

IN THE MATTER OF AN ARBITRATION
UNDER THE UNCITRAL RULES

BETWEEN

EUROPEAN MEDIA VENTURES S.A.

Claimant

-and-

THE CZECH REPUBLIC

Respondent

Tribunal:

Lord Mustill (Chairman)

Sir Christopher Greenwood C.M.G., Q.C.

Dr. Julian Lew Q.C.

Secretary to the Tribunal:

Iain Quirk Esq.

FINAL AWARD (COSTS)

1. This is the third and final award in this arbitration. This Award deals with liability for the parties' respective costs and the Tribunal's costs incurred in connection with this matter.
2. The two earlier awards were:
 - i. the Partial Award on Jurisdiction dated 15 May 2007 (the Award on Jurisdiction); and
 - ii. the Partial Award on Liability dated 8 July 2009 (the Award on Liability).
3. These two awards form an integral part of, and are incorporated into, this Final Award on Costs. They detail, *inter alia*, the parties and their representatives, the procedural arrangements and timetable, and the arguments raised and determined in this arbitration. Except where otherwise expressly stated all references and abbreviations are the same as used in these earlier two awards.

Background facts

4. It is convenient to begin by recalling the events relevant to the issue of costs.
5. (a) The arbitration was brought under the UNCITRAL Arbitration Rules. The Claimant maintained that the Respondent had violated Articles 2 and 3 of the Bilateral Investment Treaty between the Belgian-Luxembourg Economic Union and the Czechoslovak Socialist Republic ("the Treaty") and brought claims in respect of each alleged violation.

- (b) The Treaty stipulated that disputes relating to its interpretation or application should be submitted to arbitration. It further stipulated (by Article 8) that disputes concerning compensation due by virtue of Article 8(1) and (3) should be submitted to *ad hoc* arbitration.
- (c) The Respondent objected that the Tribunal had no jurisdiction over claims based on Article 2 of the Treaty, and that its jurisdiction in relation to claims under Article 3 was limited to disputes concerning the amount of any compensation due, and did not extend to the question whether any compensation at all was in principle payable.
- (d) Pursuant to an order of the Tribunal the proceedings were divided into two consecutive stages. The first dealt with the issues of jurisdiction. Oral and written evidence and submissions were advanced, culminating in an oral hearing on 18 January 2007. In its Award on Jurisdiction, dated 15 May 2007, the Tribunal ruled that it had no jurisdiction under Article 2, but that it did have jurisdiction to determine whether the Respondent had expropriated the Claimant's property and, therefore, whether any compensation was in principle due under Article 3.
- (e) The Claimant did not attempt to overturn the adverse ruling of the Tribunal in relation to Article 2, but the Respondent instituted proceedings in the High Court in London to set aside that part of the Award which asserted jurisdiction over the claim under Article 3. These proceedings terminated in a judgment of Mr. Justice Simon on 5 December 2007 upholding the decision of the Tribunal on this issue.

- (f) The outcome of this phase was that the arbitration remained alive, but in a much curtailed form: only one of the two bases of claim could thenceforth be pursued and there was much less scope for a close examination of facts and motives than there would have been under the standard of fair and equitable treatment set by Article 2.
- (g) Although, as appears from the Award on Liability, a substantial body of subsidiary issues remained for consideration, the dispute about whether the Respondent was liable to "compensate" the Claimant for an "expropriation" of an investment, within the meaning of Article 3, and if so what the amount of the compensation should be was essentially a question of principle. This was the subject of the second stage of the arbitration, at which further evidence and submissions were advanced, leading to an oral hearing during February 2008.
- (h) In the course of this hearing the Respondent introduced a new issue, namely whether the proceedings should be completely halted, on the ground that an executive of the Claimant was said to have engaged in conduct, related to the matters in issue in the arbitration, which was contrary to international public policy.
- (i) Ultimately, in its Award on Liability the Tribunal rejected the application to halt the arbitration on the grounds of public policy and rejected several other submissions by the Respondent but it concluded that there had been no expropriation and therefore rejected the claim in its entirety (see paragraphs 71-89 of the Award on Liability).

