COMMENT ON AWARD ON JURISDICTION IN THE BINDER CASE APPEALED AT CZECH COURTS[1]

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Abstract: Comment deals with jurisdictional phase of investment dispute under Treaty concerning the encouragement and reciprocal protection of investments between Federal Republic of Germany and Czech and Slovak Federal Republic, signed at Prague on October 2, 1990 (with protocol and exchange of notes dated 10 January and 13 February 1991), entered into force on August 2, 1992, i.e. 30 days after the exchange of the instrument of ratification, which took place at Bonn on 3 July 1992 in accordance with article 13 (2) (hereinafter BIT) in which German investor Rupert Joseph Binder claimed against the Czech Republic unspecified sum ranging from CZK 2,3 billion to 5 billion (USD 136 mil – to 195 mil) due to damage caused to Mr. Binder's investment by alleged bullying by Czech Customs Authorities. Such systematic pressure has, according to investor, led to factual liquidation of his business.

Author presents brief outline of the facts of the case, followed by commented decision of District Court which is split in two parts, one dealing with claimed termination of Czech-German BIT by accession of the Czech Republic to EU and the other with the issue of dual residency. Last part looks into the decision of the Municipal Court setting aside the decision of the court of first instance. In this part, submissions of parties to the dispute are dealt with, followed by the issue on which the decision of the appellate court is grounded, i.e. Inadmissibility to set aside Award on Jurisdiction under the Czech Law and last issue deals with the view of Appellate Court on the issue of termination of BIT.

The District Court decision touches two issues, though, its decision is grounded on one of them only. The first, is the issue of termination of Czech-German BIT by the accession of the Czech Republic to the EU, the second, is the fact that investor as a national of the Czech Republic, permanently residing in Prague, Czech Republic, did not comply with requirements of Czech-German BIT Art. 1(3), under which "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 investment" because he could not be considered an investor of the other Contracting Party as it is required in Articles 2, 3, 4 and 5 of BIT.

Similarly, as the District Court, Appellate Court seemingly dealt with two issues. As we can see from the reasoning below, Municipal court omitted completely the

[1] This article was elaborated as part of the research task of GA ČR 407/09/0760 "International Law of the Investment Protection and Its Impact on the Czech Republic".

issue of dual residency and it primarily dealt with new issue, i.e. admissibility to set aside Award on Jurisdiction under the Czech law as *lex arbitri*.

Resumé: Komentář se zabývá jurisdikční fází investičního sporu mezi německým investorem a Českou republikou. Autor se zaměřuje na rozhodování českých soudů ve věci zrušení rozhodnutí mezinárodního investičního tribunálu v investiční arbitráži *ad hoc* podle česko-německé dohody o ochraně investic. V komentáři nejprve předkládá (z veřejně dostupných zdrojů) přehled skutkových okolností sporu. Poté rozebírá rozhodnutí Obvodního soudu pro Prahu 1, které se dotýká dvou zásadních otázek, a) namítaným ukončením platnosti dvoustranné dohody o ochraně investic poté, co Česká republika přistoupila k EU a b) tím zda investor splňuje podmínky stanovené v této smlouvě, podmínka *miratione personae*, neboť investor byl občanem obou smluvních stran dohody o ochraně investic, a zejména měl trvalý pobyt jak v jednom, tak ve druhém smluvním státě. Právě trvalé bydliště je základním kritériem pro určení, zda jde o investora, který je dohodou chráněn. Analýza se rovněž snaží z rozhodutí Obvodního soudu abstrahovat, jaké byly základní argument strany sporu, jaké argumenty použil investiční arbitrážní tribunál. Poté se komentář věnuje rozhodnutí Městského soudu, který zrušil prvoinstanční rozhodnutí a i zde analyzuje důvody, které odvolací soud vedly ke zrušení rozhodnutí Obvodního soudu. Také zde se soud zabýval dvěma aspekty, byť své rozhodnutí opřel pouze o jeden formalní nedostatek, vyplývající z § 31 zákona č. 216/1994 Sb., o rozhodčím řízení, kterým je nedostatek pravomoci rozhodovat o nemeritorním rozhodnutí. "Award on Jurisdiction" jakkoliv jde v překladu o "Nález" není podle odvolacího soudu rozhodnutím ve věcí. Jako *obiter dictum* vyjádřil odvolací soud své přesvědčení o tom, že dvoustranná dohoda o ochraně investic uzavřená mezi Českou republikou a Spolkovou republikou Německo zůstala v platnosti i po přistoupení České republiky k EU.

Key words: Investment dispute, arbitration, revision of award, setting aside of award, annulment, lex arbitri, appellate court, bilateral investment treaty, EU law, dual citizenship, permanent residency, validity of international treaty.

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I. Introduction

It is generally recognized that domestic courts can play an important role with respect to investment agreements. Indeed, the role of domestic courts in the interpretation and application of an investment agreement's provisions can be manifold.[2] Although there are many domestic court decisions in cases related to investment protection all over the world, one can see that most of them were issued by courts in States considered to be "arbitral paradises". It is not that common to have an opportunity to comment on decisions of domestic courts outside of Switzerland, France, Great Britain or perhaps Sweden, dealing with investment arbitration. I am particularly grateful to TDM, which published two related decisions of a Czech District Court and a Czech Municipal Court respectively in the "Binder" investment arbitration, for enabling me to comment on the decisions of Czech courts. There are two reasons why I have welcomed such an opportunity. First, I was quite sceptical about annulments or revisions of investment awards rendered in ad hoc arbitrations by inexperienced national courts,[3] and second, as a Czech lawyer, I was even more curious to find out how the Czech Courts dealt with such a challenge. Last, but not least, decisions of Czech Courts as a publicly accessible source have enabled me to piece together the mosaic of the facts involved in the case of the investment dispute between Mr. Binder and the Czech Republic, facts which are still kept officially confidential.

