

Forminster Enterprises Limited (Cyprus) v. The Czech Republic
UNCITRAL Arbitration – Place of arbitration: Geneva, Switzerland

ARBITRAL TRIBUNAL

Prof. Martin Hunter Essex Court Chambers 24 Lincoln's Inn Fields GB – London WC2A 3EG	Co-arbitrator Tel [44] (0)20 7813 8000 Fax [44] (0)20 7813 8080 E-mail mhunter@essexcourt.net
Prof. Dr. August Reinisch Department of European, International and Comparative Law Section for International Law and International Relations University of Vienna Schottenbastei 10-16 AT – 1010 Vienna	Co-arbitrator Tel [43] (1) 4277 35307 Fax [43] (1) 4277 9353 E-mail august.reinisch@univie.ac.at
Dr. Paolo Michele Patocchi Patocchi & Marzolini 5, rue Pedro-Meylan CH – 1208 Geneva	President appointed by the co-arbitrators Phone [41] (22) 718 33 12 Fax [41] (22) 718 33 11 E-mail patocchi@patocchimarzolini.com

PARTIES

Forminster Enterprises Limited (Cyprus) <i>Represented by:</i> JUDr. Jan Rudolf Attorney-at-law Rudolf & Partners Jungmannova 34 CZ – 110 00 Prague 1	CLAIMANT Tel [420] (224) 235 860 Fax [420] (224) 235 864 E-mail jan.rudolf@akrudolf.cz
The Czech Republic <i>Represented by:</i> Ms. Marie Talašová Head of the International Arbitration Department Ministry of Finance of the Czech Republic Letenská 15 CZ – 118 00 Prague 1	RESPONDENT Tel [420] (257) 044 734 Fax [420] (233) 373 034 E-mail marie.talasova@mfcz.cz

FINAL AWARD – 15 DECEMBER 2014

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BRIEFS ON THE MERITS REFERRED TO IN THE FOOTNOTES

<u>By the Claimant</u>	<u>By the Respondent</u>
NoA = Notice of Arbitration dated 9 January 2014	Letter dated 6 February 2014
WNoA = Withdrawal of the Notice of Arbitration, dated 17 February 2014	AWNoA = Letter dated 26 February 2014 answering the Claimant's Notice of Withdrawal
	RSubm = Respondent's Submission according to Procedural Order No. 2, dated 10 July 2014
ARSubm = Answer to the Respondent's Submission, dated 11 August 2014	

These briefs will be referred to by the abbreviation, followed by the page number followed by the paragraph number.

Ex: NoA 1 ¶ 1 (Notice of Arbitration, page 1 paragraph 1).

All quotations made from any exhibits or briefs on the record in the present Award, whenever printed in

Courier New font,

are excerpts set out *verbatim* and will be so set out without inverted commas.

They will accordingly contain no corrections, save for clearly recognisable spelling mistakes.

ABBREVIATIONS

BIT	Bilateral Investment Treaty
CZ-CY Treaty	Agreement between the Czech Republic and the Republic of Cyprus for the Promotion and Reciprocal Protection of Investments of 15 June 2001
CZK	Czech <i>koruna</i> or Czech crown
NoA	The Claimant's Notice of Arbitration dated 9 January 2014 NoA 1 ¶ 5 means Notice of Arbitration, page 1 paragraph 5
UNCITRAL Rules, the	United Nations Commission on International Trade Law Arbitration Rules (1976) The date (1976) is indicated only where the context requires a distinction to be made between the UNCITRAL Rules (1976) and the later revision of 2010, which is not applicable in the present arbitration.

I. **THE ARBITRATION PROCEEDINGS OUTLINED**

A. **THE CLAIMANT**

1. The Claimant in this arbitration is Forminster Enterprises Limited (“Forminster”), a private limited liability company incorporated under registration number No. 78962 in accordance with the laws of the Republic of Cyprus and having its registered address at Kermia House, Office 601, 4 Diagorou Street, 1097 Nicosia, Republic of Cyprus, represented by Dr. Jan Rudolf, whose professional address is set out on the first page of the present Award.

B. **THE RESPONDENT**

2. The Respondent in this arbitration is the State of the Czech Republic (“the Czech Republic”) represented by its Ministry of Finance (see also paragraph 32 below), the address of which is set out on the first page of the present Award.

C. **THE DISPUTE**

3. **Breach of the CZ-CY Treaty.** In its Notice of Arbitration dated 9 January 2014 the Claimant claimed damages for losses resulting from measures imposed by the Czech State on its investment in the territory of the Czech Republic. The Claimant relied on Article 5(1) of the CZ-CY Treaty and Article 3 of the UNCITRAL Rules. The Claimant argued that the effect of such measures amounted to expropriation and, therefore, constituted a breach of the said Treaty and Czech law by the Czech Republic.
4. **The Withdrawal of the Notice of Arbitration by the Claimant.** On 17 February 2014 the Claimant wrote to the Respondent stating that it withdrew its Notice of Arbitration. In that letter the Claimant explained both the reasons for the withdrawal of the Notice of Arbitration and the effects that such withdrawal should have in its view.
 - 4.1. The reasons for the withdrawal were explained as follows. Upon receipt of the Notice of Arbitration, the Respondent requested that the identity of the beneficial owner(s) and the current manager(s) of the Claimant be disclosed, and raised objections to the jurisdiction of the Arbitral Tribunal. The information sought by the Respondent, the Claimant contended, had little relevance to the issue of arbitral jurisdiction. On the other hand, the merits of the case were so important to the Claimant that the Claimant had

decided to pursue its claims in a forum, the jurisdiction of which could not be called into question by the Respondent.

4.2. As to the effects of the withdrawal, the Claimant advanced two main points. Firstly, the proceedings would be terminated upon delivery to the Respondent of the Claimant's notice of withdrawal. Secondly, the withdrawal by the Claimant of its Notice of Arbitration did not constitute a waiver of the Claimant's right to damages and compensation for other losses sustained as a result of the violation of the CZ-CY Treaty by the Czech Republic.

