

IN THE MATTER OF AN INTERNATIONAL ARBITRATION  
UNDER THE ARBITRATION RULES OF THE  
UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW

BETWEEN

VOECKLINGHAUS

Claimant

And

THE CZECH REPUBLIC

Respondent

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FINAL AWARD

5/11/77 2

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**A. THE PARTIES**

1. Claimant in these proceedings is Voecklinghaus ("PV"), a German citizen, whose address is:

2. PV is represented by:

3. In the course of the arbitration, was assisted by:

4. Respondent in these proceedings is:

The Czech Republic

5. Respondent is represented by:

DLA Piper LLP (US)  
1251 Avenue of the Americas  
New York  
NY 10020  
USA

And by

DLA Piper Prague LLP  
Manesova 5  
120 00 Prague 2  
Czech Republic  
Tel: +420 222 817 366  
Fax: + 420 222 246 065

## B. THE ARBITRATION AGREEMENT

6. The proceedings were brought by PV in reliance upon the provisions of Article 10 of the Treaty between The Federal Republic of Germany and The Czech and Slovak Federal Republic Concerning the Promotion and Reciprocal Protection of Investments of 2 October 1990 ("the Treaty").<sup>1</sup>

7. Article 10 provides that:

*"(1) Disputes between either Contracting Party and an investor of the other Contracting Party regarding investments shall, as far as possible, be settled amicably between the parties to the dispute.*

*(2) If the dispute cannot be settled within six months from the date on which it was officially raised by either party to the dispute, it shall, at the request of the investors (sic) of the other Contracting Party, be submitted for arbitration. In the absence of any other arrangement between the parties to the dispute, the provisions of article 9, paragraphs 3 to 5 [of the Treaty] shall apply mutatis mutandis, subject to the proviso that the members of the arbitral tribunal shall be appointed by the parties to the dispute in accordance with the provisions of article 9, paragraph 3, and that, if the time-limits provided for in article 9, paragraph 3, are not observed, either party to the dispute may, in the absence of any other arrangement, request the Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce to make the necessary appointments. The award shall be recognized and enforced under the Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.*

*(3) The Contracting Party which is a party to the dispute shall not in the course of arbitration proceedings or the execution of the arbitral award raise an objection on the grounds that the investor who is the other party to the dispute has already received compensation for all or part of his losses under an insurance policy."*

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<sup>1</sup> The Treaty was made in the German and Czech languages. For the purposes of this Arbitration, the Parties and the Tribunal have relied upon the official English language translation, published by the United Nations - Treaty Series, Vol.1909, I-32531

### C. THE TRIBUNAL

8. By his Notice of Arbitration dated 7 October 2009, PV appointed as Arbitrator:  
JUDr. Bohuslav Klein  
Kralupska 14  
161 00 Prague 6  
Czech Republic  
Tel: +420 602672787  
Email: [bohuslav.klein@iol.cz](mailto:bohuslav.klein@iol.cz)

9. By letter dated 3 December 2009, the Minister of Finance of the Czech Republic, Eduard Janota, appointed as Arbitrator:  
Maitre Laurent Levy  
Levy Kaufmann-Kohler  
3-5, rue du Conseil General,  
P.O. box 552  
CH-1211 Geneva 4  
Switzerland  
Tel: +41 22 809 6200  
Fax: +41 22 809 6201  
Email: [laurent.levy@lk-k.com](mailto:laurent.levy@lk-k.com)

10. By agreement of the two Party-appointed Arbitrators, notified to the Parties on 3 January 2010, Mr John Beechey was appointed Chairman of the Arbitral Tribunal ("the Tribunal"). Mr Beechey's address and contact details are as follows:  
John Beechey  
ICC International Court of Arbitration  
38 cours Albert 1er  
75008 Paris  
France  
Tel: +33 1 49 53 28 21  
Fax: +33 1 49 53 29 29  
Email: [john.beechey@iccwbo.org](mailto:john.beechey@iccwbo.org)

### D. THE ARBITRATION PROCEEDINGS

11. The arbitration proceedings were initiated by Notice of Arbitration issued by PV on 7 October 2009.

12. Following the constitution of the Tribunal (see Section C above), the Tribunal wrote to the Parties on 28 January 2010, noting that it was constituted as an 'ad hoc' tribunal pursuant to the terms of Article 10 of the Treaty. The Tribunal further proposed that the place of arbitration be Paris, France. While it acknowledged that the Parties had not yet determined whether to adopt the UNCITRAL Rules of Arbitration, with or without modification, it drew their

attention, too, to the List of Matters for Possible Consideration in Organizing Arbitral Proceedings, which form part of the UNCITRAL Notes on Organizing Arbitral Proceedings. Counsel for both Parties were invited to submit their comments upon these and other points of procedure by 5 February 2010 (PV) and 19 February 2010 (the Czech Republic) – as they duly did.

13. On the basis of those responses, the Tribunal made certain Preliminary Directions on 24 February 2010. It fixed Paris as the place of the arbitration and, by agreement of the Parties, it confirmed English as the language of the arbitration. The Tribunal further noted the obligation, incumbent upon the Parties and the Tribunal, to keep the proceedings confidential, save to the extent that disclosure might be required of a Party by reason of a legal duty to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.

14. The Tribunal also proposed a preliminary meeting with the Parties (see paragraph 15 below) and directed the payment of initial advances on costs to be held by the Permanent Court of Arbitration in The Hague.

15. PV, representatives of the Czech Republic, the Parties' legal representatives and the Tribunal met in Paris on 11 March 2010. Minutes of the Meeting and the Tribunal's Procedural Order No.1 were issued on 13 March 2010. As the Minutes make clear, the Parties agreed upon a departure from the provisions of Article 9(5) of the Treaty (which are incorporated by reference in Article 10(2)) and which provide that:

*"..... Each Contracting Party shall bear the costs of its own member [of the Tribunal] and of its legal representation in the arbitration. The costs of the chairman and any other costs shall be shared equally between the two Contracting Parties. The tribunal may determine a different allocation of costs. ...."*

Instead, the advances to be made in respect of fees and expenses of all three members of the Tribunal were to be shared equally between the Parties pending a determination by the Tribunal as to the final allocation of such fees and expenses.

16. Pursuant to the timetable fixed in the course of the Preliminary Meeting, the following submissions were to be made by the Parties. To the extent that the actual dates of the submissions differ from those envisaged at the Preliminary Meeting, the latter are shown in brackets.

- PV's full Statement of Claim, save for details of the quantum of any asserted claim for damages<sup>2</sup>, together with all of the documents and the

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<sup>2</sup> At the time of the Preliminary Meeting, provision was made for the raising of an Objection to Jurisdiction by the Czech Republic by 2 July 2010, some three weeks after the submission of the Statement of Claim. In the event that no Objection to Jurisdiction was raised by 2 July 2010, PV was to supplement his Statement of Claim with details of the quantum of his claims, together with the documentary evidence and any expert's report upon which he relied, by 10 September 2010. By letter from its Counsel, DLA Piper, dated 2 July 2010, the Czech Republic confirmed that it did not seek to object to the jurisdiction of the Tribunal as a

statements of any witnesses of fact upon which he intended to rely: by 18 June 2010

- Supplementary Statement of Claim: 10 September 2010
- Answer to all of PV's liability and quantum claims, together with all documents, all statements of witnesses of fact and any expert's report upon which the Czech Republic relied, and to the extent that they had not already been the subject of a Request to Produce, a Request to Produce in conformity with Article 3(3) of the IBA Rules on the Taking of Evidence in International Commercial Arbitration ("the IBA Rules of Evidence") (actually described as "Statement of Defense"): 23 December 2010. (10 December 2010). (Resubmitted 30 March 2011)
- Reply, together with any further outstanding document(s) responsive to a Request to Produce served by Respondent and any further documents upon which PV relied and together with any rebuttal statements of witnesses of fact and any rebuttal expert's report(s): 4 February 2011. (28 January 2011)
- Rejoinder, together with any further outstanding documents responsive to a Request to Produce served by PV and any further documents upon which the Czech Republic relied and together also with any expert report or statements of witnesses of fact, provided that they were strictly responsive to matters raised in any rebuttal statement(s) or report(s) served by PV: 25 March 2011 (11 March 2011). (Resubmitted 30 March 2011):

17. PV filed testimony from:  
PV himself: 18 June 2010; 21 August 2010; 13 January 2011; and 26 January 2011  
; 24 January 2011 and 10 February 2011  
; 10 February 2011  
Petr Sima (Quantum Expert): 9 September 2010 and (undated) Complementary Comments and Response to the Qureshi Report.
18. The Czech Republic filed testimony from:  
; 17 December 2010  
; 17 December 2010  
Milan Hulmak: (Expert on Czech Law) 17 December 2010  
Abdul Sirshar Qureshi: (Quantum Expert) (17 December 2010 and 24 March 2011).

19. In light of the history of document disclosure in this Arbitration, the Tribunal draws specific attention to its direction no.17, contained in Procedural Order No.1, to the effect that:  
*"[S]ave in exceptional circumstances, and then only with leave of the Tribunal, no new documentary or other material shall be introduced into the Arbitration record after 11 March 2011."*

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preliminary matter, but it reserved its right to do so in its Statement of Defense in due course.



20. The Tribunal subsequently issued the following further Procedural Orders:

- Procedural Order No.2, 18 August 2010, supplemented on 19 August 2010: (in respect of the Czech Republic's First Request for Information/Documents of 10 August 2010 and ancillary applications);

- Procedural Order No.3, 5 October 2010: (P.O.3 dealt, *inter alia*, with then outstanding disclosure issues arising out of the Czech Republic's First and Second Requests for Information and Documents; the translation into English of all documents to which the Tribunal's attention was to be drawn; documents to which reference was made in the Expert Report of Mr Sima);

- Procedural Order No.4, 2 November 2010. The Tribunal refused the Czech Republic's applications that it should at that stage draw any adverse inferences in respect of any asserted failure by PV to comply with the Czech Republic's First and Second Requests for Information/Documents; it afforded PV the opportunity to complete his submission of documents referred to or relied upon in the Sima report in support of PV's quantum claim by 25 October 2010, pursuant to PV's Counsel's application of 21 October 2010; the Tribunal extended time for service of the Czech Republic's Answer until 24 December 2010, with consequential adjustments to the dates of submission of PV's Reply and the Czech Republic's rejoinder to 4 February 2011 and 18 March 2011 respectively; it confirmed the hearing dates (4-8 April 2011); and it stated that: "*the final date for admission of any new materials into the arbitration record pursuant to paragraph 17 of P.O. No.1 shall be amended to Friday 18 March 2011.*";

- Procedural Order No.5, 26 March 2011. The Tribunal denied PV's application of 18 March 2011 to adduce additional direct testimony from Ms. [redacted] (a further application in respect of Mr [redacted] was withdrawn) and a similar application made on 24 March 2011 in respect of Dr [redacted] it further denied PV's application to admit into the evidentiary record Exhibits CE156-CE214 inclusive; it upheld the Czech Republic's objection to the appearance of Mr [redacted] to supplement the expert evidence of Mr Sima; and the Tribunal granted PV until 28 March 2011 to make any further application that he might be advised to make in respect of his First Request for Production of Information and Documents. Finally, the Tribunal confirmed arrangements for the Hearing and indicated its inclination, subject to further consultation with the Parties, to invite an exchange of Post-Hearing Briefs on 29 April 2011;

- Procedural Order No.6, 30 March 2011. The Tribunal denied Claimant's further submission, dated 28 March 2011 in respect of his First Request for Production of Information and Documents;

- Procedural Order No.7, 15 June 2011. The Tribunal excluded three additional Exhibits filed with Claimant's Post-Hearing Brief and invited Respondent's Counsel to submit a marked-up version of Claimant's Post-Hearing Brief to Claimant's Counsel, setting out the revisions that

Respondent required Claimant to make consequent upon those deletions. (Claimant made no comment upon the mark-up, which was subsequently submitted to the Tribunal on 24 June 2011).

21. The Hearing in this Arbitration took place at the ICC Hearing Centre, 112, avenue Kleber, 75016 Paris, France over 5 days between 4 and 8 April 2011. In addition to hearing submissions made by the Parties, the Tribunal heard evidence from:

(for Claimant) Voecklinghaus (Days 1 and 2 and recalled Day 3);  
: (Day 2); (Day 3); (Days 3 and 4);  
(for Respondent) (Day 4)

Both quantum experts, Mr Sima, Expert for Claimant, and Mr Qureshi, Expert for Respondent, gave their evidence together on Day 5.

22. The Parties filed Post-Hearing Briefs on 3 June 2011. PV's Post-Hearing Brief was the subject of a revision filed by the Czech Republic on 24 June 2011, pursuant to Procedural Order No. 7. (See paragraph 20 above). The Parties' respective Costs submissions were filed on 28 June 2011 and 7 July 2011 (PV) and 28 June 2011 (the Czech Republic).

## E. INTRODUCTION

23. This dispute arises out of the development and construction of a golf course and resort project at Cihelny in the Czech Republic. The centrepiece of the project was to be a 'signature' 18 hole golf course, designed by the Gary Player Design Company. It is common ground that the European championship was hosted at Cihelny in 2002.

24. PV claims that he provided some Czech Crowns ("Cr.") 251,196,071 funding<sup>3</sup> for the initial phase of the project from late 1994 onwards to the project's corporate vehicle, KOMFORT VP Cihelny spol, s.r.o., ("KOMFORT"), of which PV owned 50% and his business partner and fellow Executive and corporate proxy, Mr ) owned the remaining 50%.

25. PV states that he made an investment susceptible to the protections afforded by the provisions of the Treaty. That investment constituted his taking of an ownership interest in KOMFORT and receivables in respect of loans made to KOMFORT.<sup>4</sup>

26. PV asserts that KOMFORT was unlawfully declared bankrupt by the Regional Court in Pilsen on 16 October 2001. The declaration of KOMFORT's bankruptcy; the appointment of 3 Princova a.s. ("3 Princova") [see paragraph 27 below] as Creditors' Representative; the subsequent sale of the assets of KOMFORT by the Bankruptcy Trustee, Dr , at what PV contends was a material undervalue to the highest bidder in the public tender, (PV's counsel, Dr Sekanina, submitted that the Cihelny course was: "*fully operational at the time*

<sup>3</sup> Exhibit JB298

<sup>4</sup> Statement of Claim, para.12

of expropriation"<sup>5</sup>); and the deletion thereafter of KOMFORT from the Commercial Registry were acts which constituted violations of Articles 2(1), 2(2), 4(1) and 4(2) of the Treaty by the Czech Republic.<sup>6</sup>

27. The eventual purchaser of the Golf Resort was Astoria Invest s.r.o. ("Astoria"). Astoria acquired the assets of KOMFORT for Cr. 61 million. PV maintained that prior to the petition for the bankruptcy of KOMFORT, the owner of Astoria, Mr [redacted] 7, had offered some DM3,400,000 (equivalent to some Cr. 61,155,800 at that time)<sup>8</sup> for the Golf Resort. Mr [redacted] was said by PV to be a client of a lawyer, Dr [redacted] who had drafted the petition for the bankruptcy of KOMFORT at the request of [redacted].<sup>9</sup> According to PV, the Golf Resort is now owned by [redacted] and by a Mr [redacted]. Mr [redacted] is the controlling owner of 3. Princova, the entity appointed as the Creditors' Representative in the KOMFORT bankruptcy and likewise advised by Dr [redacted].<sup>10</sup>

28. PV alleges that Dr [redacted] was the "organiser"<sup>11</sup> of a criminal conspiracy to deprive him of his investment and to which [redacted], Mr [redacted], Mr [redacted] and Mr [redacted] were parties, along with the bankruptcy judge, Mr [redacted], and the bankruptcy trustee, Dr [redacted]. (See also paragraphs 115-121 below).

29. PV further asserts that the failure on the part of the Czech police and state attorneys to pursue criminal proceedings against these individuals constituted an additional ground of breach of Article 4(1) of the BIT.<sup>12</sup>

30. For its part, the Czech Republic maintains that there is no proper basis upon which to engage its responsibility pursuant to the Treaty. Rather, it submits that this case is:

*"A textbook case of a claimant who made a bad business decision and is now looking to blame the State when he has only himself and his lawyers to blame."*<sup>13</sup>

31. Furthermore, contends the Czech Republic, BITs are not:  
*"insurance policies against bad business judgments or bad legal advice."*<sup>14</sup>

<sup>5</sup> Transcript, Day1, p.9

<sup>6</sup> Request for Relief, section IX, Statement of Claim

<sup>7</sup> Exhibit JB127

<sup>8</sup> Statement of Claim, para.48

<sup>9</sup> Idem, paras.41&47

<sup>10</sup> Statement of Claim, para.48

<sup>11</sup> Idem, para.172

<sup>12</sup> Idem

<sup>13</sup> Transcript, Day1, p.56

<sup>14</sup> Transcript, Day1, p.58

F. THE TREATY

32. In addition to Articles 9 and 10 of the Treaty, to which reference has been made at paragraphs 7 and 15 above, the following provisions are of particular relevance:

*Article 1*

*For the purposes of this Treaty*

- (1) *The term "investments" comprises all kinds of assets that are invested in accordance with domestic legislation, particularly:*
  - (a) *Movable and immovable property as well as any other rights in rem such as mortgages and liens;*
  - (b) *Shares and other kinds of participation in companies;*
  - (c) *Claims to money that has been used to create economic value or claims to services that have economic value and are related to an investment;*
- .....
- (2) *The term "returns" refers to amounts yielded by an investment such as profits, dividends, interest, royalties and other remuneration;*
- (3) *The term "investor" refers to an individual having a permanent place of residence in the area covered by this Agreement, or a body corporate having its registered office therein, authorized to make investments.*

*Article 2*

- (1) *Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party, permitting such investments in accordance with its laws. It shall in all cases afford investments just and equitable treatment.*
- (2) *No Contracting Party shall in any way impede the management, maintenance, use or enjoyment of investments in its territory by investors of the other Contracting Party by means of arbitrary or discriminatory measures.*
- (3) *Investments and returns thereon together with returns on any investment shall enjoy full protection under this Treaty.*

*Article 3*

- (1) *Each Contracting Party shall accord in its territory, to investments by investors of the other Contracting Party or investments in which investors of the other Contracting Party have a holding, treatment no less favourable than that accorded to investments by its own investors or to investments by investors of third States.*
- (2) *Each Contracting Party shall accord in its territory, to investors of the other Contracting Party, in respect of their activities in connection with such investments, treatment no less favourable than that accorded to its own investors or to investors of third States.*

.....

