitral award.

The argument is ill-founded.

**FOR THESE REASONS,
THE COURT,**

Having regard to the provisions of the law of 15 June 1935 of the use of languages in judicial matters,

Deciding in the presence of both parties;

Declares the recourse admissible, but ill-founded;

Dismisses the Republic of Poland;

Condemns the Republic of Poland to the costs of the proceedings liquidated as follows :

For the Republic of Poland :

Writ of summons	369,50 €
Procedural indemnity	182,20 €

For Eureka B.V. :

Procedural indemnity : 182,20 €

So judged and pronounced at the public hearing of the 71st chamber of the Court of first instance of Brussels on 23 November 2006.

Were present and sitting :

Ms. COIRBAY, sole judge,
Ms. DE PAEPE, employee with the clerk's office, assumed clerk ...

signed,

DE PAEPE C.

COIRBAY R.