5. Objection by the Respondent to the Purported Termination of the Arbitration by the Claimant. In a letter dated 26 February 2014 the Respondent disagreed that the proceedings could be terminated forthwith upon delivery of the Claimant's letter dated 17 February 2014. The Respondent took the view that, unless the parties agreed otherwise, only an arbitral tribunal had the power to terminate arbitral proceedings which had been properly instituted, whether by an award or a procedural order, and therefore an arbitral tribunal had to be constituted. In this arbitration the Parties had not reached any agreement as to the termination of the arbitration and the Respondent reserved its right to bring any claims or objections before such arbitral tribunal, once constituted.

6. The Dispute. It emerged later that the Respondent elected not to pursue any additional claims other than its claims for costs incurred in connection with the arbitration. Thus, the dispute essentially relates to the claim for costs which the Respondent presented in the arbitration.

7. The Parties' Claims. The Claimant. The Claimant maintains that it was entitled to bring these arbitration proceedings to an end on 17 February 2014 and opposes the Respondent's claim for costs. The Claimant's prayer for relief is set out in paragraph 36 *et seq.* below.

8. The Respondent. The Respondent asked the Arbitral Tribunal to terminate the arbitration proceedings and award the costs claimed (RSubm 6 ¶ 5.1). The Respondent's prayer for relief is set out in paragraph 38 below.

D. THE PROCEEDINGS OUTLINED

9. The Notice of Arbitration – Appointment of Prof. Hunter (9 January 2014). On 9 January 2014 the Claimant filed its Notice of Arbitration against the Respondent. In its Notice of Arbitration it appointed Prof. Martin Hunter as arbitrator. Prof. Martin Hunter's contact details are set out on the first page

of this Award. The Notice of Arbitration contained an express reference to the UNCITRAL Rules (1976) (NoA 3 ¶ 6).

10. The Respondent's Request for Information as to the Identity of the Claimant's Beneficial Owner(s) (21 January 2014). On 21 January 2014 the Respondent acknowledged receipt of the Notice of Arbitration on 10 January 2014, adding that such was the date of the commencement of the arbitral proceedings. The Respondent did not challenge the Claimant's indication to the effect that the UNCITRAL Rules (1976) were applicable.
11. Whilst expressing no concerns as to the impartiality and independence of Prof. Hunter whom the Claimant had appointed, the Respondent requested the Claimant to disclose the identity of its beneficial owner and its managers so that it could be determined whether Prof. Hunter, appointed by the Claimant, met the impartiality and independence requirements, and so that the Respondent could make an informed appointment of its own arbitrator.
12. Prof. Reinisch Appointed by the Respondent – Challenge of Arbitral Jurisdiction (6 February 2014). On 6 February 2014 the Respondent appointed Prof. Dr. August Reinisch as arbitrator. The Respondent noted that its letter of 21 January 2014 and the request for information contained therein had not been answered by the Claimant. Finally, the Respondent challenged the jurisdiction of the Arbitral Tribunal *ratione personae*, *ratione materiae* and *ratione temporis*. In this letter the Respondent did not challenge the indication contained in the Claimant's Notice of Arbitration to the effect that the UNCITRAL Rules (1976) were applicable.
13. Acceptance of Appointment by Prof. Dr. Reinisch (10 February 2014). On 10 February 2014 Prof. Dr. Reinisch accepted his appointment and made two disclosures. Prof. Dr. Reinisch's contact details are set out on the first page of this Award.
14. Notice of Withdrawal by the Claimant (17 February 2014). On 17 February 2014 the Claimant wrote to the Respondent that it withdrew the Notice of Arbitration ("Notice of Withdrawal"). It replied in essence that, on the one hand, the information requested by the Claimant with respect to its beneficial owner(s) was irrelevant to the issue of arbitral jurisdiction. On the other hand, as the jurisdiction of the arbitral tribunal had been challenged by the Respondent even before the Tribunal had been constituted, the Claimant had decided "to take another course of action" and intended to pursue its claims in a forum, the jurisdiction of which could not "be compromised" by the Respondent.

15. The Claimant further stated that as the Arbitral Tribunal had not been constituted and was not therefore in a position to issue a termination order in accordance with Art. 34(2) of the UNCITRAL Rules, the arbitral proceedings would be terminated according to the Claimant upon delivery of the 17 February 2014 letter to the Respondent. The arbitration proceedings would be terminated without prejudice and would not preclude the Claimant from asserting the claim in question against the Respondent in the future. Such withdrawal by the Claimant did not constitute a waiver of any right to damages or any other remedy for the losses sustained as a consequence of the breach of the CZ-CY Treaty by the Czech Republic.

16. Respondent's Answer to the Claimant's Notice of Withdrawal (26 February 2014). On 26 February 2014 the Respondent answered the Claimant's Notice of Withdrawal and objected to the termination of the arbitral proceedings. The arbitral proceedings had been commenced upon delivery of the Notice of Arbitration, and unless the Parties agreed otherwise, they could be terminated in accordance with the UNCITRAL Rules only by an award or an order for termination, that is by a decision to be made by the arbitral tribunal to be constituted. The Respondent reserved all its rights in connection with the Claimant's Notice of Withdrawal, in particular with respect to any costs incurred. In this letter the Respondent repeatedly referred to the UNCITRAL Rules without challenging the indication contained in the Claimant's Notice of Arbitration to the effect that the UNCITRAL Rules (1976) were applicable.

17. List of Potential Presiding Arbitrators and Consultation of the Parties (9 and 10 March 2014). On 9 March 2014 Prof. Hunter sent the Parties, also on behalf of Prof. Dr. Reinisch, a list containing the names of six potential presiding arbitrators, any of which would be acceptable to each of them. On 10 March 2014 the Claimant and the Respondent wrote to Prof. Hunter and Prof. Dr. Reinisch, respectively, stating that they did not have objections as to any of the six names on the list.