It should be stressed here that this comment cannot provide profound information about the substance of the case, since there are just a few pieces of relevant information available and the final award was not made public to date. Information about the facts of the case was gained from publicly accessible sources, such as the Internet. The only information disclosed officially by the press spokesman of the Ministry of Finance, Mr. Jakob, on 19 July 2011, is that the Czech Republic won the case in June, or rather in July of 2011 when the final award was most likely issued.[4] Further comments

[2] Walid Ben Hamida, Investment Treaties and Domestic Courts: A Transnational Mosaic Reviving Thomas Wälde's Legacy, in Jacques Werner & Arif Hyder Ali eds., A Liber Amicorum: Thomas Wälde, Law Beyond Conventional Thought, Cameron May, 2009, p. 69 *et seq*.

[3] See Balaš, V., Review of Awards, in Muchlinski, P., Ortino, F. and Schreuer, Ch. eds. The Oxford Handbook of International Investment Law, Oxford University Press, 2008, p. 1125 *et seq*, at p. 1142.

[4] Mezinárodní rozhodčí tribunál zamítl veškeré nároky německého investora Josepha Ruperta Bindera proti České republice v hodnotě téměř 4 mld. Kč. Německý investor namítal porušení svých práv ze strany celní správy ČR při vymáhání ručení společnosti pana Bindera.
Mezinárodní tribunál, netradičně se sídlem v Praze, projednával tento spor již od roku 2005, nicméně hlavní ústní slyšení se konalo v květnu tohoto roku. Jedná se již o druhého německého investora, který neuspěl v arbitráži podle mezinárodní dohody o ochraně investic proti České republice.
„Jednoznačně se ukazuje, že Česká republika již nepatří mezi snadné kořisti v arbitrážních řízeních. Výsledek sporu představuje jasný signál těm investorům, kteří pomýšlejí na lacině získaný prospěch z arbitrážních řízení s Českou republikou." Uvedl ministr financí Miroslav Kalousek. Podle něj se dokonce jiné středoevropské státy obracejí na Ministerstvo financí s žádostí o konzultace v oblasti vedení mezinárodních sporů na základě dohod o ochraně investic.
Ministr financí ocenil práci svého poradce Radka Šnábla, neboť úspěšná arbitráž je výsledkem především jeho úsilí a jím stanovené promyšlené strategie.

will tend to to focus on the information that is available. Because of the publicity principle governing court proceedings in the Czech Republic, we can analyse two decisions of Czech Courts dealing with an Award on Jurisdiction rendered by an arbitral tribunal.[5] These two decisions, a Judgment of the District Court in Prague 1[6] and a Resolution of the Municipal Court in Prague,[7] recite most likely a substantial part of an Award on Jurisdiction rendered by an arbitral tribunal in the jurisdictional phase. It should be added that the judgment of the court of first instance is confusing as concerns the date of commencement of arbitral proceedings.

The author of this comment presents a brief outline of the facts of the case, followed by a commented decision of the District Court, which is split in two parts, one part dealing with the alleged termination of the Czech-German BIT by virtue of the Czech Republic's accession to the EU and the other part dealing with the issue of dual residency. The last part looks into the decision of the Municipal Court which set aside the decision of the court of first instance. In this part, the submissions of the parties to the dispute are dealt with, followed by the issue on which the decision of the appellate court rested, i.e. inadmissibility to set aside the Award on Jurisdiction under Czech law and the last issue deals with the view of Appellate Court on the issue of termination of the BIT.

II. Facts of the case (Alleged Frustration of Investment)

The commented case deals with the jurisdictional phase of an investment dispute under the treaty concerning the encouragement and reciprocal protection of investments between the Federal Republic of Germany and the Czech and Slovak Federal Republic,[8] signed in Prague on October 2, 1990 (with a protocol and exchange of notes dated 10 January and 13 February 1991), which entered into force on August 2, 1992, i.e. 30 days after the exchange of the instrument of ratification, which took place in Bonn on 3 July 1992 in accordance with article 13 (2) (such treaty is hereinafter referred to as the BIT) in which German investor Rupert Joseph Binder claimed against the Czech Republic an unspecified sum ranging from CZK 2.3 billion to 5 billion (USD 136 million – to 195 million) due to damage caused to Mr. Binder's investment by alleged bullying on the part of Czech Customs Authorities. Such systematic pressure has, according to the investor, led to the factual liquidation of his business.

Mr. Binder founded a company called Cargo Transport – Internationale Spedition in the former Czechoslovakia in 1990. The main business of Cargo Transport consisted of issuing customs documents on behalf of shipping companies to

[5] Arbitral Tribunal composed of arbitrators Hans Danelius (p), Jürgen Creutzig and Emmanuel Gaillard.
[6] Rozsudek Obvodního soudu pro Prahu 1 21 C 174/2007-78.
[7] Usnesení Městského soudu v Praze 18 Co 164/2010-183.
[8] See United Nations Treaty Series 1996, Vol. 1909, No. 32531, p. 411 et seq., Authentic texts: German and Czech, Registered by Germany on 8 February 1996.

respective customs offices, thus helping to facilitate cross-border trade.[9] Mr. Binder invested a substantial amount of funds to establish 45 customs offices and forwarding (transport) centers. What Mr. Binder could not foresee when making his initial investment was the dissolution of the Czech and Slovak Federal Republic. After the breakup of the Federation, Mr. Binder probably had to once again clear goods that had been left in Slovakia, now having to clear them through customs in the Czech Republic. The damage, according to Mr. Binder, amounted to hundreds of millions of Czech Crowns in the initial phase. In 2003, Cargo Transport went bankrupt. On 29 March 2005, Mr. Binder, in compliance with Art. 10 of German-Czech BIT, officially raised the case and noticed the Czech Republic that he had a claim against it in the amount of CZK 2.3 billion. As no settlement was reached via conciliation within the six-month waiting period, on 24 November 2005 Mr. Binder instituted arbitration proceedings against the Czech Republic.