Article 4

- (1) Investments by investors of either Contracting Party shall enjoy full protection and full security in the territory of the other Contracting Party.
- (2) Investments by investors of either Contracting Party may be expropriated, nationalized or subjected to other measures with effects equivalent to expropriation or nationalization only in the public interest and against compensation. Such compensation shall correspond to the value of the investment expropriated immediately before the date on which the actual or pending expropriation, nationalization or similar measure was made public. Compensation shall be paid without delay and shall bear interest at the normal rate of bank interest; it shall be effectively convertible and freely transferable. Provision for the determination and payment of such compensation shall be made in an appropriate manner no later than the date of the expropriation, nationalization or similar measure. The legality of the expropriation, nationalization or similar measure and the amount of compensation may be subject to review in a properly constituted legal proceeding.
- (4) In matters governed by this article, investors of either Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party."

33. Pursuant to the terms of a Protocol to the Treaty, likewise done on 2 October 1990, and which was stated to constitute: "an integral part of the Treaty", certain additional provisions were agreed, in particular:

- Ad Article 1:

"The claims to money referred to in article 1, paragraph (c), include claims arising from loans in connection with a shareholding which, in purpose and scope, have the character of a shareholding (shareholding-like loans). Credits from third parties, for example, bank credits subject to commercial conditions, shall not be included hereunder."

- Ad Article 4:

"The investor shall also have a claim to compensation if measures within the meaning of article 4, paragraph 2, affect the enterprise in which he has shares and his investment suffers thereby."

**G. THE PARTIES' CONTENTIONS**

34. By his Statement of Claim dated 18 June 2010, PV maintained that following the acquisition of a 50% share in KOMFORT, he had: "provided money to [KOMFORT] through [his] German companies, especially .... MFT Engineering GmbH .... [by way of] informal 'ad hoc' loans."<sup>15</sup> Thereafter, more formal arrangements were made in January 1995, whereby PV concluded a "general loan agreement" with KOMFORT for DM10 million (equivalent to Cr.200 million), the funds to be lent "through entities controlled by [PV]." PV's receivables were

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<sup>15</sup> Statement of Claim, para. 2

subsequently to be secured by way of a lien concluded between KOMFORT and MFT-K Engineering, MFT-Engineering's wholly owned Czech subsidiary, in December 1997.<sup>16</sup> PV maintained that his total investment in the Czech Republic amounted to some Cr. 251,196,595.<sup>17</sup> It is PV's case that the receivables stemming from the repayment of these loans constitute a significant element of the investment which he contends was expropriated and otherwise damaged by reason of the alleged acts or omissions of the Czech Republic.

35. PV contended that, from the outset, the purpose of the credits obtained from Sparkasse Essen, the "house bank"<sup>18</sup> to PV's MFT Group, and advanced to KOMFORT through MFT Group entities, had been to build the Golf Resort and that "Sparkasse Essen continuously monitored [the utilization of the credits] for this purpose (on one hand by releasing the money only based on the presentation of invoices concerning the construction, on the other hand, by on-site monitoring." (Emphasis added).<sup>19</sup>

36. At the heart of PV's complaint was the declaration of bankruptcy of KOMFORT on 16 October 2001 (of both the application for which and the declaration itself he maintained that he was not informed)<sup>20</sup> and the subsequent sale of KOMFORT's assets at what PV maintained was only a fraction of their real market value. PV had been left unable to pursue his business activities in respect of the Golf Resort. His inability to start to operate the Golf Resort, which, at the time of the bankruptcy, already boasted an 18-hole international championship course, had left him unable to meet his obligations in Germany, "which started a chain reaction and caused [the] bankruptcy of [PV's] German companies."<sup>21</sup>

37. PV contended that the fact that the Czech Republic did not prevent the "illegal bankruptcy and composition proceedings<sup>22</sup> [and] the illegal deletion of KOMFORT from the Commercial Register" and its alleged "failure to ensure an impartial and fair investigation" by the Czech Police "proved" that the Czech Republic had "impaired" PV's investment as the "practical financier" of the Project and the owner of a 50% stake in KOMFORT.<sup>23</sup> Moreover, it had failed to protect PV's investment and "subjected the investment to measures the results of which [were] identical with expropriation."<sup>24</sup>

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<sup>16</sup> Idem, para.2

<sup>17</sup> Exhibit JB298

<sup>18</sup> PV Witness Statement August 2010, p.4

<sup>19</sup> Statement of Claim, para.2

<sup>20</sup> Idem, paras.41&42

<sup>21</sup> Idem, para.3

<sup>22</sup> Although the composition proceedings were initiated by PV himself on 31 January 2002, the alleged illegality was said to arise, because the bankruptcy court failed to make a decision on the application before the close of the public tender on 5 February 2002 and before the execution of the agreements for the sale of the Golf Resort on 21 February 2002. (See Statement of Claim, para. 44).

<sup>23</sup> Statement of Claim, para.19

<sup>24</sup> Idem, para.20

38. The acts of the bankruptcy Court and of the bankruptcy Trustee were "acts of government agencies ... directly attributable to the Czech Republic." PV acknowledged that if the characterisation of the bankruptcy Trustee as a government agency was "questionable", her acts could be characterised as those of a person partly exercising state power: "An act of the bankruptcy Trustee is an act which affects the procedural and substantive status of participants in the bankruptcy proceedings and, as such, it thus directly establishes obligations for these participants enforced by the state."<sup>25</sup>

39. PV's initial assessment of his loss by reason of the alleged activities of the Czech Republic was some Cr. 1 billion.<sup>26</sup> Subsequently, in his Supplemental Statement of Case, PV put forward a claim of Cr. 640,441,000<sup>27</sup>, comprising Cr. 430 million in investment loan and interest in opportunity costs and monies lent through various entities or paid to KOMFORT.<sup>28</sup>

40. PV sought the following relief:

- a declaration that by "conduct attributable to the Czech Republic", namely, the declaration of bankruptcy of KOMFORT and "other acts and omissions of the bankruptcy judge, Mr. [redacted]"; the sale of the Golf Resort by the bankruptcy trustee, Dr. [redacted] and the deletion of KOMFORT from the Commercial Registry, the Czech Republic had violated the fair and equitable treatment standard in Article 2(1) and the non-impairment standard of Article 2(2) of the Treaty

- a declaration that those same events, together with the failure of the Czech police and state attorneys to pursue criminal proceedings against the bankruptcy Trustee, Dr. [redacted], Mr. [redacted], Mr. [redacted], Mr. [redacted] and Mr. [redacted], constituted violations attributable to the Czech Republic of the full protection and security standard in Article 4(1) of the Treaty

- a declaration that the bankruptcy of KOMFORT and "other acts and omissions of the bankruptcy judge, Mr. [redacted]"; and the sale of the Golf Resort by the bankruptcy Trustee, Dr. [redacted], constituted an expropriation in violation of Article 4(2) of the Treaty.

PV also sought compensation for the damages that he alleged that he had suffered by reason of these alleged breaches of the Treaty: interest thereon; and an order for the costs of the arbitration and his legal and other costs on a full indemnity basis.<sup>29</sup>

41. By its Defense, the Czech Republic sought the dismissal of PV's claims in their entirety. As a preliminary matter, the Czech Republic challenged PV's standing to advance his claims. It argued that the Tribunal had no jurisdiction to entertain claims made by PV in respect of "investment loans" allegedly provided

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<sup>25</sup> Idem, para.22

<sup>26</sup> Idem, para.3

<sup>27</sup> Supplemental Statement of Case, para.1. (And see the Sima Report, 9 September 2010, p.98)

<sup>28</sup> Transcript, Day3, p.106

<sup>29</sup> Statement of Claim, para.300, (a)-(f)

to KOMFORT, because virtually the totality of those loans had originated as a bank credit granted by Sparkasse Essen. As such, they were not qualifying loans under the terms of the Protocol. And even if the Tribunal were to determine that the loans were qualifying investments, PV had failed to prove that he had ownership of them at the time of the alleged breaches of the Treaty.<sup>30</sup> It was the Czech Republic's submission that PV had ceased to have any ownership interest in MFT-K before KOMFORT was declared bankrupt and thus before any alleged wrongdoing on the part of the Czech Republic<sup>31</sup>. At most, the Tribunal had jurisdiction in respect of PV's 50% interest in KOMFORT.<sup>32</sup>

42. Second, the factual record disclosed that PV had been afforded "*wide access to every level of the Czech civil and criminal judicial system*", which had considered his claims "*rationally and reasonably [and] found them unproven and ill-founded*".<sup>33</sup> The Czech Republic rejected any suggestion that PV's complaints in respect of the actions of the Regional Court in the course of the KOMFORT bankruptcy proceedings came close to satisfying the high threshold necessary to establish that he had been the victim of a denial of justice, not least, because he had failed to exhaust all of the remedies available to him under the Czech judicial system. The actions of the Regional Court did not constitute an expropriation.<sup>34</sup>

43. Third, on proper analysis, the factual record provided no support for the contention that KOMFORT's bankruptcy and the loss of PV's asserted investment was the result of a conspiracy to which the bankruptcy Trustee herself as a party. To the contrary, the bankruptcy of KOMFORT had been "*inevitable*".<sup>35</sup>

44. Fourth, the Czech Republic contended that to the extent that PV could demonstrate that he had suffered loss and damage at the hands of third parties, none of them was an individual through whose actions the responsibility of the Czech Republic had been engaged under the Treaty. It was common ground between the Parties that Articles 4 and 5 of the International Law Commission's Articles of State Responsibility ("the ILC Articles") outlined the tests to determine whether the conduct of the bankruptcy Trustee was attributable to the Czech Republic.<sup>36</sup> However, her actions, even if found to be wrongful, were not the actions of an organ of the State (ILC Article 4), nor did she exercise specified elements of governmental authority (ILC Article 5).

45. The Czech Republic further argued that the bankruptcy of KOMFORT had nothing to do with any conduct or actions on its part: rather, PV's failure to secure adequate funding and prior unrelated financial difficulties in Germany led to the failure of PV's venture in the Czech Republic.<sup>37</sup>

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<sup>30</sup> Statement of Defense, para.13

<sup>31</sup> Idem, para.179

<sup>32</sup> Idem, para.15

<sup>33</sup> Idem. And see also para. 15 (a)-(d)

<sup>34</sup> Rejoinder, paras.55-60

<sup>35</sup> Statement of Defense, para.11

<sup>36</sup> Rejoinder, para.41

<sup>37</sup> Statement of Defense, para.16



46. Finally, the Czech Republic maintained that PV's damages claim itself was open to serious question, both as to his entitlement to claim damages arising from the Sparkasse Essen credit and as to the "speculative" nature of damages said to flow from the loss of PV's 50% interest in KOMFORT. Furthermore, losses claimed in relation to activities in Germany were both vague in their formulation and "otherwise [fell] foul of the principles of foreseeability and predictability."<sup>38</sup>

#### H. FACTUAL BACKGROUND

47. The Parties' positions, drawn from the same factual matrix, are poles apart. Accordingly, as a preliminary matter, the Tribunal sets out the history of the matter as it emerges from the record in this arbitration.

##### Initial Contacts between PV and

48. PV, the Claimant in this arbitration, is a businessman of many years standing. He is based in Gelsenkirchen in the Federal Republic of Germany. In addition to numerous property interests<sup>39</sup>, PV was the owner of a 76% interest in the German company, MFT-Verbrennungsanlagen- und Tanklagerbau GmbH ("MFT-VA"). MFT-Engineering GmbH ("MFT-E"), was a wholly owned subsidiary of MFT-VA. MFT-E, in turn, owned a 100% interest in MFT-K Engineering spol. s.r.o. ("MFT-K"), which was incorporated in the Czech Republic. His foray into the development of the Cihelny Golf Resort was not the first golf resort venture that he had undertaken: the Tribunal was told that in addition to his involvement in the construction of a course at Schloss Horst in Gelsenkirchen, Germany, PV had participated in the construction of around one dozen other golf courses.<sup>40</sup>

49. PV was first introduced to in 1993 by PV's trainer at his club in Gelsenkirchen, Mr PV learned that was a golf 'pro.', who managed a golf course in Karlovy Vary (formerly Carlsbad) in the Czech Republic.<sup>41</sup> was looking for investors in connection with the development of a proposed golf resort at Cihelny, near Karlovy Vary. However, had no significant funds of his own to invest.<sup>42</sup> told PV that he had studied architecture for several years at university and that he also had a background in mathematics. Unbeknown to PV at the time, he had actually previously been employed as a restaurant waiter.<sup>43</sup>

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<sup>38</sup> Idem, para. 17

<sup>39</sup> PV stated that in early 1995, he owned real estate in Germany worth some DM50 million. (See Statement of Claim, para.2).

<sup>40</sup> Transcript, Day1, p.9

<sup>41</sup> Idem, p.136 and see also Exhibit JB164

<sup>42</sup> Transcript, Day1, p.132

<sup>43</sup> Idem, p.137. PV told the Tribunal that had he known that then: "[he] would have looked into things a little more deeply"

50. Further meetings between PV and [redacted] (and his family), including several visits to Cihelny/Karlovy Vary, took place over the ensuing twelve months. Notwithstanding [redacted]'s limited business experience, PV considered that [redacted] had sufficient knowledge, from both a technical and a sporting point of view, to understand what would be involved in the development and promotion of a successful golf course project. PV felt confident enough to go into business with [redacted] as his partner in the context of the proposed Cihelny golf course and resort development, which would cost many millions of Czech crowns. PV told the Tribunal that it was a financial relationship: "*which did not mean big risk for what I was planning*".... "*I'm sure he couldn't have done everything from a technical point of view, and the commercial side was not very well developed, but I was looking after this side of things from [Germany]*".<sup>44</sup>

51. PV stated that he had drawn up contracts with the principal suppliers. Among them was a contract between MFT-E and the Gary Player Design Company. In addition, PV's accounting department was responsible for monitoring the flow of funds to the Czech Republic. Until 1999, PV maintained that Peterka's qualifications had: "*always proved themselves sufficient*".<sup>45</sup>

52. In fact, all of the funding for the Cihelny project was to be provided through, or by, PV. The Tribunal was told that the business plan for the Cihelny Golf Resort project was based upon a plan prepared by [redacted] in 1994. PV reviewed and costed it at some DM 8-9 million.<sup>46</sup> That plan envisaged the development of the golf course and resort from scratch on what was then, quite literally, a green field site. Initially, PV proposed that he would commit up to DM10 million to: "*see how far we get with that*".<sup>47</sup>

53. In order to assist in the preparation of formal contracts, PV retained advisers in the Czech Republic: a German-speaking Czech lawyer, Dr. [redacted] who also advised [redacted] company, KOMFORT Bytovo zarizeni spol, s.r.o., ("KOMFORT Bytove"), which had been incorporated in March 1991.<sup>48</sup> PV further retained a tax adviser (Dr. [redacted] Dr. [redacted] was, in fact, a gynaecologist, who, although not a trained tax specialist, held himself out as a tax consultant as a second job.<sup>49</sup>

#### **PV's Acquisition of a 50% Interest in KOMFORT**

54. On 10 November 1994, PV and Peterka entered into an agreement pursuant to which, PV acquired 50% of KOMFORT Bytove for a cash payment of Cr. 50,000.<sup>50</sup> The agreement had been drafted in Czech by Dr. [redacted] PV, who did

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<sup>44</sup> Idem, pp.135-136

<sup>45</sup> Idem, p.140

<sup>46</sup> Idem, p.157

<sup>47</sup> Idem, p.159

<sup>48</sup> Transcript, Day2, pp.140-141 and see also Exhibit JB4

<sup>49</sup> Transcript, Day1, p.134

<sup>50</sup> Exhibit JB4

not speak Czech, told the Tribunal that Dr [redacted] had read the agreement out to him in German and he had: "[taken] it as truth."<sup>51</sup> Upon PV's acquisition of his interest in KOMFORT Bytovo, the name of the company was to be changed to KOMFORT V.P. Cihelny, spol. s.r.o. ("KOMFORT"). The name change was effected on 15 June 1995.<sup>52</sup> It was also agreed that KOMFORT would relocate its registered office to Cihelny. PV and [redacted] both served as Directors and proxies of KOMFORT from 15 June 1995 until its deletion from the Commercial Register in March 2007.

55. On 23 November 1994, pursuant to a loan agreement between MFT-K and KOMFORT, MFT-K undertook, with effect from 1 January 1995, to provide a loan of up to Cr. 100,000,000 to KOMFORT at an interest rate of 8% to: "*finance a golf project in Cihelny.*"<sup>53</sup>

56. On the same day, and pursuant to his and [redacted]'s intention to "*develop a golf resort in Cihelny as equal partners*"<sup>54</sup>, PV entered into a personal agreement with KOMFORT to lend KOMFORT up to DM 10 million (corresponding to Cr. 200,000,000) at a rate of 8% per annum for the first 10 years in respect of the development of a golf resort at Cihelny, including the purchase of land and construction works. Monies were to be released in tranches - usually through MFT-K - by 31 December 2002 and by reference to the progress of the construction works in respect of the development. The agreement anticipated that a first payment of DM650,000 (Cr. 11,558,300) would be made on 27 July 1994 (some four months before the conclusion of the loan agreement). The loan was repayable by 31 December 2009. In fact, it appears that no payments were made pursuant to this second agreement.<sup>55</sup>

#### **KOMFORT's Acquisition of Land at Cihelny/Lease of "Zamecek"**

57. On 18 August 1995, KOMFORT acquired some 206,483m<sup>2</sup> (185,580m<sup>2</sup> in Cihelny and 20,903m<sup>2</sup> in Stanovice) of pasture, meadow, arable and other land "*solely for the purpose of building the 1<sup>st</sup> stage of the Cihelny golf and sports centre*" from the Land Fund of the Czech Republic for Cr. 30,972,450. 20% of the purchase price was to be paid prior to the signing of the agreement. The balance of 80% was payable by 31 December 1995. The sale was revocable by the Land Fund in the event that KOMFORT failed to present an "*effective urban planning decision of the relevant building authority of Karlovy Vary*" "*within 1 year from the date of entry of title into the Land Registry.*"<sup>56</sup> The application was in fact made on 10 June 1997.<sup>57</sup>

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<sup>51</sup> Transcript, Day1, pp.149-150

<sup>52</sup> Exhibit CE-1

<sup>53</sup> Exhibit JB5

<sup>54</sup> Exhibit JB6

<sup>55</sup> See Sima Report, p.15

<sup>56</sup> Exhibit JB16

<sup>57</sup> Exhibit JB23

58. By a further agreement dated 24 January 1996, KOMFORT entered into a 10-year lease agreement with the City of Prague for the use of buildings (in particular, a manor house ("Zamecek")) and land at Cihelny as KOMFORT's registered office and guest accommodation at the golf course.<sup>58</sup>

59. On 1 February 1996, MFT-K entered into two agreements with Sparkasse Essen - PV's and his companies' "house bank" for some 30 years<sup>59</sup> - for loans of DM3 million and DM2 million respectively. Each loan was secured by liens over MFT-K's assets of DM3 million and by personal guarantees issued by both PV and Peterka of DM2 million.

