



AD HOC ARBITRATION

CME CZECH REPUBLIC B.V. V. THE CZECH REPUBLIC

DISSENTING OPINION OF JAROSLAV HÁNDL (PARTIAL AWARD)

13 September 2001

Tribunal:

[Jaroslav Hándl](#) (Appointed by the State)

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Dissenting opinion of Jaroslav Hándl (Partial Award)

I. Introduction

- [1]. So far in this Dissenting opinion the expression "two arbitrators" is used thereby are meant the arbitrators Dr. Kühn and Mr. Schwebel.
So far in this Dissenting opinion the expression "Award" is used thereby is meant the Partial Arbitration Award in this arbitration case.
- [2]. Against the Award I have a lot of reservations, partly as to the facts mentioned there, but especially as to the legal conclusions.
The mistakes and errors in the legal conclusions have been caused basically by the fact that the two arbitrators seem to have firstly agreed upon the final decision as it is expressed in the Award and only thereafter they looked for the arguments to the favour of the Claimant. The basis of their decision was, and this was their only target, to condemn the Czech Republic and the two arbitrators adapted all their legal conclusions to this target. This is one of the reasons why their conclusions are wrong to a great extent.
- [3]. My above point of view is based not only on the wording of the Award, but also on their partial standpoints expressed during the proceedings.
- [4]. Principally the parties to this dispute did never have an equal position.
As an example I would like to point out the standpoint of these two arbitrators to requirements of the parties for written evidence to be presented by the counterparty.
- [5]. These two arbitrators gave the express consent to the requirements of the Claimant /several pages/ though there was not proved the so called materiality of evidence required by the IBA Rules on the taking of evidence in international commercial arbitration. This conclusion was drawn against my vote of minority.
- [6]. On the other hand, all requirements of the Respondent for documents to be presented by the Claimant, with the exception of one document /ICC Arbitration Award case CME v. Železný, which however had been published on the internet earlier and thus known to the public/, were rejected by the two arbitrators contrary to the opinion of mine that I expressed during the internal discussion of the arbitrators. These rejected documents referred above all to illegal steps of the Claimant in obtaining confidential information, especially about preparing steps in this arbitration within the Media Council, through a private investigator company, this information came from an informant within the Media Council. By this negative decision the two arbitrators practically helped to the Claimant to continue this illegal practice, to the detriment of the Czech Republic. Naturally

the Respondent insisted on his requirement and asked the Tribunal for the fairness, equality of arms and due process in these proceedings that the two arbitrators have not rendered to him. The Respondent had no processual defence against such discriminatory handling of him and therefore he has only declared that he continues to participate under protest, reserving however his rights. Further legal conclusions are in Art. XI. of this Dissenting opinion.

- [7]. The two arbitrators took the same attitude towards the document presented by the Respondents called the "Czech Plan". This was a document elaborated by people of the Claimant concerning preparations of CME/ ČNTS to take over the broadcasting operating of TV NOVA illegally by force. This important document has not been evaluated in the Award at all.
- [8]. That my above conclusions are right can be seen also from the Award. In the Award the two arbitrators again unilaterally accept all standpoints of the Claimant and reject any argument of the Respondent. It can be very hardly believed that any of the arguments of the Respondent would be so weak as to be rejected without giving convincing reasons for the rejection. The same standpoint of two arbitrators can be seen in evaluating the witness statements by the two arbitrators. In the Award there can be found no single negative statement as to the evaluation of witnesses presented by the Claimant, but this was not the case as to the witnesses presented by the Respondent.
- [9]. Furthermore according to IBA Rules on the taking of evidence in international commercial arbitration, applied in these proceedings, the witnesses should be heard as witnesses of the facts. Also this principle was not observed above all by Dr Kühn, who permitted to the witnesses nominated by the Claimant to present their opinions to individual legal questions, e.g. as a witness was heard the attorney at law of the Claimant, who presented his legal opinions. Dr Kühn also had no objection as to the leading /suggestive/ questions of the Claimant and of Mr. Schwebel put to the witnesses though I have drawn his attention to this fact.
- [10]. The fact that the two arbitrators pointed out in the Award only the "Authorities" presented by the Claimant, without mentioning that the Respondent presented also his "Authorities" is only further evidence of the unilateral way the two arbitrators prepared the Award. As far as the problem of judgments cited in the Award is concerned, I have ascertained later on that both arbitrators collaborated very closely also in this sphere of supporting documents, without informing me. This could be also seen from the fax of Mr. Schwebel to Dr Kühn of 29.8.200, where Mr. Schwebel informed Dr Kühn that he arranged sending of the original pages of FEDEX decision to Dr Kühn. Again without informing me at all and contrary to the principles of relations among the arbitrators, which are always observed in European arbitration. I have never been given an occasion by Dr Kühn to present authorities and/or judgment that I know and that are in connection with the case.
- [11]. Naturally the two arbitrators for smooth reaching of their above described target did not need any internal opposition in preparing the Award. Already during the proceedings this was the practice of Dr Kühn to discuss a lot of questions only with Mr. Schwebel without informing me, though this is basically against the ethics of the arbitration. The Chairman should inform one arbitrator about all his contacts and discussions with the other arbitrator. This violation of this principle by the Chairman was e.g. quite evident during the hearing in Stockholm, where three times he discussed with Mr. Schwebel processual matters and never informed me about the contents of their discussion

though I have asked for it.

- [12]. Most striking was the situation as to the preparation of the Award. During preparing the Award Dr Kühn several times, e.g. yet in June, what he conceded himself, contacted Mr. Schwebel and in a telephone conversation, a short time ago, he confirmed me that it was to my disfavour that they /both arbitrators/ could work on the Award earlier than me, this is again an inequality of the positions of the arbitrators.
- [13]. And thereafter the hostile steps of these two arbitrators against me came to a head. I have obtained the draft of the Award on 30.7.2001, amounting to 175 pages. I have asked for enough time for preparing my standpoint /about fourteen working days/ and this was rejected by both arbitrators, asking me to give my standpoint "now", with the argument that any discussion as to the merits of the case was closed at the meeting of the arbitrators in Duesseldorf in June 2001. This was absolutely untrue, as in Duesseldorf there has not been reached any arbitrators' decision saying that the discussion was closed there. The only conclusion done there was that Mr. Schwebel and me would obtain the draft of the Award for our comments. The same idea was also expressed in the Chairman's letter of July 30, 2001, when he sent to the Arbitrators "the Partial Final Award for your review" and for response and suggestions.
- [14]. This has been done by them only for the reason to exclude me from any discussion as to the merits of the case itself, contrary to the customs and ethics of the arbitration proceedings.
- [15]. After all I had no more time for preparing my standpoint to the draft of the Award than 5 working days. Naturally it was for me not possible to give my comments to all important questions and details of these questions mentioned in the draft. The above described circumstances are an unequivocal proof of discrimination of my person as arbitrator by the other two arbitrators.
- [16]. The above lines are written to illustrate the basis on which the two arbitrators created their standpoints, always negative towards the Czech Republic.
- [17]. Hereunder I point out my comments to some principal questions of the Award.