As Matthew Pountney states in his short information about the case:

"The businessman claimed that the Czech customs authority violated his rights to fair and equitable treatment under the BIT in the mid 1990s when it forced his company to pay the customs debts of a company for which it was acting as a guarantor and by which it had been defrauded."[10]

A three-person tribunal acted under the Czech-German bilateral investment treaty, which itself does not specify or offer a choice of arbitration rules for parties, beyond stating that the appointing authority would be the Arbitration Institute of the Stockholm Chamber of Commerce. The *Binder* arbitration was consequently entirely ad hoc and the tribunal set all of its own rules and procedures as far as allowed by the Czech legal system.[11]

Since the place of arbitration was Prague, Czech Republic, the arbitration was ad hoc under its own rules and the *lex arbitri* Czech Law, Czech Courts had jurisdiction to, among other things, deal with motions of the parties requesting the setting aside or annulment of an award. The Czech Republic, as the plaintiff in civil annulment proceedings at the Czech court, in its motion lodged with the District Court in Prague 1 (the court of first instance), on September 6, 2007, demanded the annulment of the "Award on Jurisdiction" rendered on June 6, 2007, demanding such annulment for two reasons – (a) invalidity of the BIT and/or (b) lack of jurisdiction *ratione personae*, because the claimant, as a Czech national and permanent resident in the Czech Republic, did not qualify as an investor under the German/Czech BIT. The Czech District Court accepted the arguments of the Czech Republic and annulled the award on jurisdiction. The judgment of the District Court in Prague 1 of June 22, 2009 was challenged by Mr. Binder, the defendant in civil annulment proceedings at the Czech court, in his appeal to the Municipal Court in Prague

[9] See Pountney, M., Czech Republic sees off long running claim, Global Arbitration Review, Friday, 05 August 2011.

[10] Ibid.

[11] Ibid.

(the appellate court). The Municipal Court overturned the judgment of the District Court in its Resolution of July 2, 2010.

III. Decision of the District Court of Prague 1

In its decision the District Court recited why the arbitral tribunal rejected, in its Award on Jurisdiction, the Czech Republic's requests for a declaration that it lacks jurisdiction to hear the claims raised by the Claimant, for a stay of the proceedings or for a request for a preliminary ruling being made to the European Court of Justice, for an order on costs and expenses and for other relief.

A reading of the District Court's recital of the Plaintiff's submission and the Award on Jurisdiction can lead to the erroneous conclusion that the Court dealt with two issues. One of these is the issue of the termination of the Czech-German BIT by virtue of the Czech Republic's accession to the EU, the other is the fact that Mr. Binder, as a national of the Czech Republic permanently residing in Prague, Czech Republic, did not meet the requirements of the Czech-German BIT Art. 1(3), under which "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, athorized to make investment" because he could not be considered an investor of the other Contracting Party, as required in Articles 2, 3, 4 and 5 of the BIT.

A brief examination, however, can be misleading. A thorough analysis reveals that the reasoning of the Court itself neglected to address the Czech Republic's objection that the BIT was terminated on the date of the Czech Republic's accession to the EU. The main line of reasoning thus focuses on dual residency only. Apart from this "shortcoming" in the District Court's reasoning, the lengthy recital of the Award on Jurisdiction and the Plaintiff's submission proves to be a useful source of information on the legal argumentation concerning the termination of the Czech-German BIT.

(i) Czech-German BIT terminated by accession of the Czech Republic to the EU

The District Court stated that in the reasoning set forth in its award, the Arbitral Tribunal had noted that the Czech-German BIT was concluded on October 2, 1990 and that it entered into force on August 2, 1992. On May 1, 2004, the Czech Republic became a Member State of the EU in accordance with the Accession Treaty. The status of the Czech-German BIT was not regulated in connection with the above mentioned Treaty and there is no indication that it was discussed during the negotiations on the Czech Republic's accession to the EU. The Czech-German BIT has not been terminated pursuant to Article 13(3) and it does not seem that the Czech Republic and Germany have agreed in any other way that the BIT should be terminated or cease to be operative. The Arbitral Tribunal did not find that the invoked substantive provisions of the Czech-German BIT, i.e. Article 2(2), which provides for protection against impairment of investments by arbitrary or discriminatory treatment, Article 2(3), which ensures full protection of investments and revenues,

Article 4(1), which provides for full protection and security of investments, and Article 4(2), which stipulates that expropriation must be for public benefit and must be accompanied by full compensation, were in any way in conflict with EC law. Consequently, there is no substantive conflict with EC law and the question of the primacy of EC law does not arise in respect of this provision.

