Translation from the Czech language

Resolution

of the arbitral panel constituted to hear the dispute of the Claimant Diag Human, SE, having its registered office at the Principality of Liechtenstein, FI – 9490 Vaduz, Pradafant 7, legally represented by JUDr. Jan Kalvoda, attorney-at-law, having his registered office at Prague 6, Belohorska 35, against the Czech Republic as the Defendant, for damages and intangible satisfaction, whereby the arbitrators doc. JUDr. Milan Kindi, CSc., as the presiding arbitrator of the panel, and Petr Kuzel, MBA, and doc. Ing. Jiri Schwarz, CSc., as arbitrators, decided as follows:

I. The proceedings are discontinued.

II. Neither party shall be entitled to compensation of the costs of the proceedings.

Reasoning:

1. Arbitration preceding the arbitral award

On 18 September 1996, the Defendant and the legal predecessor of the Claimant (originally Diag Human, a.s.) entered into an arbitration agreement in Clause I of which they agreed that "the dispute between them for compensation of damage that was allegedly caused in connection with the letter by MUDr. Martin Bojar, CSc., the then Minister of Health, addressed to K. Eldrup-Jorgensen, vice-president of A/S NovoNordisk, Copenhagen, dated 9 March 1992, shall be resolved in arbitration pursuant to Act No. 216/1994 Coll., on arbitration and enforcement of arbitral awards, by independent and impartial arbitrators".

In Clause II of the above Arbitration Agreement dated 18 September 1996, the parties agreed that the arbitrators to resolve their dispute would be three while each party to the dispute should choose one arbitrator and these should agree on the third arbitrator: such constituted panel should then choose its presiding arbitrator.

In the same Clause II of the above Arbitration Agreement, it was also agreed that the "dispute shall commence upon delivery of the written action to the presiding arbitrator" and the parties also agreed that the arbitral award would be subject to review by another arbitral panel. Marginally, it may be reminded that the Defendant sought later on that the court determine that the Arbitration Agreement was invalid. However, the then Regional Commercial Court in Prague (regional commercial courts had jurisdiction until the effectiveness of Act No. 215/2000 Coll. that occurred on 1 January 2001) dismissed its action by Judgment file No. 5 Cm 191/99 of 6 December 2000 (this Judgment came into legal force on 15 February 2001).

The action in the arbitration was filed on 15 October 1996, however, it was delivered to the presiding arbitrator on 21 October 1996 so this is the date of commencement of the arbitration (because pursuant to Clause II of the above Arbitration Agreement, it was agreed that the "dispute shall commence upon delivery of the written action to the presiding arbitrator").

On 19 March 1997, the arbitral panel in the original composition (the presiding arbitrator of which was JUDr. Josef KunaSek at that time) decided by an interim award, *inter alia*, as follows: "The Claimant's claims for damages and intangible satisfaction are lawful as regards the basis of the claims."

The Defendant filed a request for review of this arbitral award (on 15 April 1997). On 27 May 1998, the review arbitral panel decided by the review arbitral award, *inter alia*, that: "The Claimant 's claim for damages … is lawful as regards the basis of the claim." The plea of limitation is not justified."

On 25 June 2002, the arbitral panel issued a partial arbitral award whereby it decided on the obligation of the Defendant to pay a portion of the damages of CZK 326,608,334. Subsequently, on 23 July 2002, the Defendant requested that also this award was subject to review by another arbitral panel, however, it did not manage to overrule the decision.

On 27 April 2003, due to resignation of the then presiding arbitrator, dr. Josef Kunasek, doc. (today prof.) JUDr. Kvetoslav Ruzicka, CSc. was elected as the presiding arbitrator.

Prior to the issue of the arbitral award on the merits, an interim arbitral award was issued whereby it was resolved that the action was lawful as regarded its basis (after all, no other decision may be made by an interim decision) and a partial arbitral award was issued whereby a decision was made on the obligation of the Defendant to pay a certain amount (specifically, CZK 326 608 334).

With regard to the interim arbitral award in legal force, the arbitrators then conducted arbitration only on the amount of the Claimant's claim (under file No. 06/2003; prior to the election of prof. JUDr. Kvetoslav Ruzicka, CSc. as the presiding arbitrator in 20C3, the proceedings most likely did not have any file number).

2. Arbitral award

By the arbitral award of the arbitral panel comprising prof. JUDr. Kvetoslav Ruzicka, CSc. as the presiding arbitrator and prof. JUDr. Monika Pauknerova, CSc. and JUDr. Zdenek Rusek as arbitrators, the Defendant was imposed, in the first statement, an obligation to pay to the Claimant damages of CZK 4,089,716,666 in the arbitration conducted under file No. 06/2003 dated 4 August 2008 (while as regards the amount of CZK 1,354,455,000, the action was dismissed and as regards another amount, previously awarded by the arbitral award titled as partial, the proceedings were discontinued) and another statement imposed an obligation on the Defendant to pay the interest for the specified period of CZK 4,244,879,686 (for the same period, the action was dismissed with respect to the interest, as regards CZK 3,242,805,105) and also to pay daily interest of CZK 1,287,877 from 1 July 2007 until payment. The proceedings originally conducted also with respect to monetary satisfaction were discontinued by para. 9 of the statement of the above award (because the Claimant withdrew its action in this scope by a submission dated 17 April 2000). The award also contains other statements whereby the proceedings were discontinued with respect to other claims of the Claimant or with respect to which the action was dismissed, and also statements whereby the decision on the costs of the proceedings was made.