II. Investments - application of the Treaty

- [18]. This problem should be divided into two questions:

a/lack of jurisdiction -

- [19]. Principal question is, whether the objection of lack of jurisdiction has been put forward by the Respondent in time, i.e. in the Statement of Defence, in conformity with the Art.21/4 of the Uncitral Rules.

- [20]. My opinion is that this objection has been put forward duly and in time in the Statement of Defence also as to the investment of CEDC. In this respect reference is made to following points of the Statement of Defence:
- point 11 - no assets invested by CME in the Czech Republic as defined in the Treaty, i.e no Dutch investments,
 - point 202 - no investment dispute under the Treaty,
 - point 204 - investments - no investments with rights under the Treaty, here is mentioned CEDC.
- [21]. The only conclusion is that it was expressed in the Statement of Defence that the investment does not fall under the Treaty and CEDC has been mentioned. This is sufficient as raising such an objection of lack of jurisdiction.
That this objection has not been repeated later on is not decisive.
- [22]. Even on this basis the claim should have been dismissed on the beginning of the proceedings. Contrary to my opinion the two arbitrators postponed the decision as to this question to the end of the proceedings in spite of the fact that reply to such question is basic for further proceedings.
- [23]. Conclusion to this point a/: the Claimant's claim should have been dismissed due to the lack of jurisdiction of this Tribunal for deciding this dispute.

b/question of applying the law of the Treaty as legal basis to be applied, i.e. whether the Dutch Treaty or the German Treaty should be applied -

- [24]. Firstly the basic question, whether and to what extent CME is an investor according to the Netherlands - Czech Treaty should be answered.
- [25]. It is without any dispute that the initial investment that is initial capital contribution to the basic capital of ČNTS was made by CEDC, the total investment of CEDC can be ascertained from the Assignment Agreement CEDC - CME Media Enterprises B.V. dated July 28,1994 in the amount of 264 million Czech Crowns. Further there is no dispute about the fact that Central European Development Corporation Management Services GmbH /i.e. CEDC/ was a German company registered in Federal Republic of Germany. Naturally it is not relevant from where the respective money came, but who, i.e. which investor has brought the money and this was without any dispute CEDC, also according to the allegations for the Claimant.
- [26]. The argument that the investment done by CEDC was the investment of CME done through CEDC, i.e. through an investor of a third state is ill-founded. CEDC physically itself has done the investment and was accepted as investor by the Media Council, in 1993 nobody declared that this is an investment done on behalf of a third person. It results also from the wording of the Assignment agreement, point 4 CEDC shall assign - i.e. the original was not investment of CME/, point 5 /CME

accepts the assignment and shall take over the capital interest - should the original investment be the investment of CME this would be without any legal significance/.

- [27]. It is really a legal absurdity to allege that the investments of CEDC done in 1993 are the investments of CME done through CEDC, as from the document presented by the Claimant in these proceedings it can be clearly seen that CME Media Enterprises B.V. was duly constituted /came into existence/ by registration in the Netherlands on 4.8.1994. CEDC could not have done the investments in 1993 on behalf of a company that did not exist at that time.
- [28]. CEDC as legal person does not comply with the prerequisites of Art.1,para b/,point (ii) of the Netherlands - Czech Republic Treaty, stating that the term "investor" shall comprise "legal persons constituted under the law of one of the contracting parties".
- [29]. It is therefore clear that the investment done in 1993 was an investment done by CEDC as a German company and therefore cannot be protected by the Netherlands - Czech Republic Treaty.
- [30]. Also it would be against the sense of the Netherlands - Czech Republic Treaty to make the application of the Treaty in the sense explained in the Award.
- [31]. That the above conclusion is right, is confirmed also by the following example:
- [32]. The Czech Republic has no such Treaty e.g. with Bolivia. A legal person from Bolivia would make an investment in the Czech Republic and later on for certain complication would find as necessary the protection by a BIT. It would assign its right based on the investment to e.g. a Dutch company to reach such protection on the basis of the Netherlands - Czech Republic Treaty. This is not legally acceptable, it is circumventing of the law. This would be against the basic conception of a bilateral treaty concerning protection of investments done only and exclusively by persons from the state, participant of the Treaty.
- [33]. It should be repeated that the conclusions contained sub b/ are conclusions referring to the legal basis of claims of the Claimant, i.e. this is not the question of jurisdiction, but the question of application of material law, i.e. application of the law of the Treaty by which the relations should be governed. So the judging of the investment of the CEDC should be done according to the German - Czech BIT and not on the basis stated in the Statement of claim, i.e. on the basis of the Dutch - Czech BIT.
- [34]. Conclusion to this point b/: the claim so far it is based on the investments done by CEDC should be dismissed as legally unfounded, since the claim raised by the Claimant has been expressly based on the Netherlands - Czech Republic Treaty and this Treaty cannot be applied as legal basis of the claim. In addition to the above it should be stated that in case that the Award would contain a decision as to the investments of the CEDC, as a German company, such decision would not be enforceable, this opinion being based on provision of Art. V, point 1/b/ of the New York Convention 1958, where it is expressly stated that the enforcement of the award may be refused if the award contains decisions on matters beyond the scope of submission to arbitration. The scope of submission to arbitration in this case is given by Art. 8,point 1. of the Treaty that the disputes must be between one contracting party and an investor of the other contracting party, i.e. the Dutch investor as to Dutch investments

versus the Czech Republic.

[35]. Some additional remarks to this part of the Dissenting opinion:

As far as further alleged investments done by CME Media Enterprises B.V. and CME Czech Republic B.V. are concerned the burden of proof is to be borne by the Claimant, on the basis of the old principle "onus probandi incumbit actori" and it must be stated that the Claimant was not able to bear this onus.

The declaration of the witness Mr. Klinkhammer about investments in the amount of USD 140 million was in this respect very foggy. The addition of the individual items of the investments mentioned in the Award does in no case result in USD 140 million but also these items have not been proved. The Claimant would have to prove by documents all details concerning such investments, how he has carried out the investments, i.e. when, in which means /monetary or how/, in case of transferring money with proofs about such transfer etc. This has not been done and proving it is purely an obligation of the Claimant, since it is not the task of the Tribunal to invite the party to prove its allegations. There was therefore no further investment proved by the Claimant. It is very regrettable for me to state that instead of taking into consideration the proofs as the basis for decision, the two arbitrators take as proof what the Claimant only declares.

