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International Arbitration Case Law

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Award Name and Date: A11Y LTD. v. Czech Republic (ICSID Case No. UNCT/15/1) – Award – 29 June 2018

Case Report by: Velislava Hristova**, Editor Ignacio Torterola***

Summary: Claimant brought an action for relief against the Czech Republic pursuant to the United Kingdom of Great Britain and Northern Ireland-Czech Republic BIT ('BIT') alleging that the Czech Republic had breached the expropriation provision set out in the BIT in relation to its investment in assistive technologies for blind and visually impaired persons in the Czech Republic. Following a decision on jurisdiction, the Tribunal analysed the remaining jurisdictional objection, as well as the liability and quantum issues. It finally found that the Claimant's case on the merits fails in its entirety because it has not proved that the measures complained of are tantamount to an indirect expropriation under Article 5 of the BIT.

Main Issues: Whether Claimant made an investment protected under the BIT and whether Respondent's measures are tantamount to indirect expropriation under Article 5 of the BIT.

Tribunal: Hon. L. Yves Fortier, QC (Presiding Arbitrator), Prof. Stanimir A. Alexandrov (Arbitrator) and Ms. Anna Joubin-Bret (Arbitrator).

Claimant's Counsel: Mr. Hussein Haeri, Mr. David Walker, Ms. Uliana Cooke, Ms. Ruzin Dagli (Withers LLP, London), Mr. Lucas Bastin (London, United Kingdom).

Respondent's Counsel: Mgr. Marie Talašová LL.M., Ms. Anna Bilanová, Mr. Martin Nováček (The Ministry of Finance of the Czech Republic), Dr. Gerold Zeiler, Dr. Alfred Siwy, (Vienna, Austria)

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Digest:

1. Relevant Facts

A11Y LTD. ('A11Y' or 'Claimant') is a company incorporated under the Laws of the United Kingdom of Great Britain and Northern Ireland (¶ 32). Respondent is the Czech Republic ('Czech Republic' or 'Respondent').

In January 2012, the Act on Providing Allowances to Persons with Health Impairment ('Act on Allowances') came into effect in the Czech Republic providing for the granting of subsidies to persons with health impairments, including the blind. The applicant is required to pay 10% of the aid for which an allowance is sought (¶¶ 51-53).

On 17 October 2012, Claimant registered its Czech branch office (¶ 33). From late 2012, Claimant took over the business with assistive technology solutions for blind and visually impaired people of BRAILCOM, ('BRAILCOM'), including taking on new contracts with customers and hiring former BRAILCOM's employees (¶ 40).

After the Act on Allowances came into force, the Labour Office received a large number of applications and, since it did not have any guidance as to the implementation of the Act, it approved most of the applications without in-depth scrutiny (¶ 54).

On 21 May 2013, the Labour Office received a letter from Transparency International ('TI') stating that BRAILCOM contacted persons eligible for aid under the Act on Allowances with an offer that if they enter into an agreement with it, BRAILCOM will organize the procedure for applying for the aid and will pay the 10% applicant's statutory contribution. Furthermore, according to the information with which TI was provided by clients, BRAILCOM marks up the value of the special aid considerably (¶ 55).

Following the TI's letter and internal investigation, the Labour Office requested the Ministry of Labour to provide guidance on the application of the Act on Allowances (¶ 56). On 12 July 2013, the Ministry of Labour issued a statement ('July Statement') clarifying that when the aids applied for consist of several individual functionally independent components, the applicant is obliged to submit a list of the particular components and their respective prices in order for the Labour Office to assess whether the criteria of the Act on Allowances are met. The July Statement also clarified that additional services or accessory products could not be considered to be part of the basic version of aid and were therefore not covered under the Act on Allowances (¶¶ 57-59).

A11Y alleged that Respondent adopted four measures which destroyed its investment in the Czech Republic and led to its insolvency (¶ 64).

Claimant brought an action for relief against the Czech Republic alleging that the Czech Republic had breached the expropriation provision set out in the BIT (¶ 30).