Costs sought by Parties

6. It is against this background that the Tribunal now turns to the question of costs. The Parties were unable to reach an agreement between themselves regarding the question of costs and each, therefore, made submissions to the Tribunal.
7. The Claimant contends that the most appropriate order in this case would be for each Party to bear its own costs. The Claimant argued that "neither party can truly be said to have succeeded on the case each presented to the Arbitral Tribunal" and that it had prevailed on a number of issues in the Award on Liability. The Claimant did not provide the Tribunal with a statement of the legal fees and other expenses which it had incurred in connection with this arbitration.
8. The Respondent contends that it should recover all its costs on the ground that the Tribunal found that it had no jurisdiction in respect of the Article 2 claim and dismissed the Article 3 claim. The Respondent stated its costs and expenses to be £1,410,400.
9. Both parties have contributed equally to the Tribunal's costs, having deposited £250,000 (£125,000 each) in an escrow account administered by LCIA ("the LCIA account"), as requested by Tribunal.¹

The Tribunal's Authority to Determine Costs

10. The Tribunal's authority to determine these costs issues is governed by Articles 38 and 40 of the UNCITRAL Arbitration Rules. The power and duty to make an award of costs is created by Article 38 of the

1 The Claimant and the Respondent also paid £200 and £293.75 respectively in respect of appointment fees.

Rules, which distinguishes between the costs of legal representation and assistance of the successful party (Article 38(e)) on the one hand, and the fees and expenses of the arbitrators, and of certain witnesses (Articles 38(a)-(d)) on the other. We shall refer to these two categories as "representation costs" and "tribunal fees", respectively.

11. The UNCITRAL Rules prescribe rather different regimes for the two categories of costs. For "representation costs" they stipulate that –

"...the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable." (*Article 40, paragraph 2*).

For "tribunal fees", by contrast, the Rules require that

"...the costs of arbitration shall in principle be borne by the unsuccessful party ..." (*Article 40 paragraph 1*)

but the same Rule permits a tribunal to apportion the costs between the parties --

"...if it determines that apportionment is reasonable, taking into account the circumstances of the case."

12. Before setting out to apply these provisions we must address the Claimant's threshold argument that "...the Arbitral Tribunal's powers under the UNCITRAL Rules should be seen through the prism of

standard practice in treaty arbitration cases" and that this practice is that "costs shifting' in treaty arbitration cases is not common."

13. Striking though the metaphor may be, it amounts in ordinary speech to saying that— (a) an apportionment of costs in investment treaty arbitrations is uncommon, (b) from which it follows that an apportionment should be avoided even if the parties have explicitly empowered the Tribunal to make one. In the opinion of the Tribunal this proposition has only to be stated to be rejected, for a usage (if there is one, on which the present Tribunal finds it unnecessary to rule) must yield to the choice of a particular regime expressed in the UNCITRAL Rules.
14. The next step is to note the problems which can be created by the word "unsuccessful" in Article 40 (1) in those cases where there is no outright winner. For example, when a claimant recovers only one-half of his claim, each party has both won and lost, and it can be said that neither has been unsuccessful. Only if the word is understood as subject to an implied qualification such as "wholly" can the presumption be made to work, and to read in such a qualification would entail significant alteration to the express terms of the Article. We do not however have to reach a conclusion upon it, for in the present case the Claimant began the arbitration to recover a large sum of money, and has come away with nothing.
15. Whatever may have happened at the intermediate stages, the adventure as a whole has been a failure. It follows that there is a presumption that "tribunal fees" follow the event, and should be borne by the Claimant. This presumption is however rebuttable, and does not apply at all to "representation costs." Accordingly, the Tribunal is free to look to the interests of justice, and to make such apportionment, if any, that it considers appropriate and reasonable to meet the particular circumstances of the case— amongst which,

albeit not decisive, will be the degree of success of each party. The shape of Article 40 suggests that for this purpose different enquiries, leading to potentially different results, may be appropriate for the two different types of costs. Whilst accepting this as a theoretical possibility, however, the present Tribunal sees no ground to distinguish between the two in the present case.