Both parties made submissions aimed at review of the above award (but the Claimant then withdrew this submission).

2. Jurisdiction of the arbitrators (legal regulation)

Pursuant to Section 2(1) of Act No. 216/1994 Coll., on arbitration and enforcement of arbitrai awards, the parties may agree that a property dispute between them will be resolved by one or more arbitrators or a standing court of arbitration in lieu of a court of general jurisdiction.

However, an arbitration agreement cannot be made in case of a property dispute which arose in connection with enforcement of a decision or in case of an incidental dispute. Pursuant to Section 2(d)of the Insolvency Act (Act No. 182/2006 Coll.), an incidental dispute is a dispute caused by insolvency proceedings which are, pursuant to Section 2(a) of the same Act, ;uciciai proceedings the subject matter of which is the bankruptcy of the debtor. Pursuant to Section 2(2) of the Arbitration Act, a valid arbitration agreement may also be made only in case that the parties could conciliate with respect to the subject matter of the dispute. Pursuant to Section 3(1), the arbitration agreement must be made in writing otherwise it shall be invalid.

Pursuant to the provisions of Section 27 of the above Arbitration Act, the parties may agree in the arbitration agreement that the arbitral award may be reviewed by other arbitrators upon a request of either of them or both of them. Unless provided for otherwise in the arbitration agreement, the request for review must be delivered to the other party within thirty days of the day when the party requesting the review received the arbitral award. Pursuant to the above provision, the review of the arbitral award is a part of arbitration and subject to the provisions of the above Act.

3. Jurisdiction of arbitrators (assessment)

The parties also conducted a dispute for damages and some other claims of the Claimant, also expressed in monies.

Pursuant to Section 495 of the Civil Code (Act No. 89/2012 Coll.), it holds that the property is everything that belongs to the respective person. Even before the New Civil Code became effective, the judicial decisions as well as expert literature were constantly of the opinion that a property right means, in the first place, a right to property performance, i.e. a right to performance appreciable in monies. Pursuant to the decision of the Supreme Court file No. 20 Cdo 476/2009, the subject matter of an arbitration may only be a property right on which a decision is made in contentious proceedings.

Pursuant to a resolution of the High Court in Prague, file No. 10 Cmo 414/95 (that was published in the Collection of judicial decisions and opinions under No. 37/1997), the judicial practice did (and still does) rely on the fact that a property right means a right to property performance, i.e. performance appreciable in monies and, where relevant, also a declaratory motion that relates to existence or non-existence of a right to such property performance (i.e. appreciable in monies).

The **parties** conducted a dispute about (briefly speaking) damages so that their dispute is undoubtedly a property dispute.

This is not a dispute arising in connection with execution (distraint) (although even such disputes were conducted by the parties but out of this arbitration) and it is not an incidental dispute because neither party is bankrupt (and furthermore, the Defendant is explicitly excluded from the regime of the above Insolvency Act by its provisions of Section 6(1)(a).

As stated above, the parties may (validly) agree an arbitration agreement only in case of a dispute in respect of which they may conciliate.

Pursuant to the long-established judicial decisions, a conciliation is actually a settlement (for example, pursuant to the judicial decision published under No. 16/1967 of the then Collection of decisions and notices cf Czechoslovak courts, a "conciliation ... is a settlement or waiver of a right ...").

Settlement is an agreement of the paities on the rights contentious between rhem - and it is the substance of the solution. As stated also by the judicial decision quoted above: conciliation is an agreement between the parties that anticipates existence of contentious rights. For the parties to be able to enter into any agreement, they must be entitled to dispose of its subject matter; however, free legitimation alone to dispose of the subject matter of che proceedings is not sufficient (e.g. by settlement of contentious relations), there must also be the dispute.

Pursuant to a decision published under No. 103/2008 of the Collection of judicial decisions and opinions, a conciliation cannot be made in matters rfhere proceeding may be commenced without a motion, in matters of personal status and in matters where subjective law rules out an agreement of the parties (see also below). Pursuant to the opinion of the Supreme Court, relying on the conclusions of expert literature (Bures, J. - Drapal, L. - Xrcmar, Z. et al.: The Civil Procedure Code, Comments, C.H. Beck, Prague 3106, volume I, page 434), the possibility to conciliate is ruled out when (and only when) the proceedings may be commenced also without a motion or the proceedings concern matters of personal status of the parties or when the substantive law does not allow at all for an agreement of the parties. Only these are the conditions that are decisive for solving an issue whether or not it is possible to conciliate. Where the subject matter of the proceedings is any rights that may be freely disposed of by the parties and the decision on which is made in contention proceedings, conciliation is also possible with respect hereto (cf. decision of the Supreme Court, file No. 32 Odo 181/2006). In order to assess this issue, only the nature of the claim raised is decisive, i.e. whether the parties may or may not agree on that (as decided by the Supreme Court e.g. in judicial decision file No. 29 Cdo 2648/2013)

For conciliation to be made, there must be legitimation to freely dispose of the subject matter of the proceedings and there must also be the dispute.

The subject matter of the proceedings is the contentious claim of the Claimant for damages so that it is undoubtedly something that the parties may agree on (including to conciliate while conciliation is nothing else than an agreement of the parties submitted for approval to the competent body, i.e. a court or arbitrators). The claims concerned in the agreement are fully within the disposition of the parties in relation to which they may (should it be their will) conciliate.

