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IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE AGREEMENT BETWEEN THE CZECH AND SLOVAK FEDERAL REPUBLIC AND THE SWISS CONFEDERATION ON THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS SIGNED ON 5 OCTOBER 1990, ENTERED INTO FORCE ON 7 AUGUST 1991 ("TREATY")

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Case No: NN 452/FM

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-between-

KONSORTIUM OECOMICUS

(Switzerland)

Claimant

-and-

THE CZECH REPUBLIC

(Czech Republic)

Respondent

Claimant and Respondent collectively referred to herein as the Parties

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## AWARD ON COSTS

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Arbitral Tribunal  
Dr. Eduardo Silva Romero  
Dr. Sabine Konrad  
Mr. Andreas Ueltzhöffer

## 1. PROCEDURAL BACKGROUND

1. Whereas by letter dated 6 May 2011, the Arbitral Tribunal fixed the seat of arbitration as Frankfurt am Main, Germany and invited the Parties to pay €25,000 each towards the advance on costs on or before 20 May 2011, failing which the Arbitral Tribunal would terminate the proceedings in accordance with section 1056 (3) of the Zivilprozessordnung ("ZPO") which provides in relevant part that: "*The arbitral tribunal shall issue an order for the termination of the arbitral proceedings... when the parties fail to pursue the arbitral proceedings in spite of being so requested by the arbitral tribunal...*".
2. Whereas by communication dated 20 May 2011, Respondent informed the Arbitral Tribunal that it would not pay its portion of the advance on costs within the set deadline.
3. Whereas Claimant did not make any payment towards the advance on costs before 20 May 2011.
4. Whereas by letter dated 26 May 2011, the Arbitral Tribunal informed the Parties of its intention to terminate the proceedings as foreseen in its letter of 6 May 2011 and invited the Parties to submit applications for costs on or before 10 June 2011.
5. Whereas on 10 June 2011, Respondent submitted an application for costs. In its application for costs, Respondent requested that Claimant be ordered to reimburse Respondent for the costs incurred in connection with the arbitration in the total amount of CZK 6,206,877.05, including VAT.
6. Whereas by letter dated 14 June 2011, the Arbitral Tribunal invited Respondent to provide a breakdown of the costs claimed on or before 24 June 2011.
7. Whereas on 20 June 2011, the Arbitral Tribunal informed the Parties that it had received on 16 June 2011 a letter from Claimant dated 14 June 2011 in which Claimant asserted that it had paid its share of the advance on costs amounting to €25,000 and requested that the deadline for payment be extended. The Chairman of the Arbitral Tribunal confirmed that such payment had been made.
8. Whereas by letter dated 24 June 2011, Respondent provided a breakdown of its costs claimed.
9. Whereas by letter dated 1 July 2011, the Arbitral Tribunal informed the Parties that the proceedings could not be terminated in light of Claimant's payment. The Arbitral Tribunal further requested Claimant to re-send the payment of €25,000 on or before 15 July 2011

given that the previous payment had been rejected by the Chairman's law firm due to the unidentified sender.