60. On 19 December 1997, KOMFORT entered into a mortgage agreement with MFT-K, for a mortgage in favour of MFT-K over all of KOMFORT's real property and pursuant to which, the November 1994 loan (see paragraph 55 above) was increased to Cr. 200 million.<sup>60</sup>

61. On 24 April 1998, the Building Office of Karlovy Vary issued a building permit to KOMFORT for structures to provide club facilities, including changing rooms, a restaurant and a clubroom<sup>61</sup> The decision became effective on 18 May 1998.

62. However, on 25 August 1998, the City of Prague filed proceedings against KOMFORT for unpaid rent due in 1997 and 1998 and contractual penalties in respect of Zamecek, amounting to Cr. 925,250. Pursuant to a Power of Attorney made by the two Executive Directors of KOMFORT, and PV, on 26 October 1998, Dr represented KOMFORT in the termination proceedings.<sup>62</sup>

63. On 3 November 1998, the City of Prague served notice of termination of the lease, the notice period ending on 1 December 1999.<sup>63</sup> KOMFORT refused to quit.

#### **Funding Difficulties Affecting Progress on Site and Termination of the "Zamecek" Lease**

64. In correspondence, of which his letter of 10 August 1999 is an example, complained to PV about the acute pressures being faced at Cihelny by reason of a lack of funds to meet payments to creditors, who were refusing to continue to work. wrote: *consider whether it is not better to stop the whole action. By hesitating, everything takes long, not to mention the other*

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<sup>58</sup> Exhibit JB17

<sup>59</sup> Transcript, Day1, p.188. See also PV Witness Statement, August 2010, p.4

<sup>60</sup> Exhibit JB22

<sup>61</sup> Exhibit JB23

<sup>62</sup> Exhibit JB25

<sup>63</sup> Exhibit JB26

*risks associated with it. Or manage to obtain even more expensive money, it must be cheaper in the final consequence."*<sup>64</sup>

65. On 1 December 1999, KOMFORT entered into a Lease Agreement with the Cihelny Golf Club civic association, an entity controlled by [redacted] and a lawyer to whom reference has already been made and who was to come to play a significant role in the matter as it unfolded, Dr [redacted]. The lease was for a period of 50 years, subject to a right to extend for a further 10 years, at an initial annual rental of Cr.180,000. While the amount of the rental payments after the first year was to be the subject of "a detailed arrangement" in an amendment agreement, which the Parties undertook to negotiate, if no such further agreement was reached, the rent was to remain fixed at the initial rate.<sup>65</sup>

66. KOMFORT had refused to leave the Zamecek premises upon the expiration of the notice period (See paragraph 63 above) and on 7 December 1999, the District Court in Karlovy Vary upheld the City of Prague's claim to the property. On 27 December 1999, the City began eviction proceedings against KOMFORT,<sup>66</sup> which KOMFORT lost.<sup>67</sup>

67. On 24 February 2000, [redacted] wrote again to PV, urging him to take the project forward, as: "contracts are renewed and the suppliers are awaiting our instructions."<sup>68</sup> But only a matter of weeks later, on 15 May 2000, [redacted] was writing to PV to impress upon him the fact that the site faced: "a similar collapse as last year." [redacted] maintained that:

*"[I]f Sparkasse Essen does not release [DM 150,000] today, I will send a question to the bank tomorrow as to why they are causing such losses to us by such procedure despite having found everything was alright, and why they are making such a mess in respect of the last DM400,000 to 500,000 which are missing to the completion....."*<sup>69</sup> Subsequently, on 7 June 2000, [redacted] sought to blame Sparkasse for the breakdown of relations with suppliers, threats of court action and of the suspension of the works, because he had proceeded with the works on the promise of a payment of DM150,000, which had not been forthcoming. He continued:

*"I suppose that if Sparkasse Essen is such an unreliable, and for me untrustworthy, partner, nobody can expect helpful actions either on my side."*<sup>70</sup>

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<sup>64</sup> Exhibit JB29

<sup>65</sup> Exhibit JB32

<sup>66</sup> Exhibits JB33&34

<sup>67</sup> PV contends that the Zamecek property, together with the receivable from KOMFORT, was subsequently sold to 3 Princova on 6 April 2001. (See Statement of Claim, para. 56).

<sup>68</sup> Exhibit JB39

<sup>69</sup> Exhibit JB41

<sup>70</sup> Exhibit JB 42

68. It is clear from the exchanges between [redacted] and PV that by June 2000, the personal relationship between PV and [redacted] was deteriorating and that there were issues with Sparkasse Essen.<sup>71</sup> (It appears that in the summer of 2000, discussions were in train with Sparkasse Essen, so far as a refinancing of KOMFORT was concerned – see paragraph 70 below).

[redacted] criticised PV for being out of touch with the status of the works; for mistakes in the funding; and for 'drip-feeding' funds. In a particularly bad-tempered letter dated 20 June 2000, [redacted] told PV that:

*"If you want to suspend the construction or to jeopardise its quality in any way through not well-thought steps, write it to me. I will discontinue dealing with the Ministry of Environment and in the case of failure to comply with the time-limits of the phases with respect to the returning of arable land, you bear all responsibility. ... [D]o not think that if the funding is discontinued and the construction is suspended, I will discuss anything with anybody.*

*If you are not able to immediately obtain DM250,000 in the whole of Germany to complete the project and send them immediately, than (sic) I, before proceeding to deal with Sparkasse Essen, want all documents from 1995/contracts, account statements, transfer orders etc. for consulting, and I do not believe that it will be possible within a month."*<sup>72</sup>

69. It is to be noted, too, that [redacted] wrote to PV to alert him to the fact that if KOMFORT did not meet its debts to certain suppliers by 3 July 2000:

*"they would jointly file a bankruptcy petition with respect to [KOMFORT] with a court in Pilsen in the week from 3 July 2000 to 7 July 2000."*<sup>73</sup>

#### **The Attempted Refinancing of KOMFORT**

70. PV himself, writing on MFT-E letterhead, was in direct communication with Dr [redacted] by the end of July 2000, instructing him to communicate with Sparkasse Essen about a refinancing of KOMFORT and, in that regard, to forward to PV drafts of the documentation relating to a proposed repayment extension of the Sparkasse Essen loans.<sup>74</sup>

71. Thereafter, on 21 November 2000, Sparkasse Essen submitted a draft agreement to the law firm of Aldebert in Munich (with copy to PV) in respect of its claims arising in respect of loans made to MFT-E, MFT-K and MFT-VA, totaling DM10.436 million. The agreement contemplated an assignment of some DM 1.7 million of the MFT-E indebtedness, all of the MFT-K indebtedness of some DM4.24 million and some DM 4.48 million of the MFT-VA indebtedness to a third party buyer, described as "xy", in consideration of a payment of DM 3.4 million to Sparkasse Essen. Further it was proposed that PV and [redacted] would each relinquish their 50% interests in KOMFORT to xy and MFT-E would transfer its 100% interest in MFT-K to xy. In addition, various insurance policies made in

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<sup>71</sup> Exhibit JB43

<sup>72</sup> Exhibit JB44

<sup>73</sup> Exhibit JB45

<sup>74</sup> Exhibit JB46

favour of PV and his immediate family were to be assigned to Sparkasse which would be entitled to apply any eventual proceeds to the balance of DM 7.136 million of its exposure over and above the proposed immediate payment of DM3.4 million. In return, Sparkasse would confirm that it had no claims of whatsoever nature against KOMFORT.<sup>75</sup>

72. In the meantime, on 19 October 2000, KOMFORT had been obliged to apply to the Karlovy Vary Building Office for an extension of time for the completion of the Cihelny Club facilities from 31 December 2000 to 31 December 2002 by reason of its "lack of funds." The application was granted on 13 December 2000.<sup>76</sup>

73. On 20 December 2000, MFT-E assigned a Cr. 26.1 million receivable due from KOMFORT to MFT-K. On the same day, MFT-VA assigned a receivable of Cr. 53.754 million due from KOMFORT to MFT-K; and PV likewise assigned a receivable of Cr. 28.331 million to MFT-K. All of these receivables, some Cr. 108 million in all, related to costs incurred in the development of the Cihelny Golf course and related expenses. One final assignment was made that day whereby another creditor of KOMFORT, Mr. \_\_\_\_\_ assigned a receivable of Cr.158,535.71 to MFT-K.

74. The result of these arrangements was that MFT-K became the only entity in the MFT Group entitled to repayment of loans made to KOMFORT,<sup>77</sup> which, over PV's signature, signed an Acknowledgement of Debt with MFT-K on 27 December 2000.<sup>78</sup> The Acknowledgement of Debt recorded that:  
*"The ... amount [of Cr.217,919,595] represents the loan granted under agreement of 23 November 1994 to [KOMFORT] by [MFT-K] to purchase lands and develop a golf course in Cihelny.... The originally arranged loan was increased to Cr.200 [million] that was to be paid either directly from the account of [MFT-K] or through [MFT-E] or [MFT-VA] or through other entities. As of this day, the amounts granted to [KOMFORT] total at Cr.217,919,959. These amounts are shown in the books of [KOMFORT] and have been either credited with the account of this company or have been used to pay invoices on behalf of [KOMFORT]. The receivable falls due in 31 December 2002 and bears an 8% interest rate."*<sup>79</sup>

75. On the same day, MFT-K further assigned receivables (loans) of Cr. 120,000,000 out of the total of Cr. 217,919,000 due from KOMFORT to a Mr \_\_\_\_\_ a longstanding business associate and friend of PV.<sup>80</sup>

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<sup>75</sup> Exhibit JB48

<sup>76</sup> Exhibit JB49

<sup>77</sup> Exhibits JB50,51,52&53

<sup>78</sup> Exhibit JB54. \_\_\_\_\_ maintained that he had been unaware of the Acknowledgement of Debt until some years later. (Exhibit CE-52, p.3)

<sup>79</sup> In fact, KOMFORT was to receive Cr. 78,820,475.76 from MFT-K (Sima Report, p.18).

<sup>80</sup> Exhibit JB55

### The Intervention of SOLITAER

76. Simultaneously, PV signed over to SOLITAER Immobilienverwaltung GmbH ("SOLITAER") of which Mr [redacted] was the Executive Director, MFT-E's entire ownership interest of Cr. 11,658 million in MFT-K ("The Transfer Agreement"). SOLITAER thereby became the sole shareholder in MFT-K.<sup>81</sup> Once the Transfer Agreement was in place, PV was removed as the Managing Director of MFT-K. PV was replaced by Dr [redacted], who, it will be recalled, was also retained as PV's tax adviser.

77. Two days later, on 29 December 2000, a draft of an offer letter to Sparkasse from SOLITAER was prepared. The draft set out a proposal by SOLITAER to match the offer made by Aldebert's undisclosed principals (see paragraph 71 above) to take over the indebtedness of PV and the MFT Group and thereby to settle: "*any and all existing and prospective claims of Sparkasse against KOMFORT*"<sup>82</sup>

78. But on 26 January 2001, SOLITAER wrote to PV to explain that whilst it was ready to obtain a written promise of funding, [redacted] had yet to give his consent. It was hoped that a meeting with Peterka on 27/28 January 2001 would prove positive and that it would then be possible to make the first payments "*in about 14 days*."<sup>83</sup>

### The Withdrawal of Sparkasse Essen Funding

79. On 1 February 2001, however, Sparkasse Essen wrote to PV to complain (seemingly, not for the first time) that important agreements and decisions had been made without its knowledge. Specifically, the Bank required sight of the agreement in respect of the transfer of ownership interests in MFT-K "*as soon as possible*". Further, Sparkasse insisted that:

*"[Y]ou and your company must sign agreements associated with the Czech case in the 6<sup>th</sup> calendar week at the latest ... If the agreements are not signed by that date, we shall withdraw our current waiver of payments of interest and principal, we shall also terminate our business relations and we will launch a process aimed to realize the collateral we have been provided."*<sup>84</sup> That threat was to be carried out by Sparkasse Essen in April 2001.<sup>85</sup>

<sup>81</sup> Exhibit JB56. It is PV's case that this arrangement was cancelled on 2 February 2007 on the basis that SOLITAER had failed to pay the purchase price of Cr. 11,658 million for MFT-E's interest. SOLITAER and MFT-E therefore undertook to: "*provide their coordination necessary to delete SOLITAER from the, and to register [MFT-E] in, the section regarding members of [MFT-K].*" (See Exhibit JB285).

<sup>82</sup> Exhibit JB58

<sup>83</sup> Exhibit JB65

<sup>84</sup> Exhibit JB66

<sup>85</sup> Exhibit JB354



80. At almost the same time, PV and [redacted] wrote to another potential investor, Mr. [redacted] on 2 February 2001, offering to sell the entire ownership interests in KOMFORT for DM17 million.<sup>86</sup> It was suggested that [redacted] actions were the reason why nothing was to come of that initiative. (See paragraph 145 below).

#### **MFT-VA Divests Itself of its Interest in MFT-E: Insolvency of MFT-VA**

81. On 8 March 2001, MFT-VA's entire ownership interest of DM50,000 in MFT-E was divided into four equal shares of Dm12,500. Three were transferred to individuals, [redacted] Voecklinghaus (PV's daughter), [redacted] and [redacted]. The fourth went to CIC Capital- und Immobilien Contor GmbH.<sup>87</sup> PV retained his 76% ownership interest in MFT-VA. MFT-VA was declared insolvent on 5 June 2001.<sup>88</sup>

82. The Grand Opening of the Cihelny Golf Club Golf Course, "*constructed by [redacted]*", took place on 26 May 2001. Acknowledging that a club house and other facilities had still to be constructed, [redacted] told the press that the construction of the course had cost some Cr.60 million and that he anticipated that the investment would be paid back within 15 years.<sup>89</sup> Within a week of the Grand Opening, KOMFORT, represented by [redacted] entered into an agreement with [redacted] on 1 June 2001, pursuant to which, KOMFORT agreed inter alia, to vacate the Cihelny premises that it had leased from the City of Prague (and the rights to which [redacted] had acquired) with effect from 5 June 2001.<sup>90</sup>

83. In the course of September 2001, KOMFORT commissioned two valuation reports. The first of these, the Fiala Report, sought to value the land: "*regardless of [its] current use*" and produced a valuation of Cr. 26,555,800.<sup>91</sup> The second, the [redacted] Valuation Report, which focused upon the "*real estate - golf premises ... i.e. operational structures, agricultural structures, water management structures, external alterations, excluding plots of land*", arrived at a valuation of Cr. 15,067,440.<sup>92</sup>

#### **The Bankruptcy of KOMFORT**

84. On 5 October 2001, KOMFORT filed for bankruptcy. The petition, which was submitted by [redacted], stated that KOMFORT was unable to meet its obligations to its creditor, MFT-K, "*primarily due to a fall in the prices of real property in the last months of this year.*" MFT-K was stated to have a receivable of Cr. 197,610,233.30. [A second creditor was listed by KOMFORT - [redacted]

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<sup>86</sup> Exhibit JB67

<sup>87</sup> Exhibit JB69

<sup>88</sup> Exhibit RE-1669

<sup>89</sup> Exhibit JB73

<sup>90</sup> Exhibit JB74

<sup>91</sup> Exhibit JB76

<sup>92</sup> Exhibit JB78

VODOINVEST – to whom some Cr. 76,088 was said to be due). Since its efforts to find a strategic partner had failed, and notwithstanding the implementation of a recovery plan in April 2001, KOMFORT asserted that it did not have the funds to secure the winterisation of the course, “*practically its sole property*”, and which was essential to avoid its destruction. Accordingly, KOMFORT’s only option was to file for bankruptcy.<sup>93</sup>

85. On 9 October 2001, a company called Novota was commissioned by Temple Supplies a.s. (“Temple”) to carry out a valuation of the golf course. Temple was said to be interested to appraise the site as collateral for a loan for which application was to be made to Union Banka. Novota inspected the site on 3 October 2001 in the presence of “*the proprietor*”, . Novota’s report, issued in October 2001, assessed the market value of the property at “*an interesting price*” of Cr. 140,119,000 and assessed its distressed sale value at Cr. 116,065,000.<sup>94</sup>

86. On 16 October 2001, Judge . of the Regional Court in Pilsen, by way of a decision, which was stated to be not appealable, declared KOMFORT bankrupt. He appointed Dr . as the Trustee in bankruptcy. The judgment specifically provided that:

*“The creditors of the debtor are invited to register (in two counterparts) all their claims within 30 days of the declaration of bankruptcy. The registration must separately specify the grounds and the amount of each registered claim. Copies of documents that gave rise to each claim must be attached to the claim registration. If claims are quoted in a foreign currency, they must be converted on the basis of the exchange rate published by the Czech National Bank on the day on which the bankruptcy was declared. The enforceability of enforceable claims must be proved by a document that features a confirmation of enforceability no later than the review hearing; otherwise the claim shall be deemed unenforceable. Claims registered later than within two months of the first review hearing shall be ignored.”<sup>95</sup>*

87. By letter dated 16 October 2001, Judge . wrote to Economia a.s., requesting the publication of a Notice, setting out these salient terms of his decision.<sup>96</sup> It is not in dispute that the Court also sent copies of the Declaration by registered mail to both Directors of KOMFORT (Mr . and PV), to Mr . and to MFT-K, the cited creditors, various public authorities, the bankruptcy Trustee and to KOMFORT itself.<sup>97</sup>

88. On 29 October 2001, the Regional Court in Pilsen issued a Summons requiring a meeting of the bankruptcy creditors and a review hearing to be held

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<sup>93</sup> Exhibit JB79

<sup>94</sup> Exhibit JB82

<sup>95</sup> Exhibit JB84

<sup>96</sup> Exhibit JB85

<sup>97</sup> Exhibit JB90

on the afternoon of 12 December 2001 for the purposes of verifying registered claims and electing the creditors' committee.<sup>98</sup>

89. On 6 November 2001, PV, in his capacity as Executive Director of MFT-K, issued a Power of Attorney to Dr [redacted] to represent MFT-K in connection with the KOMFORT bankruptcy proceedings.<sup>99</sup> PV issued a further Power of Attorney in his own right to Dr [redacted] on 7 November 2001.