2. Procedural History Following the Decision on Jurisdiction

On 9 February 2017, the Tribunal issued its Decision on Jurisdiction (¶ 6). The Tribunal decided it had jurisdiction over the claims made under Articles 2(3) and 5 of the BIT. However, the Tribunal rejected Claimant's request for relief for a declaration that the Czech Republic has

breached Article 2(3) of the BIT. The Tribunal decided it had no jurisdiction regarding the claims under Article 2(2) and 3 of the BIT. The other objections of Respondent were rejected (¶ 7).

On 9 February 2017, the Tribunal invited the Parties to agree on the remainder of the procedural calendar. After Parties' proposal, on 21 February 2017, the Tribunal issued Procedural Order No. 7 establishing the procedural calendar for the remainder of the proceedings (¶ 8).

The Parties submitted document production requests on 3 April 2017 in accordance with the procedural calendar and on 11 April 2017, the Tribunal issued Procedural Order No. 8 setting out its decision on the Parties' document production requests (¶ 9). On 25 May 2017, the Tribunal issued directions regarding Claimant's request on the adverse inference it seeks against Respondent stating that the request is premature, but Claimant can renew it in due course (¶ 10).

On 3 July 2017, Claimant filed its Reply on the Merits and Jurisdictional Objection on Investment and on 15 September 2017, Respondent filed its Rejoinder (¶¶ 11-12). Claimant filed its Rejoinder on the Jurisdictional Objection on Investment on 13 October 2017 (¶ 13).

On 24 October 2017, Claimant requested Ms. Joubin-Bret to disclose information regarding her interactions with the Ministry of Finance of the Czech Republic in connection with her participation as a speaker at the Prague Conference on International Investment Treaties, which Ms. Joubin-Bret provided on 25 October 2017. Claimant requested further information on 27 October 2017 and Ms. Joubin-Bret responded to Claimant's request on 28 October 2017 (¶ 14).

On 1 November 2017, the President of the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference on behalf of the Tribunal and on 2 November 2017, the Tribunal issued Procedural Order No. 9 regarding the organization of the hearing (¶ 15). On 3 November 2017, the Parties filed skeleton arguments (¶ 16). On 7 November 2017, the Parties submitted an agreed daily schedule for the hearing (¶ 17). Claimant requested leave from the Tribunal to file new documents on 8 November 2017 and Respondent agreed to Claimant's request on 9 November 2017 requesting leave to submit a new document. On 9 November 2017, the Tribunal admitted Claimant's documents into the record and after inviting Claimant to comment on Respondent's request for leave which was not objected by Claimant, accepted Respondent's new document into the record (¶ 18). Claimant filed the recently admitted evidence on 9 November 2017 and Respondent filed the new evidence on 10 November 2017 (¶ 19). The hearing on the remaining jurisdictional objection on investment and the merits was held from 13 to 17 November 2017 in Paris (¶ 20).

On 28 November 2017, Ms. Joubin-Bret informed the Parties and the members of the Tribunal of her decision to step down from the Tribunal because of her appointment as Director of the International Trade Law Division of the Office of Legal Affairs of the United Nations and *ex officio* Secretary of the United Nations Commission on International Trade Law. On 20 December 2017, Ms. Joubin-Bret informed the Parties that she was authorized by the Secretary-General of the United Nations to stay as arbitrator until the issuance of the final award (¶ 22). Respondent reappointed Ms. Joubin-Bret as an arbitrator and she accepted the appointment on 21 December 2017 (¶ 23).

The Tribunal issued Procedural Order No. 10 concerning the Post-Hearing Submissions on 27 December 2017 and on 23 January 2018, the Parties filed their Post-Hearing Submissions (¶¶

24, 26). On 31 January 2018, the Parties filed their Reply Post-Hearing Submissions and their Statements of Costs (¶¶ 27-28).

3. Respondent's Alleged Measures against Claimant

3.1 Respondent Allegedly Pressured Claimant's Customers to Leave Claimant and Turn to Claimant's competitors

3.1.1 Claimant's Position

Claimant alleged that after the issuance of the July Statement, Respondent's representatives told many of A11Y's customers to leave Claimant and seek assistive technology aids from the A11Y's competitors, relying on witness statements in the record and testimony of witnesses who testified during the final hearing (¶ 65).

