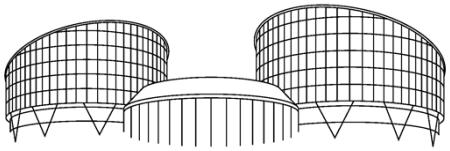

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF BTS HOLDING, A.S. v. SLOVAKIA

(Application no. 55617/17)

JUDGMENT

Art 1 P1 • Peaceful enjoyment of possessions • Unjustified refusal to enforce final and binding arbitration award by International Chamber of Commerce against National Property Fund after rescission of share-purchase agreement for State property being privatised

STRASBOURG

30 June 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of BTS Holding, a.s. v. Slovakia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Marko Bošnjak, *President,*
Péter Paczolay,
Krzysztof Wojtyczek,
Alena Poláčková,
Erik Wennerström,
Raffaele Sabato,
Ioannis Ktistakis, *judges,*
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 55617/17) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a private joint-stock company established under the laws of Slovakia, BTS Holding, a.s. ("the applicant company"), on 28 July 2017;

the decision to give notice of the application to the Government of the Slovak Republic ("the Government");

the parties' observations;

Having deliberated in private on 17 May 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. Raising mainly issues under Article 1 of Protocol No. 1, this case concerns the non-enforcement against the National Property Fund of Slovakia ("NPF"), the country's privatisation agency, of an arbitration award made by the International Court of Arbitration ("the ICA") of the International Chamber of Commerce in Paris ("the ICC Tribunal").

2. The award was for the payment of a principal amount plus interest based on the rescinding by the NPF of a contract with the applicant company for the purchase by the latter of shares in Bratislava Airport in the process of its privatisation.

THE FACTS

3. The applicant company was established in 2005 and has its registered seat in Bratislava. It was represented by Mr W. Plesser, succeeded by Mr T. Kustor, lawyers practising in Vienna (Austria).

4. The Government were represented by their Agent, Ms M. Bálintová.

5. The facts of the case may be summarised as follows.

I. BACKGROUND

6. The applicant company was the successful bidder for the purchase of a majority share in Bratislava Airport in the process of its privatisation. This resulted in the conclusion in 2006 of a share-purchase agreement ("the SPA") between the applicant company and the NPF. The latter is a body established by special legislation to implement the privatisation of State-owned property under the supervision of the government and Parliament.

7. The SPA contained an arbitration clause to the effect that disputes arising out of the agreement were to be referred to the ICC Tribunal and to be resolved under the ICC Rules of Arbitration. The seat of arbitration was to be Paris.

8. Under the SPA, the applicant company paid a large sum of money to the NPF as the first tranche of the purchase price ("the first tranche").

9. However, the NPF then rescinded the SPA and paid the amount of the first tranche back to the applicant company, on the grounds that the time-limit defined in the SPA for the approval of the transaction by the Anti-Monopoly Office of Slovakia ("the AMO") had expired without approval having been granted.

10. In 2008 the NPF, the applicant company, the State in the person of the respective ministry and another party agreed ("the 2008 settlement") that the NPF's rescission of the SPA was valid and effective as of a certain date (21 September 2006). In so far as can further be established from the ensuing judicial decisions, the parties also agreed that their mutual commitments were terminated, in particular for the payment of the purchase price in return of the transfer of the to-be-privatised shares, and it was declared that there were no outstanding mutual claims for damages. However, in order to avoid doubts, matters of return of the purchase price and interests were excluded from the scope of the settlement. No understanding concerning the dispute-resolution mechanism was included.

11. In 2009 the NPF paid another amount of money to the applicant company intended to cover interest on the amount of the first tranche in the period between rescinding the SPA and the repayment of that amount.

II. ARBITRATION AWARD

12. On 21 June 2010 the applicant company requested arbitration before the ICC Tribunal.

13. On 28 February 2011 the NPF, the applicant company and the ICC Tribunal concluded the terms of reference, defining, *inter alia*, the parameters of the case to be decided.

14. The essence of the dispute was whether the amounts paid by the NPF constituted, first, a payment towards repaying the principal amount of the first tranche and, then, payment of interest that had accrued, or the other way

around; since what date and at what rate the interest had started to accrue; and, consequently, whether there were any further amounts due by the NPF.

15. The dispute was resolved in an award of 8 June 2012.

16. The ICC Tribunal found that the payments made constituted, first, payment of the interest and, only thereafter, payment towards the principal amount of the first tranche, precisely determining the interest rates applicable to the various stages at which the payments had been claimed and made, as well as the outstanding amount of the principal sum on which interest was to be paid with regard to the said stages.