Consequently, this is a property dispute, not an execution (distraint) or an incidental dispute, the parties may conciliate with respect to the subject matter of the dispute and the arbitration agreement was made in writing (and submitted as evidence in this form to the arbitrators).

In the arbitrators' opinion, hearing of the dispute in the arbitration is not prevented by anything (furthermore, it was mentioned above that the Defendant did originally seek determination that the Arbitration Agreement was invalid but the then Regional Commercial Court in Prague dismissed its action by the judgment dated 6 December 2000, file No. 5 Cm 191/99 while the above judgment

came into legal force so it is beyond doubt that the Arbitration Agreement is valid).

4. Review proceedings

As stated above, the requests for review were filed by both parties to the dispute. The Claimant then withdrew its request so the subject matter of the proceedings is only the Defendant's request. The withdrawal of a motion to commence proceedings (even proceedings on review of the issued arbitral award) is grounds for discontinuation of the proceedings, including arbitration. Therefore, no other decision could be made on the Claimant's request for review of the arbitral award than to discontinue the proceedings.

As the following was repeatedly mentioned in the submissions of the parties and the Claimant inferred fundamentals consequences from the form of the request review for the proceedings that followed, the arbitrators find it necessary to say that the Defendant's review request was filed on the headed notepaper of the Ministry of Health and was also delivered by that ministry and it was signed by the then Minister of Health as well as the then director of the Office for Government Representation in Property Affairs (together with stating their positions).

4.1 Constitution of the review arbitral panel

Pursuant to Clause V of the above Arbitration Agreement, its Clause II applies also to review proceedings. Pursuant to Clause II of the Arbitration Agreement, each party appoints one arbitrator, they elect the third arbitrator and the three arbitrators then elect the presiding arbitrator from among themselves.

The Defendant appointed the arbitrator doc. JUDr. Milan Kindi, CSc., a citizen of the Czech Republic, and the Claimant appointed the arbitrator Damiano Della Ca, a citizen of the Swiss Confederation. They did agree on another arbitrator but he refused the nomination and then again on another one (JUDr. Otakar Motejl) who accepted the nomination but only after the expiry of the time-limit of 30 days set by law.

Pursuant to Section 9(1) of the Arbitration Act, in case the arbitrators fail to agree on the person of the presiding (here, the third) arbitrator within thirty days, the decision on the appointment will be made by a court upon a motion by either party. *Therefore*, upon a motion of the State, *Petr* Kuzel, MBA, a citizen of the Czech Republic, was appointed an as arbitrator. However, because the decision on his appointment was made by a court lacking subject-matter jurisdiction, the decision on his appointment was quashed by the Supreme Court in the appellate review proceedings (decision dated 14 October 2010, file No. 23 Cdo 4847/2009-487) but subsequently, the decision on the same was made again by a court having subject-matter jurisdiction, and it appointed him as the third arbitrators of the review panel.

The Court appoints an arbitrator upon a motion by either party pursuant to Section 9(2) of the Arbitration Act also if an appointed arbitrator resigns from his/her position or cannot perform the same. As Damiano Della Ca resigned from the position of an arbitrator by a letter dated 30 March 2010 and the Defendant did not agree to the appointment of a new arbitrator by the Claimant again, doc. Ing. Jiri Schwarz, CSc., a citizen of the Czech Republic, was appointed as the arbitrator for the Claimant. After that, the constituted panel elected its presiding arbitrator which was notified to the parties.

4.2 Requests for review of the arbitral award

As already stated, the requests for review of the arbitral award dated 4 August 2008 were originally filed by both parties. The Claimant withdrew the request later on, the Defendant insisted on it. However, the Claimant alleged that this submission of the Defendant was not procedurally effective.

Arguments of the Claimant relied on the fact that the request for review of the arbitral award was printed (see also above) on the headed notepaper of the Ministry of Health, delivered by the Ministry of Health and signed by the then Minister of Health while the co-signature of the general director of the Office for Government Representation in Property Affairs could not, in the Claimant's opinion, remedy the procedural ineffectiveness of this submission, especially as pursuant to law, the activities of the Office for Government Representation in Property Affairs are ensured by its regional office (not the general director) the district of which locates the registered office of the court with which the motion for commencement of proceedings is to be filed.

No state body has capacity to be a party to judicial proceedings or arbitration because it is only an organizational branch of the State (pursuant to Section 3(1) of Act No. 219/2000 Coll.) (as resolved in judicial decision of the Supreme Court in matter file No. Cdo 3308/2011), however, it is undoubtedly of legal importance who acts on behalf of the State in such proceedings.

The Office for Government Representation in Property Affairs was established by Act No. 201/2002 Coll. (cf. its Section 1(1)) as a state body acting in proceedings before courts and arbitrator or, where relevant, other authorities or bodies (Section 1(2) of the above Act). Pursuant to Section 2(1) of the above Act, the OGRPA acts on behalf of the State under the conditions specified by the above Act, *inter alia*, in proceedings before arbitrators. Pursuant to Section 2(2) of the above Act, its actions include all procedural acts that might otherwise be carried out on behalf of the State by its competent organizational branch. Throughout the period when the OGRPA acts in the proceedings on behalf of the State, any procedural acts of the competent organizational branch of the State pursuant to Section 21(3) of the above Act No. 201/2002 Coll. are ineffective in the proceedings (this wording of the above provision of Section 21(3) applied also when the Defendant filed its request for review of the arbitral award dated 4 August 2008).

