



## Arbitration Newsletter Switzerland

# Nomura, Saluka and the Czech Republic: a further Round in the Battle!

The Swiss Federal Supreme Court made recently available on its website [www.bgr.ch](http://www.bgr.ch) its decision 4P.114/2006, of September 7, 2006 (in German) and a full copy of this award has just very recently been made available on the website of the University of Victoria, Canada (<http://ita.law.uvic.ca/>).

This decision is of interest not only because it deals with an investment dispute of significant size which therefore attracts just by figures public interest but also because it covers a dispute on jurisdiction where the Supreme Court enjoys full cognition.

### Summary of facts

In order to understand the reasonings of the Supreme Court the facts of this particular case need to be summarized. At the beginning of the nineties the Czechoslovak Federation started privatisation of its banking sector. This effort continued also after the separation of this state in two independent states, namely the Czech and the Slovak Republic, as per December 31, 1992. Around 1994 four dominating banks were established in the Czech Republic ("the big Four") namely, Investicni a Postovni ("IPB"), Ceska sporitelna ("CS"), Komerčni banka ("KB") and Ceskoslovenska obchodni banka ("CSOB"), all of them regulated by the Czech National Bank ("CNB").

With contract of March 18, 1998 the Czech Republic, acting through the Czech National Property Fund ("NPF"), sold 36 % of the shares of IPB to Nomura Europe plc in GB, who held already 10 % of IPB. Nomura Europe plc subsequently transferred its shares in IPB on October 2, 1998 resp. February 24, 2002 to Saluka Investments BV, its wholly owned subsidiary under Dutch law.

The big Four were strategically of comparable importance for the Czech economy. All of them suffered from a significant exposure of outstanding

credits. Therefore, the Czech government changed its policy entered into previously in 1997, namely not to support the big Four. Consequently, in 1999 a significant subsidy was granted to KB, CS and CSOB amounting to 19 % of the total BIP of the Czech Republic. IPB was not included in this program since, as of that time, it was already a wholly privately owned company. CNB thereafter started investigations at IPB and, as a result thereof, put IPB in June 2000 under custody. Later, the operative part of IPB was sold to CSOB, whereby the Ministry of Finance of the Czech Republic provided a state guarantee and a hold harmless declaration to CSOB. This custody upon IPB ended in June 2002 and Nomura regained control over its subsidiary.

In December 2002 the Czech Republic and NPF initiated arbitration proceedings in Zurich<sup>1</sup> against Nomura and Soluka. Subsequently Saluka started arbitration proceedings in Geneva<sup>2</sup> against the Czech Republic based on the BIT between the Czechoslovak Republic and the Netherlands, entered into in April 1991 and thereafter confirmed by the Czech Republic in October 1992. The Czech Republic then filed a notice to dismiss with the argument that Saluka would not qualify as bona fide investor under the BIT. In March 2006, the arbitral tribunal formally accepted jurisdiction in this matter and ruled that the Czech Republic had violated in various respects article 3.1 of the BIT, reserving the financial consequences arriving thereof to a subsequent decision.

Against this partial award of the arbitral tribunal in Geneva the Czech Republic filed an action for annulment, requesting, by way of a declaratory judgment, that the arbitral tribunal should not be competent to decide on potential violations of the BIT occurring prior to Saluka's decision to invest in the Czech Republic.



**Procedural issue: there are no two bites to the apple!**

In the proceedings before the Supreme Court the Czech Republic, as claimant under the action for annulment at the Supreme Court, asked in its filing for the right to reply to any arguments raised by Saluka in a second brief. The Supreme Court had to remind the Czech Republic that based on the pertaining procedural rules<sup>3</sup> a second exchange of briefs is the exception, to be granted under very specific circumstances only, and, if in the view of the party filing a second brief, such particular circumstances were met such second filing would have to be made immediately. In the particular case the Czech Republic waited for 30 days to request such second filing which was in the view of the Supreme Court already a questionable delay. Moreover, the Czech Republic could, in the view of the Supreme Court, have anticipated the arguments raised by Saluka in its reply brief already in advance. It could not have come as a surprise that Saluka was raising the defence that the Czech Republic had in the underlying arbitration agreement already waived, based on article 192 PILA, its right for an action for annulment. The parties were indeed confronted on that issue already earlier in the landmark decision of BGE 131 III 173, arising out of the Zurich arbitration proceedings. Consequently, the Supreme Court rejected the request of the Czech Republic for a second exchange of briefs.