3.1.2 Respondent's Position

Respondent alleged that the officers of the Labour Office never asked applicants to turn to Claimant's competitors and denied that applicants were told that A11Y's aids were overpriced or that their applications will be rejected if they ordered aids from Claimant, relying on the witness statements of those officers (¶ 67). According to Respondent, the officers only informed the applicants that if they apply for aids which include unnecessary components or have premium price their application would be granted, but not in the full amount (¶ 68).

3.2 Respondent Allegedly Denounced Claimant on National Television

3.2.1 Claimant's Position

Claimant alleged that it was publicly denounced on prime-time national television on 12 January 2014. The "Udalosti" news broadcast ('TV Report') was aired at 7 p.m. on public broadcast television and was seen by over 1 million viewers (¶ 70). According to the Claimant Respondent's spokesperson stated during the TV Report that Claimant was "overpricing", was "charging for things for which it should not have been charging", "the State lost money as a result of the Claimant's wrongful practices", and that A11Y "was culpable of suspicious prices" (¶ 72).

3.2.2 Respondent's Position

Respondent denied that the Labour Office publicly denounced Claimant as its spokesperson only explained that in some cases A11Y had included some unnecessary components in the price list attached to the applications and confirmed that she was not aware of the amount paid in contradiction with the Act on Allowances (¶¶ 82-83). Respondent further argued that even if any damage was caused to Claimant due to the TV Report, the damage was caused by the TI's letter and dissatisfied customers of the A11Y and the conduct of the TV Report cannot be attributed to Respondent (¶¶ 84-85).

3.3 Respondent Allegedly Turned Over Claimant's Confidential and Pricing Information to its Competitors

3.3.1 Claimant's Position

Claimant stated that the Labour Office required A11Y to provide confidential information about the breakdown of the components of its aids and their prices concerning the implementation of the July Statement (¶ 86). In compliance with the Labour Office's request, Claimant submitted the requested information regarding its aids (¶ 88). Notwithstanding A11Y's instruction that the information is confidential, Respondent shared the information to Claimant's competitors and continued to do so despite the prohibition imposed by the Decision of the Deputy for Social Matters No. 14/2013 of 4 December 2013 (¶¶ 89, 93). Claimant further argued that it was never asked to provide a competing offer or price with reference to its competitors and therefore, the July Statement was not applied consistently (¶¶ 90, 92).

3.3.2 Respondent's Position

Respondent argued that Claimant failed to provide evidence that it disclosed its know-how, explaining that "no special know-how is needed to combine different products into a standard aid for the blind and, hence, the disclosure of the specific components used by an aid supplier in general cannot reveal any special know-how" (¶ 96). Respondent further argued that in any event applications concerning Claimant's aids were compared with the offers of its competitors like applications of other companies were compared too. Therefore, the July Statement was applied consistently (¶ 97).

3.4 Respondent Allegedly Rigged the Independent Assessments of Claimant's Assistive Technology Solutions

3.4.1 Claimant's Position

Claimant argued that its assistive technology solutions were evaluated by one of its competitors and this constituted a breach of the obligation of the Labour Office for an independent assessment of A11Y's products (¶ 100).

3.4.2 Respondent's Position

Respondent denied that it rigged the independent assessment of Claimant's aids. Respondent argued that the assessment was independent as all offers were submitted for assessment without identifying which companies had submitted the offers and without identifying the prices offered by the companies. Therefore, the Labour Office took a suitable assessment approach (¶¶ 102-104).

4. Determination on Jurisdiction

4.1 Whether Claimant Made an Investment in the Czech Republic

4.1.1 Respondent's Position

Respondent submitted that Claimant never made an investment in the Czech Republic and the Tribunal, therefore, lacks jurisdiction. According to Respondent, the BIT contains a list of

assets indicating the form which an investment under the BIT may take (¶ 108). Respondent argued that for an investment to exist three criteria are to be met – contribution, risk and duration (¶ 110). Respondent further argued that Mr. Jan Buchal, who owned and/or controlled BRAILCOM and Claimant merely shifted assets and business from one entity to another and A11Y received BRAILCOM’s business for free. (¶ 117) Therefore, Claimant made no contribution and cannot establish that it made an investment in the Czech Republic. Because it did not make a contribution, Claimant could not have assumed any risk with its alleged investment. Therefore, the Tribunal does not have jurisdiction over A11Y’s investment (¶ 118). Respondent further submitted that if the Tribunal finds that Claimant made a contribution, for an investment to exist, the investment must also involve a transfer of value from one country to another. Respondent submitted that Claimant never transferred anything of value from the United Kingdom to the Czech Republic. BRAILCOM’s business was merely transferred from one Czech entity to the Czech branch of a UK entity (¶ 122).