However, the arbitrators are not of the opinion that a deed signed by the general director of the Office for Government Representation in Property Affairs (which is constantly and in full recognized by the OGRPA as well as its then general director) may *not* be a deed of the OGRPA (only because it was signed also by another person). In other words, the arbitrators believe that when the general director of the OGRPA signs a deed on an act of the OGRPA, it is indeed an act of the OGRPA.

The objection that somebody else should have acted on behalf of the OGRPA will not stand. For example, the general director may, on serious grounds, determine other regional office than the one that is specified and competent for individual case of activities pursuant to Section 24(5) of the above Act and, in the arbitrators' opinion, it is not ruled out that the general director entrusts such activities to himself. In addition, even if the deed was incorrectly signed by the general director in lieu of a specific employee of the OGRPA, it cannot turn this deed into a deed of the Ministry of Health (and in an arbitration, only the procedural acts that are carried out in lieu of the Office for Government Representation in Property Affairs by another authority or body are procedurally ineffective). In other words, if the deed is signed by the general director of the Office for Government Representation

in Property Affairs in lieu of an authorized employee of the Office for Government Representation in Property Affairs, it cannot logically mean that it is a deed of the Ministry of Health.

Nevertheless, in the arbitrators' opinion, the circumstances of the signing of the request for review of the arbitral award are not significant.

It is much more significant that the parties submitted the commencement of the arbitration, including review arbitration, to two-tier procedure.

Pursuant to Clause II of the above Arbitration Agreement made by and between the parties on 18 September 1996, it was agreed that "the dispute shall commence upon delivery of the written action to the presiding arbitrator."

The execution of the Arbitration Agreement only creates possibility to resolve a dispute, if any, in arbitration while the dispute as such logically commences only upon delivery of the action. This is also the case of judicial proceedings: the sole existence of the Civil Procedure Code does not mean that the parties that might become parties to contentious proceedings do actually conduct such proceedings. Only when somebody files a motion for commencement of proceedings (sues somebody), the proceedings commence.

The execution of the Arbitration Agreement does not mean that a dispute must occur: the dispute only commences upon delivery of the action, in this case, upon delivery of the action to the presiding arbitrator. The execution of the arbitration agreement only creates arbitrability (the possibility to replace judicial proceedings with arbitration) but the arbitration itself commences only upon the filing of the motion to commence proceedings (i.e. the action). In case of an arbitration, the execution of an arbitration agreement creates the possibility to conduct an arbitration but the arbitration only commences upon the filing of the acting.

As mentioned above, the parties agreed in Clause V of the above Arbitration Agreement that the arbitral award is subject to the review if the request for review is delivered to the other party within thirty days of the date when the party requesting the review is delivered the arbitral award. Only upon the delivery of the review request, the arbitral award becomes reviewable (in the words of the agreement: "becomes subject to review").

In the same Clause V, it was also agreed that Clauses II through IV of this agreement applied also to the review of the arbitral award by analogy.

As was repeatedly stated, pursuant to Clause II of the same Agreement, "the dispute shall commence upon delivery of the written action to the presiding arbitrator".

The presiding arbitrator received the request for review of the arbitral award dated 4 August 2008 on 23 January 2014.

While by the execution of the Arbitration Agreement, the possibility to conduct an arbitration was agreed, i.e. arbitrability; the delivery of the request **for review** of **the arbitral award to the other party** created the possibility to review the award, i.e. the reviewability of the award.

The arbitration was commenced by the action and the award review proceedings were commenced upon delivery of the submission to the **presiding arbitrator.** This submission, delivered to the presiding arbitrator in January 2014, was undoubtedly made by the Office for Government Representation in **Property** Affairs and it was made by its competent regional office.

The objection of the Claimant cannot be agreed to in this request. This does not change anything about the fact the request for review of the arbitral award is procedurally ineffective, however, on completely different grounds (see below).

4.3. Duty to instruct

The dispute heard by the existing arbitral panel was commenced only after the delivery of the submission by the OGRPA containing a request for review to the presiding arbitrator.

It cannot be ignored that between the request for review of the arbitral award that created its reviewability (see above) and the delivery of the submission to the presiding arbitrator commencing the review proceedings with respect to the arbitral award, several years passed (however, during which the judicial proceedings on the appointment of arbitrators were pending).

Pursuant to Section 30 of the Arbitration Act, unless provided for otherwise by the Act, the provisions of the Civil Procedure Code shall apply to proceedings before arbitrators with necessary modifications (the Code still being Act No. 99/1963 Coll., although naturally amended many times). The application of the Civil Procedure Code (hereinafter the "CPC") with necessary modifications means, for example, pursuant to the decision of the Supreme Court, file No. 32 Cdo 3299/2009, the application of the rules of the CPC under the general framework of the principles of arbitration. Pursuant to Section 5 of the CPC, the courts instruct the parties on their procedural rights and obligations. Because the duty to instruct is not regulated by the Arbitration Act (i.e. Act No. 216/1994 Coll.), the arbitrators must proceed with necessary modifications in accordance with Section 5 of the CPC when discharging their duty to instruct.