Then, the District Court summarized the reasoning of the Czech Republic (the plaintiff in the proceeding before the Court and the Respondent in the investment dispute), stating:

"Before the petition was filed, the BIT had expired. The Plaintiff and the Defendant could not conclude a valid arbitration agreement, as at the time when the Defendant announced the commencement of arbitration proceedings there was no valid offer on the part of the Plaintiff to conclude an arbitration agreement which would be unilaterally acceptable to the Defendant. The Federal Republic of Germany is a founding member of the European Community. On May 1, 2004, the effects of the Czech Republic's accession to the European Union arose and the Treaty establishing the European Community, including the entire body of secondary legislation published on the basis of this Treaty up to April 10, 2004, became components of the Czech legal order. With respect to the provisions of Article 10 of the Constitution of the Czech Republic, all of the secondary legislation of the EC becomes a component of the legal order of the Czech Republic and the application of this legislation takes precedence over the law. The Treaty establishing the European Community guarantees to natural persons who are nationals of a Member State of the European Communities, as well as legal entities having their registered offices in some state of the EC, the free movement of persons, goods, services and capital. This provision of primary law is further specified and elaborated on by so-called secondary law, particularly by Council Directive 88/361/ EEC. Pursuant to Article 1 of the Directive, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. According to Annex I to the Directive, capital movements also cover the establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings. It holds true that investments of German investors in the Czech Republic continue to be protected by the Treaty establishing the European Community and in cases not regulated by this Treaty, the BIT is followed. In this area of investment protection, the BIT concerns the same matter and regulates the same sphere of issues as the Treaty establishing the European Community. Furthermore, the Plaintiff referred to the judgment of the European Court of Justice in a similar case, case No. 10/1961, which states that in cases following the Treaty establishing the European Community, this Treaty takes precedence over treaties which had been concluded between Member States before the Treaty establishing the European Community became effective. In some respects, the provisions of the BIT are in direct violation of EU law, particularly where the issue of equal status of persons subject to the BIT and other persons subject to

the regulations of EU law is concerned. The European Community was based on the principle of equality of persons (both natural and juridical) in areas which are regulated by EU law. The personal jurisdiction of the BIT is restricted to a group of persons who meet the definition of "an investor". The BIT does not apply to other Czech or foreign persons. From this point of view, German investors would be given unjustified preferential treatment in respect of access to law and justice in comparison with investors from another EC state. Admission of the possibility that German investors are entitled to apply Article 10 of the BIT to protect their investments even after May 1, 2004, and to therefore commence arbitration proceedings against the Czech Republic, would be the admission of potentially differentiated, and thus unjustified, treatment of persons subject to EU law, which would be in direct violation of the Treaty establishing the European Community and the established practice of the European Court of Justice. The Czech Republic and the Federal Republic of Germany are parties to the Vienna Convention on the Law of Treaties, which was promulgated under number 15/1988 Coll. and was incorporated into the Czech legal order. According to Article 59(1) of the Vienna Convention on the Law of Treaties, a treaty shall be considered terminated if all the parties to the treaty conclude a later treaty relating to the same subject-matter and it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty, or the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time."

What a pity that the District Court did not deal thoroughly with the issue of termination of the BIT within the meaning of the 1969 Vienna Convention on the Law of Treaties (VCLT), as was suggested by the plaintiff.

In fact I was quite curious to see how the Czech court would cope with it. Just a passing look at the wording of Article 59 of VCLT[12] gives credence to the attitude taken by the Arbitral Tribunal.

As is known, the Tribunal clearly rejected such argument based on Article 59 VCLT. One of the main reasons was a statement made by German authorities according to which the Federal Republic of Germany did not intend to suspend the BIT via the conclusion of the accession treaty by which the Czech Republic acceded to EU. It is obvious that Art. 59 VCLT does not apply to the case at hand for various other reasons, chief among them is that EU law and the accession treaty do not relate to the same subject matter. E.g., it does not stipulate any possibility

[12] *(1) A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same-subject mater and:*
(a) it appears from the latter treaty or is otherwise established that the parties intended that the subject matter should be governed by that treaty; or
(b) the provisions of the latter treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.
2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

for the protection of foreign investors via impartial investment arbitration, which, even if one acknowledges that the substantive standards of treatment in EU law and in the BIT do not differ, provides for an alternative settlement of disputes between an investor and a host State. In fact, vis-à-vis the TEU, the Czech-German BIT can be considered as a *sui generisinter-se* agreement, not within the meaning of Art. 41 VCLT, but definitely with the applicability of Art. 30(3) of VCLT or perhaps even 30(4) VCLT.[13] This is supported by the view of the authors of the commentary with regard to Art. 41 VCLT, which states that "…, indeed the conflict between successive obligations covered by Article 30(4) and 41 does not prejudice the temporal sequence of the treaties at issue: the 'restricted' or 'plurilateral' treaty can be previous or subsequent to the 'general' or 'multilateral' treaty.[14]

(ii) Objection of ratione personae – Mr. Binder is not an investor within the meaning of the BIT

Thereafter, without commenting on the European issue and the possible termination of the BIT, the Court turned its attention to another jurisdictional issue.

The Arbitral Tribunal, as it is stated in the reasoning of the District Court, dealt with the question of whether the Claimant (in this case the Defendant) had his permanent residence in Germany or in the Czech Republic. It was of the opinion that it may be assumed that the Defendant had obtained a permanent residence permit at least at the beginning in order to be able to become a Czech citizen. The Tribunal did not consider the granting of this permit decisive for whether the Defendant should be considered to have his permanent residence in the Czech Republic or in Germany. Although the Czech-German BIT envisages permanent residence in one State only and the possibility of two permanent residences may not be entirely excluded according to the wording of the BIT, the Arbitral Tribunal accepted the common view of the Parties that permanent residence should be considered to be either in Germany or in the Czech Republic but not in both countries. The term "bydliště" (residence) seems to envisage an attachment in regard to private and family life rather than the investor's professional or commercial activities.