4.1.2 Claimant’s Position

Claimant submitted that it had made an investment under the BIT (¶ 124). A11Y argued that the Tribunal should apply the broad definition of investment under Article 1(a) of the BIT which does not define or limit the kind of assets which can be qualified as an investment (¶ 125). Claimant further argued that the *Salini* test which referred to the term “investment” under Article 25(1) of the ICSID Convention does not apply in the present case as the arbitration is governed by the 1976 UNCITRAL Arbitration Rules (¶ 126). Claimant argued that its investment falls within the BIT definition of investment because A11Y has (i) movable property and property rights related to immovable property in the Czech Republic, (ii) claims to money and/or performance contracts having financial value, and (iii) know-how, technical processes and goodwill (¶ 128). The possession of know-how by Claimant was acknowledged by Respondent’s technical experts (¶ 129). Further, the origin of the investor’s capital is irrelevant as to whether investment exists (¶ 130).

4.1.3 Tribunal’s Analysis

The Tribunal noted that the BIT does not contain any definitions or limitations of the terms “every kind of asset belonging” and does not require the transfer of assets from the United Kingdom to the Czech Republic (¶¶ 136-137). The Tribunal did not consider it is its task to qualify the definition of investment because if the Parties wanted they could do it, but instead they agreed on a broad definition (¶ 138). It Tribunal further noted that the arbitration is governed by the UNCITRAL Arbitration Rules which do not contain a provision equivalent to Article 25 of the ICSID Convention (¶ 139). The Tribunal found that the BIT is clear that the investment is the asset and it must belong to the investor for the Tribunal to have jurisdiction (¶ 140). It agreed with Claimant’s assertion that A11Y’s assets in the Czech Republic consist mainly of know-how and goodwill (¶ 144). The Tribunal noted that even Respondent’s technical experts agreed that Claimant possessed know-how and the record was replete of evidence on the loyalty of A11Y’s customers and Mr. Buchal’s stellar reputation, proving Claimant’s goodwill (¶¶ 145-146).

The Tribunal concluded that the know-how and the goodwill transferred from BRAILCOM to A11Y belong to Claimant and represent an investment by Claimant in the Czech Republic under the BIT (¶ 150). As a result, the Tribunal concluded that it has jurisdiction to hear the case.

5. Determination on the Merits

5.1 Whether Respondent Breached the Expropriation Provision of the BIT

5.1.1 Claimant's Position

Claimant submitted that Respondent breached Article 5 of the BIT by unlawfully and indirectly expropriating its investment in the Czech Republic (¶ 160).

Firstly, A11Y submitted that Respondent's measures have the effect of expropriation towards Claimant's investment. The Labour Office of Respondent (i) destroyed A11Y's reputation and goodwill by persuading Claimant's customers to abandon its business; (ii) said that Claimant was "overpricing" in a prime-time television program; (iii) consistently disclosed Claimant's know-how and customer information to its competitors; (iv) rigged the "independent" assessment of Claimant's technology solutions by seeking assessments by its competitors and comparing A11Y's assistive technology solutions with different aids made by its competitors (¶ 161). In its Post-Hearing Brief, Claimant argued that the TV Report was the main cause for the failure of its business, which was confirmed by A11Y's financial and employment data (¶¶ 162, 167).

Secondly, Claimant stated that Respondent's measures were discriminatory as they were specifically targeted at A11Y: (i) the July Statement was targeted at Claimant as it was issued only after the Labour Office received the TI's letter; (ii) the Labour Office asked Claimant's competitors to offer competing prices for Claimant's applications, but never asked Claimant to do so; (iii) the July Statement was inconsistently applied by the Labour Office (¶¶ 173-174).

