

4A\_563/2020<sup>1</sup>

Judgement of November 25, 2020

First Civil Law Court

Federal Judge Kiss, presiding,  
Federal Judge Hohl,  
Federal Judge Niquille,  
Clerk of the Court: Mr. Leemann.

A.\_\_\_\_\_,  
represented by Lutz Kaiser,  
*Appellant*

v.

Czech Republic, acting through its Ministry of Finance, Ms B.\_\_\_\_\_ and Mr. C.\_\_\_\_\_,  
*Respondents*

Facts:

A.

On December 11, 2018, based on the Agreement between the Federal Republic of Germany and the Czech and Slovak Federative Republic on the Promotion of Reciprocal Protection of Capital Investments dated October 2, 1990 (Investment Protection Treaty 1990), A.\_\_\_\_\_, U.\_\_\_\_\_, Germany (Claimant, Appellant) commenced an arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law 1976 (UNCITRAL Rules) against the Czech Republic (Defendant, Respondent).

After the two arbitrators designated by the parties had jointly appointed the Chair of the Arbitral Tribunal, it was constituted on February 11, 2020.

On February 14, 2020, the Arbitral Tribunal invited the parties to submit certain documents and to respond to certain questions.

On February 26, 2020, the Defendant submitted the documents requested together with its responses. Upon request, the Claimant was granted an extension of time to March 27, 2020. By Order of March 20, 2020, the Arbitral Tribunal suspended the proceedings until April 30, 2020, and simultaneously granted the Claimant an extension of time until May 1, 2020. On April 30, 2020, the Arbitral Tribunal extended

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<sup>1</sup> Translator's Note:

Quote as A.\_\_\_\_\_ v. Czech Republic, Ms. B.\_\_\_\_\_, and Mr. C.\_\_\_\_\_, 4A\_563/2020. The decision was issued in German. The full text is available on the website of the Federal Tribunal, [www.bger.ch](http://www.bger.ch).

the suspension of the proceedings upon the joint application of the Parties until June 11, 2020, granting the Claimant a further extension of time until June 12, 2020.

On June 5, 2020, the Claimant requested a further extension of the suspension of the proceedings in order to enter into a “structured dialogue” with the Defendant under Art. 9 of the Agreement of 5 May 2020 for the Termination of Bilateral Investment Treaties Between the Member States of the European Union (Termination Agreement 2020). The Defendant objected to the extension of the suspension for which the Claimant had applied.

By Order of June 19, 2020, the Arbitral Tribunal rejected the Claimant’s procedural application for an extension of the suspension and extended the time limit for submitting documents which it had previously set to June 26, 2020.

On June 26, 2020, the Claimant submitted the documents requested and responded to the questions which had been put to it. At the same time, the Claimant requested a reconsideration of the order on suspension of the proceedings. By Order dated July 3, 2020, the Arbitral Tribunal invited the parties to pay an advance on costs of USD 125’000.00 each by August 3, 2020.

On July 14, 2020, the Arbitral Tribunal informed the parties that it would rule on the outstanding issues after the advance on costs had been received.

By Letter dated August 3, 2020, the Claimant asked the Arbitral Tribunal, *inter alia*, to initially prepare the “Terms of Engagement” prior to demanding an advance on costs.

The Defendant, for its part, notified the Arbitral Tribunal on August 4, 2020 that it would only pay its share of the advance on costs when the Claimant had complied with its obligations from a prior arbitration. The Defendant asked the Arbitral Tribunal to terminate the proceedings if the Claimant failed to pay its share of the advance on costs.

On August 10, 2020, the Arbitral Tribunal found, *inter alia*, that neither party was prepared to pay the advance on costs that had been requested. It invited the Claimant to pay the requested advance on costs by August 31, 2020; failing that, a decision to dismiss the case would be issued.

By Order dated September 7, 2020, the Arbitral Tribunal set a final grace period for payment of the advance on costs to run until September 14, 2020.