Documents from the Czech Republic often indicate Prague as the Defendant's place of residence and in connection with his business activities, Czech citizenship is stated. However, there are other documents where the Defendant stated Weiden as his place of residence. Mr. Binder lived both in Weiden with his wife and in Prague where he lived in a three room apartment in a building which is owned by one of his companies and has an address which is also his business address in Prague. He spends most of the week in Prague and weekends and some additional time in Weiden. In the past he lived only in Weiden, and had his main place of business in Prague.

[13] Orakhelashvili, A., in Corten, O., Klein, P. eds. The Vienna Convention on the Law of Treaties: A Commentary, Vol I, Oxford University Press 2011, p. 765 *et seq*.

[14] Ibid. Rigaux, A., Simon, D., Vol II, p. 987.

On the grounds of these facts, the Tribunal concluded that the Defendant never intended to move his residence to Prague but merely wanted to establish a second home there which would also serve as the centre for his business activities. Mr. Binder (the investor) took certain measures for integrating into Czech society, the most important of these being the acquisition of Czech citizenship. Nonetheless, it may be assumed that he benefited from his Czech citizenship in his dealings with the Czech authorities. Prior to the acquisition of citizenship, he asked for, and was granted, a permanent residence permit, and he regularly indicated before Czech authorities that he was a resident of the Czech Republic. The Arbitral Tribunal did not consider these measures taken by Mr. Binder to be sufficient to justify the conclusion that he had forfeited his right to protection under the Czech-German BIT in respect of his investment in the Czech Republic or that he had otherwise acted in a manner inconsistent with his current contention that he had remained at all relevant times a permanent resident of Germany within the meaning of the Czech-German BIT. Thus, the Tribunal concluded that the Defendant had his permanent residence in Germany and that he was to be considered an investor of Germany in respect of his investment in the Czech Republic. Since dual nationality was not an issue, no-one ever raised the question of whether Mr. Binder, by acquiring Czech citizenship, lost his German citizenship.

According to Art. 1(3) of the Czech-German BIT

"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"

The Czech Republic stated that the Claimant is a Czech citizen and has his permanent residence in the Czech Republic. When applying for Czech citizenship, the Claimant had declared to the Czech authorities that his permanent residence was in the Czech Republic, i.e. in the host State, and according to the Czech Republic the Claimant is therefore estopped from claiming a status as an investor under the German/Czech BIT and from bringing a claim against the State of his permanent residence. The Czech Republic considered such a claim by an investor as an act which is in bad faith (*mala fide*) and as such can be considered as *venire contra factum proprium*.

Mr. Binder asserted that nationality does not play any role, since the BIT refers to a "permanent place of residence" as the qualifying criterion for natural persons as investors. He also stated that he has his permanent residency in Germany, that he was born there and lived his whole life in Germany together with his wife and daughter. He was also subject to full German taxation and was registered by the Social Insurance Office in Germany. Having a place of residency in Prague was a practical requirement to ease the management of his business activities.

The Tribunal had to deal with the conflict of residency. The German/Czech BIT does not address such a situation and it was up to the Tribunal to deal with this issue. There are only a few possibilities. First, the Claimant does not qualify as an

investor and being a resident in the Czech Republic he cannot be considered as an investor of the other Contracting Party and as such initiate investment arbitration against the State of his permanent residency, irrespective of the fact that he also has residency in the other party to the BIT. Second, it suffices if the investor fulfils the purely formal requirement, i.e. permanent residency in Germany in the case at hand. Third, the Tribunal has to apply a test which is analogous to the Nottebohm test and establish a "genuine link" in terms of residency. The Tribunal's task was to determine the question of permanent residency either on the basis of the national law of one of the Contracting Parties or as a treaty concept. The Tribunal, while applying the treaty concept, attempted to give the term permanent residency an autonomous meaning. As a result, the Tribunal held that the investor's permanent residency was in Germany.

The District Court based its decision solely on the grounds of the documents proving the Czech citizenship of Mr. Binder and his permanent residency in Prague. It considered as proven that the BIT concluded on September 2, 1990, between the Czech and Slovak Federative Republic and the Federal Republic of Germany regarding the Promotion and Mutual Protection of Investments, promulgated under number 573/1992 Coll., does not apply to Mr. Binder as an investor. These findings led the court to the verdict that "the Award on Jurisdiction of the Arbitral Tribunal composed of arbitrators Hans Danelius, Jürgen Creutzig and Emmanuel Gaillard in the case of Rupert Joseph Binder versus the Czech Republic of June 6, 2007 shall be vacated and that the Defendant is liable to reimburse the Plaintiff for the costs of proceedings". Although the reasoning of the District Court is far from sophisticated, views on autonomous meaning and treaty concept can easily differ. One can imagine that the District Court was, in its decision, albeit unconsciously, closer to the understanding of the treaty concept than the Tribunal. While the evaluation of the Tribunal about the termination of the BIT after the Czech Republic's accession to the EU seems very rational, an evaluation of the treaty concept and Mr. Binder's entitlement to protection against the Czech Republic can be considered as rational only if the Tribunal had used a "genuine link" as the main criterion. If so, the term "treaty concept" would be better viewed as a broader "International Law Concept". The treaty concept, when interpreted in a narrow sense, would tend to mean a particular bilateral investment treaty concept. Such a concept would need to be interpreted restrictively. A restrictive interpretation could hardly lead the Tribunal to the conclusion that an investor who is national and a permanent resident of the State against which he commenced arbitration can be considered as an investor of the other Contracting Party. On the other hand, had the Tribunal tested a genuine link, it looks like it would have probably been easy to conclude that Mr. Binder is a permanent resident of Germany rather than the Czech Republic.

