

Arbitration under the 2010 UNCITRAL Arbitration Rules
PCA Case No. 2019-37

VÁCLAV FISCHER

vs.

THE CZECH REPUBLIC

FINAL AWARD

Of 6 May 2020

The Arbitral Tribunal :

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Place of arbitration:

Zurich, Switzerland

The Parties

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Claimant

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versus

The Czech Republic, Letenská 15, 118 10 Prague 1, Czech Republic

Respondent

represented by

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Claimant and Respondent are hereinafter jointly referred to as the “**Parties**”.

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I. In general

1. In its *Procedural Order No. 4* on termination of the proceedings, the Arbitral Tribunal has decided the following:

- “1. *The proceedings are terminated without prejudice.*
2. *Both Parties are invited to file their Statements of Costs by 3 April 2020.*
3. *The allocation of the costs will be decided in an Award.”*

The only outstanding issue upon which the Arbitral Tribunal has to rule concerns fixing the amount of costs and their allocation. It will however first summarize the main steps of the proceedings.

II. Summary of the proceedings

2. On 1 October 2018, Claimant filed a *Notice of Arbitration* against Respondent under the *Agreement on the Promotion and Reciprocal Protection of Investments concluded between the Federal Republic of Germany and the Czech Republic on 2 October 1990*, and which entered into force on 2 August 1992 (hereinafter “Germany-Czech Republic BIT”).
3. In June 2019, the Parties agreed to a procedure for selection of the third and presiding arbitrator, which was proposed jointly by Professor Stanimir Alexandrov (appointed as co-arbitrator by Claimant) and Ms. Jean Kalicki (appointed as co-arbitrator by Respondent). Pursuant to that procedure, the co-arbitrators notified the Parties on 12 July 2019 that they had decided to nominate Professor Pierre Tercier as President of the Tribunal.
4. On 24 July 2019, the Arbitral Tribunal was deemed validly constituted further to Claimant’s and Respondent’s e-mail/letter of 22 July 2019, by which both Parties confirmed that they had no objections to the nomination of Professor Tercier as the Chairman of the Arbitral Tribunal.
5. In the *Procedural Order No. 1* of 20 September 2019, the Arbitral Tribunal has determined certain procedural issues, including the seat of the arbitration, the applicable procedural rules and the next procedural steps.
6. On 20 and 21 November 2019, the Parties and the members of the Arbitral Tribunal have signed the *Terms of Appointment of the Permanent Court of Arbitration*.
7. On 21 November 2019, in accordance with Article 43(1) of the UNCITRAL Arbitration Rules and pursuant to paragraph 2.1 of the Terms of Appointment, the

Parties were invited to establish an initial deposit of USD 250,000 (i.e., USD 125,000 from each side) to the PCA by 21 December 2019.

8. On 29 November 2019, during the First Session of the Arbitral Tribunal by telephone conference, the Parties agreed to appoint Dr Réka Papp as Secretary to the Arbitral Tribunal.
9. In its *Procedural Order No. 2* of 5 December 2019, the Arbitral Tribunal has rejected Claimant's request to suspend the present arbitral proceedings until a date not earlier than one month after the rendering of the final award in PCA Case No. 2017-15.
10. The procedural rules have been amended by the *Procedural Order No. 3* of 5 December 2019, in which the Arbitral Tribunal decided, among other things, that the proceedings would be conducted under the 2010 version of the UNCITRAL Arbitration Rules and that the International Bureau of the PCA would serve as registry and administer the arbitral proceedings in accordance with the Terms of Appointment
11. On 27 December 2019, Respondent paid its share of the deposit.
12. On 7 January 2020, the PCA invited Claimant to confirm if payment of its share had been made, and to provide the relevant details in this regard, or to indicate when payment might be expected. Claimant did not answer.
13. On 24 January 2020, the PCA, under the instructions of the Arbitral Tribunal, granted Claimant a final opportunity to make the required payment by 31 January 2020.
14. On 4 February 2020, the Arbitral Tribunal noted that Claimant's share of the initial deposit in the amount of USD 125,000 remained unpaid. Pursuant to Article 43(4) of the UNCITRAL Arbitration Rules, the PCA wrote to both Parties inviting them to make the payment by 5 March 2020.
15. On 27 February 2020, Respondent informed the Arbitral Tribunal that it would not make a substitute payment for Claimant and filed a Request for Termination of Proceedings and Award on Costs.
16. On 28 February 2020, Claimant was invited to comment on Respondent's Request by 9 March 2020.
17. On 9 March 2020, Claimant reacted to Respondent's Request by stating the following:

Claimant would have paid the advance on the costs, however, the position of the Respondent, that he will not honour any award issued by the honourable tribunal will make any award in favour of the Claimant unenforceable. Any costs that incurred to the Respondent are therefore made on his own risk, particularly as Respondent even agreed to arbitration proceedings after the 15 January 2019 declaration has been passed.