17. In sum, the ICC Tribunal ruled that the NPF was to pay the applicant company (i) a principal amount of 1,894,597.52 euros (EUR), and (ii) interest of 14.25% per annum on EUR 1,853,584.45 for the period from 13 March 2009 until full payment of the award.

18. On 19 December 2012 the Secretary General of the ICA issued a written statement certifying, *inter alia*, that the award had been notified to the parties on 21 June 2012 and that it had been received by the NPF on 25 June 2012. The statement further cited Article 28 § 6 of the ICC Arbitration Rules, as in force at the relevant time, pursuant to which:

> "Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."

III. ENFORCEMENT OF THE AWARD

19. On 4 February 2013 the applicant company petitioned for enforcement of the award in Slovakia.

20. On 30 April and 20 June 2014, respectively, the Bratislava II District Court authorised a judicial enforcement officer to enforce the award and he issued a notice of enforcement (*upovedomenie o začatí exekúcie*) informing the NPF that enforcement proceedings had commenced and ordering it to settle its debt.

21. In response, the NPF lodged an objection (*námietky*) against the enforcement. It argued that the SPA had been superseded by the 2008 settlement and that the latter contained no arbitration clause, in the absence of which the enforcement of the award would be contrary to public policy. Moreover, it would be *contra bonos mores*, as the applicant company was simply seeking further financial satisfaction by claiming a large sum of money from public funds, ultimately at the cost of the taxpayers.

22. In reply, the applicant company pointed out that the 2008 settlement only addressed the question of the validity and effect of the rescinding of the SPA but had in no way replaced it. The ICC Tribunal had specifically examined the issue of an arbitration clause and the enforcement court had no jurisdiction to deal with this question. Moreover, the NPF had agreed to the

terms of reference whereby it had acknowledged the jurisdiction of the ICC Tribunal. Through the SPA, it was ultimately the State who had entered into a private-law relationship with the applicant company. That relationship involved liability and it was unacceptable to disregard it at the expense of the applicant company.

23. On 15 August 2014 the District Court allowed the objection and, following an appeal by the applicant company, the Bratislava Regional Court upheld that decision on 31 March 2015. Each court gave different reasons. It was later accepted by the Constitutional Court and acknowledged by the Government that the two sets of reasons were complementary. They may be summarised as follows.

24. There was no separate decision to be taken concerning the recognition of foreign arbitration awards in Slovakia. Such awards were recognised by the fact that the enforcement court took them into account as if they were domestic awards. Accordingly, issuing authorisation to carry out the enforcement of a foreign arbitration award *de facto* amounted to its recognition.

25. As to the legal framework for the objection, it was acknowledged that it could only concern the admissibility of the enforcement but not the award to be enforced. An objection against enforcement could only be based on circumstances intervening after the award had been made.

26. It was true that, in the enforcement of a foreign arbitration award, the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (promulgated in Slovakia by Decree no. 74/1959 Coll. of the Minister of Foreign Affairs – "the New York Convention") had precedence over the respective provisions of the Arbitration Proceedings Act (Law no. 244/2002 Coll., as amended). Nevertheless, the State's sovereignty and the enforcement court's power to examine issues of public policy remained unaffected.

27. The enforcement court was under a duty to examine the lawfulness of the award, not as to its substantive correctness, but as to whether it was capable of being enforced. The courts acknowledged that, as a matter of principle, a rescission of a contract had no impact on any contractual dispute-resolution arrangements. In addition, the Regional Court cited section 5(3) of the Arbitration Proceedings Act, pursuant to which, unless specifically agreed otherwise, which was not the case of the 2008 settlement, a recission of a contract had no impact on the validity of the arbitration clause contained therein. Nevertheless, without addressing the application of these rules to the facts of the present case, the District Court held that the 2008 settlement superseded the SPA and subsumed its arbitration clause. The ICC Tribunal therefore had no jurisdiction in the case and its order for payment was unlawful. The Regional Court for its part offered no specific conclusions on this matter, adding that the award did not define the time frame for compliance and was not accompanied by a certificate of the date of its

becoming enforceable (*doložka vykonateľnosti*). Although these formal requirements stemmed from the national rules, they applied to the award and the statement of the ICA Secretary General of 19 December 2012 (see paragraph 18 above) could not be seen as fulfilling them.

28. In addition, the enforcement was contrary to public policy, on three grounds.

Firstly, as the award concerned a large sum of money, its enforcement would "impact a large group of people, namely taxpayers, since in the event of an enforcement of such magnitude the financial means would come from the State budget. This would have a negative impact on the general public".