90. On 7 November 2001, Dr [redacted] filed his own claim (for Cr. 1,050) in the bankruptcy in respect of legal advice, provided to KOMFORT's Executive Director and Proxy in September 2001. He spent five minutes inspecting the file. However, by letter dated 19 November 2001, the Trustee notified Dr [redacted] that she could not review his claim without further information, as no documents proving his claim had been submitted and: "[KOMFORT's] accounting books show no corresponding obligation towards creditor."<sup>100</sup>

91. Further claims were registered by Mediatel (on 7 November 2001) and by 3 Princova (on 12 November 2001), the latter relying on the withdrawal of the Settlement of Mutual Claims between KOMFORT and 3 Princova of 1 June 2001 - see paragraph 82 above - and raising a separate claim of Cr. 4,800.<sup>101</sup>

92. On 21 November 2001, Temple submitted an offer to the Trustee in bankruptcy to buy the land and structures comprising the Cihelny Golf resort for Cr. 45,000,000. That same day, the Trustee entered into a contract for the winterisation and maintenance of the Cihelny golf course with Temple for the sum of Cr. 2,238,232.<sup>102</sup>

93. MFT-K's registration of claim in the KOMFORT bankruptcy dated 27 November 2001, which was prepared by Dr [redacted] was stamped received by the Court only at 14h00 on 10 December 2001. The claim was stated to be in the amount of Cr. 97,919,595, representing the balance of the receivable of Cr. 217,919,595 under the Loan Agreement, less the amount assigned to Mr Mair on 27 December 2000 of Cr. 120 million. The claim was supported by three documents: the Acknowledgement of Debt dated 27 December 2000; the Agreement on Assignment of a Receivable dated 27 December 2000; and the Mortgage Agreement dated 22 June 1998.<sup>103</sup>

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<sup>98</sup> Exhibit JB87

<sup>99</sup> Exhibits JB99&101

<sup>100</sup> Exhibit JB95. In the course of his cross-examination, Dr [redacted] acknowledged that at the time that he had lodged his claim, he had not submitted an invoice for the legal services, which were the purported basis of the claim. (See Transcript, Day2, p.150&151).

<sup>101</sup> Exhibits JB92,93&94

<sup>102</sup> Exhibits JB96&97

<sup>103</sup> Exhibit JB99

94. Mr [redacted] own registration of claim for a receivable of Cr. 120,000,000, likewise prepared by Dr [redacted] was also dated 27 November 2001. It was stamped received by the Court at 14h00 on 10 December 2001 – as was a claim by PV in his own right in the amount of DM30,000 (and stated as such, in contravention of the requirement that all claims be denominated in Czech crowns), said to represent cash paid by PV to KOMFORT via [redacted] on 5 November 2000.<sup>104</sup>

95. Dr [redacted] briefly inspected the file for a second time on 10 December 2001 for ten minutes between 14h10 and 14h20.<sup>105</sup>

96. On 12 December 2001, the Chairman of the Czech Golf Federation, Dr [redacted] wrote to Dr [redacted]. He sought a meeting and offered his cooperation in the identification of potential investors in the Cihelny golf course.<sup>106</sup> Dr [redacted] deplored the fact that the speed with which the disposal was being organised precluded Czech golf clubs and associations from participation. He urged a reconsideration. His letter went unacknowledged, as Dr [redacted] noted in a follow-up letter of 21 January 2002 addressed to Judge [redacted]. Dr [redacted] questioned whether the public tender was the most appropriate way forward. By his reply dated 22 January 2002, however, the Judge confirmed his intention to proceed with the tender and to hold to the timetable that had been fixed, as Dr [redacted] had "*failed to convince [him]*" that any additional measures were necessary.<sup>107</sup>

#### The 12 December 2001 Review Hearing

97. The Review Hearing was duly held on 12 December 2001.<sup>108</sup> Judge [redacted] presided. It was determined that the claims of MFT-K and of Mr [redacted] had been registered too late to enable their validity to be verified at the hearing.<sup>109</sup> For the

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<sup>104</sup> Exhibits JB100&101

<sup>105</sup> Exhibit JB103

<sup>106</sup> Exhibit JB106.

<sup>107</sup> Exhibits JB1128&129

<sup>108</sup> The Minutes of the Review Hearing are at Exhibit JB104.

<sup>109</sup> On 27 December 2001, MFT-K, Mr [redacted] and PV were each asked to provide supplemental information in respect of their claims in the absence of which, no account would be taken of them. (See Exhibits JB 112,113&114). PV, MFT-K and Mr [redacted] duly submitted further details on 22 January 2002. (See Exhibits JB 72,73&74). MFT-K added back into its claim the Cr. 120,000,000 assigned to Mr [redacted] as a precaution against the possibility that Mr [redacted] own claim would not be recognised. MFT-K's and PV's respective claims were subsequently recognised by the Trustee at the Second Review Hearing on 12 April 2002. (See the Minutes at Exhibit JB158). Mr [redacted] claim was contested by the Trustee for want of substantiation of the extent of any indebtedness of KOMFORT to MFT-K at the time of the assignment to Mr [redacted]. At the request of the Trustee, Mr [redacted] claim became the subject of separate proceedings in the Regional Court, although they were postponed pending the hearing of the application made by KOMFORT

same reason, the Court further determined that neither MFT-K nor Mr [redacted] was eligible for appointment to represent the creditors. PV protested that, as the Executive for Germany: "he ... had no oversight over the actions of the company in the Czech Republic especially in 2001..." and that the submission of MFT-K's claim had been delayed, because he had had no access to the accounting books of KOMFORT, which were maintained in the Czech Republic. However, it was noted that, in his capacity as a Director of MFT-K, PV had been informed of the proceedings by his legal counsel, Dr [redacted], before 15 November 2001. PV's own standing to represent the creditors was rejected on different grounds: quite apart from the fact that he had submitted a (non-conforming) claim in his own right, PV was recorded as having informed the Court that he had no interest as an individual. Rather, MFT-K as a company had an interest. In that regard, the Court took note of the fact that PV was an Executive Director of KOMFORT as well as of MFT-K and, accordingly, the Court declined to nominate MFT-K as the Creditors' Representative.

98. According to the Minute of the proceedings, the Court approved the appointment of 3 Princova, the only creditor with a voting right, as the Creditors' Representative. It did so over the vociferous objection of Dr [redacted] including an allegation of a fraud to which Dr [redacted] and 3 Princova were party at the expense of MFT-K, that 3 Princova had a conflict of interest. Dr [redacted] contended that 3 Princova wished to acquire the golf course for itself and hence had no interest in ensuring that the best price was achieved on any sale of the course. He argued that the proposal of a quick sale by public tender or auction would be prejudicial to the largest creditors of KOMFORT, namely MFT-K and Mr [redacted].

99. The Minute of the subsequent meeting between the Judge, the Trustee and the Creditors' representative, 3 Princova (Dr [redacted]), recorded that the Trustee and Dr [redacted] agreed that the sale of KOMFORT's real and movable property should be undertaken by way of a public tender: "through a real estate agent for a minimum price of Cr. 48 million ... and a closure deadline of 4 February 2002." The next hearing in the matter was fixed for 5 February 2002.<sup>110</sup>

100. The real estate agent selected by the Trustee was Nemovitosti REELA spol, s.r.o. ("REELA"). The Trustee entered into an agreement with REELA on 13 December 2001. REELA was to be paid a fee of 4.5% + VAT, based on the achieved purchase price. The agreement stipulated that the minimum price should be Cr. 48,000,000 and that a Cr. 20,000,000 security deposit was to be lodged by any bidder by 1 February 2002. Site inspections were to be held on 18 and 23 January 2002.<sup>111</sup>

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to cancel the bankruptcy proceedings. Mr [redacted] claim was acknowledged by the Trustee on 16 March 2004. (See Exhibit JB190).

<sup>110</sup> Exhibit JB108

<sup>111</sup> Exhibit JB111

## The Public Tender

101. The Cihelny course was duly put out to public tender. In the course of the bidding period - 27 December 2001 to 4 February 2002 - 10 parties collected copies of the Tender Documents.<sup>112</sup> On 5 February 2002, the Court convened with the Trustee and the Creditors' Representative in order to open the three conforming bids. (A fourth bidder had failed to lodge the security deposit by the 1 February 2002 deadline and was accordingly ruled ineligible). The winning bid was submitted by Astoria in the sum of Cr. 61,000,000.<sup>113</sup> Subsequently, on 21 February 2002, the agreements for the sale of the golf course were concluded between the Trustee and Astoria.<sup>114</sup> On 22 May 2002, Dr [redacted] and Mr [redacted] established Astoria Golf Club Cihelny civic association to operate the golf course and on 31 May 2004, Astoria Golf Resort a.s. was incorporated, controlled de facto by Mr [redacted] and Mr [redacted].<sup>115</sup> A Final Use Permit was issued by the Karlovy Vary Building Office in favour of Astoria on 2 August 2004.

## RELATED CIVIL PROCEEDINGS

### Composition Proceedings

102. In the meantime, and some six weeks after the approval of the public tender for the sale of the Cihelny Golf Course, PV, in his capacity as a representative of both KOMFORT and MFT-K, applied to the Regional Court on 31 January 2002 for mandatory composition on behalf of KOMFORT.<sup>116</sup> On 4 February 2002, Dr [redacted] wrote to the Court requesting a ruling on PV's petition.<sup>117</sup> The Court's attention was drawn to an offer by PV to purchase the Cihelny course for the sum of Cr. 150 million in an auction, provided the public tender was cancelled and the loans provided to KOMFORT were set off against the purchase price. PV conceded that the bid was not in conformity with the then existing tender rules, which required the payment of a Cr. 20,000,000 deposit within a stipulated deadline.<sup>118</sup>

103. On 7 February 2002, the Regional Court determined that the submission failed to demonstrate that Mr [redacted] had withdrawn his claim in bankruptcy against KOMFORT, such that his claim would not need to be settled as part of the mandatory composition. The Court gave PV an opportunity to supplement his application,<sup>119</sup> but he failed to do so within the required time limit and so, on 12 March 2002, the application was rejected.<sup>120</sup>

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<sup>112</sup> Exhibit JB117

<sup>113</sup> Exhibit JB142

<sup>114</sup> Exhibit JB147

<sup>115</sup> Exhibit JB199

<sup>116</sup> Exhibit JB135

<sup>117</sup> Exhibit JB139

<sup>118</sup> Exhibits 138&139

<sup>119</sup> Exhibit JB144

<sup>120</sup> Exhibit JB148

104. That decision of the Regional Court was the subject of an appeal to the High Court in Prague on 2 April 2002. Subsequently, KOMFORT supplemented its appeal on 19 November 2002. Although the appeal was partially successful in that the High Court remitted the matter to the Regional Court on 19 March 2003, it clarified that there might be reasons why an application could be rejected without the need for a review hearing - as, indeed, was held to be the case.<sup>121</sup>

#### **Petition to Discontinue Bankruptcy Proceedings**

105. On 20 March 2002, KOMFORT petitioned to discontinue the bankruptcy proceedings on the basis that [redacted] lacked authority to file the petition. The Regional Court required KOMFORT to supplement the petition, which it did on 8 April 2002. The Regional Court rejected the petition on 11 April 2002, concluding that [redacted] was authorised to file the bankruptcy petition on behalf of KOMFORT. That decision was itself appealed by KOMFORT to the High Court in Prague. The High Court upheld the Regional Court's ruling, noting that an application for cancellation of bankruptcy was not the correct procedure to be followed in the case of a complaint such as this. A further appeal made by KOMFORT on 6 October 2003 to the Supreme Court of the Czech Republic was rejected on 10 March 2005.<sup>122</sup>

#### **Termination of the Bankruptcy**

106. Pursuant to the Trustee's request, the Regional Court approved payment to MFT-K as a secured creditor of KOMFORT in the sum of Cr. 34,811,219.87 on 22 July 2005. A further payment of Cr.4,338,812.49 was made to MFT-K, together with payments of Cr.9,443,585.07 to Mr [redacted] and Cr.37,732.62 to PV on 2 May 2006, following the submission of the Trustee's final report.<sup>123</sup>

#### **Damages Claims against [redacted], the Bankruptcy Trustee and Claim against Judge [redacted]**

107. The termination of KOMFORT's bankruptcy, following distribution of the proceeds of sale of KOMFORT's assets, was achieved on 10 August 2006.<sup>124</sup> By letter dated 5 September 2006, Dr Hajsman confirmed that KOMFORT would not appeal the decision to terminate the bankruptcy. Dr [redacted] also stated that KOMFORT was pursuing claims for damages against [redacted] and the Trustee, Dr [redacted].<sup>125</sup> An additional claim was filed, also in early February 2004, with the Ministry of Justice against Judge [redacted]. The latter claim was rejected by the

<sup>121</sup> Exhibits JB151,173&177

<sup>122</sup> Exhibits JB 149, 153,155,178&205

<sup>123</sup> Exhibits JB226&263

<sup>124</sup> Exhibit JB269

<sup>125</sup> Exhibit JB 273. In fact, proceedings had been commenced by KOMFORT, MFT-K and PV against [redacted] and the Trustee in February 2004. (See Exhibit JB186).

Ministry in June 2004, but it was open to the Plaintiffs, MFT-K and PV, to refile their claim in proper form.<sup>126</sup>

108. So far as the claims against the Trustee and [redacted] were concerned, they were transferred from Pilsen to Ceske Budejovice by a decision of the High Court. The High Court accepted a request from the judges of the Regional Court in Pilsen that they should recuse themselves, in order to ensure that there was no appearance of bias, given the nature of the proceedings and the personalities involved.<sup>127</sup> KOMFORT and MFT-K sought exemption from payment of the statutory court fees on grounds of bankruptcy and a lack of financial means respectively on 14 June 2005 and PV withdrew his own claim on 23 June 2005.<sup>128</sup> On 29 August 2005, the Court discontinued PV's claim and granted KOMFORT the exemption that it sought. However, MFT-K's application was denied.<sup>129</sup> MFT-K failed to pay the fee and, subsequently, its claims, having been separated out from the KOMFORT claims, were discontinued by the Court in Karlovy Vary on 4 January 2007.<sup>130</sup> Although neither MFT-K, nor PV was barred from refiling their claims by the Czech courts, they never did so.

109. Pursuant to a decision of the High Court in Prague in March 2006, the KOMFORT claims were themselves bifurcated: the Court in Ceske Budejovice retained the claim against [redacted] and the claim against the Trustee was transferred to the District Court in Plzen-mesto.<sup>131</sup> In October 2005, prior to the bifurcation, the Court in Ceske Budejovice had rejected an application by KOMFORT to join the Ministry of Justice as a Defendant.<sup>132</sup>

110. Subsequently, on 21 September 2006, it rejected KOMFORT's claim against Peterka on the basis that after the declaration of bankruptcy, only the Trustee had standing to bring such an action for damages.<sup>133</sup> KOMFORT appealed the decision on 16 October 2006 and while the appeal was pending, the bankruptcy of KOMFORT was terminated, thereby removing the exclusive standing of the Trustee to bring such a claim. On 1 February 2007, the High Court in Prague overruled the Ceske Budejovice decision and remanded the case.<sup>134</sup> However, following the deletion of KOMFORT from the Register, KOMFORT had ceased to exist as a legal entity and it no longer had capacity to bring proceedings. KOMFORT's action against the bankruptcy Trustee was dismissed by the Court in Plzen-mesto on 15 August 2007. Its claim against [redacted] was dismissed by the Court in Ceske Budejovice on 27 August 2007.<sup>135</sup>

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<sup>126</sup> Exhibit JB205

<sup>127</sup> See decisions of the High Court of 21 June 2004 and 3 February 2005 at Exhibits JB 204&213

<sup>128</sup> Exhibits JB223&227

<sup>129</sup> Exhibits JB 236,237&238

<sup>130</sup> Exhibit JB280

<sup>131</sup> Exhibits JB260&279

<sup>132</sup> Exhibit JB247

<sup>133</sup> Exhibit JB275

<sup>134</sup> Exhibit JB284

<sup>135</sup> Exhibits JB295&296



111. The termination of the bankruptcy became effective on 12 September 2006 and it was recorded on the Commercial Register on 30 November 2006.<sup>136</sup> On 6 March 2007, the Register Court registered KOMFORT's deletion from the Commercial register, pursuant to an application by [redacted] (in his capacity as a Director of KOMFORT), made on 2 March 2007.<sup>137</sup> The Resolution whereby KOMFORT was deleted from the Register concluded with the statement that: *"an appeal may be filed against this resolution to the High Court in Prague through the aforementioned court within fifteen days of its delivery."* In the absence of any such appeal, the resolution became effective on 31 March 2007 and KOMFORT ceased to exist as legal entity.

#### RELATED CRIMINAL PROCEEDINGS AND ENQUIRIES

112. Between 31 January 2002 and 16 June 2006, when his complaint was dismissed, PV initiated and pursued criminal proceedings against a number of individuals, including [redacted] and the bankruptcy Trustee, Dr [redacted].

113. The complaint against [redacted] was lodged (wrongly) in the office of the Regional Public Prosecutor in Pilsen rather than with the District Public Prosecutor in Karlovy Vary, which then referred the complaint to the Police. The proceedings were formally initiated on 4 April 2002. The Police interviewed representatives of REELA, Dr [redacted], Dr [redacted] and PV. KOMFORT's accounting records, held by its accountant, Mrs [redacted], were seized.

114. In September 2002, following further allegations made by PV and the submission of a claim for damages of Cr. 200 million, the matter was referred by the District Public Prosecutor in Karlovy Vary to the corruption and serious economic crimes unit of the Pilsen police. Following extensive examination by the Pilsen Police, the matter was suspended on 21 November 2002, on the basis that it appeared to be a commercial dispute between private parties.<sup>138</sup>

115. PV filed an unparticularised complaint against the suspension on 26 November 2002.<sup>139</sup> No further supporting material was seen by the District Public Prosecutor's Office in Karlovy until 25 November 2003, when it received PV's submission of 19 October 2003.<sup>140</sup> PV's October 2003 submission raised allegations of conspiracy between [redacted], Dr [redacted] Judge [redacted] and the bankruptcy Trustee to assist Mr [redacted]'s company to acquire the Cihelny course at an unreasonably low price; it alleged a breach of the bankruptcy Trustee's duty properly to administer the bankruptcy of KOMFORT; a separate breach relating to the winterisation of the golf course; and an allegation of fraud on the part of Mr [redacted] of Temple.