The fact whether the declaration of Mr. Klinkhammer has been challenged by the Respondent or not is of no legal importance for the decision of the arbitrators as in conformity with the UNCITRAL Rules it is really only the Tribunal that determines the materiality and weight of evidence, I repeat only that the allegations of the Claimant are no proof, as it was accepted by the two arbitrators..

[36]. The Award tries to make the impression that all the Bilateral Investment Treaties /BITs/ all over the world are the same. This does not correspond to the facts, two BITs only as examples should be mentioned as follows:

German - Czech BIT of 2.October 1990 does not contain a provision that the investment can be done through an investor of a third state,
expenses of the member of the Tribunal bears the party that has nominated this member,
Chairman of the Tribunal must be from a third state and approved by parties,

USA - Czech BIT - does not contain a provision concerning making the investments through investor from a third state,
proceedings can be instituted in case that the respective national or company /investor/ has not brought the dispute before the courts of justice or administrative tribunals of competent jurisdiction of the Party that is a party to the dispute.

[37]. In addition thereto none of the above mentioned treaties does contain a provision similar to Art.8, point 6 of the Netherlands - Czech Republic Treaty, concerning the question, which law or treaties should be taken into account in case of a dispute.

III. Assignment of investments

[38]. In connection with this problem I would like to stress that the Award contains some statements that do not correspond to facts of the case.

[39]. Firstly some data as to the companies involved:

Central European Development Corporation Management Services GmbH /further only CEDC/ is a company registered in Germany. i.e. a German Company. This company took part in negotiations in 1992, so it must have been constituted somewhere in 1991.

Central European Enterprises N.V. is a Lauder company registered in Dutch Antilles and this company was the only shareholder of CME Media Enterprises B.V. registered in the Netherlands in Amsterdam. This company CME Media Enterprises B.V. was in 1997 the only shareholder of CME Czech Republic B.V. and from the year 2000 the only shareholder of CME Czech Republic B.V. was the CME Czech Republic II B.V., the only shareholder of which was CME Media Enterprises B.V.

[40]. On the basis of the above facts it must be stated that there was no proof that CEDC has been a parent or affiliated company of CME at the time of signing the Assignment Agreement dated July 28, 1994. The declaration in point 3/ of this Agreement done by CEDC and CME is therefore false. Naturally the reason of this declaration was to avoid the necessity of approval of this transfer of shares by all of Partners and the Media Council according to MOA 1993.

[41]. As this declaration is false the whole Assignment Agreement is null and void and therefore also the following Agreement on transfer of participation interest dated 21 May 1997 between CME Media Enterprises B.V. and CME Czech Republic B.V. is null and void. This legal situation must be respected by the Tribunal ex officio, because this is a statement as to the facts and not as to the legal arguments.

[42]. In addition thereto it must be taken into consideration that the first Assignment Agreement was signed in 1994, therefore at the time when the conditions, contained in the enclosure to the licence were valid, especially condition 17. According to this condition there was an obligation to submit to the Council for its prior consent any changes in the capital structure of investors. This has not been done.

[43]. The statement in the Award that immediately or shortly after the Assignment Agreement had been signed the Media Council was informed is not right. From the document No. R 126 it can be seen that the Media Council was informed about the legal succession CEDC - CME as late as it was done by the letter of CNTS of 23.7.1999 to the Media Council. This means naturally an official information that was then discussed in the Media Council.

IV. Memorandum of Association and Investment Agreement /further only MOA/

[44]. Before all as to the legal character it should be stated that this document has two legal meanings. Firstly it is a so-called partnership agreement for constituting a limited liability company concluded according to the § 57 of the Czech Commercial Code. Secondly it is the agreement of parties - signatories of this Agreement about the investments and the way how the TV station will be managed in future, i.e. by this newly constituted company.

a/MOA 1993

[45]. Irrespective of the arguments of any of the parties I present here my legal opinion based on the provisions of the Czech Law of mandatory character.

[46]. The legal basis of the Czech Law was the Czech Act No. 468/1991 on operating radio and television broadcasting /further only "Act"/ containing following provisions important to be mentioned here:

§ 11/3 - only the person applying for a licence is a party to the licence proceedings.

Comments: Only CET 21 according to the law, was and could be, participant in licence proceedings. Also in the licence conditions, being a part to the licence, CEDC and Czech Savings Bank were mentioned only as participants to the partnership agreement, i.e. to the MOA.

§ 10/1 - licence authorizes its holder to broadcast in the scope and under the conditions set in it.

Comments: this means that the licence does not authorize to broadcast any other person, only the licence holder.

§ 3/1 - broadcasting operator is that who obtained authorization to broadcast....by being granted a licence under this Act.

Comments: It was only and exclusively CET 21 that was authorized to broadcast. Naturally it cannot be seen from this provision, to what extent the broadcasting operator-licence holder has had the right to use other entities for assisting him to broadcast. But surely it was not allowed that all rights and obligations would be transferred to a third person.

§ 10/2 - Licence is not transferable.

Comments: Neither CET 21 had the right to transfer the licence to somebody that means to make such a legal step, through which CET 21 would lose all rights that make the contents of the licence and there is no doubt that the contents of the licence is the right to use it, exploit and maintain.

[47]. The above legal provisions lead to the conclusions in the case itself as follows:

CET 21 according to Art. 1.4.1 contributed as capital contribution to ČNTS the right to use, benefit from and maintain the licence, in other words brought the licence into ČNTS. According to the Czech Commercial Code the capital contribution becomes ownership of the company, i.e. ČNTS theoretically could be owner of the licence. But this is not valid as the licence is not transferable and according to §39 of the Czech Civil Code acts of law that are contrary to law are invalid /mandatory provision/.

Therefore the contribution of the licence as capital contribution to ČNTS was invalid. On the other side the company ČNTS was duly registered in the Commercial Register and therefore was duly constituted according to the Czech Law.

[48]. Anyhow after its constitution ČNTS started to work and to manage the TV station in conformity with the point D of the preamble to MOA and with Art. III. of the MOA, where it was expressly stated that the company ČNTS would operate the television station /i.e. TV Nova/.

[49]. Later on for confirming the status quo in the mutual relations between CET 21 and ČNTS, they concluded on 23.5.1996 the Agreement for specifying mutual rights and mutual obligations /i.e. before signing the MOA 1996/ and stated that:

- CET 21 is holder of the licence and operator of television broadcasting with the licence,
- the parties have based this on the fact that licence is non-transferable, therefore the rights and obligations arising under the licence are not subject of a contribution by CET 21 to ČNTS,
- there was confirmed exclusivity to the favour of the ČNTS
- economic results will be retained by ČNTS.