The arbitration agreement, as decided by the Constitutional Court of the Czech Republic e.g. in judgments file No. I. OS 3227/2007 or file No. I. OS 1794/2010, or by the Supreme Court in judicial decision file No. 20 Cdo 2487/2010, derogates the jurisdiction of the court (however, only conditionally with regard to the provisions of Section 106(1) of the CPC) and devolves (however, only conditionally again) the competence of the court to arbitrators which means that also the arbitrators are obliged to instruct the parties in the arbitration on their procedural rights and obligations.

As mentioned above, pursuant to Clause V of the above Arbitration Agreement made between the parties on 18 September 1996, the arbitral award is subject to review if the request for review is delivered to the other party within thirty days of the date when the party requesting the review is delivered the arbitral award while it was agreed in the same Clause V that Clauses II through IV of this Agreement should also apply to the review of the arbitral award by analogy. Pursuant to Clause II of this Agreement, "the dispute shall commence upon delivery of the written action to the presiding arbitrator". The delivery of the written action, or rather the request for review of the arbitral award, represents a motion to commence proceedings in accordance with the agreement of the parties (in case of an action, it is a motion for commencement of the original arbitration, in case of the request for review of the arbitral award, a motion for commencement of review proceedings). As was already stated, the presiding arbitrator received the motion for review of the arbitral award dated 4 August 2008 only on 23 January 2014.

Only upon the filing of the action, the procedural-law relation comes into existence and the rights and obligations arise as determined in the disposition of procedural rules (the hypothesis of which is the filing of

the action). The action whereby the Claimant asserts its substantive rights is the transfer from the field of substantive law to the field of civil procedural law. Consequently, the action is sometimes called a "bridge" from substantive to procedural law (e.g. cf. Steiner, V.: Fundamental Issues of Civil Procedural Law *(Zakladni otazky obcanskeho prava procesniho)*, Academia, Prague 1981, page 166) and at the same time, it is a basic manner of commencement of civil proceedings and as such, it is always a procedural act assessed pursuant to (and always only pursuant to) the rules of procedural law.

For example, the Constitutional Court decided under file No. II. ÚS 182/2001 that an action is an act carried out pursuant to procedural rules and must be assessed as such. For example, this is the reason why an action can never be invalid because invalidity of legal acts is an institute of substantive law but the action can only be defective while only the procedural law determines manners of remedy of such defects or their consequences when it comes to irremovable defects or defects that were not removed in a timely manner.

The action is an act of procedural law that is regulated by the rules of (civil) procedural law. It means that is cannot be considered pursuant to the viewpoints (standards, requirements) of substantive law so it is not possible to consider validity or invalidity of a procedural act (as decided by the Supreme Court e.g. in judicial decision under file No. 33 Cdo 3723/2011).

Although the literature describes (without a more detailed justification, as criticised e.g. by Belohlavek, A.: Arbitration Agreement, order public and criminal law *(Rozhodcl rizeni, ordre public a trestnl pravo)*, C.H. Beck, Prague 2008, volume I, page 81 et seq.) the arbitration agreements as "procedural agreements", they actually do not create procedural rights and obligations on their own. Therefore, they can be invalid (for example, pursuant to Section 3(1) of the Arbitration Act, an arbitration agreement must be made in writing otherwise it is invalid) while procedural acts can never be invalid (as decided by the Supreme Court, for example in the judicial decision referred to above, file No. 33 Cdo 3723/2011). In the matter under file No. 30 Cdo 4354/2010, the appellant in appellate review proceedings objected that procedural acts, including the arbitration agreement, hao to be considered pursuant to the provisions of the CPC while the Supreme Court concluded that the procedure of creation of an agreement, including an arbitration agreement, should be governed by the Civil Code (i.e. substantive law).

The motion for commencement of proceedings must be filed within a time-limit stipulated by substantive law (as decided by the Supreme Court under file No. 30 Cdo 794/2006), while pursuant to the decision of the Supreme Court, file No. 33 Cdo 142/2006, the effectiveness of substantive-law acts envisages that the manifestation of will within the stipulated time-limit is delivered to the addressees (while in case of written procedural acts, it is sufficient to send them). For example, actions and other motions for commencement of proceedings must be delivered to their addressees within the time-limits set out by the substantive-law rules (and if this does not happen, the consequences occur to which the same is related pursuant to substantive law, e.g. - depending on the nature of the matter - limitation or lapse of claim, i.e. cessation of the claim or even cessation of the substantive-law right).

But the arbitration agreement made between the parties envisages effectiveness of the written act upon its delivery to the addressee ("the dispute shall commence upon delivery of the written action to the presiding arbitrator").

The same applies to the request for review of the arbitral award (see above) as to an action. Identically as an action, also this motion is a motion for commencement of contentious proceedings and hence it is also a procedural act. Only on its basis (by filing an action or by filing a request for review of the arbitral award, simply by filing a motion for commencement of the proceedings), a procedural relation is established the contents of which are the procedural rights and procedural obligations of the parties to the proceedings. The proceedings only commence upon the filing of a motion for commencement of the proceedings.

Pursuant to Section 5 of the CPC (applicable by analogy also to arbitration pursuant to Section 30 of Act No. 216/1994 Coll.), courts and also arbitrators are obliged to instruct the parties on their procedural rights (or obligations) which, however, is not possible prior to their coming into existence: a court cannot instruct anybody before the proceedings are commenced, i.e. before a motion for commencement of the proceedings is filed. It follows therefrom that the court (or arbitrators) cannot instruct a party that (or whether) it should file an action or another motion for commencement of proceedings.