18. On 12 March 2020, the Arbitral Tribunal invited Claimant to inform it by 16 March 2020 “*whether it will make the payment of the advance on fees, as it has been invited to do; or whether it refuses to make the payment*”.
19. On 16 March 2020, Claimant replied that he was willing to make the required deposit, but he requested to suspend the proceedings for at least three months due to the special circumstances created by the COVID-19 pandemic.
20. On 18 March 2020, Respondent requested the Arbitral Tribunal to dismiss Claimant’s request for a stay of the proceedings and maintained its request for termination as per Respondent’s Request for Termination of Proceedings and Award on Costs of 27 February 2020.
21. In its *Procedural Order No. 4* of 25 March 2020, the Arbitral Tribunal analysed the Parties’ positions and decided to terminate the proceedings without prejudice. It invited the Parties to file their Statements of Costs by 3 April 2020.
22. On 3 April 2020, Claimant requested an extension until 30 April 2020 to file the Statements of Costs.
23. Later on the same day, Respondent submitted its own Statement of Costs. It did not send a copy to the counsel for Claimant directly. It requested the Arbitral Tribunal’s Secretary to forward the message as provided for in paragraph 10.3 of Procedural Order No. 3 (simultaneous submission).
24. On 6 April 2020, the Arbitral Tribunal invited Respondent to comment on Claimant’s request by 7 April 2020.
25. On 7 April 2020, Respondent provided its comments on Claimant’s request for extension.
26. On 8 April 2020, the Arbitral Tribunal denied Claimant’s request. It however invited Claimant to submit his Statement of Costs by 13 April 2020.
27. On 13 April 2020, Claimant submitted its Statement of Costs to the Arbitral Tribunal and to the other Party.
28. On 14 April 2020, the Arbitral Tribunal invited Respondent to communicate its own Statement of Costs, along with the relevant exhibits, to Claimant, which was done later on the same day.

III. The Parties' positions

1. Claimant's position

29. In its letter dated 13 April 2020, Claimant states the following:

“as for assessment of costs, Art. 9 paragraph 5 of the Treaty between The Federal Republic of Germany and The Czech and Slovak Federal Republic Concerning the Promotion and Reciprocal Protection of Investments of 2 October 1990 ("the Treaty") provides that each Contracting Party shall bear the costs of its own member and of its legal representation in the arbitration proceedings. The same does account in relationship between an investor and one of the contracting countries through Art 10, para 2 of the aforementioned treaty.

While claimant will accept to carry his own costs in case of a positive award in his favor, it will be unacceptable for him to carry the respondents' costs in case of a negative award. Imposing the risk of government attorney costs on losing investors in effect undermines the very purpose of such treaties; it raises the litigation risk in factual situations which are as a rule ambiguous, confused and contradictory to a prohibitive level, in particularly for smaller companies for whom litigation risk is high and where a government enjoys significant superiority in terms of expertise, experience and resources available for defence (International Thunderbird Gaming Corp v United Mexican States, Separate Opinion by Prof. Thomas Wälde (December 2005), at [139], [142]), such as in the present case. Insofar the UNCITRAL 2010 rules, that give discretion to the tribunal on the allocation of the costs, must be interpreted by the rules of the German – Czech BIT.”