[50]. This agreement was signed by ČNTS, without any doubt as prolonged hand of CME, so also the Claimant confirmed the above conclusions as to the licence to be right. It should be also borne in mind that this agreement was signed on May 23,1996, i.e. before the date of signature of MOA 1996.

[51]. Conclusion:

It is a provision of the Czech Law being of mandatory character that the licence is not transferable. This must be respected by the Tribunal ex officio, this is the fact irrespective of the allegations of the parties. The license therefore could not come and did not come as capital contribution into the ownership of ČNTS. Therefore also later on such a situation that the licence would be transferred to any third person could not arise so that, from the time of granting the licence, this licence has remained in the hands of CET21.

[52]. But the above circumstances did not influence the fact that ČNTS was duly constituted by registration in the Commercial Register.

[53]. As far as the relations of CET 21 and ČNTS in operating the TV NOVA are concerned they were, have been and are till today governed by the MOA 1993 that is in validity till today. In spite of this fact the Claimant has never used this fact for starting legal steps against CET 21, he preferred to sue the Czech Republic.

[54]. It has never been proved that MOA 1993 would be concluded on the basis of coercion of the Media Council.

b/MOA 1996

[55]. Firstly the amendment of the Media Law through Act No. 301/1995. should be mentioned This during the proceedings very criticised Act did in no case change the legal position of the CME. There were two basic changes:

- replacing the word "licence holder" by "licensed broadcaster",
/this has in no respect changed the position of CET 21 towards ČNTS or CME/

- giving to the licensee /TV broadcaster/ the right to ask for cancelling of conditions set by the Media Council to him

/this refers in this case especially to cancelling of conditions 17. and 18. - the annulling of these conditions was above all to the favour of ČNTS and CME and was done in order to avoid any control and influence of the Media Council into the operating, managing and economic solutions within the TV Nova - it is probable that this change of law has been reached by lobbying of CME and ČNTS through Dr Železný, in no case did this mean any deteriorating of position of CME or ČNTS/.

- [56]. As far as the MOA 1996 is concerned it should be stated that the main reason was practically the same as the Agreement of 23.5.1996 that is only to confirm that the licence has not been transferred. For this reason it has been agreed with Dr Železný representing both CET 21 and ČNTS that the respective passage of MOA shall be altered in that respect that CET 21 contributes the right to use, make subject of the company's benefit, and maintain know-how related to the licence, its maintenance and protection. Further there has been agreed a new Art. 10.8 that stresses again the exclusivity to the favour of ČNTS as to the know-how and goes further as it forbids to CET 21 any disposal with the licence.
- [57]. I do not share the opinion of the two arbitrators that the transfer of rights to know-how means nothing. On the basis of the consultations with experts for intellectual property rights this kind of know-how means to collaborate with the other contractual party by handing over the immaterial know-how to the other party and in addition thereto to enable using of certain rights and to the other party to gain these rights fully legally.
- [58]. Anyhow it must be stated that also after the conclusion of the MOA 1996 during next three years it happened nothing negative to the disaster of the Claimant investment and both parties i.e. CET 21 and ČNTS continued in their cooperation. This is a further proof that the allegation about the negative influence of MOA 1996 has no real basis.
- [59]. But as to the MOA 1996 there is one important legal issue more. As the two arbitrators accepted the allegation of the Claimant that the MOA 1996 had been signed on the basis of coercion of the Media Council then the MOA 1996 is not valid, i.e. is null and void for following reasons:
§ 37, subparagraph 1 of the Czech Civil Code states expressly, as follows:
"Act in law must be done freely and earnestly, determinately and understandably, otherwise it is invalid."
- [60]. The commentaries to the above provision state that there results from the wording of § 37 of the Civil Code that a legal act is invalid, when not freely done. This invalidity is the so-called absolute invalidity, that means it must be respected by the Court *ex officio* irrespective whether any party to the respective dispute refers to this fact or not as that provision is of mandatory character. Naturally it means the invalidity *ex tunc*.
- [61]. The act in law has not been done freely, if it has been done under physical or psychical coercion.

The psychical coercion can be done through an illegal threat or through a threat that is legal, but that has been misused for reaching something that the other party would otherwise not have done or did not want to have been done. The coercion can come from the parties to the dispute or also from the part of a third person.

- [62]. As according to the allegation of the Claimant accepted by the two arbitrators the signature of MOA 1996 has been reached by coercion /including alleged but not proved danger of withdrawing the license/ the act of law done by CME, i.e. signing the MOA 1996 is invalid and therefore the MOA 1996 is invalid in whole, because without a valid signature of CME, as the majority shareholder /88% of shares/, the amendment of MOA 1996 is invalid, i.e. is null and void. Under the light of this fact the MOA 1993 must have remained in validity in 1996 and later on.
- [63]. The opinion of one of the arbitrators that the above provision must be taken into consideration by the arbitrators only in case when it is referred to by a party during the proceedings is erroneous. Firstly the arbitrators are not advisers to the parties and are not obliged and also not allowed to advise parties in dispute during the proceedings what they should submit, though some arbitrators do not always respect this principle. Secondly this provision is of mandatory character and therefore it must be respected by the arbitrators for the reason that such provision exists in any event.
- [64]. There exists a remark expressed in writing by Dr Kühn in an internal document that mandatory Czech law provisions supersede all other law rules, such provision should be ranked as part of the international and Czech "order public".
- [65]. Therefore if a provision of the Czech law of mandatory character is not respected, this means the violation of the Czech public order and the Award is under certain circumstances not enforceable with respect to the provision of Art.V,point 2.b/ of the New York Convention 1958.
- [66]. Conclusions:
- either there was no coercion from the part of the Media Council in that case the MOA 1996 has been concluded by all its signatories freely and is in validity and could not be the root of all evil, i.e. reason for alleged harm that the Claimant suffered,
 - or the MOA 1996 has been signed under coercion from the part of the Media Council as it is the conception of the two arbitrators, in that case the MOA 1996 is null and void, therefore it could not have been the reason of the harm that the Claimant suffered, as the Claimant alleged, and the MOA 1993 remains in validity till today.

V. Service Agreement of 21.5.1997

- [67]. Firstly it should be stated that there is no evidence that this Service agreement has been concluded under coercion from the side of the Media Council. General talkings and allegations, as well as very indirect reproductions of alleged coercion cannot replace the evidence necessary to be brought in arbitration proceedings to prove such allegations.

