

## **CZECH REPUBLIC AWARDED COSTS IN ARBITRATION AFTER CLAIMANT PURPORTS TO TERMINATE PROCEEDINGS UNILATERALLY**

*Forminster Enterprises Ltd (Cyprus) v The Czech Republic*, UNCITRAL Arbitration, Geneva

### **Introduction**

On 15 December 2014, an UNCITRAL Tribunal handed down an award in *Forminster Enterprises Ltd (Cyprus) v The Czech Republic*, awarding the Respondent its costs of the arbitration after the Claimant purported to unilaterally terminate the proceedings.

### **Background**

By a Notice of Arbitration dated 9 January 2014, the Claimant brought arbitration proceedings against the Czech Republic claiming expropriation and seeking damages for breach of Article 5(1) of the Agreement between the Czech Republic and the Republic of Cyprus for the Promotion and Reciprocal Protection of Investments (“the Treaty”) and Article 3 of the UNCITRAL Rules 1976.

The Respondent sought to challenge the Tribunal’s jurisdiction, and requested disclosure of the identities of the Claimant’s beneficial owners and current managers. This information was sought on the basis that it was necessary for the determination of whether the arbitrator appointed by the Claimant satisfied the requirements regarding impartiality and independence. The Claimant resisted this request, contending that this information had little relevance to the issues of jurisdiction and that the Respondent could not call into question the Tribunal’s jurisdiction.

The Claimant subsequently sought to terminate the arbitration proceedings by way of a letter dated 17 February 2014 purporting to withdraw its Notice of Arbitration, and sought to argue that this action did not constitute a waiver of its right to damages and compensation for other losses it had sustained as a consequence of the expropriation and breach of the Treaty.

The Respondent argued that, in the absence of agreement between the parties, only a Tribunal had the power to terminate properly instituted proceedings. Therefore, a Tribunal had to be constituted, and the Respondent reserved its rights to put additional claims and/or objections before that Tribunal.

The Claimant invited the Tribunal to declare that it had been entitled to bring the arbitration proceedings to an end and to reject the Respondent’s claim for costs. The Respondent

requested the Tribunal to terminate the arbitration proceedings and claimed the costs it had incurred in connection with the arbitration. The Respondent did not in the event put forward any additional claims.

## **Decision**

The Tribunal (Dr Paolo Michele Patocchi (Chair), Professor Martin Hunter, Professor August Reinisch) held that the Claimant was not entitled to terminate the arbitral proceedings unilaterally, and awarded the Respondent its costs incurred in the arbitration.

It was common ground between the parties that the UNCITRAL Rules contained no provision conferring a right on a claimant to withdraw its Notice of Arbitration, and that where a claimant did purport to withdraw the determination of the consequences thereof were a question of interpretation and construction of the UNCITRAL Rules.

The Claimant relied on a general principle of procedure in civil law jurisdictions whereby a claimant is entitled to withdraw a claim without prejudice. The Claimant had pointed to no specific provision that would assist the Tribunal. The Tribunal found that the Claimant was not entitled to terminate the arbitral proceedings unilaterally.

The arbitration proceedings could not properly be declared to be “unnecessary” in light of the existence of the Respondent’s claim for costs. Therefore the Tribunal decided not to terminate the proceedings through the mechanism contained in Article 34(2) of the UNCITRAL Rules.

Having found that it had jurisdiction to hear the Respondent’s claim for costs, the Tribunal held that, as the successful party in the proceedings, the Respondent was entitled to the costs incurred in connection with the arbitration.

The Claimant was ordered to pay the equivalent of US\$37,331.65 in costs, comprising:

- (a) CZK340,222.79 (for outside counsel);
- (b) CZK11,320.00 (for in-house counsel); and
- (c) EUR20,000.00 (the deposit on the Tribunal’s costs).

## **Concluding Remarks**

The decision in *Forminster v Czech Republic* demonstrates the importance of ensuring that arbitration is the appropriate and advantageous forum in which to bring a claim, as the consequences of a wrong decision in this respect can be both time-consuming and costly.

10 February 2015