By Submission dated September 11, 2020, the Claimant reiterated its position as expressed in its letter of August 3, 2020. In addition, the Claimant stated that it would only pay the advance on costs after the Arbitral Tribunal had ruled that it had jurisdiction, notwithstanding the Termination Agreement 2020. After the requested advance on costs went unpaid even during the grace period set by the Arbitral Tribunal, the Arbitral Tribunal ruled by Award of September 18, 2020, that the “place of arbitration shall be Zurich, Switzerland”, and dismissed the request for arbitration (“the proceedings are terminated without prejudice”).

B.

By civil law appeal, the Claimant has requested the Federal Tribunal to set aside the decision of the Arbitral Tribunal with its seat in Zurich dated September 18, 2020, and to remand the matter for readjudication. In addition, it has requested the grant of free legal aid for the appellate proceedings before the Federal Tribunal.

The Federal Tribunal has not requested the submission of any comments.

Reasons:

1.

According to Art. 54(1) BGG<sup>2</sup> the Federal Tribunal issues its decisions in an official language<sup>3</sup>, as a rule in the language of the decision under appeal. When that decision is in another language, the Federal Tribunal resorts to the official language chosen by the parties. The challenged arbitral award was rendered in the English language. Because English is not one of the official languages of this Court, the Decision of the Federal Tribunal is being issued in the language of the Appeal, in line with the Court's practice (BGE [142 III 521](#) at 1).

2.

In the field of international arbitration, a civil law appeal is possible under the requirements of Art. 190-192 PILA<sup>4</sup> (SR 291) Art. 77(1)(a) BGG.

2.1. The seat of the Arbitral Tribunal in the present case is located in Zurich. The challenged dismissal ruling by which the Arbitral Tribunal terminated the proceedings constituted a final decision which may be challenged by appeal under Art. 190(2) PILA. A civil law appeal within the meaning of Art. 77(1) BGG is, in principle, of a purely cassatory nature, *i.e.* it may only seek the setting aside of the decision under challenge (see Art. 77(2) BGG, ruling out the applicability of Art. 107(2) BGG insofar as this empowers the Federal Tribunal to adjudicate the matter itself). To the extent that the dispute concerns the jurisdiction or the composition of the arbitral tribunal, however, there is an exception: the Federal Tribunal itself may rule on the arbitral tribunal's jurisdiction or lack thereof or on the removal of the arbitrator involved (BGE [136 III 605](#) at 3.3.4 p. 616 with references). The Federal Tribunal may also remand the matter to the arbitral tribunal (Judgements 4A\_124/2020 of November 13, 2020 at 2.1; 4A\_418/2019 of May 18, 2020, at 2.3; 4A\_294/2019 of November 13, 2019, at 2.2).

Accordingly, the application by the Appellant is admissible. Subject to submission of legally sufficient substantiation (Art. 77(3) BGG), it is proper for the Federal Tribunal to deal with the appeal.

2.2. Only the grievances listed in Art. 190(2) PILA are admissible (BGE [134 III 186](#) at 5 p. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). Pursuant to Art. 77(3) BGG, the Federal Tribunal reviews only

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<sup>2</sup> Translator's Note: BGG is the most commonly used German abbreviation for the Federal law of June 6, 2005 organizing the Federal Tribunal (RS 173.110).

<sup>3</sup> Translator's Note: The official languages of Switzerland are German, French, and Italian.

<sup>4</sup> Translator's Note: PILA is the most frequently used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.

grievances raised and reasoned in the Appeal Brief; this corresponds to the duty to provide reasons in Art. 106 (2) BGG for the violation of constitutional rights and of cantonal and inter-cantonal law (BGE [134 III 186](#) at 5 p. 187 with references). Criticism of an appellate nature is not admissible (BGE [134 III 565](#) at 3.1 p. 567; 119 II 380 at 3b p. 382).

2.3. The Appellant raises as a grievance the violation of public policy (Art. 190(2)(e) PILA) but asserts, as its sole justification for this grievance, that the challenged Award leads “to a result, specifically termination of the proceedings without structured dialogue”, which, it argues, is irreconcilable with “material principles of international law”. In saying this, it fails to indicate which fundamental legal principles these are (as to the concept of public policy: BGE [144 III 120](#) at 5.1; [138 III 322](#) at 4.1; Judgement 4A\_248/2019 of August 25, 2020, at 9.1, intended for publication). These submissions are devoid of substance.