- [68]. Secondly this Service agreement does not contain any substantial change, as to the relation between the parties CET 21 and CME that have been based on the MOA 1993. This Service agreement was only continuation of contractual anchoring of relations between CET 21 in the agreements of 23.5.1996 and of 4.10.1996.
- [69]. In the Service Agreement it was repeatedly agreed that CET 21 is holder of the licence and broadcaster and that the licence is not transferable. The original exclusivity has not been touched.
- [70]. Further it was agreed that ČNTS would arrange the service to the television broadcasting and will acquire the economic results.
- [71]. Naturally the practice of all the years has been observed, i.e. ČNTS after collecting all revenues paid the salary of the secretary of TV NOVA and Dr Železný obtained monthly CZK 100,000,-.
- [72]. There is one proof that this Service Agreement has been concluded absolutely freely between CET 21 and ČNTS. This is the letter of ČNTS of 13.7.1999 /presented in these proceedings/ prepared evidently by Dr Radvan, who, jointly with Mr. Vávra also signed it. This letter contains detailed description of relations CET 21 and ČNTS partly with respect to the Service Agreement and it is clear from this letter that the Service Agreement contains free conception of the ČNTS without any coercion from the part of the Media Council. And stress should be laid upon the fact that this is a letter of ČNTS, i.e. expressing the facts declared by ČNTS as right facts.
- [73]. For the true description of all circumstances it should be stressed that the only reason for the arbitrary termination of this Service Agreement by Dr Železný, whereby any harm to ČNTS have been caused, was the alleged violation of this Service Agreement from the side of ČNTS. As to this termination there was not produced any evidence during the proceedings proving that the Czech Republic - the Media Council compelled Dr Železný to do it or contributed in any way to this termination. This step was a step done freely and exclusively by Dr Železný for the good order's sake it should be mentioned that there was no connection between this termination of the Service Agreement by Dr Železný and the MOA 1993 or MOA 1996.

VI. Administrative proceedings against ČNTS

- [74]. Firstly it should be generally stated that according to the § 20, point 6 of the Media Law the Media Council shall impose a fine on a person that operates the broadcasting without having the right to do so.
- [75]. As this starting of these proceedings is in the Award interpreted as unacceptable coercion from the side of the Media Council it is necessary to state the exact facts and legal conclusions in order to put the things right, as follows:

- that the administrative proceedings were started according to the Czech Code of

Administrative Proceedings, i.e. before such proceedings are terminated no legal consequences of such proceedings exist, therefore starting such proceedings cannot be considered as a kind of pressure upon ČNTS,

- in case that these proceedings are terminated without final decision it means that it is a situation as if nothing happened, this principle is the same all over the world both in civil and administrative proceedings and criminal proceedings,

- the only reason of starting proceedings was the suspicion of the Media Council that ČNTS realises the TV broadcasting without authorisation, in no case the object of these proceedings was an attempt or intention of the Media Council to withdraw the licence from CET 21 and this was also never mentioned in any official document of the Council, this has never been proved and allegations in this respect are a pure phantasy of some persons around ČNTS and CME,

- for the above reasons this starting administrative proceedings and closing them without any final decision, i.e. only stopping the proceedings could in no case be a reason for a damage allegedly caused to ČNTS/CME or evidence of violating the Treaty by the Czech Republic /discrimination/,

- the administrative proceedings were stopped on the basis of the conclusion that everything had been brought into order in conformity with the law.

[76]. That the above lines are right results also from the decision of the Media Council of 16.9.1997 concerning the stopping of these administrative proceedings, where it was expressly stated that ČNTS removed all inadequacies.

[77]. In addition to the above it should be stressed that there was no danger that ČNTS would have to pay any fine as the Media Law has fixed a time bar for imposing the fine, either one year from ascertaining the violation or two years from the time when the violation occurred. Both time limits have elapsed at the time when the proceedings were commenced.

[78]. But ČNTS preferred not to fight the case in spite of surely successful result and accepted the stopping of the proceedings with the intention to have argument for alleged coercion of CME from the part of the Czech Republic.

[79]. Conclusion:

The starting of these proceedings was no illegal deed of the Media Council, it was based on suspicion that ČNTS carries out the television broadcasting without having the right to do so. This was mainly based on the fact that ČNTS had registered in the Commercial Register as object of business activities the television broadcasting on the basis of the licence granted to CET 21 /number of licence granted to CET 21 mentioned/.

Other reason was transfer of all broadcasting activities into the hands of ČNTS, because it meant the transfer of the licence. After everything has been brought in order according to the requirements of the Media Council the proceedings have been stopped. These are the facts and all these rumours about the coercion are talking about unproved allegations. As from the time of starting these proceedings till to the time of stopping them there was never proved that at

any stage of these proceedings there would be a danger of withdrawing the licence held by CET 21.

VII. Letter of the Media Council of 15.3.1999

[80]. I think that it would be of no sense to make analysis of this letter line by line. Anyhow I think it is necessary to mention hereunder some points to this letter, as this letter is one of the main pillars that the Claimant has used for supporting his claim.

[81]. As to this letter the following points should be taken into consideration:

a/ according to the Czech Law the Media Council decides only in form of s.c. Administrative Decisions according to the Administrative Proceedings Code, only such decision is enforceable, however this letter was not such a decision., i.e. was not enforceable.

b/if this letter should have a legal significance it would have to be so that this letter should contain a resolution of the Media Council, i.e. interpreting of an opinion of the Media Council, as a whole, but such a resolution could come into validity only after voting in the Media Council, but this letter did not represent any resolution of the Media Council at all as no such resolution had been reached,

c/ this letter did not contain any decision directed against CET 21 or ČNTS/CME, this letter did not impose on CET 21 any obligation to do something, further the Media Council had no right to impose anything upon ČNTS since ČNTS was no legal partner towards the Media Council,

d/ when the Media Council expressed the opinion about the non-exclusive basis between the broadcaster and the service companies, this formulation surely did not mean to state, what is now wrong and what should be changed, as on the next page of this letter the Media Council states that everything has been put in order, no matter whether it was so or not, this is of no importance, since the most important fact was that the Council was content with the actual stage of things and relations.

[82]. Whether this letter has been written on the basis of initiative of Dr Železný or not is of no importance, since once more it should be repeated that from the legal point of view this letter has no legal consequences, as this letter does not represent a legally formal decision of the Media Council in conformity with the Administrative Proceedings Code.

[83]. Further it should be added that the letter of the Media Council was addressed to Mr. Vladimír Železný as executive of CET 21, as its partner - holder of licence, but at that time he was still managing director of ČNTS, so ČNTS was officially informed. But anyhow ČNTS and CME formally were not and could not have been partner to the Media Council and I repeat that therefore the Media Council had no right to order them what to do and what should not have been done. Only should the Media Council ascertain that ČNTS and/or CME violated the Media Law, Media Council could start administrative proceedings against them, but this was not the case.