16. There is however another, and this time more conspicuous, distinction to be drawn; namely, between the two consecutive phases of the arbitration, relating first to jurisdiction and then to "the merits". The application of Article 40 to a situation of this kind is not straightforward, for the two phases differed both as to the degree to which each party obtained what it sought, and also as to the distribution of success and failure among the individual issues arising in each phase. Thus, at the end of the jurisdictional phase the Respondent had taken a major step forward, and yet could still have lost on the merits. It was not until the end of the second phase that it could be identified as the overall winner and, on the way, a number of subsidiary battles had to be fought, and in some instances lost.
17. One way to deal with this problem would be to perform separate adjudications for each phase, starting with the first and weighing up all the factors relevant to the proceedings on jurisdiction and arriving at an appropriate allocation of costs; and then, drawing a mental line under it, proceed to a similar exercise in relation to the merits; and finally combining the two allocations into a single outcome. This process although attractive would not in our opinion be sound, for there were not here two arbitrations, but only one, separated into two phases for convenience and economy alone; and the weights to be attached to each of the relevant factors should not

be affected by the choice of the Tribunal to proceed step by step rather than with a unified hearing.

18. It would however be pedantic to carry this approach to the extreme of ignoring altogether the additional time and expense resulting from the Respondent's unsuccessful attempts to terminate the arbitration altogether on jurisdiction, or its equally unsuccessful multiple defences on the merits (including the allegation of blackmail), rather than concentrating on the short question of expropriation.
19. Taking all these matters together, the Tribunal thinks it plain that the whole of the costs should not be left to lie where they fall; such an approach would be too favourable to the Claimant. At the same time the Respondent would be over-compensated by an indemnity for anything approaching the totality of its expenditures. Exact arithmetical computation is impossible in this field, and would only give a false air of scientific method. We think it preferable to take a broad view and work in round figures.

The Tribunal's Conclusions regarding Costs

20. Accordingly the Tribunal has decided to allocate the costs in this case along the following lines. Although Respondent has been successful in this arbitration, i.e. it defeated Claimant's claims under Articles 2 of the Treaty, as falling outside the jurisdiction of the Tribunal, and its claims under Article 3 on substantive grounds, the Respondent was unsuccessful on one aspect of its jurisdictional challenge, and on several grounds relating to the substantive issue in this arbitration. The Tribunal has accordingly concluded that it would be unfair to apportion to the Claimant all of the representation costs. Rather, the Tribunal has concluded, to reflect

the result in this arbitration, that the Claimant should reimburse the Respondent for a portion of its costs in this arbitration. The Tribunal has unanimously concluded that an appropriate amount for the Claimant to pay the Respondent as a contribution towards its representation costs is £400,000. This conclusion has been reached in light of the total fees claimed by Respondent and what the Tribunal considers reasonable in the light of the overall conduct and result in this arbitration.

21. Payment of this sum shall be made within 30 days of the date of this Award, failing which simple interest shall accrue on the £400,000, at the rate of 8% per annum, from the date of this Award until the date of payment.
22. There remain the "tribunal fees". These amount to £243,945.62. As required by Article 38(a) of the UNCITRAL Rules the fees are stated separately for each arbitrator.²
23. Here the Tribunal has decided that the share borne by each Party should be adjusted so as to reflect the principles applied by the Tribunal in respect of representation costs (as set down in paragraph 21, above). On that basis, the Tribunal considers it appropriate that the Claimant should bear two thirds of the total tribunal fees. This amounts to £162,630.41. That leaves the Respondent's share as £81,315.21.
24. Taking account of the deposit paid by each Party, the appointment fees and the interest earned by the account, the LCIA account currently stands at £253,266.57. Since the Tribunal's fees and expenses come to £243,945.62, this leaves a surplus of £9,320.95

² In Appendix A hereto.

to be returned to the Parties. As the Respondent has contributed significantly more (£125,293.75) than the share of tribunal fees which the Tribunal has determined (see paragraph 23, above) it should bear (namely £81,315.21), the Tribunal considers that the entirety of this surplus should be refunded to the Respondent. That will reduce the amount contributed by the Respondent to £115,972.80. The difference between that sum and £81,315.21, namely £34,657.59, should be paid by the Claimant to the Respondent.