Therefore, the courts instruct parties only on their procedural rights and obligations arisen after the motion for commencement of proceedings was filed (or arisen after the proceedings were commenced).

Logically, it is not possible to instruct the parties on their procedural rights in advance, before such rights come into existence, simply prior to the commencement of the proceedings.

On the contrary, a court is not entitled to instruct the parties on substantive law, e.g. on what should be made in order to satisfy the claims of the party (for example, by when a motion for commencement of proceedings must be filed within the time-limit stipulated by substantive law, as decided by the Supreme Court under file No. 30 Cdo 794/2006) or in order to make its defence against them successful because it court would thereby breach the equality of parties (as decided by the Supreme Court in judicial decision under file No. 23 Cdo 3848/2007) which also applies in case of a procedural act the contents of which are of substantive law nature (for example, pursuant to decision of the Supreme Court file No. 28 Cdo 1305/2008, a plea of limitation raised in the course of judicial proceedings is such an act). As stated by the Constitutiona1 Court in decision file No. IV. ÚS 22/2003, the duty to instruct cannot be extended so that it covers substantive law, and the same judicial decision was made by the Supreme Court, e.g. in decision file No. 30 Cdo 2998/2013. Pursuant to decisions of the Supreme Court, file No. 26 Cdo 495/2010 or file No. 20 Cdo 7551/2011, the court simply does not instruct on other than procedural rights (and procedural rights come into existence only when the proceedings are commenced).

The court (and the arbitrators) cannot instruct a party that it should file a motion for commencement of proceedings or when the party should do so or for example that it should raise a plea of limitation or set-off because the court would thereby grossly breach the equality of procedural parties (and the parties must stand before the court in equal positions, without one or the other having advantages of any kind, as stressed by the Constitutional Court e.g. under file No. II. ÚS 202/2003 and in a number of its other decisions).

The arbitrators could not instruct the parties that the motion for review of the arbitral award must be delivered to the presiding arbitrator (which would allow for an earlier decision in the arbitration) because pursuant to the **agreement made by and between the parties, it only commences the dispute and**

the procedural rights and obligations come into existence while the party cannot (must not!) be instructed by the court (or the arbitrators) that it is to file a motion for commencement of proceedings.

4.4. Plea of res iudicata

In addition to a number of other arguments, briefly speaking, the Defendant defended by the fact that in the above arbitration, a partial arbitral award was issued on 25 June 2002 whereby the Claimant was awarded the right to certain performance (that was paid by the Defendant to the Claimant).

This award was subjected by the Defendant to the review and the then review arbitral panel (speaking very briefly) agreed with the original decision in its award dated 16 December 2002. Because a part of the claim on which the above award decided was not specified in any manner in the award and was not differentiated in any manner from the remaining part of the claim raised, the decision was made on the entire claim, in the Defendant's opinion (so that further hearing of the matter is prevented by the plea of res iudicata because pursuant to Section 159a(4) of the CPC, as scon as a final and conclusive decision is made on the matter, it cannot be heard any longer or again and the proceedings must be discontinued).

Both parties actually requested that the arbitration be discontinued, although each of them on different grounds: The Claimant, because it considered the review request of the other party to be legally ineffective and withdrew its own request so there is nothing to be heard, while the Defendant, because the matter was actually resolved back in 2002 so there is nothing to be heard and all the subsequent decisions are null and void and all the subsequent procedural acts are ineffective. Both parties identically moved that the proceedings be discontinued while both of them claimed that there was nothing to be heard, although each of them on completely different grounds.

As regards the objections of the Defendant, it is naturally true that for a long time, the judicial practice (for the first time probably under No. V/1968 of the Collection of judicial decisions and opinions) has been of the opinion that the part of the matter being heard, on which a decision may be made by way of a partial decision, may only be one out of more separate claims or, as the case may be, a claim against only one out of more defendants.

It is also true that in case that a decision in the matter was already made, the matter cannot be heard again and that subsequent decisions, if any, whereby a decision is made on the issues already decided on, lack any legal effects.

Similar principles of ineffectiveness of an arbitral award are relied on e.g. by a decision of the Supreme Court, file No. 20 Cdo 2227/2011 pursuant to which, for example, when "no arbitration agreement is concluded, the issued arbitral award is not a qualified execution title regardless of the fact that the obliged person did not object in the arbitration to the non-existence of the arbitration agreement" (the same judicial decision is made by the Supreme Court also in the resolution file No. 20 Cdo 3284/2008). Even in execution proceedings, it is necessary to examine whether there were pleas to the proceedings excluding the possibility to make the decision, as decided the Constitutional Court in decision file No. II. ÚS 3406/2010 or file No. IV. ÚS 2735/2011 and the Supreme Court e.g. in decision file No. 20 Cdo 653/2013, file No. 32 Cdo 2050/2013, file No. 20 Cdo 2568/2013 or file No. 29 Cdo 3969/2013.

Also pursuant to judgment of the Constitutional Court, file No. I. US 199/2011, a party to the arbitration must not be adversely affected by the arbitral award not observing similar fundamental rules (not even if it was passive in the proceedings). Similar significant defects are reflected in the ineffectiveness of the decision. It is also true that the Act does permit that the court (and also the arbitrators) decides by way of a separate decision only on a part of the subject matter of the proceedings, however, pursuant to the decision of the Supreme Court, file No. 21 Cdo 1509/2010, such decision may only be made on the claim of one of the claimants, on the claim against only one defendant, on one of the matters joined for common proceedings, on cross-action or on a fully separate claim. Naturally, the matter to be heard does not concern more claimants of more defendants or cross action or joining of matters.