VIII. Violation of the Treaty

[84]. Firstly I would like shortly to comment the decisions and/or authorities presented in the Award as follows:

- the proceedings and the Award are not in the sphere of the Anglo-American law and therefore the Tribunal is not bound by these decisions and, in addition thereto, these also cannot be considered as "international law", the s.c. authorities represent opinions of the individual persons, also this cannot be considered as international law, there are opinions always to the contrary and the opinions and judgments cited in the Award are often very far from the problems to be solved in this dispute,

- these decisions, so far I could ascertain, do not, as to a great part of them, refer to problems of BITs,

- great part of them are decisions presented by the Claimant, none of them has been presented by the Respondent, on the other hand decisions and /or authorities presented by the Respondent contrary to those presented by the Claimant are left without any comments, this is again an example of non-equal handling of the Respondent by the two arbitrators.

[85]. Individual points of the alleged violation of the Treaty:

a/ - depriving the Claimant of its investments - the Claimant has never been deprived of its investment, from the facts ascertained in the proceedings it results that the only investments ascertained and proved are investments for which the Claimant obtained the shares, the Claimant is owner of the shares till today, he has never been deprived of them, in case that the shares lost partly their value this is the question of claim for damages and not based on depriving,

as far as the alleged expropriation is concerned, it should be taken into consideration that the alleged expropriation occurred on the Territory of the Czech Republic and should be judged according to the Czech law /there is no reason for application of the international law/, but an expropriation by the State can occur in the Czech Republic only on the basis of an Administrative decision by the respective state body on the basis of Administrative proceedings, nothing like that happened,

b/ - fair and equitable treatment - in the commercial disputes there are considered as unfair treatment such steps that are contrary to customs of fair businessmen and/or that are contrary to bonos mores, here in the whole case one cannot find any step of the Media Council that would be contrary to customs of fair business relations or that could be considered to be contra bonos mores,

non-equitable treatment would be if the ČNTS/CME would be by acts of the Media Council or other Czech official body handled in a worse way that it was with the Czech citizens, but this never happened and has not been proved,

c/ - discriminatory measures - it is necessary to point out here the definition of the discrimination according to the Great Encyclopedia of 1999 as follows: "discrimination means intentional disadvantaging by creating non-equal economic, political or legal conditions", in this case no disadvantaging of the foreign investor has been proved, neither economically, nor

politically, nor legally, because disadvantaging would mean to create for the foreign investors worse conditions than for the Czech ones.

This is supported by the following :

Question: After CME has bought from the Czech Savings Bank the shares in the ČNTS, had CME worse conditions than the Czech Savings Bank?

Naturally the answer based on the facts is "No".

No discrimination in comparison with the Czech company has been proved.

d/ - full security and protection - the Media Council never violated the Czech Law in non-rendering the full security and protection to the foreign investor, to draw such a conclusion is really paradoxical in comparison with the official policy of the Czech Republic that invites as from 1989 the foreign investors to the Czech Republic giving them not disadvantages but great advantages in comparison with the Czech companies, therefore it is absolutely far from reality to allege that the only target of the Media Council was to make harm to a foreign investor. And once more I would like to lay stress upon on the fact that none of the above conclusions is based on official decisions of the Media Council, always it is based on the allegation that somebody has somewhere heard something or that somebody quite unofficially has written something.

- [86]. But with respect to the conclusions mentioned hereunder and supported by certain parts of the Award stating that Dr Železný was originator of the wrongdoing it should be added here that the alleged violation of the Treaty by the Czech Republic, if any, could only contribute to the arising of damage. This opinion is supported by the wording of the point 408. of the Award that "the Arbitral Tribunal is aware that it may well be that a variety of circumstances may have caused the deterioration of the Claimant's investment".
- [87]. In addition thereto this opinion is supported by citing of the standpoint of the U.N. International Law Commission in the point 583 of the Award, where it is expressly stated that the decisions of international tribunals do not support the reduction or attenuation of reparation of concurrent causes, except in cases of contributory fault.
- [88]. Exactly "this is the case, as also from the Award it results that principal tortfeasor was Dr Železný declared in the Award several times as "originator" and therefore on the side of the Czech Republic there can be only "contributory fault", if any.
- [89]. In addition thereto the above opinion is supported by the statement of the CME in the ICC dispute, cited in the ICC Award on page 40, point 119. that "Dr Železný's actions to replace ČNTS with AQS, Czech Production 2000 and MAG Media 99 had almost caused the complete destruction of ČNTS. Dr Železný breaches of his non-compete and non-solicitation obligations had had the effect that ČNTS currently provides no services to TV NOVA or any other station."
This ICC Award must be taken in consideration, as it was presented in these proceedings as evidence.

- [90]. To this point it should be stated that the Award speaks several times of non-actions of the Media Council as violation of the Treaty, but is not in a position to point out what actions should the Media Council have done i.e. in which points the Media Council caused something by non-doing something that would be expressly defined as belonging to its obligations /with the exception of alleged obligation to withdraw its letter of 15.3.1999 that would have no legal significance/.
- [91]. Further there should be made here the analysis of the law to be applied as follows:
The Treaty states the following sequence of legal provisions to be applied:
- Czech Law
 - the respective Treaty /BIT/ and other Treaty between the same states
 - special agreements relating to investments
 - international law.
- [92]. It is without any doubt that the sequence of the legal provisions has been fixed by both states - partners to the Treaty intentionally. Therefore primarily the Czech Law should be applied. But it must be stated that the two arbitrators do not take this fact into consideration and apply only the international law and only those parts that are convenient for the Claimant, absolutely non-respecting the Treaty and consequently the provisions of the Czech law.
- [93]. In addition to the above it is important that in the Award there are not respected the mandatory provisions of the Czech Law. Further certain conclusions of the two arbitrators mean that they try to force the Czech Republic - Media Council to nonrespecting of the Czech Law. These both contingencies mean not only a serious violation of the Czech legal system, but especially violation of the Czech public order.

IX. Circumstances of alleged harm suffered by the Claimant

- [94]. It is without any doubt that Dr Železný was the main personality in this case. In addition thereto it should be stated that the company CET 21 that obtained the licence for television broadcasting was fully managed and controlled by him. For the starting of the TV broadcasting he needed financing and therefore he went into relation with company CEDC GmbH. Then CET 21 and CEDC created the company ČNTS.
- [95]. The great fault of CEDC and later on also CME was that Dr Železný became the leading and deciding personality in CET 21, as well as in ČNTS. In this way CME fully lost any control over anything that happened in connection with TV Nova. But this loss of control has not been caused by the Media Council, ground to this loss of control was the decision of CME based on its free own will to appoint Dr Železný. The basis thereof were the decisions of the organs of the CET 21 and ČNTS as two companies fully independent of the Media Council in this respect as legal bodies. Naturally this has been used by Dr Železný positively for himself.

