

DOMBO BEHEER B. V. v. THE NETHERLANDS

EUROPEAN COMMISSION OF HUMAN RIGHTS

APPLICATION No. 14448/88

DOMBO BEHEER B. V.

against

the NETHERLANDS

REPORT OF THE COMMISSION

adopted on 9 September 1992

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I. INTRODUCTION

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1. The following is an outline of the case as submitted to the European Commission of Human Rights and of the procedure before the Commission.

A. The application

2. The applicant is a Dutch private company with limited liability and has its registered office at Nijmegen, the Netherlands. Before the Commission the applicant company was represented by Mr. A.P.H.M. van Tielraden, succeeded by Mr. A.D. van der Feltz and Mr. D.W. Byvanck, who are lawyers practising in The Hague.

3. The application is directed against the Netherlands. The respondent Government were represented by their Agent, Ms D.S. van Heukelom, succeeded by Mr. K. de Vey Mestdagh, both of the Netherlands Ministry of Foreign Affairs.

4. The applicant company complains under Article 6 para. 1 of the Convention of inequality of arms in proceedings concerning overdraft facilities with a bank.

B. The proceedings

5. The application was introduced on 15 August 1988 and registered on 8 December 1988 under file No. 14448/88. On 14 December 1989 the Commission decided to give notice of the application to the respondent Government inviting them to submit observations in writing on the admissibility and merits of the application.

6. The Government submitted their observations on 7 March 1990 and the applicant replied on 8 May 1990.

7. On 3 September 1991 the Commission declared the application admissible.

8. On 4 October 1991 the parties were invited, should they so desire, to submit further observations regarding the merits of the application.

9. The respondent Government submitted such observations on 13 November 1991. After two extensions of the time-limit, the applicant's supplementary observations were submitted on 15 January 1992.

10. On 21 February 1992 the applicant company was granted legal aid.

11. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. In the light of the parties' reactions, the Commission finds that there is no basis on which a friendly settlement can be effected.

C. The present Report

12. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C. A. NØRGAARD, President  
J. A. FROWEIN  
F. ERMACORA  
E. BUSUTTIL  
G. JÖRUNDSSON  
A. S. GÖZÜBÜYÜK

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A. WEITZEL  
J. -C. SOYER  
H. G. SCHERMERS  
H. DANELIUS  
Mrs. G. H. THUNE  
Sir Basil HALL  
MM. F. MARTINEZ  
C. L. ROZAKIS  
Mrs. J. LIDDY  
MM. L. LOUCAIDES  
J. -C. GEUS  
M. P. PELLONPÄÄ  
B. MARXER

13. The text of the Report was adopted by the Commission on 9 September 1992 and is now transmitted to the Committee of Ministers in accordance with Article 31 para. 2 of the Convention.

14. The purpose of the Report, pursuant to Article 31 para. 1 of the Convention, is

- (1) to establish the facts, and
- (2) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

15. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application forms Appendix II.

16. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

## II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

17. The applicant company claimed to have a contract with its bank concerning overdraft facilities. The negotiations took place between the applicant company's former director and the bank manager. On 28 January 1981 the bank refused to carry out payment orders stating that the company's balance had passed the overdraft facility. The bank denied there was a contract with more favourable overdraft facilities for the applicant company.

18. The applicant company brought proceedings against the bank before the Regional Court (Arrondissementsrechtbank) of Arnhem in order to obtain financial compensation. On 2 February 1984 the Regional Court, in an interlocutory decision, invited the applicant company to submit evidence of the alleged contract, in particular concerning the alleged increase of the overdraft facilities. The bank appealed against this decision. The applicant company states that, at the hearing of the Arnhem Court of Appeal (Gerechtshof), its former director unsuccessfully tried to address the Court, whereas according to the Government he did not formally request the Court to hear the parties. The appeal was rejected on 8 January 1985. At the request of both parties, the Court of Appeal dealt with the case henceforth.

19. On 13 February 1985 the investigating judge (raadsheer - commissaris) refused to hear as a witness the former director of the applicant company who had negotiated the contract with the bank, because he could be said to represent the company, one of the parties to the dispute, although he had formally been dismissed as

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director of the company by the shareholders' meeting on 29 June 1984. The applicant company requested that the investigating judge should on the same grounds refuse to hear the bank manager who, on the bank's behalf, had participated in the negotiations on the contract. The applicant company submitted that if its request were not acceded to the principle of "equality of arms" would be violated.