2. Respondent's position

30. In its letter dated 3 April 2020, Respondent stated the following:

“6. RESPONDENT IS ENTITLED TO ITS ENTIRE COSTS

7. *Respondent requests that the Tribunal award it its entire costs. Respondent incurred these costs for its representation and for its own services regarding the claim raised by Claimant. While Claimant initiated the proceedings, he failed to fulfil his duties under the applicable arbitration rules. The termination of the proceedings is therefore a consequence of Claimant's breach of his duties. The costs incurred by Respondent were therefore wasted due to Claimant's breach of his duties. Claimant should therefore bear the costs incurred by Respondent.”*

IV. The Arbitral Tribunal's analysis

1. The applicable rules

31. Article 10 para 2 of the Germany-Czech Republic BIT, in connection with the arbitration proceedings initiated by an investor against a State, reads as follows: “[...] *In the absence of any other arrangement between the parties to the dispute, the provisions of article 9, paragraphs 3 to 5 shall apply mutatis mutandis [...]*”.
32. Article 9 para 5 of the BIT, in connection with disputes between the Contracting Parties (the States), reads as follows: “[...] *Contracting Party shall bear the costs of its own member and of its legal representation in the arbitration proceedings. The costs of the chairman and any other costs shall be shared equally between the two Contracting Parties. The tribunal may determine a different allocation of costs. [...]*”
33. The Parties have not expressly adopted “*any other arrangement*”. However it was agreed that the proceedings shall be submitted to the 2010 UNCITRAL Rules.
34. In those Rules, the principle is expressed by Article 40 that reads as follows:
1. *The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.*
 2. *The term “costs” includes only:*
 - (a) *The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;*
 - (b) *The reasonable travel and other expenses incurred by the arbitrators;*
 - (c) *The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;*
 - (d) *The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;*
 - (e) *The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;*
 - (f) *Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.*
- [...]
35. It appears from this text that the Arbitral Tribunal should distinguish between the costs of the arbitral proceedings as such and the costs incurred by the Parties.

2. The costs of the arbitral proceedings

2.1. The fees of the Arbitrators

36. Articles 9 and 10 of the BIT do not address the description of the costs. The Arbitral Tribunal considers that it may apply Article 40(2)(a) of the 2010 UNCITRAL Rules. According to that provision, the fees of the Arbitral Tribunal are to be fixed separately for each arbitrator. According to Article 41 of the Rules: “*The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.*”

37. The Parties have agreed with the Arbitral Tribunal that the arbitrators would apply an hourly rate of USD 700,- per hour. The arbitrators’ fees for the proceedings have been fixed finally as follows:

	Nr of hours	USD
Jean Kalicki	█	█
Stanimir Alexandrov	█	█
Pierre Tercier	█	█
TOTAL	103.5	72,450

This amount appears reasonable in view of the amount in dispute, the complexity of the issues and the time spent.

2.2. The expenses of the Arbitrators

38. According to Article 40(2)(b), the costs include “*the reasonable travel and other expenses incurred by the arbitrators*”. Below the related statement:

	USD
Jean Kalicki	█
Stanimir Alexandrov	█
Pierre Tercier	█
Réka Papp	█
TOTAL	109.64

39. The Tribunal also incurred bank costs in the amount of USD 124.96.

2.3 *The fees and expenses of the PCA*

40. Pursuant to the Terms of Appointment of the Permanent Court of Arbitration, the International Bureau of the PCA was designated to act as registry in this arbitration. Total PCA fees amount to USD 4,290.85. The PCA incurred no expenses.

2.4 *Summary*

41. Summing up the preceding, the overall costs of the arbitral proceedings are the USD 76,975.45.

42. Respondent has paid the advance in an amount of USD 125,000, whereas Claimant has not paid its share.

43. In its Statement of Costs, Respondent invited the Arbitral Tribunal to order Claimant to reimburse the total amount of the advance payment it made to the PCA. It is generally accepted that each Party participating in an arbitral procedure is jointly responsible for the costs and expenses incurred by it. Therefore the amount of USD 76,975.45 will be paid out of the advance deposit to the PCA. The Arbitral Tribunal will decide below whether Respondent may be reimbursed by Claimant.

44. The PCA will reimburse the unexpended balance of the deposit in the amount of USD 48,024.55 to Respondent.

3. **Allocation of costs**

45. According to Articles 9 and 10 of the BIT, each Party shall bear the fees and expenses of the Arbitrator it has appointed and bear half of the fees and expenses of the Presiding arbitrator. However the rule also states that “*the tribunal may determine a different allocation of costs*”.

According to Article 42 para 1 of the Arbitration UNCITRAL Rules:

“1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.”