18. Appointment of the Presiding Arbitrator by the Co-arbitrators (11 March 2014). On 11 March 2014 Prof. Dr. Reinisch wrote to the Parties, also on behalf of Prof. Hunter, informing them that they had agreed on the appointment of Dr. Paolo Michele Patocchi as President of the Arbitral Tribunal, chosen from the list mentioned in paragraph 17 above. Prof. Hunter and Dr. Patocchi received a copy of the same letter. Dr. Patocchi's contact details are set out on the first page of this Award.

19. Acceptance by Dr. Patocchi (12 March 2014). On 12 March 2014 Dr. Patocchi wrote to the Parties that he was ready and willing to accept the appointment; Prof. Hunter and Prof. Dr. Reinisch were copied in.
20. Constitution of the Arbitral Tribunal (26 March 2014). On 26 March 2014 the Arbitral Tribunal confirmed to the Parties in Procedural Order No. 1 that it had been constituted in accordance with the UNCITRAL Arbitration Rules (1976).
21. In a letter of the same day to Counsel for the Respondent, who had asked whether the Arbitral Tribunal had expressed the view or the conclusion that the UNCITRAL Rules (1976) applied, the Arbitral Tribunal stated that the reference to the UNCITRAL Rules (1976) in Procedural Order No. 1 was based on what the Arbitral Tribunal had understood to be common ground between the Parties (see paragraphs 9, 10, 12 and 16 above). If this point happened, however, to be in dispute between the Parties, the Arbitral Tribunal would then decide it in due course.
22. Request for an Advance on Costs (15 April 2014). On 14 April 2014 the Arbitral Tribunal asked each Party to pay an amount of EUR 20,000.00 by 15 May 2014 and informed the Parties that each Arbitrator would charge an hourly rate of EUR 400.00. The Arbitral Tribunal further indicated that it was minded to set the place of arbitration in Geneva (Switzerland) and the Parties' views were sought in this respect.
23. Parties' Comments (23 April 2014). The Claimant's Comments. On 23 April 2014 the Claimant first restated its case on the termination of the arbitration. Whilst acknowledging that the UNCITRAL Rules did not make provision for a withdrawal of the Notice of Arbitration, the Claimant pointed out that Art. 3 of the UNCITRAL Rules did not require the Notice of Arbitration to be communicated to the Arbitrators, or to be translated in the language of the arbitration. The absence of an express provision dealing with the withdrawal of the Notice of Arbitration could not be reasonably construed as an implied preclusion, considering that the UNCITRAL Rules dealt with the initial stage of the arbitration with few provisions and were intended to confer broad discretion on the claimant. That discretion must include a decision by the Claimant to withdraw its Notice of Arbitration. It was contrary to the principles of procedural flexibility, party autonomy and cost expediency to have to appoint an arbitral tribunal just to have a termination order issued. The Claimant asked the Arbitral Tribunal to discontinue the proceedings by a summary decision following Procedural Order No. 2.

24. The Claimant further submitted that the subject-matter of the proceedings was substantially limited even in the Respondent's view and that the scope of the Parties' submissions should be limited to the allegations and legal arguments relating to the application of Art. 34(2) of the UNCITRAL Rules.
25. The Respondent's Comments. On 23 April 2014 the Respondent agreed that the place of arbitration should be in Geneva, Switzerland, and it agreed to the hourly rate and the advance on costs proposed by the Arbitral Tribunal.
26. Payment by the Respondent. On 20 May 2014 the Arbitral Tribunal acknowledged receipt of payment of the advance on costs by the Respondent.
27. Claimant's Objection to the Proposed Hourly Rates and Advance on Costs (2 June 2014). On 2 June 2014 the Claimant objected to the hourly rate of EUR 400.00 and the amount of the advance on costs of EUR 20,000.00 proposed by the Arbitral Tribunal on 15 April 2014, on the basis that the Notice of Arbitration had been withdrawn on 17 February 2014 and there was no reason to elaborate on the case more than it was necessary to terminate the proceedings in a summary fashion.
28. The Claimant added that the hourly rate and the amount of the advance on costs were disproportionate to the work carried out by the Arbitral Tribunal. The Claimant did not volunteer to make any payment and did not indicate whether a lower hourly fee was agreeable.
29. Further to this objection the Respondent asked the Arbitral Tribunal to consider whether the proceedings could be limited to one submission by each Party and the Arbitral Tribunal could consider to proceed on the basis of the advance on costs paid by the Respondent.
30. Procedural Order No. 2 (10 June 2014). On 10 June 2014 the Arbitral Tribunal set the time limits for one comprehensive submission to be filed by each Party (expiring on 10 July 2014 for the Respondent and on 11 August 2014 for the Claimant). It also decided that the advance on costs paid by the Respondent was a sufficient basis on which to proceed.
31. Parties' Submissions. The Parties timely filed their submissions.
32. New Counsel for the Respondent. On 10 July 2014 Ms. Marie Talašová, Head of the International Arbitration Department of the Ministry of Finance of the Czech Republic informed the Arbitral Tribunal and the other side that

she would represent the Respondent based on a power of attorney issued by the Ministry of Finance of the Czech Republic, dated 8 July 2014 and signed by Ing. Andrej Babiš.

33. Proceedings Closed (12 November 2014). On 12 November 2014 the Arbitral Tribunal sent the Parties Procedural Order No. 3 confirming that the place of arbitration was in Geneva and informing them that the proceedings had been closed in accordance with Art. 29(1) of the UNCITRAL Rules.

II. THE ARBITRATION AGREEMENT

34. The arbitration agreement contained in Article 8 [Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party] of the CZ-CY Treaty reads as follows:

1. Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of that other Contracting Party shall be settled, if possible, by negotiations between the parties to the dispute.