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<sup>136</sup> Exhibit JB276

<sup>137</sup> Exhibits JB289&290

<sup>138</sup> Exhibit JB174

<sup>139</sup> Exhibit JB175

<sup>140</sup> Exhibit JB180

116. Matters were complicated by PV's insistence that jurisdiction to deal with his complaint against the decision of the Pilsen Police to suspend the proceedings lay with the Regional Public Prosecutor's Office in Pilsen, rather than with the District Public Prosecutor in Karlovy Vary. That dispute was finally resolved against PV by the High Public Prosecutor's Office in Prague in March 2004.<sup>141</sup>

117. In the event, the suspension of the proceedings was revoked on 26 April 2004, when the District Public Prosecutor's Office in Karlovy Vary ordered the Pilsen Police to reopen its enquiry and to interview all persons with knowledge of the bankruptcy proceedings.<sup>142</sup>

118. From the record in this arbitration, it is apparent that, between May 2004 and January 2006, the Police interviewed some eight individuals connected with the bankruptcy. They included Mr [redacted] the bankruptcy Trustee, Dr [redacted], Mr [redacted]; Ms [redacted]; Dr [redacted], Mr [redacted] and Mr [redacted].

119. In addition, expert reports were commissioned from (i) Ceska znalecka in respect of the market valuation of the Cihelny golf Course; the standing of receivables said to be due to PV and to MFT-K at the time of the filing of the KOMFORT bankruptcy petition; and KOMFORT's own financial standing; and (ii) from a golfing expert, Mr Jirasek.<sup>143</sup>

120. On the basis of their investigations, which in the case of Dr [redacted] were particularly protracted, involving not only the Pilsen Police but the Regional Public Prosecutor's Office, the Pilsen Police concluded that there was insufficient evidence to commence criminal prosecutions against any of [redacted], Mr [redacted], Dr [redacted] or Mr [redacted]. On 29 May 2006, the Pilsen Police suspended their enquiries.<sup>144</sup>

121. PV protested that decision on 31 May 2006 but, as he failed to adduce any supporting documentation, the complaint was dismissed by the Regional Public Prosecutor's Office in Pilsen in 16 June 2006.<sup>145</sup>

## I. ANALYSIS

122. The Tribunal has sought to reflect the chronological record revealed by contemporaneous documents with some care. It is possible thereby to place the interventions of officials and those of the Courts and the Police in the Czech Republic upon which PV seeks to base his claims in the context of his overall activities in respect of the Cihelny venture.

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<sup>141</sup> Exhibit JB 189

<sup>142</sup> Exhibit JB194

<sup>143</sup> Exhibits JB207,214&257

<sup>144</sup> Exhibit JB264

<sup>145</sup> Exhibit JB266

123. What emerges from that record and from PV's evidence to the Tribunal is that, in November 1994, PV undertook an effectively open-ended commitment to finance the development of the Cihelny golf course project from a green field site on the basis of rudimentary financial cost projections prepared by [redacted],<sup>146</sup> a man whom, as Counsel for the Czech Republic put it, PV "barely knew."<sup>147</sup> PV had a long and successful career in business behind him, principally in and around Gelsenkirchen in Germany, often working with his brother and with business people whom he had known and come to trust over many years, such as Mr [redacted]. But it would seem that, whilst PV and his companies had provided services to, and supplied, contracts outside Germany, this venture was his first foray in his own right outside what, in vernacular terms, might be described as his 'comfort zone' in the German business environment and into the Czech Republic, a country he had not visited before 1992-1993.<sup>148</sup> He chose to do so with an untried and untested business partner, [redacted], with whom PV had never worked before, had, as PV well knew, no funds of his own to contribute to the project that he was proposing to PV as an investment.<sup>149</sup>

124. PV conceded that in the first instance, he had: "*trusted [his] instinct and placed [his] faith and trust*" in [redacted].<sup>150</sup> Such was his faith in his instinct, however, that PV carried out only a cursory due diligence on [redacted] and he forewent the opportunity to insist upon a controlling interest in the business venture, so that he could ensure, if need be, that the project proceeded in a way consistent with his objectives. Instead, he allowed Dr [redacted], whom he had retained as his own adviser, although PV knew that he had long represented [redacted] company, KOMFORT,<sup>151</sup> to draw up an agreement pursuant to which PV and [redacted] were to enjoy equal rights and obligations as Directors and proxies of KOMFORT. Dr [redacted] himself noted that had PV insisted upon a 51% stake in KOMFORT, he could have recalled [redacted] as a Director and proxy. PV's decision to proceed on the basis of a 50-50 split with his new partner was an: "*act of generosity*"<sup>152</sup>.

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<sup>146</sup> Transcript, Day 1, p. 150

<sup>147</sup> Idem, p.54

<sup>148</sup> PV August 2010 Witness Statement, para. 5. And see Transcript, Day1, p.172

<sup>149</sup> Indeed, PV supported [redacted] and his family financially by paying him a consultancy fee of Cr.35,000 per month and a further Cr.15,000 monthly towards his accommodation costs, as well as providing him with a car. Other monies were made available to [redacted] from time to time. These monies were said by PV to have been advanced as "quasi-loans" by MFT-K, but: "*no written agreements [were] established*" and no monies have ever been repaid. (See PV Witness Statements of 18 June 2010 (para.12(f)) and August 2010, p. 8)

<sup>150</sup> Transcript, Day 1, p. 173

<sup>151</sup> See paras. 53&54 above

<sup>152</sup> Transcript, Day2, p.154

125. Notwithstanding the monthly reports that PV required [redacted] to submit and a limit on spending, which did not require prior authorisation from PV,<sup>153</sup> there were clear warning signs in the course of 1999, notably in August 1999,<sup>154</sup> that the project was in financial difficulty. By the end of 2000, it was impossible to ignore the fact that, as PV was to acknowledge: "*things [had] got out of control*".<sup>155</sup> In the course of 2000, PV had received ever more heated complaints from [redacted] about the effects on the project of 'drip-feed' financing by PV.

[redacted] had also warned that contractors and suppliers would cease work for lack of payment and that some had threatened proceedings, even bankruptcy proceedings.<sup>156</sup> Yet PV took no steps directly to intervene and to ascertain for himself whether [redacted] reports reflected the reality on the ground in Cihelny or otherwise to seek to assume control of a project which he was funding.

126. It is all the more inexplicable that that should have remained the case even in the third quarter of 2000, since PV himself told the Tribunal that in August 2000, Dr [redacted] had put to him a proposal, which, in PV's view, amounted to a fraud on Sparkasse:

*"In August 2000, Dr [redacted] presented a planned fraud against Sparkasse Essen to [PV] in the presence of Dr [redacted]; [PV's] daughter and Dr [redacted]. The aim of the fraud was to strip Sparkasse Essen of its return from loans it had granted for the purposes of the Golf Resort, and thus to free the Golf Resort of debts...."* (Emphasis added)<sup>157</sup>

127. PV stated that he had rejected that proposal out of hand. That may well be so, but it begs the question why, in light of all of the warning signals in correspondence and arising out of meetings such as this, still fully a year before [redacted] presented the petition for bankruptcy of KOMFORT, PV failed to satisfy himself whether or not all was well with the management of KOMFORT. And, to the extent that it was not, as, on the basis of the concerns that he says that he had, he must have had good reason to believe might, in fact, be the case, why he took no immediate steps to seek to retrieve the position. (It must also be pointed out, however, that Dr [redacted] proposal would appear to have been submitted in response to instructions from PV himself in July 2000 to communicate with Sparkasse Essen and to prepare documentation in connection with a restructuring of the loans to KOMFORT. (See paragraph 70 above)).

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<sup>153</sup> In the course of his evidence, PV conceded that until the bankruptcy of KOMFORT, he had been unaware that [redacted] had spent all the money, because from mid-2000, certain liabilities were not included in the books reviewed by PV: "*Then, the bankruptcy trustee came with a list of outstanding payments, which showed me that I should have looked into and which I would have liked to look into, had I known.*" (Emphasis added). (See Transcript, Day1, p.168).

<sup>154</sup> See para.64 above

<sup>155</sup> Transcript, Day1, p.156

<sup>156</sup> See paras.67-69 above

<sup>157</sup> Statement of Claim, para.185

128. PV's inability to keep his finger on the pulse was exacerbated, as he himself acknowledged, by the fact that his visits to the Czech Republic were irregular and of short duration, even after the breakdown in his relationship with [redacted] in mid-2000. In his Statement of Claim<sup>158</sup>, PV conceded that his absence from the scene: "*ultimately made it possible [on PV's case] for ... and others, including the Bankruptcy Judge and the Bankruptcy Trustee to perform (sic) illegal bankruptcy proceedings in respect of KOMFORT.*"

129. Whatever might be said about the characterisation of the outcome of PV's lack of direct involvement in the Cihelny project, which the Czech Republic certainly disputed and from which PV himself subsequently backed away (see paragraph 132 below), it remains, in the context of the factual record of this case, a very significant concession by PV. It is undeniable that even before the declaration of bankruptcy of KOMFORT in October 2001, PV's venture in the Czech Republic was in substantial difficulty. Quite apart from the fact that KOMFORT had experienced an acute cash flow shortage and that it had come under considerable pressure from suppliers and contractors in 1999 and 2000:

- (i) PV was seeking new investors in late 2000;
- (ii) in October 2000, the lack of funds had obliged KOMFORT to apply to the Building Office in Karlovy Vary for a two year extension of time until 31 December 2002 to complete the Golf Club facilities;
- (iii) in November 2000, Sparkasse Essen had been prepared to grant a discharge of all claims against KOMFORT for an immediate payment by a third party representing a two thirds discount against the book value of its loans to the MFT Group, together with an assignment of some insurance policies from PV and his immediate family;
- (iv) although it seems that in December 2000, SOLITAER had been prepared to match any such payment to Sparkasse Essen, that proposal came to nothing. Instead, in February 2001, Sparkasse had warned PV that his failure to keep it informed of the transfer of ownership in MFT-K to SOLITAER and any subsequent failure to "*sign agreements associated with the Czech case*" by mid February 2001 would result in the cessation of the waiver of principal and interest payments afforded by Sparkasse Essen, a termination of business dealings and moves by the bank to realize its collateral;
- (v) subsequently, Sparkasse Essen had indeed terminated its relationship with PV and his business interests in April 2001, thereby depriving him of his principal source of funding; and
- (vi) in the context of PV's German interests, MFT-VA had gone bankrupt in June 2001.<sup>159</sup>

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<sup>158</sup> Idem, para.26

<sup>159</sup> The Tribunal notes that, as a simple matter of chronology, PV's contention that the bankruptcy of KOMFORT precipitated a series of events leading ultimately to the bankruptcy of PV's German companies is unsustainable. (See Statement of Claim, para.3: "*Because he was not able to start operating the Golf Course, [PV] could not meet his obligations in Germany, which started a chain reaction and caused bankruptcy of [PV's] German companies.*").

130. PV acknowledged that he had taken a risk in embarking on such a project with [redacted] albeit that the: "*danger that Mr [redacted] posed would have been controllable under normal circumstances. We proceeded against him ... but we never got anywhere.*"<sup>160</sup> PV subsequently recognised that some of the problems affecting the Cihelny Project: "*came into existence before KOMFORT was declared bankrupt, including ... the conclusion of the lease agreement for the golf course and the loss of control over [Zamecek].*" He accepted, too, that: "*[T]hese problems were caused by specific individuals, in particular Mr [redacted] and Dr [redacted] whose conduct is not attributable to the Czech Republic.*" But PV contended that "*unlawful*" acts, which constituted a: "*plan for a hostile takeover*" of the Golf Course could not be dismissed and: "*reduced to an allegation that [PV] assumed excessive personal risk by giving away too much freedom and influence over KOMFORT in favour of [redacted].*" Rather, he maintained, fault lay in the failure of the Czech authorities properly to pursue complaints laid against [redacted] and other individuals.<sup>161</sup> He declined to accept the suggestion that: "*Mr [redacted] took away your investment in the Czech Republic, didn't he?*" He responded that his problems had started with the decision of the bankruptcy judge to declare KOMFORT bankrupt.<sup>162</sup>

131. The Tribunal cannot accept these propositions, not least because they are at odds with PV's own acknowledgement recorded at paragraph 128 above. PV's 'hands-off' approach to the business of KOMFORT was, to put it no higher, a significant contributory factor to the difficulties with which he came to be faced. It left him vulnerable to the actions of others and to the consequences of such legal and other advice as he might have received and which in a number of important respects, notably the structure of the 10 November 1994 agreement and the timely filing of important submissions in the bankruptcy and related civil and criminal proceedings, proved to be deficient. Furthermore, no criminal proceedings were formally initiated at PV's instigation until 4 April 2002 (see paragraph 113 above). And when they were, PV accepted that the correct initial procedures had been followed and that the police investigations had been: "*thorough, long and extensive*"<sup>163</sup> By that time the criminal proceedings got underway, the die was cast: agreements for the sale of the Golf Course had been concluded on 21 February 2002. (See paragraph 101 above).

132. In the context of these preliminary remarks, it is appropriate, too, to deal with PV's allegations that he had been deprived of his investment as a result of a criminal conspiracy that could not have succeeded, but for the involvement of the bankruptcy Judge, Mr [redacted] and the bankruptcy trustee, Dr [redacted]. In the course of his opening remarks, Counsel for PV accepted that he was unable to prove that there had been any such conspiracy,<sup>164</sup> although he went on to suggest that: "*even if ..... the judge were only used by the conspiracy organisers as*

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<sup>160</sup> Transcript, Day1, p.174

<sup>161</sup> PV's Post-hearing Brief, paras. 85&86

<sup>162</sup> Transcript, Day1, p.174

<sup>163</sup> Statement of Claim, para.175

<sup>164</sup> Transcript, Day1, p.32

*unknowing tools - which given all the facts, I think, it is most unlikely -it would mean they did not meet their duty of care."*<sup>165</sup>

133. The Tribunal is not minded to proceed on the basis of any ambiguity: it concludes that there is no evidence of a criminal conspiracy, much less a conspiracy to which Mr [redacted] and Dr [redacted] were parties, whether witting or otherwise. To the extent that their conduct falls to be scrutinised by this Tribunal, it will be reviewed on the basis of the available record, no more, no less. In any event, in light of PV's concession, it follows that PV's allegation that the Czech Republic breached the provisions of Article 4(1) of the Treaty, by reason of a failure to protect PV against: *"the criminal conspiracy of 'miscreant State officials' and some 'others' [including Dr [redacted] and [redacted]]"*<sup>166</sup> will be disregarded by the Tribunal. The extent to which, if at all, there was otherwise a breach of Article 4(1) of the Treaty by the Czech Republic is considered below.

134. For its part, the Czech Republic has contended that:  
*"Even two years before any alleged wrongdoing by the Czech Republic, [PV's] own failure to secure sufficient funds for the development of the Cihelny Golf Course and a complete lack of planning and foresight, placed KOMFORT on an irreversible trajectory towards bankruptcy."*<sup>167</sup>

That is a submission, which, having regard to the evidence in the record and PV's own concessions, the Tribunal finds compelling. It is difficult to see on what basis the losses which PV maintains he sustained in connection with his involvement in the Cihelny Golf Course project can be laid at the door of the Czech Republic, whether by reason of any failure on its part to honour its obligations under the Treaty or, indeed, at all. Beyond the unhappy fact that PV was, to a considerable degree, the author of his own misfortune, he might have grounds for redress against a number of third parties, including his contractual counterparty, his advisers and others, but those are not matters with which this Tribunal has to concern itself.

135. Even if PV's claim were, in principle, properly to be regarded as a Treaty claim, there is a number of formidable obstacles which PV would have to overcome. First, he must demonstrate that there is an investment within the terms of the Treaty in respect of which he has standing to bring a claim. Second, he must demonstrate that those actions of officials in the Czech Republic about which he has complained were both wrongful and attributable to the Czech Republic. Third, he must demonstrate that his treatment at the hands of the Czech Republic constituted a denial of justice or otherwise breached the Treaty. In the opinion of the Tribunal, PV's claim fails on all counts.

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<sup>165</sup> Idem, p.33

<sup>166</sup> Statement of Claim, para.259

<sup>167</sup> Resubmitted Statement of Defense, para.9

### Is there an Investment?

136. PV maintains that he is an 'investor' within the terms of Article 1(3) of the Treaty and that his qualifying investment, pursuant to Article 1(1)(a) of the Treaty is in the form of his 50% ownership interest in KOMFORT and "receivables in respect of the money lent to [KOMFORT]".<sup>168</sup>

137. Whilst it is common ground that PV is an investor within the terms of the Treaty, the extent of his investment is in dispute. The Czech Republic did not challenge PV's 50% shareholding in KOMFORT<sup>169</sup>. However, it maintained that the Tribunal had no jurisdiction over PV's claim to repayment of some Cr.197.2 million loaned to KOMFORT through the MFT Group, first, because PV had failed to demonstrate that he had a legal or beneficial interest in MFT-K at the time of the alleged breaches of the Treaty and, second, because the loans to KOMFORT originated as a bank credit from Sparkasse Essen. Sparkasse Essen lent the equivalent of some Cr.180 million to MFT Group and various entities in the Group, which, in turn, lent 197.2 million to KOMFORT. Accordingly, maintained the Czech Republic, the loans to KOMFORT fell squarely within the exclusion prescribed by the Protocol to the Treaty, namely:

*"The claims to money referred to in article 1, paragraph (c), include claims arising from loans in connection with a shareholding which, in purpose and scope, have the character of a shareholding (shareholding-like loans). Credits from third parties, for example, bank credits subject to commercial conditions, shall not be included hereunder."* (Emphasis added)

That being the case, they did not constitute an investment within the terms of Article 1 of the Treaty.

