



School of International Arbitration

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International Arbitration Case Law

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BURIMI SRL AND EAGLE GAMES SH.A

V.

**REPUBLIC OF ALBANIA
(ICSID CASE NO. ARB/11/18)**

AWARD

Case Report by CHEN Fei & ZHENG Tianyuan**

Edited by Mark Feldman***

An Award rendered on May 28, 2013, under the Agreement for the Promotion and Protection of Investments concluded between Italy and the Albania ("BIT"), Albania's Foreign Investment Law ("FIL"), and in accordance with the ICSID Convention and Arbitration Rules.

Tribunal: Mr. Daniel M. Price (President), Professor Bernardo M. Cremades, Professor Ibrahim Fadlallah

Claimant's counsel: Ms. Patrizia Di Nunno, Attorney-at-law, Brescia, Italy

Defendant's Counsel: Mr. Hamid Gharavi and Ms. Sophie von Dewall of Derains & Gharavi, Paris, France; and Ms. Ledina Mandia, Ministry of Justice, Tirana, Albania

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Digest

1. *Facts of the Case (paras. 1- 40)*

On March 29, 2004, Eagle Games was founded by two Albanian nationals, Ms. Alma Leka and Mr. Artan Serjani, who each owned 50 percent of the shares of the company. The company was established to organize games of chance, mainly through the sale of lottery tickets. Mr. Fatjon Luniku, also an Albanian national, was appointed General Director.

On April 6, 2004, Eagle Games was registered in Albania. Eagle Games applied for a gambling permit from Albania's Finance Ministry.

On June 18, 2004, the Finance Ministry granted Eagle Games a 10-year permit to organize instant lottery games.

On August 24, 2004, Ms. Leka entered into a loan agreement ("the financing agreement") with an Italian company, Burimi SRL, under which Burimi SRL would finance all investments made by Ms. Leka in Eagle Games. Under the financing agreement, 90 percent of any prospective profits from the Eagle Games operation would be distributed to Burimi SRL, and 10 percent of such profits would be distributed to Ms. Leka. Any losses incurred by Eagle Games would be absorbed by Burimi SRL.

Ms. Leka also entered into a "pledge agreement", which required Ms. Leka to pledge her shares in Eagle Games as a guarantee for the financing received by Burimi SRL.

Based on the financing and pledge agreements, Burimi SRL invested EUR 204,431.00 towards the development of Eagle Games.

On September 9, 2004, Ms. Leka and Mr. Serjani each transferred 15 percent of their shares to Mr. Edmond Shoto, an Albanian national. Thereafter, Eagle Games had the following ownership structure: Ms. Leka and Mr. Serjani each held a 35 percent interest, and Mr. Shoto held a 30 percent interest.

On November 26, 2004, Eagle Games' board appointed Mr. Ilir Burimi, a national of Albania and Italy, as General Director, to replace Mr. Luniko. The board also authorized Ms. Leka to represent the company in dealings with banks.

On June 1, 2005, Eagle Game's board appointed Mr. Adrian Kosturi, an Albanian national, as its new General Director, replacing Mr. Burimi. The board also

revoked Ms. Leka's power of attorney and conferred those powers upon Mr. Kosturi.

On July 4 and August 2, 2005, Eagle Games filed a request with the Gambling Commission and the Finance Ministry for the approval of the production of lottery tickets.

A new Albanian Government took office in September 2005. Around that time, oversight of the gaming industry was transferred from the Finance Ministry to the Trade Ministry. The Claimants—Burimi SRL and Eagle Games—argued that Eagle Games' activity had been blocked for more than one year because the Trade Ministry had not created the Gambling Commission in charge of authorizing the issuance of new tickets for games of chance.

On December 16, 2005, Eagle Games once again changed its ownership and management structure. Mr. Serjani and Mr. Shoto transferred their shares in Eagle Games to Mr. Burimi. Following the transfer, Mr. Burimi held 65 percent of the shares of Eagle Games.

In January 2007, Eagle Games submitted a request for approval for an instant lottery ticket named "FORTUNE WITH YOU". On March 20, 2007, the Gambling Commission approved Eagle Games' request. However, around the same time, the Trade Ministry was considering amending the Gambling Law. The amendments would have included the creation of a centralized National Lottery that would replace multiple lottery companies.

On May 4, 2007, the Trade Ministry informed Eagle Games that because of the amendments proposed in the draft bill, its "FORTUNE WITH YOU" request would not be considered further.

On May 28, 2007, Albania adopted Law No. 9744 (the "2007 Gambling Law"). The new law revoked all existing permits and licenses for instant lotteries, including Eagle Games' permit. The revocation of Eagle Games' permit gave rise to the dispute at issue.

On June 23, 2010, the Finance Minister issued Order No. 21, which set out a procedure by which companies affected by the 2007 Gambling Law could apply for compensation.