2. If any dispute between an investor of one Contracting Party and the other Contracting Party cannot be thus settled within a period of six months from the written notification of a claim, the investor shall be entitled to submit the case, at his choice, for settlement to:

(a) a court of competent jurisdiction or an administrative tribunal of the Contracting Party which is the party to the dispute,

or

(b) the International Centre for Settlement of Investment Disputes (ICSID) having regard to the applicable provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C. on 18 March 1965,

or

(c) an arbitrator or international ad hoc arbitral tribunal established under the Arbitration

Rules of the United Nations Commission on International Trade Law (UNCITRAL). The parties to the dispute may agree in writing to modify these Rules,

or

(d) the Arbitration Institute of the Chamber of Commerce in Stockholm.

3. The arbitral awards shall be final and binding on both parties to the dispute and shall be enforceable in accordance with domestic legislation.

35. In its Notice of Arbitration the Claimant opted for the option available under Article 8(2)(c) (NoA 1). This Arbitral Tribunal was, therefore, constituted in accordance with the UNCITRAL Arbitration Rules (1976), as confirmed by the Arbitral Tribunal in Procedural Order No. 1 dated 26 March 2014 (see also paragraphs 20 and 21 above).

III. THE PRAYERS FOR RELIEF

A. THE CLAIMANT

36. In its Notice of Arbitration of 9 January 2014, the Claimant set out the following prayer for relief (NoA 12-13 ¶ 52):

G.

RELIEF AND REMEDY SOUGHT

52. Without prejudice to its right to amend, supplement or restate the relief to be requested in the arbitration, the Claimant requests the Arbitral Tribunal to:

- (i) Award the Claimant monetary damages of CZK 803,232,139 (to wit: eight hundred and three million two hundred and thirty-two thousand one hundred and thirty-nine Czech Crowns) in compensation for all its losses sustained as a result of the suspension of rights to the Shares;
- (ii) Award the Claimant the interest on CZK 803,232,139 at the rate of 3.038% per year from November 1, 2002 until the date of full payment of this amount;
- (iii) Award the Claimant all costs of legal representation and assistance incurred by the

Claimant in the course of this arbitration including, without limitation, attorney's and all other professional fees and expenses;

- (iv) Order the Czech Republic to pay the fees of the arbitral tribunal to be fixed by the tribunal in accordance with Article 39 of the UNCITRAL Arbitration Rules, travel and other expenses incurred by the arbitrators, the costs of expert advice required by the arbitral tribunal and the travel and other expenses of witnesses.

37. In its submission dated 11 August 2014 the Claimant concluded as follows (ARSubm 2):

As it follows from the above presented conclusions, FEL is of the opinion that (i) the Arbitration Proceedings have been promptly terminated and (ii) no costs should be awarded to the Respondent.

B. THE RESPONDENT

38. In its submission dated 10 July 2014 the Respondent sought the following (RSubm 6 ¶ 5):

5. Prayer for Relief

5.1 Respondent respectfully requests the arbitral tribunal to:

- (a) Terminate this arbitration proceeding and;
- (b) Render an award on costs obliging Respondent to reimburse all costs and expenses incurred by Respondent in relation to these proceedings, including, inter alia, the fees and expenses of the arbitral tribunal, external legal counsel, in-house lawyers, experts, consultants in the amount of 1.813.432,65 CZK in total as specified in Annex No. 1.

39. There is an obvious clerical error in the quotation set out in the preceding paragraph which the Arbitral Tribunal will correct of its motion. For it is beyond any doubt (see RSubm 5 ¶ 4.13) that the Respondent claims its own legal costs against the Claimant, and the expression "render an award on costs obliging Respondent to reimburse ..." can only mean "render an award on costs ordering Claimant to reimburse ...".

IV. THE QUESTIONS TO BE DECIDED BY THE ARBITRAL TRIBUNAL

40. The issues arising for determination in this arbitration are as follows:

- (i) whether the Claimant was entitled to bring this arbitration to an end by its Notice of Withdrawal dated 17 February 2014 and whether this Arbitral Tribunal has jurisdiction to make an award of costs ("the first pair of issues");

the Arbitral Tribunal's decision on the first pair of issues is set out in paragraph 88 below;

- (ii) in case the answer to the first question set out in (i) is in the negative and the answer to the second question set out in (i) is in the affirmative, whether the Respondent is entitled to an award of costs and, if so, in which amount ("the second pair of issues");

the Arbitral Tribunal's decision on the second pair of issues is set out in paragraph 112 below.

V. THE DECISION BY THE ARBITRAL TRIBUNAL

A. WHETHER THE CLAIMANT WAS ENTITLED TO TERMINATE THE ARBITRATION PROCEEDINGS UNILATERALLY BY WITHDRAWING ITS NOTICE OF ARBITRATION – WHETHER THIS ARBITRAL TRIBUNAL HAS JURISDICTION TO MAKE AN AWARD ON COSTS (THE FIRST PAIR OF ISSUES)

41. The Arbitral Tribunal's decision on the first pair of issues is set out in paragraph 88 below.

1. The Claimant's Position

42. Claimant's Right to Terminate the Arbitral Proceedings. It is the Claimant's case that the arbitral proceedings were duly terminated on 17 February 2014 (ARSubm 1, first paragraph (i)).

43. The Claimant acknowledges that there is no provision in the UNCITRAL Rules expressly dealing with the withdrawal by a claimant of his notice of arbitration. However, the Claimant argues that it is a common principle of civil law that "the claimant may withdraw all or part of his claim at any time and the withdrawal takes effect on the date on which the respective notice

is delivered of it and where the whole claim is withdrawn, proceedings are brought to an end against the relevant respondent on that date” (ARSubm 1, first paragraph (iv)).

44. The Claimant further argues that it has repeatedly informed the Arbitrators and the Respondent that it had duly withdrawn from the arbitration proceedings and that, as a consequence, “the subject-matter of that particular case has been thus substantially limited” (ARSubm 1, first paragraph (iii)).

45. Finally, the Claimant denies that its Notice of Withdrawal is an attempt at withholding the identity of its beneficial owner(s) as alleged by the Respondent; the Claimant does not intend to provide information on a point which is devoid of any relevance in view of the clear and unambiguous definition of “Investor” in Art. 1(2) of the CZ-CY Treaty (ARSubm 1, second paragraph (i)).