10. Whereas by letter dated 24 July 2011, the Arbitral Tribunal acknowledged receipt of a payment of €25,000 made by Claimant.
11. Whereas by letter dated 3 August 2011, the Arbitral Tribunal invited Respondent to pay its share towards the advance on costs on or before 17 August 2011.
12. Whereas by letter dated 17 August 2011, the Arbitral Tribunal acknowledged receipt of Respondent's payment of €25,000 towards the advance on costs.
13. Whereas on 20 October 2011, the Arbitral Tribunal issued Procedural Order No.1 deciding, *inter alia*, that the 2010 UNCITRAL Arbitration Rules would apply to the present proceedings and that Claimant should file its Statement of Claim on or before 1 November 2011.
14. Whereas Claimant failed to submit its Statement of Claim on or before 1 November 2011.
15. Whereas by letter dated 2 November 2011, Respondent requested that the proceedings be terminated in light of Claimant's failure to file its Statement of Claim and that Claimant be ordered to bear its own costs of the arbitration and to reimburse Respondent for the costs of the arbitration in the amount of CZK 7,958,422.13 pursuant to Article 42(1) of 2010 UNCITRAL Arbitration Rules and Article 9(2)(d) of the Treaty.
16. Whereas Respondent contends that its costs are reasonable given that it was forced to undertake independent investigation of a range of matters of fact and law relating to Claimant and its alleged investment in order to be able to defend itself against Claimant's unsubstantiated claims.
17. Whereas Respondent asserts that its costs were further increased by Claimant repeatedly ignoring instructions from and deadlines imposed by the Arbitral Tribunal.
18. Whereas Respondent further contends that the principle of "costs follow the event" should apply. In this regard, Respondent refers to Claimant's failure to duly pursue its alleged claim and to comply with the instructions provided and deadlines imposed on it by the Arbitral Tribunal.
19. Whereas by decision dated 5 December 2011, the Arbitral Tribunal terminated the present proceedings pursuant to Section 1056(2)(1) of the ZPO and Article 30(1) of the 2010

UNCYTRAL Rules of Arbitration based on Claimant's failure to timely file its Statement of Claim and to provide a sufficient cause for such failure ("Termination Decision").

20. Whereas at paragraph 113 of its Termination Decision, the Arbitral Tribunal noted that Counsel for Claimant had not identified the Claimant as required under German law, the law of the seat of the arbitration. The Arbitral Tribunal accordingly invited Claimant at paragraph 114 of its Termination Decision to identify the members of the Konsortium Oeconomicus within 14 days from the date of the Termination Decision.
21. Whereas the Arbitral Tribunal further decided in its Termination Decision that an Award on Costs incurred in relation to the present proceedings would be rendered separately thereafter.
22. Whereas by communication dated 15 December 2011, Claimant requested the Arbitral Tribunal in its attached letter dated 12 December 2011 to reconsider its Termination Decision.
23. Whereas by letter dated 16 December 2011, Respondent objected to Claimant's request for the reconsideration of the Termination Decision.
24. Whereas by Procedural Order No.2 dated 20 December 2011, the Arbitral Tribunal denied Claimant's request for a reconsideration of the Termination Decision and reiterated its invitation for Claimant to identify the members of the Konsortium Oeconomicus within 3 days from the date of the present Procedural Order, following which an Award on Costs would be rendered.
25. Whereas Claimant failed to identify the members of the Konsortium Oeconomicus within the imparted deadline.
26. Whereas by letter dated 2 January 2012, Claimant requested the Arbitral Tribunal to reconsider its Termination Decision again.
27. Whereas by communication dated 3 January 2012, the Arbitral Tribunal invited Respondent to comment on Claimant's letter dated 2 January 2012 on or before 10 January 2012.
28. Whereas by communication dated 9 January 2012, Counsel for Claimant provided a medical report dated 11 November 2011 concerning his spinal vertebrae fracture.
29. Whereas by letter dated 10 January 2012, Respondent provided its comments on Claimant's letter dated 2 January 2012. Respondent maintained that the arbitral proceedings had been finally and properly terminated and that Mr. [redacted] repeated request for the reversal of

the Termination Decision should be disregarded as both procedurally impermissible and materially unfounded. Respondent further repeated its request that it be reimbursed for the costs of the arbitration incurred by Respondent in the newly calculated aggregate amount of CSH 8,629,867.85 given that it had incurred additional costs since the end of September 2011

30. Whereas by letter dated 20 January 2012, the Arbitral Tribunal acknowledged receipt of a letter dated 17 January 2012 from Mr. [REDACTED], the representative of Konsortium Oeconomicus, and transmitted a copy of the aforementioned letter to Respondent.
31. Whereas by letter dated 24 January 2012, Respondent provided its comments on the letter dated 17 January 2012 from Mr. [REDACTED] on behalf of Claimant.
32. Whereas by communication dated 24 January 2012, the Arbitral Tribunal received a further letter dated 23 January 2012 from Mr. [REDACTED], the representative of Konsortium Oeconomicus.
33. In light of the above, the Arbitral Tribunal decides as follows with respect to the costs of the arbitration and the allocation of such costs.