[96]. During these proceedings then CME has tried to clarify its apparent inexperience in the commercial enterprising by allegation, how far CME did trust to Dr Železný. But contrary to this allegation of the Claimant the Award states that Dr Železný as executive director of ČNTS committed massive, clear and intentional breach of his director's duties as a serious criminal offence. Naturally such an offence should be governed by the Czech law. It is surprising that the two arbitrators make conclusions based on the Czech criminal law, without quoting any provision of the Czech criminal law, on which their conclusion that Dr Železný committed a serious criminal offence is based.

[97]. Anyhow it must be stated that these acts - breaches of obligations were acts of Dr Železný, personally, for which the Respondent is not responsible and the Media Council on the basis of its activity prescribed by the Czech law, especially by the Czech Media law had no possibility to forbid to Dr Železný to do what he wanted to be done and what he has done. These facts are not denied in the Award but in spite of this fact this situation was not expressed in the Award and the question of contributory fault, if any has not been taken into account.

[98]. Dr Železný himself step by step prepared a solution that would be positive only for himself as follows:

- firstly he secured starting of activity of TV Nova financially by agreement with CEDC,
- thereafter he has done everything for securing the considerable profits derived from the activity of TV Nova, as ascertained in 1996, and then in 1997 and later in 1998,
- he gained leading position in CET 21 and ČNTS in order to know in advance any detail necessary for the steps positive for him, this thanks to great artlessness and unexperience of people of CME, but without any contribution to this situation from the part of Media Council,
- then followed steps of Dr Železný with the only aim to get rid of ČNTS/CME and to gain all profits from TV Nova, additionally to have free hands in cooperation with other advertising agencies, this aim he reached by termination of the Service Agreement in 1999, stopping any cooperation with CME,
- during the whole proceedings there has never been proved a connection between the change of MOA 1996 and termination of the Service Agreement, there were only talking about it and allegations of the Claimant that are as proof absolutely insufficient.

[99]. Now it is to be answered, what results from the above description of facts:

Above all it the following question should be put: "Who has done the first act, on the basis of which it resulted the situation that CME lost its profits and the value of its investments has been reduced?"

[100]. Was it the Media Council? Surely not, as should Dr Železný not terminate the Service Agreement in an arbitrary way, the situation would remain such as it was in 1993 and thereafter without change in 1996, irrespective of any steps of the Media Council. So the originator of the "injury Claimant

suffered" was exclusively Dr Železný, the principal blame is on his side. To what extent the Media Council committed faults is another question, but in no case the Media Council was the originator. In addition thereto it should be stated that the Media Council is neither towards the foreign investors nor towards any other person responsible for acts of Dr Železný.

[101]. In any event there must be in a right way ascertained the basis of the responsibility for the harm caused allegedly to CME. From the above lines it is necessary to draw the conclusion that the original grounds were always the deeds of Dr Železný. So far any wrongdoing should be ascertained on the side of the Media Council, what was not the case, this could only contribute to the harm.

[102]. There is here an unambiguous fact that should Dr Železný have not arbitrarily terminated the Service Agreement, nothing wrong would have happened, nothing to the detriment of the CME and everything would have continued as it was before. That this conclusion is right is also supported by some points contained in the wording of the Award.

[103]. What he wanted was to stop the exclusive cooperation with ČNTS and to stop thereby the situation, when all incomes gained by TV NOVA were collected by ČNTS and the net income came into the pocket of CME. He used to it the first occasion given to him legally. For the advertisement he wanted to use other companies and to pay them only individually for the service rendered.

[104]. And now comes the principle question:

What would happen, should Dr Železný not have done the worst step, i.e. should he not terminate the Service Agreement?

The answer is clear: Nothing would happen, the relations CET 21 - ČNTS would remain as they were in 1993 and in 1996 and in 1999, CME would suffer no damage.

[105]. Further question:

Could Dr Železný have done, what he did, i.e. in an arbitrary way to terminate the Service Agreement, should the Media Council not have made steps that are considered as violation of the Treaty?

The answer is again unambiguous: Yes, he could and nobody could stop him, neither the Media Council.

[106]. But if once more there are taken into consideration the duties and rights of the Media Council, as they are based on the Media Law it must be stated that the Media Council had no right at all to prohibit to Dr Železný, what he has done.

[107]. The conclusion to this point should have been taken into consideration in deciding as to the basis for damages in this partial Award. This has not been done in the Award and one of the arguments of Dr Kühn was that however Dr Železný is not the Defendant /Respondent/. This argument is not understandable because any court can decide that somebody has caused certain percentage of the

damage in spite of the fact that the main wrongdoer has not been sued at all.

[108]. Practically the same principle, i.e. only the partial responsibility of the Respondent could be understood from the declaration of the witness Mr. Klinkhammer, when he said that "Media Council had confiscated at least a portion of our investment in the Czech Republic."

X. Claim for damages

[109]. As it has been stated in the Award the decision contained in the Award shall not contain the decision as to the quantum of damages.

[110]. But it should be stated that the point 2. of the decision in this Award is practically decision as to the basis of the damages, done on the basis of Relief sought by the Claimant. But it must be stated that this has been an attempt of the Claimant to circumvent proving of principal aspects, thereby I mean the principal aspects of the claim for damages, as they are anchored practically in all European legal systems, and this attempt has been accepted by the two arbitrators contrary to the principal aspects of claims for damages.

[111]. These principal aspects are as follows:

- violation of a legal obligation - according to the Award it has been proved by the violation of the Treaty
- arising of actual damage - it has not been proved, this has nothing to do with the quantum of damages,
- blame/in German Verschulden/, i.e. dolus or culpa here surely only culpa, could be freely translated into English as negligence- has not been proved,
- nexus causalis - has not been proved
- quantum damages - to be proved in next phase of proceedings.

[112]. Naturally the same principles are contained in the Czech law, which has to be applied under the principle that the alleged violation of law occurred on the Czech territory.

[113]. It results from the above that by formulating the Relief Sought as it is the case the Claimant tries to escape from obligation to prove that the damage actually has arisen, proving of blame and nexus causalis. But this is not legally possible. Since the Relief Sought by the Claimant was accepted by the two arbitrators, this means that within the second phase of the proceedings the Claimant has the obligation to prove the basis aspects of the damages as described above.