Secondly, as set out in the statement of 19 December 2012, prior to the arbitration the parties had waived their right of recourse against the award, which included the right of access to a court.

Thirdly, the claims of the applicant company were based on the rescinding of the SPA by the NPF and that had been due to the need to protect against market concentration.

29. On 20 October 2015 the District Court terminated the enforcement proceedings. In its reasoning, it noted that the NPF's objection against the enforcement had been allowed and it directly followed from Article 50 § 5 of the Enforcement Code (Law no. 233/1995 Coll., as applicable at the relevant time) that the proceedings were to be terminated, the decision not being amenable to appeal. However, in the concluding part of the decision, which is reserved for instructions concerning any remedies, it indicated that the decision could be appealed against within fifteen days.

30. In the absence of any appeal as to the merits of the decision to terminate the proceedings, it became final and binding on 12 November 2015.

IV. CONSTITUTIONAL COMPLAINT

31. On 26 August 2015 the applicant company lodged an individual complaint with the Constitutional Court, challenging the decisions of 15 August 2014 and 31 March 2015 concerning the NPF's objection to enforcement.

Arguing that there had been a violation of its rights to a fair hearing and protection of property, the applicant company emphasised that, at the enforcement stage of the proceedings, any objections could only pertain to the enforcement but not to the award. The conclusion that it was unenforceable on the grounds that it lacked a time frame for compliance and a certificate of its becoming final had been based on requirements of national law which were inapplicable to foreign arbitral awards. Any suggestion that it had been contrary to public policy for the parties to waive rights to be acquired in the future was manifestly flawed since any such waiver had been specifically limited "insofar as [it had been possible for it] validly [to] be made". The reference to the need to protect against market concentration was

likewise arbitrary because this was not a part of the dispute, there was nothing at play that could endanger competition, and the Regional Court had completely distorted the applicable rules and principles. Lastly, the reasoning of the Regional Court concerned matters that had not been debated at the earlier stages of the proceedings and the applicant company had had no opportunity to take a position on them.

32. On 8 November 2016 the Constitutional Court declared the complaint inadmissible. Any complaint in relation to the District Court fell within the jurisdiction of the Regional Court and, under the principle of subsidiarity, not within that of the Constitutional Court. As to the Regional Court, it had exercised its jurisdiction within its remit, interpreting and applying the relevant legal rules in a constitutionally acceptable manner. Its conclusions followed from the established facts and were logical and legitimate.

33. There had been no obstacle for the Regional Court to uphold the decision of the District Court in that it had supported the latter's conclusions by supplementing substantial argumentation of its own.

34. There was nothing in the challenged decision to show that there had been an interference with the applicant company's right to protection of property.

35. As an aside (*nad rámec uvedeného*), the Constitutional Court observed that the enforcement proceedings had been terminated in the meantime and that the applicant company had not challenged that decision by an appeal. It had accordingly not exhausted ordinary remedies, which precluded it from seeking the protection of its rights before the Constitutional Court.

RELEVANT LEGAL FRAMEWORK

I. ARBITRATION PROCEEDINGS ACT

36. Foreign arbitral awards are addressed in sections 46 to 50 of the Act. There is no separate decision to be taken concerning their recognition (section 49(1)). Such an award is recognised by the fact that the enforcement court takes it into account (*naň prihliadne*) as if it were a domestic award.

37. Under section 50(2), the enforcement court must refuse recognition and enforcement of a foreign award even without an application to that effect by the party against whom the award is asserted, if it finds the enforcement contrary to public policy.

38. Pursuant to section 51(3), if a certain procedural matter is not addressed by the Act, it is to be resolved under the provisions concerning the procedure before the ordinary courts.

39. The provisions of the Act apply unless an international treaty binding on Slovakia and part of its legal order, such as the New York Convention, provides otherwise (section 53, in conjunction with footnote 19 in the Act).

II. CODE OF CIVIL PROCEDURE

40. At the relevant time and until 30 June 2016, the rules of procedure before the ordinary courts were embodied in the Code of Civil Procedure (Law no. 99/1963 Coll, as amended). Under Article 160 § 1, if a judgment of a court of law imposed a duty, it was to be complied with within three days of the judgment becoming final and binding, with the court having the power to define a longer period for compliance.

III. ENFORCEMENT CODE

41. At the relevant time, objections against enforcement proceedings were mainly regulated by Article 50 of the Enforcement Code. According to its paragraph 1, an objection might be raised if, subsequent to the decision to be enforced, circumstances had arisen that prevent its enforcement or if there were other grounds on which the enforcement was impermissible. The objection had to include reasons and any reasons advanced subsequently were not to be considered.