### PV's Standing

138. As of 1 January 1999, PV owned 76.66% of MFT-VA, which, in turn, owned 100% of MFT-E, the parent company of MFT-K. On the basis of the arrangements in place until 20 December 2000, funding had been made available to KOMFORT principally by MFT-K. MFT-VA, MFT-E and PV himself had also advanced funds in the amounts of some Cr.53.754 million, Cr.28.331 million and Cr.26.1 million respectively. As the Tribunal has noted at paragraphs 73-76 above, a series of transactions took place between 20 and 27 December 2000, pursuant to which the arrangements between KOMFORT and its lenders underwent a material change.

139. First, on 20 December 2000, MFT-VA, MFT-E and PV assigned the entirety of their interests of Cr.108 million in KOMFORT receivables to MFT-K. MFT-K thus became the sole MFT entity to which KOMFORT owed money – a fact that KOMFORT confirmed in an Acknowledgement of Debt issued over PV's signature

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<sup>168</sup> Statement of Claim, para.11

<sup>169</sup> Transcript, Day1, p.59



on 27 December 2000, in which it referred to a total indebtedness to MFT-K of Cr.217,919.959.

140. That same day, MFT-K assigned Cr.120 million of the KOMFORT debt to Mr [redacted] and MFT-E transferred its entire interest in MFT-K to Mr [redacted] vehicle, SOLITAER. According to the Commercial Register maintained by the Regional Court in Pilsen, SOLITAER remains the 100% owner of MFT-K.<sup>170</sup>

141. Subsequently, on 8 March 2001, MFT-VA's entire ownership interest of D50,000 in MFT-E was divided into four equal shares of Dm12,500. Three of those shares went to individuals, namely, PV's daughter, [redacted] Voecklinghaus, [redacted] and [redacted]. The fourth was allotted to CIC Capital- und Immobilien Contor GmbH.

142. As at 8 March 2001, therefore, while PV retained his 76.66% ownership interest in MFT-VA, MFT-VA had divested itself of its interest in MFT-E and, in any event, MFT-E had long since divested itself of its interest in MFT-K. Thus, contended the Czech Republic, PV had no legal ownership interest in the entity to which all receivables from KOMFORT were owed. In the opinion of the Tribunal, that submission is plainly right. Accordingly, submitted the Czech Republic, all KOMFORT owed directly to PV was the Cr. 548,824 (initially claimed as DM30,000<sup>171</sup>) claimed by PV in the bankruptcy.

143. In his submissions to the Tribunal, however, PV maintained that whatever the ostensible position, he had retained a beneficial interest in MFT-K: the intervention of SOLITAER had come about on the basis of a 'Treuhand' agreement between PV and Mr [redacted]. A second 'Treuhand' agreement had underpinned the transfer of MFT-VA's interest in MFT-E in March 2001.

#### **Search for new investors in KOMFORT in 2000**

144. The genesis of these arrangements was PV's search in late 2000 for new investors in the Cihelny project. He had approached a longstanding business associate and friend, Mr [redacted], who, although not interested in the golf course itself, was interested in becoming involved in the second (construction) phase of the development. Mr [redacted] had a corporate vehicle, SOLITAER, of which the sole shareholder, under an arrangement with which the Tribunal was to become familiar, - a 'Treuhand' agreement - was his brother, Mr [redacted].<sup>172</sup>

145. PV told the Tribunal that Mr [redacted] had been prepared to invest in the Cihelny project, but on the basis of an interest greater than 50% and provided that there were security for his investment.<sup>173</sup> Unlike another prospective investor, Mr [redacted] Mr [redacted] was prepared to proceed, notwithstanding an

<sup>170</sup> Exhibit JB355

<sup>171</sup> Exhibit JB101

<sup>172</sup> Transcript, Day3, p.44

<sup>173</sup> Transcript, Day2, pp.28&29

abortive site visit during the course of which                    had refused to allow PV and Mr                    access to Zamecek.<sup>174</sup>

146. Mr                    requirement for security was the basis of PV's offer, subsequently realised in the 27 December 2000 Transfer Agreement, to transfer the shares of MFT-E in MFT-K to SOLITAER. As he recalled: "*I offered to transfer the shares, that would protect you, and if you were to invest, theoretically, it would be transferred and this would then be the implementation of your holding.*"<sup>175</sup>

#### The 'Treuhand' Agreements

147. However, prior to entering into the Transfer Agreement, it was the evidence of both PV and Mr                    that they had concluded a 'Treuhand' agreement. It is not disputed that the essence of a 'Treuhand' agreement, a recognised structure in German law, is that the 'Treugeber' (principal) transfers assets to a fiduciary ('Treuhaender') to be managed for the principal by the fiduciary under the 'Treuhand' agreement. The fiduciary acts as owner to the outside world and exercises any and all rights relating to the ownership of the assets, but solely and exclusively in compliance with the instructions of the principal.

148. Although the evidence is not entirely clear, it seems that PV and Mr                    spoke over the telephone during the Christmas holiday period in 2000. It was suggested that they had concluded a 'silent' ('verdeckte') 'Treuhand' agreement orally over the telephone whilst still in Germany and before they travelled together to Karlovy Vary to finalise the documentation by which the terms of the oral 'Treuhand' agreement and those of the agreements intended to give effect to the underlying 'Treuhand' agreement were to be recorded and implemented. Those agreements were the assignment agreement whereby MFT-K assigned Cr.120 million of its KOMFORT debt to Mr                    (see paragraph 75 above) and the Transfer Agreement of 27 December 2000, pursuant to which MFT-E transferred its 100% interest in MFT-K to SOLITAER for Cr.11.658 million. (See paragraph 76). PV stated that he had been "*advised by his legal and tax advisers to draw up [such a 'Treuhand'] agreement in order to protect [his] investment.*"<sup>176</sup> Mr                    told the Tribunal that he had entered into these arrangements on the basis that he had been: "*making a contribution towards securing the fact that this project would not be lost to [PV].*"<sup>177</sup>

<sup>174</sup> Transcript, Day2, p.37

<sup>175</sup> Idem, p.30

<sup>176</sup> In answer to a question from a member of the Tribunal, PV sought to clarify an earlier explanation, stating that on the basis of their "*general experience*" (in Mr                    's case, supported by legal advice), "*... we talked on the phone over the [Christmas 2000] holidays. Mr i                    knew a lawyer that he could phone during that period of time and, as far as I know, he contacted him and asked him about these points that we agreed on orally.*" (See Transcript, Day2, p.19). And see also PV's evidence at Transcript, Day2, p.13).

<sup>177</sup> Transcript, Day3, p.47

149. In essence, it was PV's case that the intent behind the 'Treuhand' agreement with Mr [redacted] and the associated formal agreements entered into with Mr [redacted] and SOLITAER was that PV would be left as the true beneficial owner, such that whether or not there had been an ostensible transfer of the ownership of MFT-K from MFT-E to SOLITAER, there was an agreement as between principal and fiduciary that the principal could always have the property transferred back. PV and Mr [redacted] confirmed that, in fact, Mr [redacted] never paid the purchase price for the ownership interest in MFT-K transferred pursuant to the Transfer Agreement. Nor did he pay for the KOMFORT receivables transferred to him by MFT-K. For his part, PV stated that, consistent with his understanding of the position pursuant to the 'Treuhand' agreement, he had never intended the purchase price to be paid. PV stated that it was his "general experience" that if an ostensible payment obligation in an agreement subject to a 'Treuhand' was not met, then: "transfer back is not a problem ... it's enough to argue that payment hasn't been made in order to reverse the transactions." As he saw it: "MFT was always the owner until everything had been paid."<sup>178</sup> Mr [redacted] confirmed that it had been his understanding that: "until I pay [the purchase] price, I am not the owner of a project. ... I don't know Czech law, but that's what I was told, so I assumed things would be the same as in German law, ie a transfer is only deemed to have happened once I pay."<sup>179</sup>

150. It was also said that MFT-E's shares in MFT-K remained on MFT-E's books at all times and never entered the accounting books of SOLITAER. Counsel for PV submitted that: "there [was] only one plausible explanation: the transfers to Mr [redacted] were made as part of a 'Treuhand' arrangement under which [PV] remains the owner and the investor all the time."<sup>180</sup> Further, SOLITAER was said to have been simply an administrator of PV's interests. While PV had been formally replaced as Managing Director of MFT-E, his successor, Dr [redacted], worked to his instructions.<sup>181</sup> Thus, it was contended, PV remained the owner and investor at all times and, through MFT-E, maintained an ownership interest in MFT-K:

*"The transfer of the [MFT-E] ownership interests in MFT-K to SOLITAER dated 27 December 2000 did not interrupt [PV's] ownership interests in MFT-K, as the transfer was effected under a previous Treuhand agreement concluded by and between [PV] and Mr [redacted] prior to the transfer of the ownership interests in MFT-K."*<sup>182</sup>

151. If the matter were still in any doubt, maintained PV, that doubt should be dispelled by the fact that on 2 February 2007, he and Mr [redacted] had signed an Agreement on the Cancellation of Agreement on the Transfer of Ownership Agreement ("the Cancellation Agreement").<sup>183</sup> By that agreement, SOLITAER

<sup>178</sup> Transcript, Day2, p.14&20

<sup>179</sup> Transcript, Day3, p.52

<sup>180</sup> Transcript, Day1, p.42

<sup>181</sup> PV Post-Hearing Brief, para.33

<sup>182</sup> PV Post-Hearing Brief, para.7

<sup>183</sup> Exhibit JB285

acknowledged that it had not paid the consideration of Cr.11.658 million to MFT-E: "II. SOLITAER has failed to pay the amount of Cr.11,685,000 to [MFT-E]. Both companies confirm this fact and affirm this fact by fixing their signatures below." and that:

"III ... the legal consequence of the cancellation of the [Transfer Agreement] will rest (sic) in the restoration of the legal relationships to their status before the time of its conclusion, ie, including, without limitation, the fact that SOLITAER has never become a member of MFT-K Engineering."

Further, MFT-E and SOLITAER undertook, pursuant to Article IV of the Cancellation Agreement: "to provide their coordination necessary to delete SOLITAER from, and to register [MFT-E] in, the section regarding members of [MFT-K]."

152. A second 'silent Treuhand' agreement between PV, his daughter and three other third parties was said to underpin the assignment of the entirety of MFT-VA's interest in MFT-E made in March 2001.

153. The Czech Republic invited the Tribunal to reject these submissions. The Czech Republic pointed out that the existence of the alleged 'Treuhand' agreements had only been raised late in the day in PV's Reply.<sup>184</sup> It maintained that the evidence of PV and Mr [redacted] had been vague at best as to when, in fact, the 'Treuhand' agreement in respect of the Transfer Agreement had been concluded, much less as to what its effective terms or duration were intended to be.<sup>185</sup> The basis of the assertion that the transfer of the MFT-K interest to SOLITAER was intended to protect PV's investment in MFT-K had not been explained either.

154. Instead, what the Tribunal had to consider was:

(i) the acknowledgment by PV that as of 8 March 2001, months before the alleged breaches of the Treaty by the Czech Republic, he had no legal ownership in MFT-E or MFT-K.<sup>186</sup> Instead, PV maintained that he had retained a beneficial ownership interest in MFT-K thereafter by way of the two asserted 'Treuhand' agreements;

(ii) the clear terms of the 27 December 2000 Transfer Agreement, pursuant to Article 1 of which: "[MFT-E] transfers its entire ownership interest of 11,658,000 Czech crowns, representing 100 per cent of the registered capital of {MFT-K}..... to SOLITAER, which takes it over.";

(iii) PV's concession that no other written agreement had been made after the conclusion of the Transfer Agreement, changing its terms;<sup>187</sup>

(iv) a complete absence of any written or notarised document or any other form of documentary evidence to support the existence of either of the alleged 'Treuhand' agreements, notwithstanding numerous references in the course of the oral evidence of PV and Mr [redacted] to such an agreement

<sup>184</sup> Reply, paras.135-139.

<sup>185</sup> Respondent's Post-Hearing Brief, para.10

<sup>186</sup> See Exhibit JB69, Art.1 and see also PV's Affidavit dated 21 January 2011, para18 at Exhibit JB348

<sup>187</sup> Transcript, Day2, p.3

being drawn up in the context of the Transfer Agreement. (See, for example, paragraph 148 above and PV's statement that there was a manuscript document recording the terms of the 'Treuhand' agreement between PV and Mr [redacted]<sup>188</sup>). Indeed, beyond PV's own evidence, there was nothing to support the existence of the second 'Treuhand' by which the four third parties who took assignments of MFT-VA's ownership interest in MFT-E were said to have held those interests on trust for PV. In short, in the absence of proof of the existence of either of the 'Treuhand' agreements, PV could demonstrate neither a legal nor a beneficial interest in MFT-K at the time of the alleged breaches of the Treaty by the Czech Republic;

(v) the fact that the second alleged oral 'Treuhand' agreement between PV, his daughter and three other third parties was said to have been concluded on 16 March 2001, eight days after the operative transfer by MFT-VA of its interest in MFT-E;<sup>189</sup>

(vi) no evidence had been adduced to support the assertion that the MFT-K shares remained on MFT-E's books; and

(vii) the fact that by virtue of the 8 March 2001 transfer by MFT-VA of its entire interest in MFT-E, there remained nothing to connect MFT-K to MFT-VA, through which company, PV maintained his entitlement to pursue a claim in respect of the MFT-K receivables.

#### **The Critical Defects in the Evidence Relating to the Terms of the 'Treuhand' Agreements**

155. It was further argued by the Czech Republic that German law required that key terms of a 'Treuhand' agreement, notably the specific duties of the fiduciary, to be agreed. Mr [redacted] had been unable to describe to the Tribunal what those duties were said to be with any degree of specificity.<sup>190</sup> Further, the failure to reduce to writing and to notarise a 'Treuhand' agreement made in respect of a transfer of shares in a limited liability company rendered it invalid pursuant to the provisions of S.15(4) of the German Limited Liability Companies Act, which date back to 1892.<sup>191</sup>

156. PV disputed that contention on the basis that first, both 'Treuhand' agreements ante-dated the Order of the German Federal Supreme Court of 12 December 2005, and accordingly, there was no requirement that they should be in writing and notarised.<sup>192</sup> Second, PV contended that the notarisation requirement was not binding on transfers of ownership interests in a Czech

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<sup>188</sup> *Idem*, p.14

<sup>189</sup> Transcript, Day1, p.40

<sup>190</sup> Transcript, Day3, p.47

<sup>191</sup> Respondent's Post-Hearing Brief, footnote 21

<sup>192</sup> Transcript, Day1, p.40. And see German Federal Supreme Court Order 12 December 2005 - Case No. II ZR 330/04 and see also S.15(4), German Limited Liability Act.

company (MFT-K), as opposed to a German company. It was therefore inapplicable to the 'Treuhand' agreement between PV and Mr

157. The Tribunal is not persuaded by PV's submission. First, both of these asserted 'Treuhand' agreements, which he has conceded, most recently in his Post-Hearing Brief,<sup>194</sup> were oral agreements, are governed by German law, albeit that the subject matter of one of them is a Czech limited company. Second, the German jurisprudence on the subject and reflected in the Federal Supreme Court's Order of 12 December 2005 is both consistent and longstanding – and it pre-dates both of the 'Treuhand' agreements upon which PV seeks to rely.

158. PV argued, that even if the Tribunal were to determine that the effect of the German legislation was to require a 'Treuhand' agreement involving a transfer of shares in a limited liability company to be in writing and notarised, the arrangements that he put in place were not in contravention of the requirements of S.15(4) of the German Limited Liability Companies Act. He suggested that because the form of the final agreement (the Transfer Agreement), which was the product of the obligations undertaken by PV and Mr under their 'Treuhand' agreement corresponded with the form of the oral 'Treuhand' agreement, he is entitled to avail himself of an exemption. But such an exemption would only be available, as PV's own submission recognises (see footnote 193 below), if the asserted oral 'Treuhand' Agreement was concluded before the substantive agreement giving effect to its terms.

159. Even assuming in PV's favour that that were true of the 'Treuhand' agreement between Mr and PV, it is not the case, so far as the asserted second 'Treuhand' agreement is concerned. It is not in dispute that that agreement post-dated the transfer of MFT-VA's interest in MFT-E to the putative fiduciaries. Accordingly, the Tribunal accepts the submission of the Czech Republic that the second 'Treuhand' agreement is void *ab initio*. If that is so, it follows that it confers no form of beneficial ownership in MFT-E (and through MFT-E, in MFT-K) upon PV at the time of the alleged breaches of the Treaty by the Czech Republic in and after October 2001.<sup>195</sup>

### The Cancellation Agreement

160. So far as the Cancellation Agreement was concerned, the Czech Republic submitted that, quite apart from the technical defect that it had not been notarised (resulting in its invalidity in any event as a matter of Czech Law), that agreement could not cancel a sale that had been perfected pursuant to the 27 December 2000 Transfer Agreement. The relevant provision is Section 572, para.2 of the Czech Civil Code, which provides that:  
*"Parties may agree that an outstanding obligation or its part shall be cancelled, without establishing a new obligation at the same time. Unless agreed otherwise,*

<sup>193</sup> PV's Post-Hearing Brief, paras.23&24

<sup>194</sup> See, for example, PV's Post-Hearing Brief at para. 27

<sup>195</sup> Respondent's Post-Hearing Brief, para.20

*the cancelled obligation ceases to exist when the offer of its cancellation is accepted by the other party.*" (Emphasis added).

161. PV submitted that even if the Cancellation Agreement could not have retroactive effect (which he disputed), the issue was "irrelevant". The transfer of the ownership interest in MFT-K in December 2000 was "only to document the position of the [fiduciary] ('Treuhaender') vis-à-vis third parties". Similarly, the purpose of the Cancellation Agreement was "only ... to terminate the position of the [fiduciary] vis-à-vis third parties." What the Cancellation Agreement did not do, according to PV, was cancel the underlying 'Treuhand' agreement between PV and Mr [redacted]; that would only cease to exist when the assets the subject of the 'Treuhand' agreement had been transferred back to the principal (i.e., PV), thus fulfilling the objectives of the 'Treuhand' agreement.<sup>196</sup>

162. The Tribunal is not persuaded by that submission. First, it has not been established what the terms of the asserted 'Treuhand' agreement between PV and Mr [redacted] were. Second, it contradicts PV's own submission (see paragraph 158 above) that the Transfer Agreement faithfully reflected the terms of the underlying 'Treuhand' agreement - which begs the question: what would be left, once the Transfer Agreement had been cancelled? Third, even if, contrary to the plain terms of the Cancellation Agreement, the effect of the Cancellation Agreement had been to transfer the ownership of MFT-K back to MFT-E as at 27 December 2000 rather than 2 February 2007, the terms of the 8 March 2001 assignment of MFT-VA's interest in MFT-E to Voecklinghaus and others would remain in effect. PV would still be unable to demonstrate a legal interest in MFT-K at the time of the alleged Treaty breaches by the Czech Republic in and after October 2001. Nor has PV satisfied the Tribunal that he had a beneficial interest in MFT-K at the relevant time either.