Views on the effect of dual nationality and dual permanent residency in investment disputes can differ. It would be interesting to find out whether the Tribunal refered to the most well known cases such as *Eudoro A. Olguín* v. *Republic*

of Paraguay,[15] *Soufraki* v. *United Arab Emirates,*[16] *Champion Trading* v. *Egypt*[17] *or Siag and Vecchi* v. *Egypt,*[18] and how it commented on them. The Binder case definitely has some common aspects with some of these cases. Although all of the cited cases were decided at the ICSID, they probably played a role in the Tribunal's deliberations as well as the Nottebohm case that set up the standard with its genuine link principle. On the other hand, a Tribunal proceeding in ad hoc arbitration is not bound to observe the same formal requirements as those anchored in ICSID Convention Art. 25(2)a), excluding nationals having nationality of the Contracting State Party to the dispute.[19] One has to admit that the concept of an investor under the Czech-German BIT would not necessarily be interpreted in a completely different manner merely because such BIT is silent on the issue of preventing dual nationals from taking advantage of the protection granted by the BIT. Be that as it may, Mr. Binder definitely did not act as Pey Casado[20] and did not try to renounce his German permanent residency or nationality.

IV. Resolution of the Municipal Court

Mr. Binder, as the Defendant, represented by JUDr. Ilja Hrubý, appealed against the District Court's decision to the Municipal Court in Prague, and the appellate court, by its Resolution of 2 July, 2010, vacated the judgment of the court of first instance and discontinued further proceedings.

(i) Submissions of the Parties

In its reasoning, the Municipal Court mentioned the Plaintiff's view under which the vacation of the arbitration award on jurisdiction by the District Court was justified. The Plaintiff disagreed with the jurisdiction of the Arbitral Tribunal. In its view, the Czech-German BIT, published in the Czech Collection of Laws on December 16, 1992 under number 573/1992 Coll., expired already prior to November 24, 2005, when the motion to commence arbitration proceedings was filed. The Federal Republic of Germany is a founding member of the European Community and the Czech Republic became a Member State of the European

[15] *Eudoro A. Olguín* v. *Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001

[16] *Hussein Nuaman Soufraki* v. *United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004

[17] *Champion Trading Company Ameritrade International Inc., James T. Wahba, John B.Wahba, Timothy T. Wahba* v. *Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction 21 February 2003

[18] *Waguih Elie George Siag and Clorinda Vecchi* v. *The Arab Republic of Egypt*, ICSID case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007

[19] Schreuer, Ch., with Malintoppi L., Reinisch, A. and Sinclair, A., The ICSID Convention: A Commentary, Second Edition, Cambridge University Press, Cambridge 2009, p. 271 *et seq*. Commentary refers to the Report of the Executive Directors which explains the provision of dual nationality as follows: "It should be noted that under clause (*a)* of Article 25(2) a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nationality of another State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent".

[20] Pey Casado v. Chile, Award, 8 May 2008, paras. 314-322

Union on May 1, 2004. Investments of EU investors continue to be protected by the Treaty establishing the European Community and only in the case of issues not regulated by this Treaty is the BIT followed. The BIT regarding the Promotion and Mutual Protection of Investments concerns the same matter and regulates the same sphere of issues as the Treaty establishing the European Community. Consequently, the Treaty establishing the European Community takes precedence over the BIT. Moreover, the Plaintiff was of the opinion that the provisions of the BIT are in some respects in direct violation of EU law, particularly where the issue of equal status of persons subject to the BIT and other persons subject to the regulations of EU law is concerned. The BIT is confined to a group of persons who meet the definition of "an investor". Consequently, German investors would be given unjustified preferential treatment as concerns access to law and justice in comparison with investors from another EC state. The BIT is considered to be terminated even according to Article 59(1) of the Vienna Convention on the Law of Treaties, which was promulgated under number 15/88 Coll. As another reason for the vacation of the abovementioned Award, the Plaintiff stated that the Arbitral Tribunal's conclusion regarding the Defendant having his permanent residence on the territory of the Federal Republic of Germany was incorrect. The Defendant is a natural person having Czech citizenship and permanent residence in the Czech Republic, therefore, he cannot be considered a German investor who would be protected by the provisions of the BIT.

The Defendant disagreed with the action and was of the opinion that pursuant to Sec. 15(1) of Act No. 216/94 Coll., on Arbitration and Enforcement of Arbitral Awards, the arbitrators were not authorized to decide in the case of their own jurisdiction. Furthermore, he especially objected to procedural errors that preceded the issuance of the challenged judgment, consisting of the fact that the court of first instance did not respond to the Defendant's request for proceedings to be held in his mother tongue. Therefore, the court breached the provisions of Sec. 18 of the Civil Procedure Code as well as the principle of equality of parties laid down in Article 96(1) of the Constitution and Article 37(3) of the Charter of Fundamental Rights and Freedoms.

The Defendant (as the appellant at the Municipal Court) also argued that the challenged judgment was at variance with Act No. 216/1994 Coll., on Arbitration and Enforcement of Arbitral Awards. Section 23 of Act No. 216/94 Coll. defines an arbitration award as a meritorious decision, while a resolution is defined as a decision of a procedural nature. Both decisions terminate arbitration proceedings. However, pursuant to Sec. 31 of Act No. 216/94 Coll., courts are competent to vacate arbitration awards only, not resolutions. Yet, Act No. 216/94 Coll. does not incorporate any provision which would admit the possibility to vacate such awards issued in arbitration proceedings, which are partial[21] (meaning an interim award) and not final. Consequently, the judgment of the court of first instance is based

[21] See e.g. Redfern, A., Hunter, M, Smith, M., Law and Practice of International Commercial Arbitration, Second Edition, London Sweet & Maxwell, 1991, p. 372 *et seq*.

on an erroneous determination of law in the case. The Appellant proposed that the Appellate Court vacate the challenged judgment and refer the case to the court of first instance for additional proceedings.