46. Answer to the Respondent’s Case. The Claimant disagrees with the Respondent that an arbitral tribunal is to be constituted in order for the proceedings to be terminated (ARSubm 1-2, second paragraph (ii)). The UNCITRAL Rules should have provided for such case. As they do not contain such a provision, the alleged need to constitute an arbitral tribunal “just” to bring the proceedings to an end finds no support in the UNCITRAL Rules. The interpretation of the UNCITRAL Rules advocated by the Respondent is a self-serving interpretation (ARSubm 2, second paragraph (ii)).

2. The Respondent’s Position

47. Termination of Proceedings under the UNCITRAL Rules. The Respondents submits that only an arbitral tribunal can terminate arbitral proceedings under Art. 34 of the UNCITRAL Rules, and therefore an arbitral tribunal must first be constituted in order for proceedings to be terminated.

48. It follows that the Claimant’s Notice of Withdrawal dated 17 February 2014 did not operate so as to terminate the arbitral proceedings.

3. The Reasons for the Arbitral Tribunal’s Decision

49. The Arbitral Tribunal’s decision is set out in paragraph 88 below.

a) The Provisions in Point of the UNCITRAL Rules

50. This arbitration is governed by the provisions of the UNCITRAL Rules (1976) (see paragraph 35 above).
51. It is common ground between the Parties that there is no provision in the UNCITRAL Rules conferring a right on a claimant to withdraw its notice of arbitration. It also appears to be common ground that where a notice of arbitration has been withdrawn by a claimant, the determination of the consequences of such withdrawal is a question of interpretation and construction of the UNCITRAL Rules.
52. Art. 3 of the UNCITRAL Rules. Art. 3(1) of the UNCITRAL Rules provides that the claimant shall give the respondent a notice of arbitration.
53. Art. 3(2) of the UNCITRAL Rules provides that arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.
54. Art. 34(2) of the UNCITRAL Rules. Art. 34(2) of the UNCITRAL Rules reads as follows:

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reasons not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

b) The Termination of the Proceedings in the Present Case

55. In this sub-section the Arbitral Tribunal will determine the date on which the arbitral proceedings were commenced, the relevance of the claim for costs which the Respondent reserved and the application of Art. 34(2) of the UNCITRAL Rules prayed in aid by the Claimant.

aa) The Date When Proceedings Were Commenced

56. It is the Claimant's case that the withdrawal of the Notice of Arbitration operates so as to terminate the arbitral proceedings as of the date on which the Respondent received such Notice of Withdrawal (WNoA 2). The Claimant maintained that its Notice of Withdrawal did not amount to a withdrawal or a waiver of its claims against the Respondent, but had simply

a procedural effect in that it brought the arbitral proceedings to an end (WNoA 2).

57. In its answer to the Claimant's Notice of Withdrawal the Respondent objected to the withdrawal, contending that it was a matter for the arbitral tribunal to be constituted to terminate the proceedings. The Respondent also reserved its right to be compensated for the costs incurred.
58. The Claimant rebutted in its letter dated 23 April 2014 that it made little sense to constitute a tribunal "for the sole purpose of issuing a termination order".
59. In this letter the Claimant did not mention the claim for costs which the Respondent had reserved in its answer to the Notice of Withdrawal dated 26 February 2014. However, the claim for costs which the Claimant reserved in its letter dated 26 February 2014 is not irrelevant in the Arbitral Tribunal's view, and this claim will be considered in due course below.
60. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent, Art. 3(2) of the UNCITRAL Rules. In the present case the Respondent received the Notice of Arbitration on 10 January 2014 (*see* paragraph 10 above).
61. The Claimant relied on the fact that it had filed simply a Notice of Arbitration, as opposed to a full Statement of Claim (Claimant's letter dated 2 June 2014; ARSubm, first paragraph (ii)). The Claimant, however, did not elaborate on the consequences following from such a distinction in the circumstances of the present case.
62. It is not in dispute that the Claimant did not file a Statement of Claim within the meaning of Art. 18 of the UNCITRAL Rules in the present case. However, it is also true that in its Notice of Arbitration the Claimant set out its prayer for relief with an indication of the amounts sought (*see* paragraph 36 above) as well as a statement of the facts supporting its claim; such statement of facts is required for a Statement of Claim under Art. 18(2)(b) of the UNCITRAL Rules, but not for a Notice of Arbitration under Art. 3 of the UNCITRAL Rules. The statement of the facts supporting the Claimant's claim covers three full pages in the Notice of Arbitration (NoA 4 ¶ 11 to NoA 7 ¶ 24).
63. The extent to which a notice of arbitration deals with the facts of the dispute is not relevant, however, to the application of Art. 3(2) of the UNCITRAL Rules.

64. It therefore follows that these arbitral proceedings were commenced and have been pending as of 10 January 2014 in accordance with Art. 181 of the Swiss Federal Private International Law Act, 1987¹ and Art. 3(2) of the UNCITRAL Rules.

bb) The Respondent's Claim for Costs

65. In the UNCITRAL Rules (1976) there is no opportunity for a respondent to answer a claimant's Notice of Arbitration until after the arbitral tribunal has been constituted and the claimant has filed its statement of claim. This was changed in the latest version of the UNCITRAL Rules (2010) in which a respondent is entitled to file a Response to the notice of arbitration (Art. 4).

66. If one considers the period of time immediately following receipt of the Notice of Arbitration, the Respondent therefore had an opportunity to give notice of its claim for costs only by way of a letter in the present case, rather than an ordinary submission, after the Notice of Arbitration was received. This is what the Respondent did in its letter dated 26 February 2014, in which it reserved a claim for costs.