[114]. In addition thereto it is inevitable to come back to the preceding point of this Dissenting opinion as to the basic blame for the damages. This is without any doubt the blame of Dr Železný. In some parts

of the Award it has been stated in a right way that this or this was done by Dr Železný that led to the disaster of the CME investments. Therefore I can only repeat that also in case that the Czech Republic violated the Treaty, what I do not accept, the Czech Republic was not the originator of the damage. And this is the question of the degree of blame, as it has been defined in one cited authority above as "contributory fault". In the Award it is formulated so as if the Czech Republic was the originator of everything what was done wrong. But this is in no case right, as also the Award says in its reasoning more than once that the Czech Republic helped to Dr Železný in this way or that way, but without stating that the harm to CME would not occur in case when Dr Železný would behave in a perfect way.

[115]. It should be added some lines concerning the indicating in the Award of the Czech Republic to be the tortfeasor. The two arbitrators erroneously try to prove that the Czech Republic was the tortfeasor. This is not right. If somebody then it is Dr Železný, who must be declared as tortfeasor. The Czech Republic, in case that the conception of the two arbitrators expressed in the Award as to the originator of the wrongdoing is right, is neither the tortfeasor nor the joint tortfeasor, but a person that helped allegedly to Dr Železný, i.e. to the tortfeasor to commit the tort. In addition as to the tort it has never been proved that on the side of the Czech Republic there would be an intent that necessarily must have been proved, and further the Czech Republic could at the maximum play a contributory role.

[116]. Therefore the sense of point 2. of the decision should be understood in that way that the obligation of the Czech Republic to remedy the injury suffered by the Claimant should correspond to the degree of contributory fault of the Czech Republic.

[117]. For the confirming that the above conclusions are right it is necessary to make a comparison as follows:

If a person intentionally destroys somebody's property by incendiary attack, then principally responsible for the damage is this person that completed the fire and not another person that prepared the fuel /wood, oil etc./ and incendiary means.

[118]. In connection with the above it should be borne in mind that the Claimant has never proved what were the investments and in which amounts /in details/, this is naturally in direct connection with the "fair market value of the Claimant's investment" in the second phase of these proceedings, because for fulfilling the requirement of the Claimant as to the restoring the value of investments it must be known, what were the investments.

In addition thereto the amount to be paid to the Claimant should be reduced to a foreseeable amount, but generally it can be said that the Media Council could never foresee that Dr Železný will terminate arbitrarily the Service Agreement.

XI. The role of the Arbitral Tribunal

[119]. During the proceedings and in the Award the two arbitrators tried to create around the Tribunal a nimbus of superiority of this Tribunal against any state body of the Czech Republic, especially as to

the Czech Courts. But the task of the Tribunal according to the Treaty has been to decide an investment dispute between the Czech Republic and the investor from Netherlands, nothing more.

[120]. But the Award several times criticises the decisions of the Czech Courts though it has no right to do so, especially the judgment of the Prague Court of Appeal as to the question of the arbitrary termination of the Service Agreement by Dr Železný. This Tribunal has neither the right to criticise nor to change it. And here it can be seen the very reason of this standpoint expressed by the two arbitrators in the Award. The above Judgment of the Appeal Court which is in legal force /Superappeal does not influence this/, has that legal sense that this question must be considered as *res iudicata*, i.e. this is a matter already decided. The principle of "*res iudicata*" is expressly accepted practically in all European legal systems and that this case is a dispute according to the European Civil Law and not according to the American Common Law, is without any doubt.

[121]. And on the basis of this principle this Tribunal has no right more to make a decision concerning the question, whether the Service Agreement was terminated in conformity with the law or not, because this question has been decided yet. Naturally this fact is not convenient for the two arbitrators in their general conception to make a decision only and exclusively to the favour of the Claimant.

[122]. The two arbitrators in insisting that this Tribunal is a body superior to any other court or state instance of the Czech Republic also have tried to acquire the right to select their proper legal principles for their deciding, irrespective the fact that the Treaty in its Art. 8, point 5 in an obligatory way states according to which law should the decision be made, there is in the first row mentioned the Czech Law. On the basis of this point of view adopted by them they did not respect the provisions of the Czech Law of mandatory character, e.g. as to the non-transferability of the licence or invalidity of legal acts reached by coercion, they did not respect that the steps of the Media Council were in conformity with the Czech Law, and the Award tries to bless acts that are contrary to the Czech Law, further it tries to draw legal consequence from the documents that are not an official decision of a Czech state body, e.g. the Media council.

[123]. But the two arbitrators not only did not respect the Czech Law, they also did not respect the provisions of the Uncitral Rules. It is surely not necessary to repeat, how far they did not respect the rights of the Respondent, verbatim according to the Respondent that he is entitled to "fairness, equality of arms, due process and /respecting the principles of/ public policy" and that therefore the Respondent - Czech Republic on 14.3.2001 raised in writing the objection that the Respondent "continues to participate in this arbitration under protest and reserves all its rights". As there was no reaction from the part of the Tribunal it must be presumed that this protest was right. In the light of the provision of Art.15, point 1 of the Uncitral Rules it must be stated that the Tribunal violated the principle of treating the parties with equality and through its non-action accepted that the protest of the Respondent as fully justified. This fact surely will have influence on the possible enforcing of the Arbitration Award /vide Art. V, point b) last line of the New York convention 1958/.

XII: Closing statement

[124]. This closing statement refers only to the description of facts and legal conclusions drawn in the

Award, not to the violation of the ethics and customs of the arbitration above all by the Chairman in relation to me as the third arbitrator, whereby I have been pushed in the role of the third arbitrator only as person completing the prescribed number of arbitrators.

[125]. From the whole Dissenting opinion it can be seen the violation of the arbitration principles, but only main points are mentioned, as follows:

- wrong ascertaining of facts, partly due to full accepting of the allegations of the Claimant without asking him to prove them and non-enabling to the Respondents to prove his points by asking the documents specified by the Respondent from the Claimant,
- wrong legal conclusions as to the legal analysis of the provisions of the Netherlands - Czech Republic Bilateral Investment Treaty,
- non-taking into the consideration the Czech Law, as well as the wrong interpretation of the Czech law,
- non-respecting of the provisions of the Czech Law that are of mandatory character, e.g. the Media Law or the Administrative Proceedings Code, thereby violation of the principle to observe the public policy /order/ of the respective country,
- non-respecting of the internationally accepted principles of law, as e.g. *impedimentum rejudicatae*,
- non-equal handling of Claimant and Respondent to the disadvantage of the Respondent and violating the principles of fairness, equality of arms and due process towards the Respondent.

[126]. For the good order's sake I would like to lay stress upon the fact that all of the above objections and arguments to the merits of the case have been told by me to the two arbitrators and above all to the Chairman before the Partial Award has been prepared.