Thirdly, A11Y submitted that Respondent's measures were not carried out for public purpose (¶ 175). According to Claimant, Respondent attempted to persuade the Tribunal that the July Statement and the TV Report had no impact on Claimant's business and its business model was the only reason for the subsequent insolvency of A11Y (¶ 176).

Finally, Claimant submitted that Respondent's measures were not accompanied by prompt, adequate, and effective compensation (¶ 177).

5.1.2 Respondent's Position

Respondent submitted that it had not breached Article 5 of the BIT (¶ 179).

Firstly, Respondent submitted that for an indirect expropriation to exist, Claimant must prove that A11Y's insolvency is a result of Respondent's measures and Claimant failed to do so (¶¶ 180-181). According to Respondent, Claimant's insolvency was caused by the flaws in the A11Y's business model, based on selling high-end products which were too expensive for the Czech market. (¶¶ 182-183).

Secondly, Respondent submitted that the July Statement was a legitimate regulation based on the law existing at the time Claimant entered the Czech market, and it did not change the existing legal situation, but it merely provided a detailed interpretation of the Act on Allowances (¶ 184). Furthermore, Respondent argued that, contrary to Claimant argument, the standard to be applied is not whether the Act on Allowances was incorrectly applied, but

whether there was “blatant disregard” of the Act on Allowances by Respondent and A11Y has failed to prove that Respondent disregarded the Act on Allowances (¶ 185).

Finally, Respondent submitted that Claimant failed to prove that it was discriminated with respect to the application of the Act on Allowances (¶ 186). Respondent argued that there was no different treatment of Claimant as the July Statement was not directed at Claimant but aimed to ensure the effective implementation of the Act on Allowances and was applied equally to all companies for assistive technology (¶ 187). Even if Claimant was treated differently, Respondent argued that this would not have amounted to discriminatory treatment, because A11Y’s business model put it in a different position to its competitors (¶¶ 188-189).

5.1.3 Tribunal’s Analysis

The Tribunal found that Claimant has failed to prove that Respondent’s measures tantamount to indirect expropriation under Article 5 of the BIT (¶ 197).

The Tribunal found that although the July Statement was issued after the receipt of the TI’s letter, it was a *bona fide* regulatory measure applicable uniformly to all companies providing aids to people with different health impairments and did not target or discriminate Claimant (¶¶ 210-211). The Tribunal stated that following the receipt of the TI’s letter, Respondent needed to provide guidance to the Labour Office on the application of the Act on Allowances and this is what it did (¶ 212).

The Tribunal considered that after the July Statement was issued, Claimant could no longer charge for training and accessory products and had to provide a list of the components of the special aids with their prices in order for the Labour Office to determine whether the aid meets the requirement to be “basic” and “the least economically demanding” (¶ 213). However, the Tribunal found that Claimant’s solutions could not be considered the most “basic” solutions (¶ 214). The Tribunal concluded that if A11Y’s business of providing high-end product at premium price became commercially unviable in the regulatory environment created by the July Statement that cannot be considered as expropriation (¶ 217). The Tribunal noted that it follows from Mr. Buchal’s statement and Claimant’s experts that A11Y’s business model was not sustainable in the long term in the regulatory environment created after the issuance of the July Statement (¶¶ 220-221).

The Tribunal considered that some employees of the Labour Office pressured customers to abandon Claimant and purchase aids from its competitors and shared with the latter A11Y’s business information as well as the TV Report harmed Claimant leading to loss of customers and orders (¶ 223). The Tribunal unsuccessfully tried to separate the effect of Claimant’s loss of customers and orders resulting of the improper actions of the Labour Office from the effect of Claimant’s price reductions and non-coverage of training and accessory products (¶ 224). It found that the evidence before it is not adequate to decide that Respondent’s measures and the resulting loss of customers and orders would destroy Claimant’s business without the effect of the July Statement. Furthermore, the Tribunal concluded that after the implementation of the July Statement, A11Y’s business model was doomed to fail, as it happened (¶ 225).

The Tribunal concluded that Respondent has not indirectly expropriated Claimant’s investment in the Czech Republic (¶ 226).

6. Costs

The Tribunal ordered A11Y to bear the full costs and expenses of the arbitration, while each party shall bear its respective legal costs (¶¶248-249).