It is also true that a partial arbitral award in this matter does not specify in any manner what part of the asserted claim is concerned and the panel that issued the award subject to review dated 4 August 2009 (on page 100) simply subtracted this previously awarded amount from the lost profits. The fact that the court did not decide on the entire asserted claim does not make it a partial decision (as may be inferred, for example, from the reasoning of the Supreme Court, file No. 22 Cdo 411/98) regardless of its name. Each procedural act, including a decision, must be considered from an objective point of view in terms of its contents (as may be inferred from the decision of the Supreme Court, file No. 2 Cdon 1646/96) and the accuracy of the final and conclusive decision can no longer be reviewed or attributed other legal effects, even if it is not correct (as decided by the Supreme Court under file No. 32 Cdo 4343/2013). Pursuant to the decision of the Supreme Administrative Court, file No. 1 Afs 80/2013, the failure to comply with the prescribed form of the decision alone cannot create unlawfulness of the decision and rule out its effects as determined by its contents. The objections of the Defendant that the decision formally titled as partial is not actually such a partial decision must be agreed to.

The plea of res iudicata is established e.g. also by a final and conclusive arbitral award pursuant to decision of the Supreme Court file No. 29 Cdo 2254/2011. The arbitrators believe that this plea did occur by issue of the partial arbitral award.

4.5 Judicial proceedings

Any assessment (review) may only be dealt with by the arbitrators when there exists a procedurally effective review request. As already stated other words, the Claimant withdrew its request for review of the award dated 4 August 2008 so it cannot be heard and no other decision on it may be made than the discontinuation of the proceedings. On the contrary, the Defendant insisted on the request for review of the arbitral award dated 4 August 2008.

However, an arbitrator cannot be only a passive recipient of the submissions by the parties in the arbitration but must also ensure issue of a fair **decision complying** with the **body** of laws which arises **from** the **fact** that arbitration is one of the types of civil procedure (cf. judgment of the Constitutional Court, file No. I. US 3227/2007 dated 8 March 2011) so the arbitration, in spite of its distinctive character of chiefly contentious proceedings must naturally observe the constitutional requirements, in particular the right to fair trial (cf. resolution of the Constitutional Court, file No. II. US 2784/2010).

Therefore, pursuant to the provisions of Section 15(1) of Act No. 216/1994, the arbitrators are entitled (and also obliged) to examine their jurisdiction. The purpose of the provisions of Section 15 of Act No. 216/1994 Coll. is (for example pursuant to the decision of the Supreme Court dated 23 February 2011, file No. 23 Cdo 111/2009) to allow the arbitrator to resolve the matter even in case there are doubts about his/her jurisdiction. Such jurisdiction is vested in an arbitrator even where the lack of jurisdiction is net challenged by the parties (as was the case here); the arbitrator alone must consider whether he/she is authorised to resolve the matter.

It must also be mentioned that by the judgment of the District Court in Prague 1, file No. 22 C 64/2004-32, which came into legal force on 12 January 2006, issued in respect of the action of JUDr. Jiri Orsula against the defendants "1) Czech Republic - Ministry of Finance of the Czech Republic" and (then) "2) Diag Human, a.s., Company ID (iC): 00408611", the Court decided on the obligation of the latter defendant to pay the amount specified in the judgment; the action relied on the latter defendant (at that time, Diag Human, a.s.) assigning a portion of its receivable due from the Czech Republic to the claimant (i.e. JUDr. Jiri Orsula) (cf. the first paragraph of the reasoning of the above judgment: "The claimant stated that it had entered into an agreement with the latter defendant … on the assignment of a portion of a receivable for damages of the latter defendant due from the former defendant…"). It follows from the reasoning of the judicial decision referred to above that the action was filed after the arbitral panel in the dispute between (then) Diag Human, a.s. and the Czech Republic issued a partial arbitral award whereby the Czech Republic was bound to compensate a part of the damage caused (cf. the first paragraph of the reasoning of the judgment referred to above, text on page 2).

This was a situation when JUDr. Jiri Orsula raised an action with the court of general jurisdiction against the Czech Republic and (then) Diag Human, a.s., the action being based on the execution with the latter defendant (Diag Human, a.s.) of an "agreement … on the assignment of a part of a receivable of the latter defendant due from the former defendant for damages ...".

Pursuant to the provisions of Section 91a of the CPC, the person who raises a claim in respect of a thing, in full or in part, in relation to which the proceedings are pending between other persons, may file an action against such parties until the final and conclusive termination of the proceedings.

JUDr. Jiri Orsula (on the basis of the fact that he was assigned a portion of the Claimant's receivable) filed an action against the Claimant (at that time, Diag Human, a.s.) as well as the Defendant (the Czech Republic) who were conducting a dispute at that time heard by arbitrators in the arbitration. A decision on this action was made by a judgment of the court of general jurisdiction that came into legal force (on 12 January 2006).