3.

The Appellant raises the grievance of a violation of Art. 190(2)(b) PILA.

3.1. Pursuant to Art. 190(2)(b) PILA, the Federal Tribunal freely reviews jurisdictional objections as to legal objections, including to preliminary substantive issues upon which the determination of jurisdiction depends (BGE [146 III 142](#) at 3.4.1 p. 148; [144 III 559](#) at 4.1; [142 III 239](#) at 3.1). By contrast, it will review findings of fact of the challenged Arbitral Award also in the context of a jurisdictional objection only when some admissible grievances within the meaning of Art. 190(2) PILA are raised against such factual findings or when some new evidence (Art. 99 BGG) is, exceptionally, taken into account (BGE [144 III 559](#) at 4.1 S.563; 142 III 220 at 3.1, 239 at 3.1; [140 III 477](#) at 3.1; [138 III 29](#) at 2.2.1; each with references).

3.2. The Appellant submits that the Arbitral Tribunal failed to consider that under Art. 2 of the Termination Agreement 2020, the Member States of the European Union agreed to terminate all investment protection treaties made between its Member States. Thus, the Appellant argues, the parties’ arbitration is no longer covered by the Investment Protection Treaty 1990. However, under the transitional provision of Art. 8 of the Termination Agreement 2020 covering pending arbitrations, a “structured dialogue” should be conducted between the Parties pursuant to Art. 9. The Appellant argues that because this legal requirement was already governing the termination of investment protection treaties at the time the arbitral Award was issued, “the only way in which the Tribunal could have acted in a manner which was not subject to legal error would have been by suspending the proceedings and referring the Parties to the dialogue procedure”. The Appellant argues that the Arbitral Tribunal lacks jurisdiction to end that procedure.

3.3. The grievance is manifestly unfounded. The Arbitral Tribunal did not find that it had or lacked jurisdiction (cf. Art. 190(2)(b) PILA), but rather it terminated the proceedings “without prejudice” after the advance on costs it had requested had gone unpaid. In the challenged decision, it expressly noted, referring to Art. 9 of the Termination Agreement 2020, that although the question of the validity of the arbitration agreement and consequently the jurisdiction of the Arbitral Tribunal was a valid one, it would nevertheless not be able to rule on this question without first having received the advance on costs. Thus, the objection that the Arbitral Tribunal appointed in this case lacked jurisdiction misses the mark. If the Appellant means by its remarks to criticise the way in which the Arbitral Tribunal conducted the

proceedings, in connection with its refusal to suspend them as well as the advance on costs it had ordered, the Appellant is not raising a grievance that is admissible under Art. 190(2) PILA.

4.

The appeal is rejected in proceedings under Art. 109(2)(a) BGG, to the extent the matter is capable of appeal.

It is proper for the Federal Tribunal to dismiss the Appellant's request for free legal aid for the proceedings before the Federal Tribunal, because the appeal appeared from the outset to lack any prospect of success (Art. 64(1) BGG). In accordance with the outcome of the case, the Appellant shall be liable to pay costs (Art. 66(1) BGG). The Responded is not awarded any party compensation, because it has not incurred any expenditure from the proceedings before the Federal Tribunal (Art. 68(2) BGG).

Therefore, the Federal Tribunal pronounces:

1.

The appeal is rejected, to the extent the matter is capable of appeal.

2.

The application of the Appellant for grant of free legal aid is dismissed.

3.

The judicial costs of CHF 1'000 shall be paid by the Appellant.

4.

No party compensation shall be awarded..

5.

This decision shall be notified in writing to the Parties, and to the arbitral tribunal with its seat in Zurich, by letters to the parties.

Lausanne, November 25, 2020

In the name of the First Civil Law Court of the Swiss Federal Tribunal

Presiding judge:  
Kiss

Clerk of the Court:  
Leemann