67. The Respondent's claim for costs is a disputed claim (ARSubm 2, second paragraphs (iii) and (iv)).

cc) Whether Proceedings Were Terminated by the Claimant or Are to Be Terminated under Art. 34(2) of the UNCITRAL Rules

68. The Claimant has pressed different points in relation to the termination of the arbitral proceedings. In certain submissions the Claimant contended

¹ Art. 181 PILA reads as follows in the official German version and the English unofficial translation:

V.
Rechtshängigkeit Art. 181

Das Schiedsverfahren ist hängig, sobald eine Partei mit einem Rechtsbegehren den oder die in der Schiedsvereinbarung bezeichneten Schiedsrichter anruft oder, wenn die Vereinbarung keinen Schiedsrichter bezeichnet, sobald eine Partei das Verfahren zur Bildung des Schiedsgerichts einleitet.

V.
Lis pendens Art. 181

The arbitral proceedings are pending as of the time when one of the parties submits its request to the arbitrator or arbitrators designated in the arbitration agreement or, in the absence of such designation, from the time when one of the parties initiates the procedure for the constitution of the arbitral tribunal.

that the proceedings had been terminated as a consequence of its Notice of Withdrawal (WNoA 2; Letter of 23 April 2014). In other submissions it contended that the proceedings were to be terminated under Art. 34(2) of the UNCITRAL Rules on the basis that the proceedings had become “unnecessary” within the meaning of this provision (Letter of 23 April 2014 as an alternative argument).

69. The Arbitral Tribunal will therefore first examine whether the Claimant’s Notice of Withdrawal operates so as to bring the arbitral proceedings to an end, and, if the answer to that question is in the negative, whether proceedings should be brought to an end under Art. 34(2) of the UNCITRAL Rules.
70. Whether the Claimant Was Entitled to Terminate the Arbitral Proceedings on 17 February 2014. In the Arbitral Tribunal’s view, if one were to accept in the circumstances of the present case that the Claimant could bring arbitration proceedings to an end unilaterally by withdrawing its Notice of Arbitration and without the constitution of an arbitral tribunal, that would also mean that the Claimant would be given the right to get rid of the Respondent’s claim for costs to all intents and purposes. In the Arbitral Tribunal’s view, such a consequence would be unacceptable by any standards.
71. The Claimant’s contention is flawed in so far as the Claimant takes the view that it is entitled to terminate the arbitral proceedings prior to and without the constitution of an arbitral tribunal. It is inaccurate that an arbitral tribunal must be constituted “only” in order to discontinue the proceedings under Art. 34(2) of the UNCITRAL Rules; such an argument turns a blind eye to the Respondent’s claim for costs.
72. The Respondent opposed the termination of the proceedings which the Claimant sought to impose relying on its Notice of Withdrawal (see paragraph 16 above). There is at this juncture no reason to assume that the Respondent did not have a legitimate interest in reserving its claim for costs.
73. The Claimant prays in aid a general principle of procedure in civil law jurisdictions whereby a claimant or a plaintiff is entitled to withdraw a claim without prejudice (ARSubm 1, first paragraph (iv)).

The Arbitral Tribunal need not determine whether such a general principle exists in the circumstances of the present case. The Arbitral Tribunal will observe at this juncture that the Claimant did not refer to any particular

provisions of any system of law. Be that as it may, even if such a general principle existed, such principle would not in the Arbitral Tribunal's view operate so as to dispense the Tribunal with the determination of a disputed claim for costs.

74. Therefore, the answer to the first issue mentioned in paragraph 69 above is in the negative: the Claimant was not entitled to terminate the proceedings simply on the basis that its Notice of Arbitration had been withdrawn.
75. Finding by the Arbitral Tribunal. The Arbitral Tribunal therefore finds that the Claimant was not entitled to terminate the arbitral proceedings unilaterally on 17 February 2014.
76. Whether the Arbitral Proceedings Are to Be Terminated under Art. 34(2) of the UNCITRAL Rules. The Arbitral Tribunal will then consider, at this juncture, whether the arbitral proceedings should be terminated by the Tribunal itself under Art. 34(2) of the UNCITRAL Rules.
77. In the Arbitral Tribunal's view, the provision in Art. 34(2) of the UNCITRAL Rules is inapplicable in the present case due to the existence of the Respondent's claim for costs. As long as there is a claim of either Party to be determined by the Arbitral Tribunal, arbitral proceedings cannot be said to be "unnecessary". One can only fairly assume, at this juncture, that the Respondent has a legitimate interest in asserting its claim for costs. If this were not the case or if the claim for costs were devoid of any foundation, then the Arbitral Tribunal would dismiss it in due course.
78. Art. 39(2) of the UNCITRAL Rules (2010) contains a sentence which explains the meaning of "unnecessary" and which confirms that the conclusion reached by the Arbitral Tribunal in the preceding paragraph is in line with the spirit of the UNCITRAL Rules; such sentence reads as follows: "The arbitral tribunal shall have the power to issue such an order unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so".
79. In the Arbitral Tribunal's view, the Respondent's claim for costs must be determined before the proceedings are terminated.
80. Finding by the Arbitral Tribunal. In the Arbitral Tribunal's view, the Claimant's application in order for the arbitral proceedings to be terminated under Art. 34(2) of the UNCITRAL Rules must be dismissed.

c) Whether the Arbitral Tribunal Has Jurisdiction to Hear the Respondent's Claim for Costs

81. As a matter of Swiss law, a party may challenge arbitral jurisdiction without using any particular terms of art (*Peugeot c. Omega*, ATF/BGE 128 III 50). Accordingly, it is a matter for the Arbitral Tribunal to determine whether a party has in essence raised such an objection and, if so, to determine whether such an objection has any foundation. Thus, an objection to arbitral jurisdiction may be raised by a party simply by challenging the capacity or *locus standi* of the other.

82. The Claimant has not challenged the Arbitral Tribunal's jurisdiction in so many words. Yet the main part of the Claimant's argument is to the effect that the proceedings were terminated as of 17 January 2014 and there was therefore no need to constitute an arbitral tribunal.