The Supreme Court decided e.g. in resolution file No. 20 Cdo 2487/2010, firstly, that the hearing of the matter in arbitration does not mean waiver of legal protection but represents rather its transfer to another decision-making body and also, that arbitration rules out that simultaneous civil proceedings be conducted in the same matter (and, logically, vice versa). The arbitration agreement, as decided by the Constitutional Court of the Czech Republic in the judgment referred to above, file No. I. ÚS 3227/2007, or in decision file No. I. ÚS 1794/2010, or by the Supreme Court in the judicial decision file No. 20 Cdo 2487/2010, derogates the jurisdiction of the court only conditionally with regard to the provisions of Section 106(1) of the CPC.

The simultaneous judicial proceedings and arbitration on the same matter are prevented by the provisions of Section 106 of the CPC.

Provisions of Section 106(1) of the CPC provide for the plea of arbitration agreement: if the court establishes that the matter is to be heard before arbitrators in accordance with the agreement of the parties, it cannot continue hearing the matter and shall discontinue the proceedings.

However, this plea due to which the matter cannot be heard and decided on is not examined by the court by virtue of office pursuant to the above provisions of Section 106(1) of the CPC but only upon a party's objection.

Pursuant to Section 106(1) of the CPC, the court "cannot continue hearing the matter and shall discontinue the proceedings" only if "it establishes that the matter is to be heard in proceedings before arbitrators in accordance with the parties' agreement", however, only where the court establishes the same "upon an objection of the defendant raised no later than upon its first act in the matter (quotations of the provisions of Section 106(1) of the CPC in inverted comas).

The court shall hear the matter even if the "matter is to be heard in proceedings before arbitrators in accordance with the parties' agreement" if:

- the defendant fails to raise the plea of the arbitration agreement upon its first act in the matter at the latest (i.e. either the defendant raises the same later or does not raise it at all, as was the case in the matter in which the final and conclusive judgment referred above was issued); and/or

- the parties do not insist on the arbitration agreement ("however, the matter shall be heard if the parties declare that they do not insist on the agreement", cf. again Section 106(1) of the CPC).

The arbitration agreement prevents the hearing of the matter before a court only if the defendant timely raised the plea of its existence before the court; on the contrary, the hearing of the matter by the court is not prevented if the defendant failed to raise the plea of existence of the arbitration agreement in a timely manner or at all and/or declared later on that it did not insist on the arbitration agreement (and the same is declared by the claimant).

If the arbitration agreement pursuant to which "the matter is to be heard in proceedings before arbitrators in accordance with the parties' agreement" does not prevent the hearing of the matter by the court, e.g. because the defendant failed to raise the plea of existence of the arbitration agreement in a timely manner or at all, the courts do have jurisdiction.

In the proceedings conducted on the action (principal intervention) of JUDr. Jiri Orsula, the parties to the dispute resolved the conflict between arbitration and judicial proceedings by the plea of existence of the arbitration agreement not being raised by either defendant (the Czech Republic or Diag Human, a.s.) (upon the first act in the matter or later on) (while Diag Human, a.s. argued only the lack of local jurisdiction of the Court and also that another body should act on behalf of the Czech Republic, cf. page 3 of the quoted judgment).

The parties to the dispute regarding the principal intervention resolved the conflict between arbitration and judicial proceedings in favour of judicial proceedings because both parties (the Czech Republic and Diag Human, a.s.)

failea *zo* raise the plea of existence of the arbitration agreement, and hence the coirt has jurisdiction to hear and decide on the matter.

Subsequently, claims were raised in these proceedings which had been acquired from dr. Orsula (by an agreement on the assignment of a receivable) by Towit Machinery Trading AG, VH-440.3.020223 Handelstregister des Kantons Thurgau, having its registered office at Romanshorn, Schlossbergstrasse 26, 8590 Romanshcrn, the Swiss Confederation, by an action (principal intervention) against both parties to this dispute. However, the arbitrators concluded that they did not have jurisdiction to hear and decide on the principal intervention in the dispute referred to above. In such a case, they had no other choice than to discontinue the arbitration on the principal intervention of Towit Machinery Trading, AG. The arbitrators instructed the parties in the resolution on discontinuation of the proceedings on principal intervention that pursuant to decision of the Supreme Court file No. 29 Odo 1051/2004, the decision on the discontinuation of the proceedings due to the plea of arbitration agreement does not contain the statement on the transfer of the matter by the arbitrators (in case the court discontinues the proceedings pursuant to Section 106(1) of the CPC, it does not decide on the transfer of the matter to an arbitrator. In the arbitrators' opinion, this conclusion holds with regard to the above provisions of Section 30 of the Arbitration Act also vice versa; the arbitrators' decision on discontinuation of proceedings does not contain a statement on the transfer of the matter to the court. In the decision on the principal intervention, the parties were instructed also on the fact that the effects of procedural acts of the parties remain preserved if made by the respective party again before the court (e.g. if a party files a motion for continuation of the proceedings) within thirty days after the party received the decision on the lack of jurisdiction. The conclusions arrived at by the arbitrators when deciding on the principal intervention naturally apply also to the decision-making of the dispute between the parties of the original dispute (even though the plea of res iudicata occurred earlier).

However, due to all the reasons described above, the arbitrators had no other choice than to discontinue the arbitration. The statement on the costs of the proceedings relies on the arrangement in Clause III of the Arbitration Agreement pursuant to which each party shall bear its own costs.

In Prague on 23 July 2014

(signature)
Petr Kuzel, MBA
arbitrator

(signature)
doc. Ing. Jiri Schwarz, CSc.
arbitrator

(signature)
doc. JUDr. Milan Kindi, CSc.
presiding arbitrator of the arbitral panel