163. Whilst it appears that SOLITAER never paid for the ownership interest in MFT-K, PV conceded that the transfer had taken place and that, so far as the outside world was concerned, throughout the period from 27 December 2000 until February 2007 - and even as at June 2010 - the Pilsen Regional Court Commercial Register entry for MFT-K<sup>197</sup> showed that the ownership of MFT-K was vested in SOLITAER.<sup>198</sup>

164. On the plain terms of the Cancellation Agreement, there is no suggestion that it was intended to have retrospective effect (even if, as a matter of Czech law, it could). First, the Cancellation Agreement records that the 100% ownership interest of MFT-E in MFT-K was transferred pursuant to the Transfer Agreement and that the transfer was duly registered. (Article I). Second, Article III of the Cancellation Agreement provides that its cancellation is to be: "effective as of the execution hereof." (ie on 2 February 2007). Third, the Parties undertook to amend the register to reflect the re-registration of MFT-E. (To date, it seems that that has yet to be done).

<sup>196</sup> PV's Post-Hearing Brief, paras.40-42

<sup>197</sup> Exhibit JB355

<sup>198</sup> Transcript, Day2, p.12

165. The Tribunal concludes that PV retained no legal or beneficial ownership interest in MFT-K after 8 March 2001, some seven months prior to the bankruptcy of KOMFORT and any alleged wrongdoing by the Czech Republic. Accordingly, the Tribunal holds that it has no jurisdiction to hear PV's claims in respect of receivables owed to MFT-K by KOMFORT.

**Do the Receivables owed to MFT-K by KOMFORT qualify as an Investment under the Treaty?**

166. Even if the Tribunal had found that PV had an ownership interest in MFT-K at the time of the alleged breaches of the Treaty by the Czech Republic, it would have been obliged to consider whether it could properly exercise jurisdiction over the receivables owed by KOMFORT to MFT-K, given their provenance.

167. In his Statement of Claim, PV contended that he had invested some Cr. 251,196,071 in the Czech Republic. He acknowledged that he had: "*received part of the money from credits granted by Sparkasse Essen*" - to the extent of some Cr. 180 million, between 1994 and 1999. However, the credit agreements were not concluded between Sparkasse Essen and KOMFORT, "*... but exclusively with companies controlled by [PV].*"<sup>199</sup> PV refuted any suggestion that the loans made by Sparkasse Essen were, in fact, loans granted to KOMFORT and therefore that they were denied protection pursuant to the Treaty to the extent that those loans had been used to finance PV's investment in the Czech Republic. The Protocol exemption, contended PV, operated to preclude the extension of: "*investment protection over banks of one party whose loans are not repaid by business entities having the nationality of the other party.*"<sup>200</sup> In this case, PV had drawn loans from Sparkasse Essen and then used those loans himself to finance his investment.

168. In the course of his opening remarks at the Hearing, Counsel for PV explained that the "*original idea*" had indeed been: "*to finance the construction of the Cihelny Golf Course by direct loans from Sparkasse Essen. However, Sparkasse Essen refused such an arrangement and instead loans were extended to [PV's] German companies.*"<sup>201</sup> As a result, it was [PV's] German companies that extended loans to KOMFORT, not Sparkasse Essen ... The loans from Sparkasse Essen were secured by liens over real estate of [PV] located in Germany and by [PV's] personal guarantee, not by KOMFORT's assets ... [PV] settled his obligations vis-à-vis Sparkasse Essen in the meantime even without proceeds from the operation of the golf course Cihelny. This further shows the separate nature of the loans provided by Sparkasse Essen to [PV's] group on the

<sup>199</sup> Statement of Claim, para.2

<sup>200</sup> Reply, para.142

<sup>201</sup> One of the reasons, seemingly, was that Sparkasse Essen was not prepared to advance funds against the security of a charge over the Cihelny real estate. (See Transcript, Day4, p.19)



one hand and the loans provided by [PV's] companies to KOMFORT on the other hand. In summary, the loans to KOMFORT came from the MFT Group, not from Sparkasse, and, as such, they are protected by the [Treaty]."<sup>202</sup> (Emphasis added). Accordingly, it was submitted, the loans drawn from Sparkasse and the loans made to KOMFORT were not identical – a "fact [that] had not been disproved at the hearing".<sup>203</sup>

169. On a careful analysis of the materials in the record, however, the Tribunal concludes that the distinction that PV sought to draw is a distinction without a difference: While Sparkasse Essen funds may well have been channelled through PV and his MFT Group of companies, there is no room for doubt that those funds were applied directly to KOMFORT and the Cihelny project. As PV's expert Mr Sima noted, the loans obtained from Sparkasse Essen had been for the special purpose of financing the development of the Cihelny Golf Course.<sup>204</sup> Sparkasse Essen itself said as much in a letter written to PV in February 2011.<sup>205</sup> PV's own Statement of Claim recorded that the purpose of the credits was: "*from the beginning, to build a Golf Resort; Sparkasse Essen continuously monitored their utilization for this purpose (on the one hand by releasing the money only based upon the presentation of invoices concerning the construction, on the other hand, by on-site monitoring).*" (Emphasis added).<sup>206</sup> And in evidence to the Tribunal, PV himself confirmed that he had told Sparkasse Essen that the money that he was borrowing would be invested in the Czech Republic.<sup>207</sup>

170. The extent of Sparkasse Essen's direct day-to-day involvement in the Cihelny project is evident, too, from correspondence in May 2000, in the course of which, he roundly criticised Sparkasse Essen as an "unreliable partner" by reason of its delay in making funds available (see paragraph 67 above); by the discussions relating to the refinancing of KOMFORT intended to settle Sparkasse Essen's claims against KOMFORT (see paragraphs 70-77 above); and PV's avowed rejection of the fraud that he alleged that Dr was proposing to perpetrate on Sparkasse Essen in August 2000 and which, according to PV was intended: "*to strip Sparkasse Essen of its return from loans it had granted for the purposes of the Golf Resort, and thus to free the Golf Resort of debts....*" (See paragraph 126 above).

<sup>202</sup> Transcript, Day1, p.43

<sup>203</sup> PV Post-Hearing Brief, para.54

<sup>204</sup> Sima Report, p.17

<sup>205</sup> Exhibit JB354

<sup>206</sup> Statement of Claim, para.2. And see Exhibit JB 18: by two loan agreements made between Sparkasse Essen and MFT-K on 1 February 1996 in the amounts of Dm3 million and DM2 million respectively, Sparkasse Essen provided that "*at its sole discretion*", partial payments could be released "*in line with the progress of the building works provided that all of the terms for the loan payments are met. It must be ensured that the development project may be completed solely with the funds still available....*"

<sup>207</sup> Transcript, Day3, p.142.

171. As was apparent from the correspondence between Sparkasse Essen and PV in February 2001, Sparkasse Essen's threat to withdraw its credit lines to PV and the MFT Group (a threat, which it duly carried out in April 2001) related directly to concerns about the status of the Cihelny project months before the bankruptcy of KOMFORT and any intervention by the Czech Republic of which PV now complains. (See paragraph 79 above).<sup>208</sup>

172. On the basis of the evidence before it, the Tribunal is satisfied as a matter of fact that the loans provided to KOMFORT and which constitute receivables owed to MFT-K arose out of a bank credit made available by Sparkasse Essen, which was raised by PV for the express purpose of the development of the Cihelny golf course project. In the opinion of the Tribunal, such a credit falls squarely within the exclusion provisions of Article 1 of the Protocol, which provides that: "... Credits from third parties, for example, bank credits subject to commercial conditions, shall not be included hereunder."

The purpose of the Treaty Protocol is to avoid investments by under capitalized investors, who have to resort to significant external funding in order to develop and sustain their investment. This is such a case: Sparkasse Essen was the source of over 90% of the financing for the Cihelny Project. Accordingly, that financing does not qualify as a protected investment under the terms of the Treaty.

173. For the sake of completeness, the Tribunal notes that even if it had concluded that the Sparkasse Essen bank credit constituted a protected investment, any claim by PV ought properly to reflect, and give credit for, the terms of the settlement agreements that he concluded with Sparkasse Essen in 2003 and 2005, the existence of which first became apparent on Day 2 of the Hearing in this Arbitration.<sup>209</sup> Under the terms of the latter (2005) agreement, PV's liabilities to Sparkasse Essen were settled for Euros 2.736 million, some 23% of the outstanding liability - as PV put it, a "cancellation of the loan that I got".<sup>210</sup> And as the evidence has established, that loan was applied to the development of the Cihelny project.

#### **The alleged breaches of the Treaty by the Czech Republic.**

174. Had PV established (a) that he had standing to bring his claim before this Tribunal and (b) that that claim related to an investment susceptible to the protections afforded by the Treaty, he would have had to demonstrate that the Czech Republic had acted in breach of its obligations under the Treaty. The premise upon which PV grounds his claim is that he was subject to an immediate denial of justice as a result of the non-appealable declaration of bankruptcy of

<sup>208</sup> PV's pleaded case - Reply, para. 9 - that Sparkasse Essen was not exerting any pressure on PV to repay his debts immediately and that it was the bankruptcy of KOMFORT and the sale of the golf course, allegedly at an undervalue, that precipitated the forced sales of PV's property in Germany is difficult to reconcile with this evidence.

<sup>209</sup> Transcript Day2, pp.60&61. And see Exhibits JB460 &461

<sup>210</sup> Transcript, Day3, p.120

KOMFORT by Judge in October 2001: "If [PV] failed to exhaust local remedies in some other proceedings such as with regard to the decision deleting KOMFORT from the Commercial Registry, it is simply irrelevant from the point of view of expropriation, which was completed by that time."<sup>211</sup>

175. PV complained that by reason of:

- (i) Judge's declaration that KOMFORT was bankrupt;
- (ii) the subsequent decision of the bankruptcy Trustee to proceed to a sale of KOMFORT's assets by public auction; and
- (iii) the deletion thereafter of KOMFORT from the Commercial Register,

he had been denied:

- (i) his rights to fair and equitable treatment pursuant to Article 2(1) of the Treaty;
- (ii) his rights to non-impairment pursuant to Article 2(2) of the Treaty; and
- (iii) his investment had been expropriated pursuant to Article 4(2) of the Treaty; and, further,
- (iv) the failure of the Czech authorities properly to pursue PV's criminal complaints constituted a breach of the Czech Republic's obligation to afford an investor full protection and security pursuant to Article 4(1) of the Treaty.

176. PV submitted that KOMFORT was not, in fact, bankrupt in October 2001 and the declaration by Judge that it was constituted: "the first breach of international law."<sup>212</sup> Acknowledging that: "simple breaches of duty of care by the trustee and the judge are not necessarily enough to constitute breaches of international law", it was further submitted on behalf of PV that the: "importance of these breaches was such as to be clear violations of international law."<sup>213</sup>

### The Conduct of Judge

177. PV criticised the fact that Judge took only two working days to determine the bankruptcy of KOMFORT on the basis of two disparate receivables. That, PV argued, amounted to: "a strong indication that [he] was not doing what he was supposed to be doing."<sup>214</sup> PV further suggested that: "had the bankruptcy judge communicated with [PV], he would have easily ascertained that the prerequisites for declaration of bankruptcy [had not been] met."<sup>215</sup> Moreover, contended PV, Judge's decisions and the reasons upon which he based them were not transparent. The judge had compounded his initial error in declaring KOMFORT bankrupt by his subsequent failures:

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<sup>211</sup> Transcript, Day1, p.45

<sup>212</sup> Idem, p.15

<sup>213</sup> Idem, p.36

<sup>214</sup> Idem, p.14

<sup>215</sup> Statement of Claim, para.221

- (i) to accept MFT-K's application to be appointed the Creditors' Representative;
- (ii) his "*wrongful frustration of composition with creditors*"; and
- (iii) his failure to supervise the bankruptcy Trustee, Dr 216

178. The Tribunal does not accept that those criticisms of Judge are well founded.

### The Bankruptcy Petition

179. The Tribunal set out at paragraph 84 above the circumstances and the basis upon which the petition for the declaration of bankruptcy of KOMFORT was filed by He, as a Director and proxy of KOMFORT, had lawful authority to file the petition, as, indeed, the Czech Supreme Court was to hold. (See paragraph 105 above). The Supreme Court found that PV's contentions relating to a director's authority to file a bankruptcy petition were "*clearly inaccurate*" and inconsistent with Czech law.<sup>217</sup> The petition was sufficient as to form and content in that it certified bankruptcy and listed assets. The Czech Republic pointed out that, consistent with rulings of the Czech courts, affirmed by the Supreme Court,<sup>218</sup> a debtor has a lower standard to satisfy than a creditor in filing a declaration of bankruptcy: a declaration was deemed sufficient, if it cited circumstances leading to the logical conclusion that the debtor was bankrupt. On its face, the petition was in conformity with the provisions of S.4 of the Bankruptcy Act. Judge had no reason to go behind the terms of the petition, much less to make additional enquiry of PV of his own volition, as PV suggests he should have done. (See paragraph 177 above).

180. The Regional Court had 10 working days within which to certify the petition and declare KOMFORT bankrupt. It complied with that requirement. The fact that it acted quickly is not of itself indicative of a denial of justice. Judge's decision as set out in the Resolution of 19 October 2001<sup>219</sup> was sufficiently reasoned and sufficient notice of his decision was given. PV conceded that notice was sent to him, but to 's address, rather than his own. As became apparent in the course of Dr 's examination<sup>220</sup>, no attempt was ever made by PV to change his address for service, notwithstanding the breakdown in the relationship between him and 's. No fault attaches to the Regional Court in that regard. In any event, as is clear from the record, PV actively participated in the process, registered a claim, albeit not in conformity with the requirements, and attended the First Review Meeting.

<sup>216</sup> Idem at para.210

<sup>217</sup> Decision of the Supreme Court, Ref. No. Odo 963/2003, 10 March 2005 (published under Ref. No. R29/2006).

<sup>218</sup> See, inter alia, Decision of the Supreme Court, ref. No. Odo37/2004 (24 January 2006)

<sup>219</sup> Exhibit JB 84

<sup>220</sup> Transcript, Day2, p.162

181. Nor can Judge [redacted] be criticised for his appointment of Dr [redacted] from the list of bankruptcy Trustees maintained by the Court. Her appointment was in conformity with the usual procedures and it has not been suggested that there were any conflicts of interest that she failed to disclose or any other matters that might have precluded her from accepting appointment. The allegations of a conspiracy involving, inter alia, Judge [redacted] and Dr [redacted] have not been pursued.

182. PV has disputed, too, the appointment of 3 Princova as the Creditors' Representative. But the fact is that 3 Princova had registered a timely, substantiated claim in conformity with the prescribed guidelines and its claim had been recognised before the election of the Creditors' Representative. It was also represented at the Creditors' meeting. In contrast, MFT-K's/PV's claims were submitted nearly a month late, such that they were received by the Court on 10 December 2001, less than 48 hours before the 12 December 2001 First Review Meeting. Neither submission provided sufficient substantiation and PV's claim did not conform with the requirement that it be denominated in Czech crowns. In such circumstances, it lies ill in the mouth of PV to rebuke the Court for failing to exercise any discretion in his favour by granting special voting rights to PV or MFT-K to elect the Creditors' Representative. The fact is that his claim and that of MFT-K were subsequently recognised (as, eventually, was that of Mr [redacted] when appropriate substantiation was provided.<sup>221</sup> In all the circumstances, the Tribunal rejects the suggestion that the refusal by the Regional Court to register the claims of PV, Mr [redacted] and MFT-K in the form in which they were submitted prior to the First Review Meeting constituted a denial of justice or violation of due process, as PV claims.

#### **Failure to supervise the Bankruptcy Trustee and the Liability of the Czech Republic for the Actions of the Trustee**

183. PV's principal complaint against the bankruptcy Trustee was that he did not consider her competent to manage a golf resort.<sup>222</sup> In her reliance upon inapposite expert valuations and by pressing ahead with a rushed sale by public tender, rather than an auction, PV maintained that she had failed to maximize the return on the assets of KOMFORT.<sup>223</sup> PV further contended that the Regional Court was at fault for failing to appoint a trustee who was competent.

184. As a preliminary point, the latter complaint is difficult to follow. The suggestion seems to be that Dr [redacted] alleged lack of due professional care, demonstrated by her conduct in this case, ought to have been a factor weighed by the Court in determining whether to register Dr [redacted] on the list of bankruptcy Trustees in the first place. The fact that an individual was included on the list was a guarantee of quality.<sup>224</sup> It is not for this Tribunal to attempt to

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<sup>221</sup> See footnote 109 above

<sup>222</sup> PV Post-Hearing Brief, para. 66

<sup>223</sup> Statement of Claim, para. 225

<sup>224</sup> PV Post-Hearing Brief, para. 67

'second guess' the basis of Dr [redacted] original inclusion on the list. The fact is that she was on the list at the material time and Judge [redacted] appointed her, having referred to the list in the normal way.

185. PV maintained that the responsibility of the Czech Republic had been engaged, first, because the Czech Republic was responsible for court-reviewed acts of bankruptcy trustees (and the Regional Court had failed in its oversight duties). Second, because bankruptcy trustees are state organs, regarded as public bodies '*sui generis*'.

186. As to the first of those points, and contrary to PV's submissions, the Tribunal finds that the Regional Court, having appointed Dr [redacted] from the list of registered bankruptcy trustees, was astute to act in accordance with well established practice in leaving the bankruptcy Trustee to determine how to deal with claims in the review hearing and which claims to accept or reject.<sup>225</sup> While the Regional Court was supportive of the bankruptcy Trustee's decision to proceed by way of public tender (see paragraph 96 above), it did not seek to intervene in the process.