In its letter of 23 April 2014 the Claimant contended that after the constitution of the Arbitral Tribunal "the second Procedural Order should only address issues relevant to timely discontinuation of the proceedings following its termination upon delivery of the Notice of Arbitration withdrawal to the Czech Republic".

The Claimant then went on to remark that even if the Respondent were right in contending that the proceedings could be terminated only by the Arbitral Tribunal, such view would substantially limit "the subject-matter of the proceedings" and the Arbitral Tribunal "would only determine whether the continuation of the proceedings has become (or rather has been since the withdrawal of the Notice of arbitration) unnecessary within the meaning of Art. 34(2) of the UNCITRAL Rules (1976)".

In the same letter the Claimant did not mention the Respondent's claim for costs.

The same point about the subject-matter of the arbitration being "substantially limited" was pressed again in the Claimant's latest submission (ARSubm 1, first paragraph (ii)).

83. The Claimant's argument may therefore be taken to amount to an implied challenge of the Arbitral Tribunal's jurisdiction, at least as far as the Respondent's claim for costs is concerned.

84. If such an objection to arbitral jurisdiction has possibly been raised at all, such objection is without foundation in the Arbitral Tribunal's view.

85. As noted in paragraph 66 above, the Respondent was entitled to reserve a claim for costs. That claim was presented by the Respondent as soon as the procedural timetable allowed, namely in the Respondent's final submission.

86. In the Arbitral Tribunal's view, arbitral jurisdiction extends in the present case to the Respondent's claim for costs.

87. Finding by the Arbitral Tribunal. The Arbitral Tribunal has jurisdiction to entertain the Respondent's claim for costs.

4. The Arbitral Tribunal's Decision

88. Therefore, the Arbitral Tribunal is driven to the conclusion that the Claimant was not entitled to terminate the arbitral proceedings unilaterally on 17 February 2014. The proceedings cannot be terminated under Art. 34(2) of the UNCITRAL Rules as being "unnecessary" since the Respondent had reserved a claim for costs which it has properly presented in accordance with the procedural timetable. The proceedings shall therefore continue until the Arbitral Tribunal has determined the Respondent's claim for costs.

89. The Arbitral Tribunal has jurisdiction to hear the Respondent's claim for costs.

B. WHETHER THE RESPONDENT IS ENTITLED TO AN AWARD ON COSTS AND, IF SO, FOR WHICH AMOUNT (THE SECOND PAIR OF ISSUES)

90. The Arbitral Tribunal's decision on this pair of issues is set out in paragraph 112 below.

91. The Respondent essentially has the position of a claimant in relation to its claim for costs and the Arbitral Tribunal will therefore first examine the Respondent's case and then the Claimant's defence on costs.

1. The Respondent's Position

92. The Background. The Respondent alleges that the Claimant first served a Notice of Arbitration on 1 October 2009, claiming declaratory relief and compensation for damage allegedly caused by the seizure of shares. The claim was based on a breach of the CZ-CY Treaty. However, the Claimant failed to prosecute its claims in those proceedings. The Respondent incurred significant costs.

93. The Present Proceedings. The Claimant then filed a fresh Notice of Arbitration on 9 January 2014 in the present proceedings, making reference to its previous submission. Then on 17 February 2014 it withdrew its Notice of Arbitration in order to avoid to disclose the identity of its beneficial owner(s).
94. The Costs Incurred. Emphasis is placed by the Respondent on the fact that a sovereign State faced with a claim for an amount in excess of CZK 800,000,000.00 based on a breach of international law is bound to act diligently and prepare its defence to such a claim.
95. The Amount of the Costs Incurred. The Respondent claims an amount of CZK 1.813.432,65 as specified in Annex 1 to its final submission.
96. Annex 1 sets out the costs allegedly incurred by the Respondent in three distinct categories: (i) attorney fees, (ii) in-house lawyer costs and (iii) Tribunal costs.
97. Attorneys' Fees. The costs allegedly incurred in connection with the outside counsel retained cover a period of 4 years, namely the years 2009 (CZK 214,200.00), 2010 (CZK 990,057.00), 2011 (CZK 257,632.26) and 2014 (CZK 340,222.79).
98. In-house Lawyers. The costs allegedly incurred in connection with the use of in-house lawyers in 2004 amount to CZK 11,320.00.
99. Tribunal's Costs. The Tribunal's costs amount to EUR 20,000.00.

2. The Claimant's Position

100. The Claimant denies that the Respondent is entitled to any compensation for legal costs on the basis that the choice of legal advisers was a matter exclusively for the Respondent and, in the absence of any agreement, the Claimant cannot be held liable for the consequences of such a decision.
101. The Claimant further argues that the fact that the Respondent filed its latest submission signed by in-house counsel is compelling evidence of the fact that resort to outside counsel was not required at all in the present case, and the whole case could have been managed by in-house lawyers.
102. Finally, the Claimant takes the view that the amount claimed is out of proportion to the scope of work of outside counsel. The Claimant alleges that there was a meeting at Weinhold Legal on 22 July 2012, and no further activity was required afterwards until 9 January 2014. The Claimant

concludes that "any decision on costs based on simple copies of invoices of external legal advisors would be wrong and unacceptable".

3. The Reasons for the Arbitral Tribunal's Decision

103. The Arbitral Tribunal's decision is set out in paragraph 112 below.
104. There appear to be three issues arising for determination in relation to the Respondent's claim for costs, as follows:
- (i) whether costs relating to activities carried out prior to 9 January 2014 are recoverable at all;
 - (ii) whether the photostat copies of invoices produced by the Respondent are admissible evidence; and
 - (iii) whether the costs evidenced by the Respondent are reasonable under Art. 38(e) of the UNCITRAL Rules.
105. The Relevant Period of Time. These arbitral proceedings were started by the Claimant on 9 January 2014. Any claim for costs relating to these proceedings would *prima facie* cover activities carried out after such date, and not beforehand, unless any activities carried out beforehand are shown to relate to these proceedings.
106. The Respondent does not make such a showing and confines itself to claiming costs relating to the first proceedings brought by the Claimant back in 2009. In the Arbitral Tribunal's view, such costs are not recoverable in the absence of specific and convincing explanations, which the Arbitral Tribunal has been unable to find in the Respondent's submissions.
107. Finding by the Arbitral Tribunal. The Arbitral Tribunal is therefore driven to the conclusion that the Respondent is in principle entitled to recover costs as from 10 January 2014, subject to proof of *quantum*.
108. The Evidence Filed by the Respondent. The Arbitral Tribunal will dismiss the Claimant's objection based on the alleged inadmissibility of photostat copies as evidence of legal costs. The Respondent has acted in accordance with international standard practice. The Claimant has failed to substantiate its objection. The Claimant's objection in this respect must therefore be dismissed.