The Plaintiff disagreed with the Appellant's view that the Award on Jurisdiction could not be vacated within the meaning of Act No. 216/94 Coll. In the Plaintiff's view, the Arbitration Act does not determine which form of decision should be applied by arbitrators deciding in respect of their own jurisdiction, and thus we may infer that awards may be issued even in the case of procedural issues. Moreover, the Czech-German BIT, in accordance with which the arbitrators proceeded, leaves the form of the decision entirely up to arbitrators. In investment arbitrations, arbitrators proceed in three stages, where the first stage concerns particularly the issue of jurisdiction and the second stage may be proceeded to if arbitrators infer the jurisdiction. The Plaintiff referred to a decision of international arbitration which ruled that the arbitral tribunal had no jurisdiction to hear the case of PHOENIX ACTION, LTD. versus the Czech Republic, under file number ARB/06/05, as well as to decisions of foreign courts (e.g. British and Swiss courts) reviewing arbitrators' affirmative awards on jurisdiction. The judgments of Czech Courts (32 Odo 1528/2005, 32 Odo 217/2004, IV. ÚS 149/04) also allow the issuance of an interim arbitral award in the case.

The assertion of the Plaintiff (the Czech Republic) that the Czech-German BIT leaves the form of the decision entirely up to arbitrators comes probably from an interpretation of the last sentence of Art. 9 (5): "The tribunal shall also draw up its own rules of procedure". It would be interesting to find out whether and to what extent an arbitral tribunal can decide on all issues connected with the procedure. It is also unclear what the term "rules of procedure" should be understood to mean. Usually, such rules adopted by the tribunal itself do not mention the form in which particular decisions are to be rendered. Unless such a clear rule was adopted by the arbitral tribunal, one can hardly avoid the impact of *lex arbitri*, which in this case consists of Czech Law and mainly its Arbitration Act. It should also be noted that the Plaintiff's reference to the judgments of Czech Courts can lead to the conclusion that *lex arbitri* applies also in this case. If this was not the Plaintiff's intention, one can consider it to be a minor inconsistency in argumentation. Although, in practice, attorneys may tend to put forward any argument available. Some of these may seem counter-productive without a closer explanation.

(ii) Lack of Jurisdiction – Inadmissibility to set aside the Award on Jurisdiction under Czech Law

Similarly, as with the Judgment of the District Court, the Appellate Court seemingly dealt with two issues. As we can see from the reasoning below, the Municipal court omitted completely the issue of dual residency and dealt primarily with a new issue, i.e. the admissibility of setting aside the Award on Jurisdiction under Czech law as *lex arbitri*. Its response was as follows:

"Pursuant to Sec. 212 and Sec. 212(a) of the Civil Procedure Code, the Appellate Court reviewed the challenged judgment including the proceedings preceding its issuance, and pursuant to Sec. 214(2)(d) of the Civil Procedure Code, it did not order a trial in respect of the judgment itself. The Appellate Court concluded that the appeal was justified.

Pursuant to the provision of Section 103 of the Civil Procedure Code, anytime during the proceedings, the court may evaluate whether the conditions under which it may decide in the case (conditions of proceedings) are fulfilled.

Pursuant to the provision of Section 104(1), first sentence, of the Civil Procedure Code, in the case of an uncurable defect concerning a condition of proceedings, the court shall discontinue the proceedings.

Pursuant to the provision of Section 7(3) of the Civil Procedure Code, the courts try and adjudicate in other cases (apart from the cases determined in clause 1 and 2 of the abovementioned provision) in the course of civil proceedings only when a statute so provides.

Pursuant to the provision of Section 31 of Act No. 216/94 Coll., on Arbitration and Enforcement of Arbitral Awards, the circumstances under which an arbitration award may be set aside by the court upon application by a party include:

a) non-arbitrability of the subject matter of the dispute;
b) the arbitration agreement is void for other reasons, or has been terminated, or does not cover the subject matter of the dispute;
c) an arbitrator takes part in the decision who has not been named in the arbitration agreement or otherwise duly appointed to decide the dispute, or who lacks the capacity to be and to act as arbitrator;
d) the arbitration award has not been adopted by a majority of arbitrators;
e) the parties have not been given the opportunity to present their case;
f) the award contains an order against the losing party for relief not claimed by the winning party, or the performance of which is impossible or illegal under domestic law; or
g) the court is satisfied that there are grounds on which it would be possible to apply for a new trial in civil proceedings.