## 2. DECISION OF THE ARBITRAL TRIBUNAL

### 2.1 The costs of the arbitration

34. Article 40 of the 2010 UNCITRAL Rules of Arbitration provides 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. The costs of the arbitration in the present proceedings include the fees and expenses of the Arbitral Tribunal (Art. 40(2)(a) & (b)) and the legal and other costs incurred by the Parties (Art. 40(2)(e) & (f)).
36. In accordance with Article 40(2)(e) & (f), Respondent is claiming legal and other costs in the amount of CZK 8,629,867.85. Such legal and other costs include the fees for the services rendered by the ICC in connection with the request for the appointment of the president and a replacement arbitrator, its share towards the advance on costs as well as its legal fees and disbursements.
37. Respondent's legal fees have been calculated on the basis that 1914.70 hours have been spent working on the present case.
38. The Arbitral Tribunal deems such costs, which were incurred over the course of three years, to be reasonable given that the arbitration proceedings were protracted largely as a result of Claimant's failure to comply with the instructions from the Arbitral Tribunal as well as the deadlines imposed on it by the Arbitral Tribunal.
39. In addition, the costs incurred by Respondent relating to the fees for the services rendered by the ICC in connection with the request for the appointment of the president and a replacement arbitrator and the advance on costs amounting to CZK 704,049.73 were directly incurred as a result of Claimant's institution of the present arbitration proceedings. The Arbitral Tribunal accordingly considers such costs to be reasonable. In this regard, the Arbitral Tribunal notes that Claimant has neither contested the fact that Respondent has claimed for all costs in CZK nor the conversion rate used for the costs originally in a different currency.

## 2.2 The allocation of the costs

40. Article 9(2)(d) of the Treaty provides that *"[e]ach party to the dispute shall bear the costs of its own member of the tribunal and of the chairman and the remaining cost shall be borne in equal parts by both parties to the dispute. The tribunal may, however, in its award decide on a different proportion of costs to be borne by the parties and this award shall be binding on both parties."*
41. Article 42(1) of the 2010 UNCITRAL Arbitration Rules provides that *"[t]he 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.”*

42. The Arbitral Tribunal notes that in a case where no award on the merits had been issued, it was held that a claimant was to be perceived as the unsuccessful party in view of its failure to orderly prosecute its claims.<sup>1</sup>
43. In the present case, Claimant failed to duly pursue its claim and persistently ignored numerous deadlines imposed on it by the Arbitral Tribunal including, *inter alia*, the deadline for appointing an arbitrator to replace its nominated arbitrator JUDr Jiří Marvan following the latter's resignation, the deadline for its comments on the organizational matters to be decided on in view of the proceedings going forward, the deadline for the payment of its share towards the advance on costs, the deadline for the provision of powers of attorney and the deadline for the submission of its Statement of Claim. In addition, the Arbitral Tribunal never received the names of the members of the Konsortium. Nor did it receive any submission from Claimant showing that it would have jurisdiction over the members of the Konsortium.
44. The Arbitral Tribunal accordingly considers that Claimant can be viewed as the unsuccessful party in the present case given its failure to orderly prosecute its claim.
45. In any event, the Arbitral Tribunal notes that pursuant to the second sentence of Article 42(1) of the 2010 UNCITRAL Arbitration Rules and Article 9(2)(d) of the Treaty, it has discretion to reasonably apportion the costs between the Parties as it sees fit taking into account the circumstances of the case.
46. In light of Claimant's aforementioned conduct in the present proceedings, the Arbitral Tribunal accordingly decides that Claimant shall bear all of its costs incurred in relation to the present arbitration in addition to the reasonable costs incurred by Respondent in relation to the present arbitration proceedings in the amount of CZK 8,024,742.85 as well as Respondent's share towards the advance on costs in the amount of EUR 25,000.
47. The Arbitral Tribunal further decides that Claimant shall bear all of the Arbitral Tribunal's fees and expenses.
48. The Arbitral Tribunal notes that Counsel for Claimant has not identified the Claimant as required under German law as the law of the seat of this arbitration (see German Supreme

