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Czech Republic

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A. Legislation and rules

A.1 Legislation

International arbitration in the Czech Republic continues to be governed by Act No. 216/1994 Coll., on Arbitration Proceedings and Enforcement of Arbitration Awards, as amended (the “Arbitration Act”). On 30 September 2017, an amendment to the Arbitration Act came into effect, according to which court proceedings regarding invalidity of an arbitration agreement and court proceedings regarding annulment of an arbitration award are to be decided by a regional court as the first instance court, instead of a district court. District courts are subordinated to regional courts.

According to the bill proposal, there were several reasons for the amendment. First, the arbitral awards are on the same level as first instance court rulings. District courts do not carry out any review of court decisions of subordinated courts, unlike regional courts. Thus, review of arbitral awards should be within the jurisdiction of the second instance courts, similar to appeals against first instance court rulings. Second, similar practice is also common in some other civil law jurisdictions, such as Austria, where review of these issues is carried out by a supreme court, and Germany, where these matters are within the jurisdiction of a high court. Finally, there was also a historic tradition in the Czech Republic to have arbitral awards

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reviewed by higher courts. In practical terms, this amendment should increase the quality of review of arbitration awards.

A.2 Institutions, rules and infrastructure

The most-used arbitration institution in the Czech Republic is the Arbitration Court of the Czech Economic Chamber and the Czech Agrarian Chamber (the “Arbitration Court”). In 2017, the Arbitration Court issued new Additional Procedures for Online Arbitration (“Online Rules”) which form an integral part of the Arbitration Court Rules, under which arbitral proceedings may be conducted and the arbitral award rendered online, provided that the parties have explicitly agreed to arbitration under these Online Rules. The Online Rules came into effect on 1 October 2017.

In 2017, the Czech Republic also witnessed an initiative of several prominent arbitrators and lawyers advocating for the adoption of ethical rules preventing conflicts of interest in arbitration proceedings.³ Due to several high profile cases, the general public tends to view local arbitration as a means of avoiding court proceedings and thereby also avoiding state-guaranteed justice. The proposed ethical rules might be, to certain extent, inspired by the respective IBA Rules, which are well known in the Czech Republic.

B. Cases

B.1 The Czech Republic won the first of several solar cases

As reported in previous issues of the *Yearbook*, the Czech Republic has in recent years witnessed several⁴ investment treaty cases brought by European investors in solar energy installations. The investors contested significant amendments to Czech laws, which placed a levy on electricity generated from solar power plants.

³ Czech Institute for Popularization and Revitalization of Arbitration (*Český institut pro popularizaci a revitalizaci arbitráže (CZIPRA)*).

⁴ The regulatory actions affecting the renewable energy sector gave rise to seven separate claims against the Czech Republic.



On 11 October 2017, an ad hoc arbitral tribunal consisting of Gabrielle Kaufmann-Kohler (the chair), Peter Tomka (the Czech Republic's appointee) and Gary Born (the claimants' appointee) ruled in the dispute brought by Jürgen Wirtgen, Stefan Wirtgen, and JSW Solar (zwei) GmbH & Co.KG⁵ that the tax imposed on the electricity output of solar power plants and other measures introduced by the Czech government did not violate the Germany-Czech Republic Bilateral Investment Treaty.⁶ The arbitral tribunal thus entirely dismissed the claimants' damages claim of CZK 500 million.⁷

The six remaining arbitrations relating to the very same measures are still pending. Since the subject matter of all of these claims is the same, the Czech government hopes that the different arbitral tribunals will reach the same conclusions and dismiss the other claims as well.

B.2 Suspension of enforcement of arbitral awards

The Arbitration Act recognizes the possibility of suspending the enforcement of an arbitral award under certain circumstances. One such reason, provided by Section 32(2) of the Arbitration Act, is a situation where the immediate enforcement of the arbitral award could result in a serious harm to the obligated party. The Supreme Court of the Czech Republic has issued a decision that provides some guidance on interpretation of this particular provision.

In the case,⁸ the defendant was ordered to pay CZK 1,000,000 (approximately EUR 40,000) within three days of the day the arbitral award came into force. The first and second instance courts agreed to suspend the enforcement of the award under Section 32(2) of the Arbitration Act due to the ordered amount and the length of the period within which the defendant should have paid this amount.

⁵ *Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen and JSW Solar (zwei) v. Czech Republic* (ad hoc under Swiss Private International Law Act rules).

⁶ Mr. Born issued a dissenting opinion.

⁷ Approximately EUR 20 million.

⁸ Decision of the Supreme Court of the Czech Republic File No. 23 Cdo 60/2017 dated 2 March 2017.

The Supreme Court disagreed with the reasoning of the lower instance courts. It stated that the suspension under Section 32(2) of the Arbitration Act could not be satisfied solely by the sheer amount of the award. The Supreme Court established that serious harm relates to a specific consequence that the potential enforcement of the arbitral award could cause to the obligated party, and the sum to be paid is only one of the aspects that needs to be taken into consideration. The other aspects are the total assets owned by the obligated party and the impact of the potential enforcement on the overall estate of the obligated party. The Supreme Court also stated that it is up to the obligated party to demonstrate specific impending negative consequences that could arise to them as a result of the immediate enforcement of the arbitral award. Only if upon considering all of these aspects the court concludes that the enforcement may cause serious harm to the obligated party, may it suspend the enforcement of arbitral awards.