46. The Arbitral Tribunal has taken into consideration the following circumstances:

- The principles set out in Articles 9 and 10 of the Germany-Czech Republic BIT consider the situation in which the proceedings have been conducted until the end, with a final award that decides upon the Parties’ prayers for relief. It does not apply in a situation where the proceedings have been prematurely terminated because of the failure of one of the Parties to comply with its duties.
- In any case, the rule allows expressly the arbitral tribunal to “*determine a different allocation of costs.*” The Arbitral Tribunal considers that such a determination of a different allocation is justified in the present case.
- Applying the principles of Article 42 of the UNICTRAL Arbitral Rules, Claimant appears to be the “*unsuccessful party*”, as far as the proceedings that he initiated have been terminated because of his decision not to pay the first advance, after having started the proceedings. His behavior with respect to payment of the costs of the arbitration appears to be in bad faith, as far as it involves a the decision to introduce claims against another party while resisting advancing any share of the fees, and forcing the other party to do so and to defend against these claims.
- Since Respondent was raveled into the proceedings where it did not have an opportunity to present its case but complied with all the requests addressed to it, the Arbitral Tribunal considers that it would be unfair for Respondent to have to bear costs of the proceedings.

47. Therefore, the Arbitral Tribunal orders Claimant to reimburse Respondent the amount of its initial deposit to the PCA that is not reimbursed by the PCA after settling the costs of the arbitral proceedings, i.e. USD 76,975.45.

3.1 *Indemnity of the Parties*

48. According to Article 9 para. 5, of the Germany-Czech Republic BIT, applicable by reference of Article 10, “[c]ontracting Party shall bear the costs [...] of its legal representation in the arbitration proceedings”. Article 40(2)(e) of the UNCITRAL Rules mentions as one of the element of the costs of arbitration, “*the legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable*”.

49. In its Statement of Costs, Claimant requests the Arbitral Tribunal to order Respondent to indemnify the Claimant for the following costs:

Description	EUR
Attorney ██████████	██████████
Costs 2016-2017 Analysis of the case, notification, conciliation, travel expenses Claimant	125,000.00

Costs 2018 2019 Submission of the case to the Tribunal, travel costs, examination of interference by White and Case Law Firm	25,000.00
Costs 2020 Vaclav Fischer – external advice on the financing of the case and whether the Czech Republic will comply with the judgment	██████████
TOTAL	671,111.81

50. In its Statement of Costs, Respondent invites the Arbitral Tribunal to order Claimant to reimburse it for the following costs:

Description	CZK
zeiler.partners, legal fees	57,041.67
zeiler.partners, expenses (ADS Management Consulting GmbH)	78,808.40
Respondent's internal costs	32,000.00
TOTAL	167,850.07

51. The Arbitral Tribunal considers that the grounds it has given for the allocation of costs also apply in this context and that it is fair to order Claimant to reimburse the amount submitted by Respondent. This amount (CZK 167,850.07, i.e. approx. EUR 6,208.54) appears reasonable, in particular in view of the amount claimed by Claimant (EUR 671,111.81).

52. Therefore, the Arbitral Tribunal orders Claimant to reimburse Respondent an amount of CZK 167,850.07 for its costs incurred in these proceedings.

V. AWARD

For the reasons set forth above, the Arbitral Tribunal decides the following:

1. *The proceedings are terminated without prejudice, as decided in PO 4.*
2. *The overall costs of the arbitral proceedings are fixed at USD 76,975.45.*

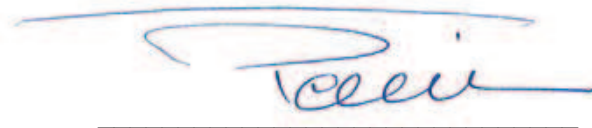
3. *Claimant is ordered to reimburse Respondent an amount of USD 76,975.45, corresponding to the balance of its initial deposit to the PCA that is not reimbursed by the PCA after settling the costs of the arbitral proceedings.*
4. *Claimant is ordered to reimburse Respondent an amount of CZK 167,850.07 for its costs incurred in these proceedings.*
5. *All other prayers for relief are rejected.*

Place of arbitration: Zurich, Switzerland

Date: 6 May 2020

For the Arbitral Tribunal:

Prof. Pierre Tercier
President



Prof. Stanimir A. Alexandrov
Co-arbitrator



Ms Jean E. Kalicki
Co-arbitrator