25. The Tribunal therefore directs that: (i) the fees of the Tribunal, as detailed in Appendix A, shall be paid from the escrow account forthwith; (ii) the balance remaining in this account after such payment (£9,320.95) shall be paid to the Respondent; and (iii) the Claimant shall pay to the Respondent a further sum of £34,657.59.
26. Payment of the sum of £34,657.59 shall be made by the Claimant within 30 days of the date of this Award, failing which simple interest shall accrue on that sum, at the rate of 8% per annum, from the date of this Award until the date of payment.

AWARD

27. Accordingly, the Tribunal has determined and makes this Final Award:
 - (a) The Claimant shall pay £400,000 in respect of representational costs and £34,657.59 in respect of tribunal fees; i.e. a total of £434,657.59, to the Respondent within 30 days of the date of this Award.

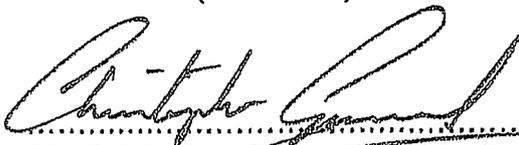
- (b) In the event that payment of the above amount is not made within 30 days of the date of this Award, simple interest shall accrue on that amount at the rate of 8% per annum from the date of this Award until the date of payment.
- (c) The fees and expenses of the Tribunal, as detailed in Appendix A to this Award, shall be paid forthwith from the escrow account.
- (d) The balance of funds held on deposit after paying the Tribunal's fees and expenses shall be repaid to the Respondent.
- (e) All other claims and reliefs sought by the Parties are dismissed.

Place of Arbitration: London

Date 28th January 2010

M. J. Mustill

Lord Mustill (Chairman)



Sir Christopher Greenwood C.M.G., Q.C.

Julian Lew

Dr. Julian Lew Q.C.

Appendix A

ARBITRATION: European Media Ventures v The Czech Republic
(LCIA Ref: 6842F)

FINANCIAL SUMMARY as at 28 January 2010

| | £ | £ | £ |
|---|------------------|------------------|-------------------|
| FUNDS RECEIVED | | | |
| From Claimant: | | | |
| 09-Oct-06 Appointment Fee | | 200.00 | |
| 03-Sep-07 Deposit | | 50,000.00 | |
| 19-Jun-09 Deposit | | 60,000.00 | |
| | | <u>15,000.00</u> | 125,200.00 |
| From Respondent: | | | |
| 01-Jun-06 Appointment Fee | | 293.75 | |
| 05-Sep-07 Deposit | | 50,000.00 | |
| 26-Jun-09 Deposit | | 60,000.00 | |
| | | <u>15,000.00</u> | 125,293.75 |
| Bank Interest Credited | | | 2,772.82 |
| TOTAL FUNDS RECEIVED & CREDITED | | | <u>253,266.57</u> |
| LESS COSTS OF ARBITRATION: | | | |
| Tribunal's fees: | | | |
| Lord Michael Mustill - to 17Aug09 | 72,025.00 | | |
| Dr Julian Lew - to 17Aug09 | 69,600.00 | | |
| Sir Christopher Greenwood - to 17Aug09 | <u>64,850.00</u> | 206,475.00 | |
| Tribunal's expenses: | | | |
| Lord Michael Mustill | 1,003.00 | | |
| Dr Julian Lew | 73.33 | | |
| Sir Christopher Greenwood | <u>230.00</u> | 1,306.33 | |
| Fees of Secretary to the Tribunal | | | |
| 1July06 to 6Dec07 | 7,872.62 | | |
| 7Dec07 to 29Jul09 | <u>25,900.00</u> | 33,772.62 | |
| LCIA's accrued administrative charges | | <u>2,391.67</u> | |
| TOTAL COSTS OF ARBITRATION | | | 243,945.62 |
| BALANCE OF FUNDS as at 28 JANUARY 2010 | | | <u>9,320.95</u> |