B.3 Arbitrator appointments and transparency

In its recent decision,⁹ the Supreme Court dismissed the appeal relating to a rejected writ of execution, which was awarded via arbitral proceedings constituted on the basis of an arbitration agreement. The arbitration agreement was the focal point, as the issued writ of execution was refused due to the invalidity of the clause. The Supreme Court ruled that the arbitrator who issued the award was appointed based on an arbitration agreement that was deemed invalid due to non-transparency. This lack of transparency stemmed from two primary concerns.

The first concern was the nature of the third party that was designated as the appointing authority in the arbitration clause. In this case, the appointing authority was the director of a company that provided administrative services for the arbitrator and obtained financial profit for such services. As a result, the third party could not be considered

⁹ Decision of the Supreme Court of the Czech Republic File No. 20 Cdo 1348/2017 dated 27 June 2017.



as unbiased and independent, and thus the arbitration agreement was deemed non-transparent as well.

Furthermore, the Supreme Court concluded that an arbitration agreement stipulating that the arbitrator was supposed to be chosen and appointed from among the persons registered in the register of attorneys and trainee attorneys maintained by the Czech Bar Association should also be regarded as non-transparent. Such register was neither commonly known to the parties, nor was it permanent and immutable throughout the entire duration of the legal relationship of parties.

For these reasons the Supreme Court ruled that an arbitration award that is based on an erroneously appointed tribunal may not be enforced.

B.4 Arbitrator's liability for setting aside an arbitral award

When an arbitral award is set aside, the winning party is generally left with nothing even though it has already invested substantial amounts in the proceedings. In such a case, it is not uncommon for the party to look for someone to blame. In this situation, the claimant initiated a damages claim against the sole arbitrator and the appointing authority. According to the claimant, if the award was set aside due to the invalidity of the arbitration agreement, these parties were responsible for the damages since they should not have acted based on an invalid arbitration agreement.

When the matter reached the Supreme Court¹⁰ based on the appeal of the claimant, the Supreme Court ruled that the actions of the arbitrator and the appointing authority carried out based on an arbitration agreement later declared invalid did not indicate any wrongdoing, nor were their actions unlawful. It was the claimant that should be held responsible for the costs as it concluded the invalid arbitration agreement and the arbitral award was set aside solely due to such

¹⁰ Decision of the Supreme Court of the Czech Republic File No. 25 Cdo 2179/2015 dated 23 November 2016.

invalidity. The fact that the appointment of this arbitrator was based on an invalid arbitration agreement is neither the fault of the sole arbitrator nor of the appointing authority.

The Supreme Court thus concluded that an arbitrator could only be held liable for the damage arising out of setting aside of an award if the arbitrator committed an unlawful act which directly led to the setting aside of the award.

C. Funding in international arbitration

In general, Czech law does not explicitly regulate funding in arbitration. There is neither any case law of Czech courts addressing the issue of third-party funding, nor is the issue addressed in the Rules of the Arbitration Court. Although there are some companies that offer such services, external funding is still relatively rare in the Czech Republic. This is the case for both domestic and international arbitration. Since international commercial and investment arbitration tend to be more demanding in this sense, we assume that smaller claimants may enter into external funding schemes with private funding service providers. However, the data relating to such funding is not usually publicly available. This is especially true in the case of arbitration proceedings, which are in most cases not public (unlike civil litigation). In addition, agreements between private entities on arbitration funding arrangements are not subject to any disclosure obligations.

On the other hand, conditional or contingency attorney fee arrangements are relatively common. Such arrangements are mainly restricted by the Ethical Code of the Czech Bar Association, which *inter alia* provides that the agreed remuneration for the provided legal services shall be proportionate to the amount and complexity of the case. In addition, according to the Ethical Code, a success fee cannot exceed 25% of the amount of the dispute.

With respect to the reimbursement of the costs of arbitration, the rules may differ depending on the specific agreement of the parties to this



effect and the respective arbitration institution. For example, under the applicable rules in an arbitration led before the Arbitration Court,¹¹ the arbitral tribunal usually awards the party that was fully successful in its claim with a reimbursement of the costs of the arbitral proceedings against the party that was not successful in the dispute. In the case that each of the parties were partially successful in the dispute, the arbitral tribunal may award each party reimbursement of the costs of the proceedings according to the proportion of this success, or may decide that neither of the parties is entitled to reimbursement of the costs. However, the arbitral tribunal may award full reimbursement of the costs to a party that was only partially successful in the proceedings if it was unsuccessful only to a negligible extent of the raised claim, or if the decision on the amount was dependent on an expert opinion or was within the discretion of the arbitral tribunal. These rules are analogous to the rules applicable in civil litigation. Nevertheless, unlike in civil litigation, in arbitration the parties may agree on different rules applicable to the reimbursement of their costs.

¹¹ The Rules of the Arbitration Court effective as of 1 October 2015.