109. Reasonableness of Costs. The Claimant has not specifically contested the reasonableness of the costs claimed by the Respondent in relation to the year 2014. The Arbitral Tribunal finds that the amount of CZK 340,222.79 (equal to approx. EUR 12,000.00) for outside counsel is reasonable, and so is the amount of CZK 11,320.00 (equal to approx. EUR 407) for in-house counsel.

110. Award of Costs to the "Successful Party". Arts. 38(e) and 40.1 of the UNCITRAL Rules provide that an award of costs is to be made to "the successful party" and the question therefore arises whether the Respondent is to be awarded all of its costs relating to the year 2004.

111. In the Arbitral Tribunal's view, the Respondent is the successful party in the present proceedings as the Respondent's case was upheld both on the first pair of issues (termination of proceedings and arbitral jurisdiction) and on the first of the second pair of issues (the principle of the Claimant's liability for costs). The Arbitral Tribunal takes the view that fairness requires that the amount of costs awarded to the Respondent in relation to the year 2014 should not be further reduced on the basis that the Respondent failed to recover any costs in relation the years 2009, 2010 and 2011.

4. The Arbitral Tribunal's Decision

112. The Arbitral Tribunal will therefore make an award of costs in the amount claimed by the Respondent for the year 2014, namely CZK 340,222.79 plus CZK 11,320.00.

VI. THE COSTS OF THE ARBITRATION (OTHER THAN THE RESPONDENT'S CLAIM FOR COSTS)

113. The Amount in Dispute. The amount in dispute following the Claimant's Notice of Withdrawal is of CZK 1,812,112.65 (equal to approx. EUR 65,204.00) and EUR 20,000.00, represented by the costs claimed by the Respondent.

114. The Deposit on Costs. The Respondent paid the amount of EUR 20,000.00 (twenty thousand) on 19 May 2014. The Claimant declined to pay its share of EUR 20,000.00 in the advance of costs of EUR 40,000.00 requested by the Arbitral Tribunal.

115. The Costs of the Arbitration: Article 38 of the UNCITRAL Rules requires the Arbitral Tribunal to determine the costs of the arbitration in its Award.

116. The Fees & Expenses of the Arbitral Tribunal. Article 39(1) of the UNCITRAL Rules provides that the Arbitral Tribunal, in setting its reasonable fees, shall consider the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators, among other factors deemed relevant to the case.

117. The Arbitral Tribunal has studied the file, made three procedural orders and made the present Award. The time spent on this case by the three Arbitrators amounts to 80 hours altogether.

118. Based on the factors set out in paragraph 116 above, the Arbitral Tribunal determines that its fees will be allocated on a 40%/30%/30% basis as follows:

<u>Arbitrator</u>	<u>(EUR) Total Fees</u>
Prof. Martin Hunter	6,000.00
Prof. Dr. August Reinisch	6,000.00
Dr. Paolo Michele Patocchi	<u>8,000.00</u>
Total	20,000.00

119. The Arbitral Tribunal waives the courier costs incurred in connection with the signing and the notification of the present Award. The entire deposit on costs (EUR 20,000.00, see paragraph 114 above) has therefore been expended.

120. The Parties' Costs: The Claimant's Position. The Claimant has not claimed any costs in this arbitration.

121. The Respondent's Position. The Respondent's costs have been dealt in paragraph 90 *et seq.* above and the Arbitral Tribunal's decision is set out in paragraph 112 above.

122. In addition, the Respondent claimed reimbursement of the fees and expenses of the Arbitral Tribunal (see paragraph 38 above).

123. In the Arbitral Tribunal's view, the Respondent is entitled to be reimbursed also the amount of EUR 20,000.00 paid for the Arbitral Tribunal's fees and expenses. In the circumstances of the present case, the Arbitral Tribunal finds that it would not be appropriate and reasonable to reduce such amount under Art. 40(1) and (2) of the UNCITRAL Rules on the basis that the Respondent's claim for costs was not awarded in its entirety (the finding made in paragraph 111 above is hereby expressly adopted and applied *mutatis mutandis*).

VII. OPERATIVE PART OF THE FINAL AWARD


THEREFORE,
THE ARBITRAL TRIBUNAL HAS MADE THE FOLLOWING AWARD:

1. DECLARING that these arbitral proceedings are terminated;
2. DECLARING that the Claimant's claims were withdrawn without prejudice;
3. ORDERING the Claimant Forminster Enterprises Limited to pay to the Ministry of Finance of the Czech Republic the amounts of CZK 340,222.79 (three hundred and forty thousand two hundred and twenty-two and 79), CZK 11,320.00 (eleven thousand and three hundred and twenty) plus EUR 20,000.00 (twenty thousand).

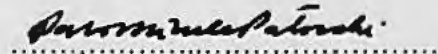
Place of arbitration: Geneva, Switzerland
Award made in five originals


.....
Prof. Martin Hunter
Arbitrator

5 December 2014
.....
(Date)


.....
Prof. Dr. August Reinisch
Arbitrator

5 Dec. 2014
.....
(Date)


.....
Dr. Paolo Michele Patocchi
Chairman of the Arbitral Tribunal

15 December 2014
.....
(Date)