

JUDGEMENT OF THE COURT OF FIRST INSTANCE OF BRUSSELS

(4th Chamber)

22 December 2006

R.G. 2006/1542/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 Jafferalli loco Mr. Lucien Simont and Mr. Vanessa Marquette, attorneys at law, avenue Louise 149/20, 1050 Brussels,

Versus :

1. Eureko by, a limited liability company 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, having elected domicile at the address of its advisor;

Defendant,

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

And in the presence of:

1. Mr. Stephen M. Schwebel, domiciled 1501 K Street, N.W. Washington D.C. 20005 (U.S.A.), having elected domicile at the address of its advisor,

Represented by Mr C. Verbruggen loco Mr André Faurès, attorney at law, Avenue Louise 106, 1050 Brussels,

2. **Mr. Yves Fortier**, domiciled Swabey Ogilvy Renault, 1981 McGill College Avenue, Bureau 1100, Montréal, Québec, H3A 3C1 (Canada);

3. **Mr. Jerzy Rajski**, domiciled Burkelska 6 B, C3-973 Warsaw (Poland);

Who do not appear, nor are represented;

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In this case taken into consideration on 3 November 2006, the Court pronounces the following judgement;

Having seen the procedural documents, namely :

- the judgement rendered on 16 June 2006;
- the submissions following adjournment of the parties Republic of Poland and Eureka;

Having heard counsels for the parties Republic of Poland, Eureka and Schwebel in their explanations and submissions at the public hearing of 3 November 2006;

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I. Jurisdiction of the Court

Further to the judgment of 16 June 2006, the Claimant submitted as requested by the court its request for recusal of Mr Schwebel to CEPANI.

CEPANI represented by its chairman expressed its position in a letter dated 12 October 2006, indicating that:

"It is our opinion that CEPANI lacks authority to rule on Mr Schwebel's recusal.

Indeed, the recusal procedure organized by Article 10 of CEPANI's rules only applies in the case of arbitrators appointed or approved by CEPANI's Appointments Committee or the CEPANI chairman. In fact, this procedure is a mere extension of the procedure for appointment and approval of arbitrators set forth in Article 9 of CEPANI's rules.

In general, the rules of a given arbitral institution are conceived in order to be applied within the framework of this institution.

It is thus not possible to take from CEPANI's rules a particular provision, especially a basic one, and to refer disputes relating to that provision to CEPANI if the other provisions of the CEPANI's rules which are directly related to the provision in question do not apply. CEPANI's rules constitute a whole, certainly with respect to their basic mechanisms, which no doubt include the recusal of an arbitrator who has been appointed or approved by CEPANI."

Therefore, the Court is the appropriate venue having jurisdiction to rule on the request for recusal of arbitrator Schwebel.

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Three questions need still to be judged:

- Inadmissibility of the recusal claim because it was allegedly brought too late;
- Alleged lack of grounds for this recusal;
- Immediate enforcement of the judgement.

II. Inadmissibility of the recusal

Article 1691(1) Judicial Code provides that a request to remove an arbitrator must be served on the arbitrators *"as soon as the party concerned learns of the grounds for recusal"*.

Eureko is of the opinion that the notice of recusal dated 7 October 2005 is late as the invoked grounds for recusal were known or should have been known by the Claimant a long time before this notice.

Claimant argues that the existence of links between Mr Schwebel and the law firm Sidley Austin does not constitute the sole ground for recusal but that this recusal is justified by the conjunction of these links with the fact that arbitrator Schwebel was presented in *The American Lawyer's Focus* as counsel to Cargill, Claimant's opponent in an other arbitral procedure and the peculiar reaction of Mr Schwebel and Sidley Austin to the legitimate questions raised by Claimant in this respect;

Eureko considers that *"the impetus for the present action was the (mis) information according to which Mr Schwebel allegedly served as counsel to Cargill, Inc, (...)"*;

It is obviously the publication of this information, admittedly incorrect, which has decided the Republic of Poland to act, since, as stated by Eureko, the Republic of Poland was perfectly aware of the fact that, in reality, Mr Schwebel did not appear in the Cargill case;

Furthermore, it is not established that Claimant discovered this publication before the end of September 2005, as Claimant alleges;

Therefore, the notice of recusal dated 7 October 2005 is not late and the present action is consequently admissible.

III. The merits of the request for recusal

Article 1690(1) of the Judicial Code provides that:

"arbitrators can be removed if the circumstances are such as to raise legitimate doubts as to their impartiality or independence";

Claimant derives from the circumstances described above (sub II) that it has justifiable legitimate doubts as to the impartiality and the independence of Mr Schwebel and relies namely on the English saying *"justice must not only be done, it must also be seen to be done"*; this is a principle developed by case-law of the European Court of Human Rights.

In this case the court assumes that Mr Schwebel was not involved in the Cargill case, since he says so and nothing proves the contrary;

On the other side, Mr Schwebel says that he has an independent office in Washington, independent from the Sidley Austin firm and that the different presentations made in press releases by Sidley Austin and in the American Lawyer's Focus which could indeed have been confusing or given rise to interpretation were deleted or rectified;

So the possible doubts of Claimant have been clearly refuted;

In this respect, the mere fact that arbitrator Schwebel has his office in Washington B.L. in the same building as Austin Sidley is not sufficient to maintain a suspicion with regard to his independence and impartiality;

Consequently the request for recusal is ill-founded;

Finally the present objections of Claimant with regard to the attitude of arbitrator Schwebel during the arbitration proceedings were not raised *in tempore non suspecto* and in due time, i.e. during these arbitration proceedings and before the arbitral award of 19 August 2005, which condemned the Republic of Poland on the principle.

IV. Immediate enforcement

The two parties claim the immediate enforcement of the judgement;

But they do not justify their request; Defendant limits itself to argue that the claim of the Republic of Poland is only a delaying tactic, but without drawing a precise consequence from this fact with respect to the immediate enforcement, in its summary trial brief, and the Republic of Poland only raised the point during the oral hearings, that it can be doubted that a decision which would reject its claim could be granted immediate enforcement;

The court therefore rejects this request.

**FOR THESE REASONS,
THE COURT,**

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

Deciding contradictory with regard to the Republic of Poland, the company Eureka BV and arbitrator Schwebel and in the absence of arbitrators Fortier and Rajski, in first instance and in furtherance to its prior judgement;

Declares the claim admissible, but ill-founded;

Condemns the Claimant to the costs of the proceedings liquidated as follows :

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

So judged and pronounced at the public hearing of the 4th chamber of the Court of first instance of Brussels on 22 December 2006.

Were present and sitting :

M. STEVENS, sole judge,

Ms. LEFEBVRE, delegate clerk of the court ...

signed,

LEFEBVRE

STEVENS