187. As to the second, the Tribunal accepts the submission by the Czech Republic that decisions of the Constitutional Court and the Supreme Court of the Czech Republic have upheld the proposition that no liability attaches to the State, whether under Czech civil or criminal law, for the conduct of the bankruptcy Trustee.<sup>226</sup> In this regard, the decision of the Supreme Court of 22 April 2004 in Ref. No. 29 Cdo 3064/2000 is instructive. In that case, an action was brought against the Czech Republic to recover damages caused by the failure of a bankruptcy trustee to exclude certain real estate from a list of bankruptcy assets. Acknowledging that bankruptcy trustees were public bodies '*sui generis*', the Supreme Court ruled that bankruptcy trustees were not state organs or bodies of state administration and accordingly, the Czech Republic was not responsible for their acts or omissions. A bankruptcy trustee was always personally liable for his or her actions and had standing to be sued for damage caused by those acts or omissions. The Supreme Court further held that recovery for damages caused by a bankruptcy trustee may only be sought direct from the bankruptcy trustee under the general provisions of the Czech Civil Code which govern private legal relationships.

188. There is no support either for PV's position in ILC Articles 4 and 5. Decisions of international tribunals confirm that acts of a 'state organ' (the status of which is to be determined first pursuant to domestic law) are attributable to a state pursuant to Article 4 only in circumstances where there is clear evidence

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<sup>225</sup> See Decision of the High Court of Prague Ref. No.1 Ko 556/2001 (29 March 2002) and the Commentary on the Bankruptcy Act by Zelenka & Marsikova, (2<sup>nd</sup> amended and revised ed., 2002) at p. 578

<sup>226</sup> Decision of the Constitutional Court Ref. No. 403/2002 Coll. (25 June 2002); Supreme Court decisions Ref. No. 29 Cdo 3064/2000 (R24/2006) (22 April 2004) and Ref. No.8 Tdo 708/2009 (10 December 2009).

that the entity acts as the state and not as a commercial or private entity.<sup>227</sup> It is not in dispute that pursuant to S.7 of the Bankruptcy Act, a bankruptcy trustee does not represent, and is independent of, the Czech Republic and that the trustee has an independent position in the bankruptcy process. Pursuant to S.8 of the Act, the Trustee has personal liability for her actions (for which she must carry insurance) and she does not benefit from any sovereign immunity attaching to the Czech Republic. There is no requirement that she should be a government employee and, indeed, her remuneration is not in the form of a state salary, but is derived from the proceeds of sale of the assets. Her duties are not legislative, executive, judicial or regulatory in nature (S.18(1&2); S.30(1); and S.4(4) of the Act) and she does not exercise governmental functions or sit within the governmental hierarchy (S.28(1)). Her acts are akin to commercial acts of managers or accountants of private corporations. (S.14a; S.18(1&2); S.27; S.30(1); and S.44(4)).

189. Nor is there anything in Czech law, which authorises a bankruptcy trustee to exercise elements of governmental authority pursuant to ILC Article 5. It would be necessary to demonstrate that a domestic law in the Czech Republic specifically authorised a bankruptcy trustee to undertake public functions and further that the act complained of arose out of the exercise of that delegated governmental function.<sup>228</sup> The Bankruptcy Act affords no authorisation to a bankruptcy trustee to undertake public functions; the trustee's role is limited to safeguarding and selling the bankrupt entity's assets.

190. But all of that is predicated on the basis that the actions of the bankruptcy Trustee had gone beyond "normal errors" for which PV accepted that the Czech Republic would not be liable in any event.<sup>229</sup> In answer to a question from a member of the Tribunal, Dr. [redacted] acknowledged with candour that she might have made some mistakes.<sup>230</sup> But there is nothing in the record to suggest that she acted improperly or irrationally in her review and recognition of claims - to the contrary, it appears that she reviewed them with some diligence. See, for example, paragraphs 90, 93 and footnote 109 above.

191. In the opinion of the Tribunal, the reasonableness or otherwise of her actions must be viewed in the context of a situation in which she had barely Cr. 29,450 cash in hand.<sup>231</sup> The proposal that the assets be disposed of by way of a public tender rather than by auction arose out Dr. [redacted] view that matters needed to be resolved quickly, but the proposal was put to, and discussed with,

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<sup>227</sup> See *Jan de Nul NV and Dredging International NV v. Egypt*, ICSID Case no. ARB/04/13 - Award, paras.158-161; *Maffezini v. Spain*, ICSID Case No.ARB/97/7 - Award, para.52; *Impreglio S.p.A. v. Islamic Republic of Pakistan* [CSID Case No. ARB03/3 - Decision on Jurisdiction, paras. 205&206; *Eureko v. Poland*, ICC - Partial Award, para.129

<sup>228</sup> Statement of Defense (Resubmitted), para. 231

<sup>229</sup> Statement of Claim, para. 32

<sup>230</sup> Transcript, Day4, p. 153

<sup>231</sup> *Idem*, p.155

the Creditors' Representative, 3 Princova, and the Judge.<sup>232</sup> The minimum price set for the tender was fixed on the basis of negotiations with the creditors and it was established that it should be not less than Cr. 48 million, with Cr. 20 million to be put down as security in order to deter frivolous bids.

192. Her principal concern, quite properly, was to ensure that the bankruptcy estate did not deteriorate. She understood that winterisation – a matter emphasised in the petition for bankruptcy itself – was a priority: *"One of the tasks of a bankruptcy trustee [is] to make sure that the value of the assets is not lower."*<sup>233</sup> It is true that Dr [redacted] placed some reliance on the advice and recommendations of [redacted] not least, so far as the commissioning of Temple to undertake the winterisation works at what PV now suggests was a material overcharge was concerned. But it is equally true that it weighed with her, quite apart from [redacted]'s recommendation, that Temple was prepared to wait for payment: she had not been in a position to make an advance payment or an immediate payment once the particular works were complete.<sup>234</sup> As the Czech Republic pointed out, it is hardly for PV to be heard to complain that Dr [redacted] placed any reliance upon the recommendations or guidance of [redacted] when he himself had afforded [redacted] such latitude in the course of the project.<sup>235</sup>

193. It must also be recalled that the conduct of the bankruptcy Trustee was the subject of both separate civil proceedings brought subsequently by PV, by KOMFORT and by MFT-K and of a criminal investigation initiated by PV. None of the civil claims was pursued, although both PV and MFT-K had the opportunity to refile them. KOMFORT's claim was dismissed by the District Court in Pilsen-mesto in August 2007, following the deletion of KOMFORT from the Commercial Register. (See paragraphs 108 – 110 above). The criminal investigation involving Dr [redacted] was protracted, but no proceedings ever ensued. (See paragraph 120 above).

194. Having regard to all the circumstances, the Tribunal concludes that the conduct of the bankruptcy Trustee, Dr [redacted], was not such as to amount to a contravention of her obligations under Czech law, much less conduct giving rise to a colorable claim for a breach of international law.

#### The Composition Proceedings

195. The Tribunal has outlined the history of these proceedings at paragraphs 102-104 above. It was submitted on behalf of the Czech Republic that the application came far too late – on the last day before the closing date for the posting of tender bid deposits and some six days before the sealed bids were to be opened. PV acknowledged that the application could have been filed

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<sup>232</sup> Idem, p. 128

<sup>233</sup> Idem, p.79

<sup>234</sup> Idem, pp.86&87

<sup>235</sup> Respondent's Post-Hearing Brief, para. 53



sooner<sup>236</sup>, but there was no reason why the sale could not have been postponed, thereby avoiding the low recovery attendant upon a distressed sale: PV was offering 100% satisfaction to other creditors (as opposed to the 6.8% recovery which resulted from the actual sale).<sup>237</sup> He complained that he should not have been refused and he should have been afforded more time to correct any deficiencies.

196. The Tribunal rejects those criticisms. It is clear that the Regional Court dealt promptly with the application and that it afforded PV an opportunity to supplement his application in order to provide further information that the Court thought necessary to its deliberations. When he failed to do so within the deadline fixed by the Court, the application was rejected. The matter was remitted to the Regional Court following an appeal to the High Court in Prague and finally denied on grounds, which have not since been challenged.

197. Finally, in order to complete the picture, so far as Judge is concerned, the Tribunal notes that the Ministry of Justice afforded PV and MFT-K an opportunity to refile a claim made against the judge direct to the Ministry in February 2004, but it appears that that claim was not pursued.

#### **Deletion of KOMFORT from the Commercial Registry: 31 March 2007**

198. PV maintains that the deletion of KOMFORT from the Commercial Register similarly frustrated his legitimate expectations; that it was not transparent and not predictable. The principal basis of his objection was that whilst it was perfectly possible to delete from the Register a company, which had no assets, KOMFORT had outstanding receivables from and from the bankruptcy Trustee.

199. PV contended that that was a matter of which the Register Court was aware before it dealt with the petition filed by . However, it was conceded by PV that: *"perhaps the court did not have an obligation to take this information into account under Czech law when it received it outside the petition to delete KOMFORT, but it did have it and its formalistic approach certainly did not demonstrate good faith and attention to due process according to international standards."* In PV's view, the approach of the Register Court had been "deficient" and had allowed to avoid a claim for Cr. 150 million.<sup>238</sup>

200. The Czech Republic dismissed that complaint. It noted that the Register Court had observed the requisite procedures; the application had been made in full conformity with procedural requirements; the decision of the Register Court<sup>239</sup>, albeit not fully reasoned (it was not required to be pursuant to the provisions of the s.169(2) of the Code of Civil Procedure) provided PV with an

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<sup>236</sup> Transcript, Day1, p.28

<sup>237</sup> Idem, p.29

<sup>238</sup> Idem, p.32

<sup>239</sup> Exhibit JB290

adequate basis to understand the basis upon which KOMFORT had been deleted from the Register; and it set out the basis upon which the decision might be appealed. No such appeal was filed and so the decision became effective on 31 March 2007. Accordingly, the decision had been both transparent and predictable.<sup>240</sup> The Tribunal agrees.

### The Duty to Provide Fair and Equitable Treatment

201. On the basis of its analysis, the Tribunal concludes that the conduct of Judge the bankruptcy Trustee and that of the Czech courts and criminal investigation authorities could not be said to have fallen short of the criteria enunciated by the Tribunal in the *Saluka* case<sup>241</sup>, namely:

*"A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies bona fide by conduct that is, so far as it affects the investor's investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and nondiscrimination."*

202. In the opinion of the Tribunal, PV was subject to no more and no less than a proper and consistent application of the laws of the Czech Republic. There is no evidence to support an allegation that PV's legitimate expectations had not been met. As Counsel for the Czech Republic put it:

*"This is simply a case alleging that the Czech Republic failed to fulfil its obligation of law. There [is] no proof of that and the faithful application of [a] host state's law will not ground a claim. [PV] cannot point to any authority to suggest that he could have had an expectation that he would be treated in any way other than as the law provides. This also is not a case in which there is a change of law about which he is complaining. It is simply a question of the application of the host state's law and the faithful application of the host state's law will not ground a claim ... [PV's] legitimate expectations were met because the Czech Republic faithfully applied Czech law by declaring KOMFORT bankrupt, approving 3 Princova as the Creditors' Representative, approving the public tender, rejecting [PV's] application for mandatory composition and deleting KOMFORT from the Commercial Register."*<sup>242</sup>

### No Impairment of PV's Investment Through Arbitrary Measures

203. PV's case, asserting a breach of Article 2(2) of the Treaty, was put on the basis that he would show that the conduct of the Czech Republic had "certainly [been] arbitrary<sup>243</sup>". He cited the decisions in the *Noble Ventures* case<sup>244</sup> and in

<sup>240</sup> Rejoinder, paras.215-218

<sup>241</sup> *Saluka Investments BV v. The Czech Republic*: Partial Award: 17 March 2006

<sup>242</sup> Transcript, Day1, p.95&96

<sup>243</sup> Statement of Claim, para. 238

<sup>244</sup> *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11 – Award, para. 176

*Genin*<sup>245</sup> the former, which followed the decision of the International Court of Justice in *ELSI*, holding that 'arbitrary' conduct amounted to:

*"a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety."*

In *Genin*, the Tribunal held that in order to constitute arbitrary conduct:

*"any procedural irregularity that may have been present would have to amount to bad faith, a wilful disregard for due process of law, or an extreme insufficiency of action."*

204. While the Tribunal recognises that PV's investment in the Czech Republic has been lost, it does not accept that that is attributable in any way to arbitrary conduct on the part of the Czech Republic. For the reasons that have been set out at length in this Award, there was nothing arbitrary about the declaration of bankruptcy; the sale of the golf course; or the deletion of KOMFORT from the Commercial Registry. Certainly no evidence has been adduced of any act or omission that might even arguably be attributed to the Czech Republic that might properly be described as bad faith, a wilful disregard for due process or an extreme insufficiency of action. There is equally no evidence of any peremptory change in the law or that those laws and their application were anything other than stable, transparent and predictable. There is, in short, no evidence to support the allegation that the Czech Republic harmed PV's investment by means of arbitrary or discriminatory measures.

#### **No Denial of Justice and No Expropriation**

205. It is well accepted that any investment claim tribunal faced with an allegation of 'denial of justice' must be astute to avoid the assumption of the role of a court of appeal over foreign domestic courts. It is equally well established that mere judicial error, even if it results in serious injustice, does not amount to a denial of justice in the context of a Treaty claim.<sup>246</sup>

206. In the words of the Tribunal in the *Loewen* case, a party seeking to establish a substantive denial of justice must show "*manifest injustice*" or '*gross unfairness*', a "*flagrant and inexcusable violation*" in which "*bad faith, not judicial error, seems to be the heart of the matter*"<sup>247</sup> and that there has been a failure of the judicial system as a whole, such that:

*"[the] investor that fails to exercise his rights within a legal system, or exercises his rights unwisely"*<sup>248</sup> cannot be heard to complain that he has suffered a denial of justice at the hands of the state in question.

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<sup>245</sup> *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2 – Award, para. 371

<sup>246</sup> See Statement of Defense (Resubmitted), paras. 243-246

<sup>247</sup> *Loewen Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3 – Award, para.130

<sup>248</sup> *AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, para.76

207. There can be no doubt PV was afforded very wide access to the Czech civil and criminal judicial system. However, it is equally clear from the record in this Arbitration that he did not avail himself of all available local remedies - or else to the extent that he did so, submissions were, on occasion, late or incomplete or both.

208. The Tribunal has considered PV's allegations of a denial of justice with great care. It has done so, not least, with the conclusion of the Tribunal in the *Mondev* case in mind, namely:

*"The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome bearing in mind on the one hand that international tribunals are not courts of appeal and on the other... [treaties for the protection of investments are] intended to provide a real measure of protection. In the end, the question is whether at an international level, and having regard to generally accepted standards of the administration of justice a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable."*<sup>249</sup>

209. That is a far cry from this case: none of the decisions of Czech tribunals or the Czech criminal investigation authorities reviewed in the course of this Award could be described as "clearly improper" or "discreditable" on any objective analysis. Accordingly, the Tribunal rejects the complaint that PV suffered a denial of justice in the Czech Republic.

#### **PV's Claims for Damages**

210. On the basis of the findings in this Award, none of PV's claims has succeeded. Accordingly, no entitlement to damages, whether as claimed or otherwise, arises.

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<sup>249</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2 - Award, para. 127

J. COSTS

211. Pursuant to Article 38 of the UNCITRAL Rules, it is incumbent upon the Tribunal to fix the costs of the arbitration. Article 40(1) of the Rules provides that, in principle, the costs of the arbitration shall be borne by the unsuccessful Party, subject to the Tribunal's discretion to apportion such costs between the Parties, taking into account the circumstances of the case. Article 40(2) affords the Tribunal a further discretion in respect of any Order for costs that it might make in respect of the costs of the successful Party.

212. The Czech Republic has been entirely successful in its defence of PV's claims. Pursuant to the terms of Procedural Order No.1 herein, advances in respect of the fees and expenses of the members of the Tribunal were to be shared equally between the Parties, pending a determination by the Tribunal as to the final allocation of those fees and expenses. The fees and expenses of the Tribunal, including those of the PCA Registry, amount to Euros 254,595.75. In accordance with Article 40(1) of the Rules, those fees and expenses shall be paid in their entirety by PV.

213. Save for the unidentified "*miscellaneous*" item included in "*other disbursements and expenses*" claimed by the Czech Republic, PV shall also pay the legal fees and expenses of the Czech Republic, which the Tribunal fixes at Cr. 80,817,757.15.

**K. DISPOSITIF**

214. For all of the reasons given and rejecting all submissions to the contrary, the Tribunal HEREBY DECLARES AND AWARDS AS FOLLOWS:

(1) PV's request for a Declaration that:

- (i) the declaration of bankruptcy of KOMFORT and other acts and omissions of the bankruptcy judge Mr
  - (ii) the sale of the Golf Resort by the bankruptcy trustee Dr
  - (iii) the deletion of KOMFORT from the Commercial Registry
- were acts and omissions attributable to the Czech Republic, which constituted violations of the fair and equitable treatment standard in Article 2(1) of the Treaty and the non-impairment standard in Article 2(2) of the Treaty is denied;

(2) PV's request for a Declaration that:

- (i) the declaration of bankruptcy of KOMFORT and other acts and omissions of the bankruptcy judge Mr
- (ii) the sale of the Golf Resort by the bankruptcy trustee Dr
- (iii) the deletion of KOMFORT from the Commercial Registry;
- (iv) the failure of the Czech police and state attorneys to carry out the criminal proceedings against bankruptcy trustee Dr and Dr , Mr , Mr ; and Mr

were acts and omissions attributable to the Czech Republic, which constituted violations of the full protection and security standard in Article 4(1) of the Treaty is denied;

(3) PV's request for a Declaration that:

- (i) the declaration of bankruptcy of KOMFORT and other acts and omissions of the bankruptcy judge Mr
- (ii) the sale of the Golf Course by the bankruptcy trustee, Dr

were acts and omissions attributable to the Czech Republic, which constituted an expropriation in violation of Article 4(2) of the Treaty is denied;

(4) PV's requests for Orders that the Czech Republic pay PV compensation for the damages allegedly suffered as a result of the said alleged breaches of the Treaty, together with interest thereon are denied;

(5) PV shall pay the costs of these arbitration proceedings, including the costs and expenses of the Tribunal, in the amount of Euros 254,595.75, together with the legal costs and expenses of the Czech Republic in the amount of Cr.80,817,757.15.

(6) All and any other claims are dismissed.

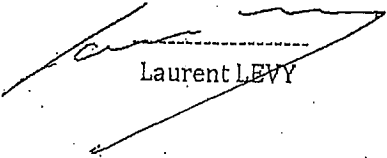
Paris, 19 September 2011



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John BEECHEY



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