On August 25, 2010, Eagle Games wrote to Albania, disagreeing with the

compensation it would be entitled to pursuant to Order No. 21. The Claimants argued that the available compensation (ALL 9,970,000) would only reimburse them for the cost of obtaining the license. Claimants further argued that Albania had rejected their compensation request.

Respondent maintained that Eagle Games did not apply for compensation and instead had chosen to pursue ICSID arbitration.

2. *Legal Issues Discussed in the Decision*

(a) *Law Applicable to the Jurisdiction of the Tribunal (paras. 92-95)*

Jurisdiction was governed by the Article 25 of the ICSID Convention, Articles 1 and 8 of the Italy-Albania bilateral investment treaty (“BIT”) and Articles 1 and 8 of Albania’s foreign investment law (“FIL”).

(b) *Jurisdiction racione personae with respect to the claims of Eagle Games (paras. 109-122)*

To have standing under ICSID Convention Article 25(2)(b), Eagle Games had to show that it was a national of a Contracting State other than the State party to the dispute, or that it should be treated as such for the purposes of the ICSID Convention because of foreign control.

Because Eagle Games was a legal entity incorporated in Albania, it did not qualify as a national of a Contracting State other than the State party to the dispute under the first clause of Article 25(2)(b).

To determine whether, because of foreign control, the disputing parties had agreed that Eagle Games should be treated as a national of Italy, the Tribunal looked to the BIT and the FIL.

According to Article 8(2)(c) of the BIT, a company having legal nationality of a Contracting Party to the dispute, but with a majority of capital owned by investors of the other contracting Party or of another third party, “will be considered as having the nationality of the latter.” However, the Tribunal found that the financing and pledge agreements did not represent ownership by Burimi SRL of Ms. Leka’s 35 percent shareholding in Eagle Games, and that Claimants had not provided sufficient evidence that Mr. Burimi, who held a 65 percent interest in Eagle Games, was acting on behalf of Burimi SRL. The Tribunal found that Mr. Burimi, a dual national of Italy and Albania, was the relevant party for

determining whether Eagle Games, because of foreign control, could be treated as a national of a contracting State other than Albania.

The Tribunal observed that under Article 25(2)(a) of the ICSID Convention, “a dual national may not invoke one of his two nationalities to establish jurisdiction over a claim brought in his own name.” The Tribunal then found that it would be “anomalous” for the principle against use of dual nationality under Article 25(2)(a) not to apply to Article 25(2)(b). “[O]therwise,” the Tribunal reasoned, “any dual national who is a national of the Contracting State to a dispute could circumvent the bar in Article 25(2)(a) by establishing a company in that state and asserting foreign control of that company by virtue of his second (foreign) nationality.” Thus, the Tribunal found that Mr. Burimi could not invoke his Italian nationality to establish foreign control of Eagle Games. The Tribunal concluded that it lacked jurisdiction *ratione personae* with respect to the claims of Eagle Games.

(c) *Jurisdiction ratione personae with respect to the claims of Burimi SRL (paras. 123-133)*

Burimi SRL was a juridical person with nationality of a Contracting State (Italy) other than the State party to the dispute (Albania), and thus fulfilled the requirement of “national of another Contracting State” under Article 25(2)(b).

The Tribunal thus concluded that it had jurisdiction *ratione personae* with respect to the claims of Burimi SRL.

(d) *Jurisdiction ratione materiae with respect to the claims of Burimi SRL (paras. 134-146)*

Article 25(1) of the ICSID Convention states that the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State and a national of another contracting State. Although Burimi SRL alleged ownership of 65 percent of Eagles Games, the Tribunal found that the Claimants had not provided sufficient proof that Mr. Burimi was acting on behalf of Burimi SRK as the purchaser and owner of the shares. Therefore, the Tribunal concluded that Burimi SRK did not own the shares held by Mr. Burimi and that those shares therefore did not represent an investment in Albania by Burimi SRL.

In addition, the Tribunal found that the financing agreement, by which Burimi

SRL financed Ms. Leka's share purchase in exchange for 90 percent of the profits she would receive, did not represent Burimi SRL's ownership of Eagle Games. Rather, the financing agreement represented a private, contractual loan agreement between Burimi SRL and Ms. Leka, and did not constitute an investment by Burimi SRL.

The Tribunal concluded that it lacked jurisdiction *ratione materiae* with respect to the claims of Burimi SRL.

3. *Costs (paras. 159-165)*

Exercising its discretion under ICSID Convention Article 61, the Tribunal awarded all costs in favor of the Respondent, observing that "some of the grounds for jurisdiction asserted by Claimants did not withstand even moderate scrutiny."

4. *Decision*

The Tribunal decided that the Tribunal lacked jurisdiction *ratione personae* with respect to the claims of Eagle Games, and lacked jurisdiction *ratione materiae* with respect to the claims of Burimi SRK. The Tribunal ordered Claimants to pay the Respondent's costs of the proceedings (USD 93,225.30) and the Respondent's legal costs and expenses in the arbitration (EUR 348,856).