Within the meaning of the abovementioned provisions, the court of first instance did not proceed correctly when it decided on the merits of the action without considering the issue of its jurisdiction to try and adjudicate in the case. It follows from the contents of the Award which is the subject-matter of the proceedings (and in this respect the parties were in agreement) that its purpose is an evaluation of the procedural issue relating to the arbitration dispute initiated by the Defendant, i.e. the affirmative evaluation of the arbitrators' jurisdiction to try and adjudicate in the case as well as other procedural decisions related to this conclusion (dismissal of the decision to stay the proceedings, dismissal of the order on costs and expenses, dismissal of the request for a preliminary ruling). In the abovementioned Award, the

arbitrators did not deal with the case itself, not even with the basic facts. Therefore, it is not apparent whether the Defendant's claim, based on the allegation that the Czech Republic breached its duty to protect his investments, is substantiated or is unsubstantiated in the arbitrators' view. The judgment, the vacation of which the Plaintiff seeks, deals only with the existence of the arbitrators' jurisdiction to try the case and thus, in terms of its content, it is a procedural decision rather than a meritorious decision which would potentially be regulated by the provision of Sec. 31 of Act No. 216/94 Coll. Czech courts are not authorized to review a procedural decision regarding the fact that arbitrators have jurisdiction, as it follows from the abovementioned provision of Sec. 31 of Act No. 214/94 Coll., as amended, in conjunction with Sec. 7(3) of the Civil Procedure Code, that this concerns an exhaustive list, one not permitting an expansive interpretation. If the Czech legal order proceeds from the principle that, except for exhaustively stipulated exceptions, arbitration proceedings are in principle non-reviewable by a court, it must be concluded that Czech courts do not have jurisdiction to vacate a procedural decision regarding arbitrators' jurisdiction. The conclusion is in no way altered by the circumstance that the interpreter translated the Award as "nález", while the Act on Arbitration and Enforcement of Arbitral Awards (Sec. 23(a) in conjunction with Sec. 30 of the Civil Procedure Code) reserves this term for meritorious decisions, not for procedural decisions. Although the international arbitrators issued the aforementioned Award in Prague, as far as the procedural measures and decision-making are concerned, they apparently did not follow the cited Arbitration Act but complied with the BIT concluded between the former Czech and Slovak Federative Republic and the Federal Republic of Germany regarding the Promotion and Mutual Protection of Investments, which was published under number 573/92 Coll. This BIT leaves the procedural measures, including the application of concepts of law, up to arbitrators [see Article 9 (5) last sentence of the BIT]."

The abovementioned conclusion of the Appellate Court regarding the lack of jurisdiction is in accordance with the judgments of Czech courts that the Plaintiff refers to in his statement, as these judgments have always dealt with arbitrators' jurisdiction in arbitration proceedings in connection with the case itself (at least as far as the basic facts are concerned). From the point of view of the jurisdiction of Czech courts, the other reference of the Plaintiff to judgments of foreign courts is not relevant. With respect to the Plaintiff's objection according to which its petition should be tried on the merits and that it should be determined that such a decision would be in accordance with the principle of procedural economy, it must be stated that this principle itself may not extend the statutory determination of jurisdiction stated in Sec. 7(3) of the Civil Procedure Code. To summarize, it may be stated that a court does not have the jurisdiction to try an action by which a plaintiff seeks the vacation of an arbitration award by which it was decided only in respect of arbitrators' jurisdiction and not on the merits of the case. As far as the aforementioned procedural conclusion regarding the lack of the court's jurisdiction

is concerned, it was redundant to deal with the further objections of the Appellant regarding the breach of his right to proceedings in his mother tongue, including his meritorious objections."

On the grounds of all of the abovementioned reasons, the Appellate Court proceeded pursuant to Section 219(1)(a) of the Civil Procedure Code and vacated the challenged judgment due to the lack of conditions required for proceedings (i.e. the court's jurisdiction) which cannot be cured, and discontinued the proceedings pursuant to Section 221(1)(c) of the Civil Procedure Code.

It can be added that the above mentioned reasoning, which can be criticised as purely formalistic, played, without any doubt, a decisive role in the Appellate Court's deliberations.

(iii) Czech-German BIT terminated by accession of the Czech Republic to the EU

The second issue dealt with by the court concerned the validity of the BIT. The court cautiously expressed its view about the issue and as far as real reasoning is concerned, its remark gives the impression of being more on the order of *obiter dictum*.

"As far as the possibility to submit a dispute to arbitrators is concerned, the BIT is in the Appellate Court's view valid and effective, as it has so far been a component of the valid legal orders of both states and is not in violation of EC law on court jurisdiction, which does not expressly refer to international arbitration [see Article 1(d)(ii) of Council Regulation (EC) No. 44/2001], however, it respects its existence [Article 25 of the Preamble of Council Regulation (EC) No. 44/2001]."

It is probably worth mentioning that accession to the EU does not of itself automatically terminate BITs with third States, as is stated in Article 351[22] TEU (former Article 307 TEC ex Article 234).[23]

The above-mentioned Article 351 TEC lays down a rule for resolving conflicts between treaties concluded among EU member states and treaties concluded with third states. The TEU should be given total priority over other international contractual obligations of member states; however, as can be exemplified by BITs, it probably does

[22] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal EU 2008/C 115/47.

[23] *The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.*
To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.
In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

not mean that arbitration tribunals cannot decide on a breach of bilateral investment treaties in investment disputes and it is not at all certain whether such an opinion will be shared by investment tribunals.

In relation to third states, the situation is quite different and it is obvious that Article 351 (ex 307, ex 234) does not imply any priority of the TEU. If this is the case of treaties concluded by member states with third parties before the TEC or TEU became binding on them, both the cited provision and the consistent case law of ECJ imply that these treaties have priority over obligations under EU law. From the point of view of the considered matter, it is clear that the outcome of a potential investment dispute may differ substantially depending on whether the investor comes from an EU member state or from a third country. Under certain conditions, even an owner of a legal entity incorporated in one of the EU member states, even though himself a national of a third country, could sucessfully claim compensation for devaluated property.

Concluding Remark

What to add? In the end, irrespective of all the shortcomings or inconsistencies one can find in the commented reasoning of Czech Courts in the Binder case, it has to be admitted that it was not that bad. The decisions of both courts reflected possible views. At least the judicial system in the Czech Republic proved to be as impartial as one would expect in a democratic state.