20. On 13 March 1985 the investigating judge rejected the applicant company's request. At the hearing of the bank manager, the company's former director was present but was not heard as a witness. The investigating judge heard for the bank its manager and one of its employees and for the applicant company one of its former directors, a former bookkeeper, an administrator, a management consultant and a tailor. After the hearings of the witnesses both parties were given the opportunity to submit written observations regarding the dispute and the evidence taken.

21. On 11 March 1986 the Arnhem Court of Appeal rejected the company's request for financial compensation. On 27 June 1986 the applicant company appealed to the Supreme Court (Hoge Raad) against the decisions of the investigating judge and the Court of Appeal. On 19 February 1988 the Supreme Court rejected the appeal. It held, *inter alia*, that the Court of Appeal was free to evaluate the evidence adduced by the bank and to take into account the position of the bank's witness. The Court of Appeal could, furthermore, evaluate this evidence in the light of any other submissions made by the other party. The Supreme Court concluded that the applicant company's procedural rights were, therefore, not infringed.

22. The applicant company's former director was neither heard as a witness under oath nor did he make any oral statement at any stage of the proceedings.

B. Relevant domestic law

23. Until April 1988 parties in civil proceedings were not allowed to testify in their own case pursuant to an unwritten legal tradition.

24. However, Article 19a of the Code of Civil Proceedings (Wetboek van Burgerlijke Rechtsvordering-CCP) provided that the court may, *ex officio* or at the request of one or both parties, order the parties to appear in court in order to obtain information. Parties were thus able to submit orally their view on the case. However, para. 4 of this provision stipulated that such a statement made by the party on whom the burden of proof rests could not be admitted as evidence.

25. Under Dutch civil procedural law, oral pleadings are usually made by the parties' representatives but Article 20 CCP grants parties the right to plead themselves. Moreover, a party may, after the representative's pleadings, make additional oral statements. These statements do not constitute formal evidence either but are to be considered as a supplement to the written submissions and documents in the case-file.

26. On 1 April 1988 the law of evidence in civil proceedings was amended. Article 190 CCP now expressly authorises parties to appear and testify as witnesses. As such a testimony can have important consequences for the outcome of the proceedings, in particular when the burden of proof rests with the party heard as a witness, a new Article 213 has been drafted which limits its evidential value.

27. Insofar as relevant, Article 213 provides as follows:

<Dutch>

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"1. Indien een partij als getuige is gehoord, kan haar verklaring omtrent door haar te bewijzen feiten geen bewijs te haren voordele opleveren, tenzij de verklaring strekt ter aanvulling van onvolledig bewijs ...".

<Translation>

"1. If a party has been heard as a witness, his statements concerning the facts to be proven by him cannot provide any evidence to his advantage, unless the statements supplement incomplete evidence ...".

III. OPINION OF THE COMMISSION

A. Complaint declared admissible

28. The Commission has declared admissible the applicant company's complaint that there was no equality of arms in the proceedings against the bank concerning overdraft facilities.

B. Point at issue

29. Accordingly, the issue to be determined is whether there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

C. The alleged violation of Article 6 para. 1 (Art. 6-1) of the Convention

30. Article 6 para. 1 (Art. 6-1) of the Convention provides as follows:

"1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by a ... tribunal established by law."

31. The applicant company complains that it was placed under a procedural disadvantage vis-à-vis its opponent since its former director, who had negotiated the overdraft contract, was not heard as a witness despite his attempt to submit orally his view to the court, whereas the bank manager who had negotiated the contract on the bank's behalf was able to testify. In view of the burden of proof, the impossibility for the former director to testify and thus to adduce formal legal evidence breached the equality of arms and rendered the proceedings unfair.

32. The Government submit that the proceedings were fair as the applicant company had the possibility to request the court to hear the parties under Article 19a CCP, although such statements do not amount to legal evidence. Moreover, pursuant to Article 20 CCP, the applicant company's former director could also have sought leave to plead himself or to be allowed to make oral submissions after the pleadings.

33. The Government further contend that, even if the applicant company's former director would have been able to testify, the outcome of the proceedings would not have been altered as the applicant company did not have sufficient evidence to prove its claim concerning the overdraft contract.

34. The Commission recalls that the Convention does not explicitly secure the right to have witnesses called in civil proceedings. That right is secured, under Article 6 para. 3 (d) (Art. 6-3-d), only to persons charged with criminal offences. That does not mean, however, that the citing and questioning of witnesses in civil cases is not covered by Article 6 para. 1 (Art. 6-1) of the Convention (No. 9938/82, Dec. 15.7.86, D.R. 48 p. 21, 32). In order to determine whether Article 6 para. 1 has been complied with in the

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present case, the Commission must examine the proceedings as a whole, in particular since the principle of "equality of arms" is only one feature of the wider concept of a fair trial (see e.g. No. 12952/87, Comm. Rep. 14.1.92, Family Ruiz-Mateos v. Spain, para. 91).