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<sup>1</sup> See the Order for the Termination of the Proceedings and Award on Costs dated 2 August 2010 in the NAFTA and UNCITRAL case between Melvin J. Howard, Centurion Health Corp. & Howard Family Trust ("Claimants") and the Government of Canada ("Respondent"), paragraphs 75-76.

Court/BGH, Judgment of 21.1.2001-II ZR 331/00, published in NJW 2001, 1056). The German Supreme Court requires an entity like Konsortium to provide exact details of the names and identities of the consorts, of the legal representatives and the name under which the entity is doing business. If the entity is not sufficiently identified or if there is not sufficient proof of its existence, the persons having commenced proceedings as representatives of the entity will be personally liable for costs.<sup>2</sup>

49. As a result, JUDr . . . . . and Mr. . . . . are accordingly personally liable for the costs that the Arbitral Tribunal is ordering Claimant to bear.

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<sup>2</sup> BGH, NJW 2001, 1056, 1060: "Im Aktivprozess der Gesellschaft ist es den für die Gesellschaft auftretenden Personen ohne weiteres zumutbar, die Gesellschaft - beispielsweise durch die möglichst exakte Bezeichnung der Gesellschafter, der gesetzlichen Vertreter und der Bezeichnung, unter der die Gesellschaft im Verkehr auftritt - identifizierbar zu beschreiben. Sollte sich im Verlauf des Prozesses herausstellen, dass tatsächlich keine Außengesellschaft existiert, müsste zumindest derjenige für die Prozesskosten aufkommen, der im Namen der vermeintlichen Gesellschaft den Prozess als deren Vertreter ausgelöst hat. Im Falle des Auftretens für eine nicht existierende Partei trägt der in deren Namen auftretende und die Existenz der Partei behauptende Vertreter als Veranlasser des unzulässigen Verfahrens die Prozesskosten (Senat, NJW-RR 1999, 1554 = LM H. 10/1999 § 50 ZPO Nr. 50 = ZIP 1999, 489 [491] m.w. Nachw.). Es ist also immer zumindest eine natürliche Person als Kostenschuldner vorhanden."

50. In light of the above, the Arbitral Tribunal hereby makes the following

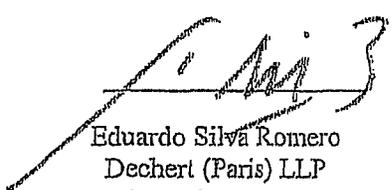
AWARD

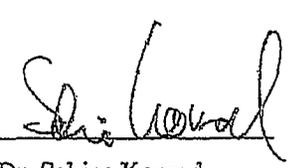
51. Declaring that JUDr . . . . . and Mr. . . . . are jointly and severally liable for the costs of this arbitration as defined in Article 40 of the 2010 UNCITRAL Rules, including Respondent's reasonable legal and other costs of the present proceedings as well as the fees and expenses of the Arbitral Tribunal; and

52. Ordering JUDr . . . . . and Mr. . . . . , jointly and severally, to pay to Claimant CZK 8,024,742.85 for Respondent's legal fees and expenses as well as EUR 25,000 for the reimbursement of Respondent's share of the advance on costs.

This Award on costs is issued at the Place of Arbitration, Frankfurt am Main, Germany on

8 February 2012

  
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