**Did the parties actually waive their right for an action of annulment?**

In dealing with the arguments of Saluka the Supreme Court referred, in essence, to the arguments of the previous decision as to the alleged waiver for an action of annulment. In particular, the Supreme Court restated that such a waiver could be assumed only under very specific circumstances where the parties to the arbitration agreement explicitly agreed on such a waiver. The reference, as in this case, to the finality and the binding character of the decision of the arbitral tribunal was not enough<sup>4</sup>. This conclusion, already made by the Supreme Court in the previous decision, could not be altered by making reference to the Vienna Convention of May 23, 1969 on the Interpretation of Contracts. Furthermore, the Supreme Court did not hear the argument of Saluka, according to which states being parties to a BIT would not

accept interventions of an arbitral tribunal seating in a third state. Finally, the Supreme Court rejected the argument raised by Saluka that the Czech Republic had, at the time of the conclusion of the BIT, not yet adhered to the Washington Convention, which, in addition, also provides for a possibility to request annulment of arbitral decisions rendered under the ICSID rules. Considering all of these arguments the Supreme Court concluded there was no evidence established by Saluka that the parties had actually agreed on a waiver of annulment in the sense of article 192 PILA.

**Did the arbitral tribunal have jurisdiction?**

The Czech Republic did also question the jurisdiction of the arbitral tribunal. For that purpose it maintained that the arbitral tribunal's jurisdiction was restricted (*ratione temporis*) to potential violations of the BIT after Saluka had actually rendered its investments, thus triggering the protective provisions of the BIT. It seems that both Saluka and the arbitral tribunal, were agreeing on this principle. The question was only, as to the facts, which was to be considered as the triggering issue leading to the violation of the BIT, if any. According to the Czech Republic the facts leading to the violation of the BIT steamed out of a decree issued already on May 27, 1998, whereas the BIT became effective between the two states on October 2, 1998 only.

Recalling that the Supreme Court enjoys full cognition to review decisions of arbitral tribunals as to jurisdiction the Supreme Court then went through a detailed analysis of the relevant facts and concluded there were no legitimate reasons shown why the Czech Republic did treat IPB differently from the other big Four and confirmed that the Czech Republic did after, October 2, 1998, the date the relevant BIT became effective, not render fair and equitable treatment to Saluka in the sense its of article 3 (1). Being satisfied with the factual conclusions of the arbitral tribunal as to that issue the jurisdiction of the arbitral tribunal based on the Czech-Dutch BIT was confirmed by the Supreme Court. Consequently, the Supreme Court rejected the action for annulment filed by the Czech Republic, herewith also approving that article 3 (1) of the Czech-Dutch BIT was violated by the assistance provided to the other three of the big Four.



## Conclusion

The result of this decision seems to be clear, it is based on a detailed analysis of the facts, as established by the arbitral tribunal in Geneva. Once again the Supreme Court has supported the decision of an arbitral tribunal seating in Switzerland. Therefore, the arbitral proceedings in Geneva shall continue now as to the assessment of damages. In this perspective it will be interesting to follow the "interaction" between the Zurich and Geneva arbitral tribunal which, in essence, cover the same facts but, involve, at least by name, not the same parties and do not deal with the same reliefs thought. Whichever the outcome, the two arbitral proceedings are continuing to be of interest.

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<sup>1</sup> Ad hoc arbitration, with the following arbitrators: Pierre Tercier, Chair, Yves Derains and Bernard Hanotiau. This arbitral tribunal accepted in August 2004 jurisdiction over the case against the Nomura but denied jurisdiction as to Saluka. Against this decision Nomura filed an action for annulment which led the Supreme Court to its landmark decision 131 III 173, where, for the first time, a waiver of an action for annulment in the sense of article 192 PILA was assumed (cf. our newsletter of September 14, 2006).

<sup>2</sup> Ad hoc arbitration, with the following arbitrators: Arthur Watts QC, Chair, Yves Fortier QC and Peter Behrens.

<sup>3</sup> Article 93 (3) of the Law on the Organisation of the Federal Judiciary ("OG").

<sup>4</sup> Article 8 (7) of the BIT between the Czech Republic and the Netherlands reads as follows: "The tribunal takes its decision by majority of votes; such decision shall be final and binding upon the parties to the dispute".