35. Article 6 para. 1 (Art. 6-1) of the Convention, while implying that each party shall have a reasonable opportunity of presenting his case to the Court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent, does not lay down rules as to the evidence as such, and in particular as to its admissibility and probative value, these questions being essentially dependent on domestic legislation (No. 7450/76, Dec. 28.2.77, D.R. 9 p. 110).

36. The Commission has therefore examined whether, in the present case, the applicant company was placed at a substantial disadvantage vis-à-vis its opponent and, if so, whether this affected the equality of arms in such a way as to render the proceedings as a whole unfair in the sense of Article 6 para. 1 (Art. 6-2).

37. It here notes that only one of the two persons who had allegedly negotiated the overdraft facilities, namely the bank manager, was heard as a witness, pursuant to the Dutch law in force at the relevant time.

38. It is undisputed between the parties that, at the relevant time, no possibility existed under Dutch law to hear the former director of the applicant company as a witness or for him to give evidence in any other way.

39. It is true that he could have been asked by the court, in accordance with Article 19a CCP, to give information and that, under Article 20 CCP, he could also have made an oral statement to the court supplementing that of the company's lawyer. However, any such declaration would not have been made in circumstances comparable to those in which the bank's employee was heard and it would not have constituted evidence under Dutch procedural rules. It can therefore be assumed that it would have carried less weight than the evidence given by the bank's employee as a witness under oath and that the applicant company would have remained at a substantial procedural disadvantage as compared with the other party.

40. It follows that the equality of arms has not been respected and that the applicant company did not have a fair hearing within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

CONCLUSION

41. The Commission concludes, by 14 votes to 5, that there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

Secretary to the Commission

President to the Commission

(H. C. KRÜGER)

(C. A. NØRGAARD)

OPINION DISSIDENTE de M. J.-C. GEUS, à laquelle se rallient  
MM. C.A. NØRGAARD, J.A FROWEIN, G. JÖRUNDSSON et B. MARXER

Nous ne pouvons, à notre regret, nous rallier à l'opinion de la majorité de la Commission.

Nombre de législations établissent une différence entre les parties à un litige et les témoins, avec la conséquence que les organes d'une personne morale ne peuvent être entendus comme témoins dans des procédures où ladite personne est partie, bien qu'ils aient la possibilité de s'y exprimer selon des modalités différentes.

En l'espèce, s'il est vrai que, formellement, les arguments en

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faveur de l'une et l'autre parties au litige n'ont pas été en tous points exprimés de la même manière devant le juge, cette inégalité des armes n'est qu'apparente et n'a pu, selon nous, affecter le caractère équitable de la procédure.

Le fait que le directeur de la banque, qui était l'adversaire de la société requérante, a été entendu en qualité de témoin ne confère nullement à ses déclarations un caractère contraignant pour la juridiction. Ayant prêté serment, il pourrait certes être condamné pour avoir travesti la vérité dans l'intention de nuire à autrui. En l'absence d'une telle intention - et donc d'infraction - un témoignage peut cependant être entaché d'erreurs, d'omissions, d'imprécisions ou de contradictions, si bien qu'il n'a jamais la valeur d'une preuve absolue. La juridiction disposait donc d'un large pouvoir d'appréciation lui permettant de confronter ce témoignage à l'ensemble des éléments du dossier, et notamment les déclarations orales des employés et anciens employés de la requérante et des observations écrites qu'elle a pu présenter.

Nous souscrivons, pour ces raisons, à la motivation de l'arrêt du Hoge Raad (par. 21).

APPENDIX I

HISTORY OF PROCEEDINGS

Date	Item
15 August 1988	Introduction of application
8 December 1988	Registration of application
Examination of admissibility	
14 December 1989	Commission's decision to invite the Government to submit their observations on the admissibility and merits of the application
7 March 1990	Government's observations
8 May 1990	Applicant's observations in reply
3 September 1991	Commission's decision to declare the application admissible and to ask the parties for further factual information
Examination of the merits	
13 November 1991	Government's further information
11 January 1992	Commission's consideration of the state of proceedings
15 January 1992	Applicant's further information
21 February 1992	Applicant granted legal aid
16 May 1992	Commission's consideration of the state of the proceedings
1 September 1992	Commission's deliberations on the merit and final vote

9 September 1992

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Adoption of the Report.