42. Pursuant to paragraph 5 of Article 50 of the Code, if the decision allowing an objection became final and binding, the enforcement court was to terminate the proceedings; this decision was not amenable to appeal.

43. Under Article 201 § 1 (b), in relation to enforcement proceedings that have been terminated, no action for their reopening is permissible.

IV. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

44. Under Article V of the New York Convention:

> "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the [arbitration agreement] were ... under some incapacity, or the said agreement is not valid ...; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration...; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

V. REMEDIES UNDER FRENCH LAW IN RELATION TO INTERNATIONAL ARBITRATION AWARDS ISSUED IN FRANCE

45. Unless otherwise agreed by the parties, international arbitration awards made in France as from 1 May 2011 may be subject to an action for annulment under Articles 1518 and 1526 of the Code of Civil Procedure, with further remedies being available under Articles 1485 and 1502, in conjunction with Article 1506 §§ 4 and 5.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

46. The applicant company complained that enforcement of the arbitral award in its favour had been arbitrarily refused, contrary to its rights under Article 1 of Protocol No. 1 to the Convention, which reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

1. Compatibility

47. Referring to the domestic courts' conclusion that the applicant company's arbitration award was unenforceable, the Government contended that none of them had "upheld" the applicant company's "claim" and that, accordingly, that claim was not "arguable" and therefore did not amount to a possession for the purposes of Article 1 of Protocol No. 1. The applicant company's complaint under that provision was therefore incompatible with it *ratione materiae*. In their view, the present case was similar to *ALMEDIA spol. s r.o. v. Slovakia* ((dec.) [Committee], no. 55631/12, 6 November 2018), which had been rejected on precisely that ground.

48. The applicant company disagreed and challenged the grounds on which the enforcement had been refused.

49. The Court reiterates that a "claim" can constitute a "possession" within the meaning of Article 1 of Protocol No. 1 if it is sufficiently established to be enforceable, for example by virtue of an arbitration award (see *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 59, Series A no. 301-B).

50. In the present case, the applicant company relied on an arbitration award by the ICC Tribunal for payment of an amount of money in its favour. It is undisputed that this award has become final and binding, that it could have been challenged by the procedures provided for this purpose in the jurisdiction of the seat of the arbitration (see paragraph 45 above), that no such procedures have been made use of, and that, by operation of the New York Convention and the respective provisions of the Arbitration Proceedings Act, foreign arbitration awards are in principle enforceable in Slovakia (compare *Stran Greek Refineries and Stratis Andreadis*, cited above, § 61).

51. As acknowledged by the domestic courts, there was no separate decision to be taken for the recognition of the award in Slovakia and, by operation of law, its legal recognition in Slovakia was implicit in the appointment of a judicial enforcement officer to enforce it (see paragraphs 24 and 36 above).

52. The Court would emphasise in particular that, beyond the question of such implicit recognition, the proceedings pursued by the applicant company at the domestic level were purely of the nature of enforcement proceedings. As is likewise clear from the applicable statute and practice, the legal framework of those proceedings for the examination of the NPF's objection to the enforcement did not allow for any substantive review of the award itself, such examination being limited to any obstacles to the enforcement intervening after the award had been made (see paragraphs 25 and 41 above).

53. In these circumstances, the Court finds that the applicant company's award was sufficiently established to amount to a "possession" within the meaning of Article 1 of Protocol No. 1. The obstacles to its enforcement, as established by the domestic courts, pertain to the questions of interference with the applicant company's rights under that provision and, as the case may be, compliance of that interference with the applicable requirements.

54. In response to the Government's specific argument, the Court fails to discern any relevant similarity between the present case and *ALMEDIA spol. s r.o.* (cited above, §§ 39-40). That case concerned the enforcement against the legal successor of the applicant company's original debtor of a court order issued against the original debtor, the point of contention being whether the claim adjudicated against the original debtor had passed from it onto its legal successor.

55. The Government's incompatibility objection is accordingly dismissed.

2. Domestic remedies

56. The Government also relied on the Constitutional Court's observation that the applicant company had not challenged the decision to terminate the enforcement and argued that it had therefore failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention.

57. The applicant company disagreed and argued, relying on Article 50 § 5 of the Enforcement Code, that no appeal against the decision to terminate the enforcement proceedings had been available.

58. The Court notes first of all that Article 50 § 5 of the Enforcement Code, as applicable at the relevant time, clearly and directly excluded the availability of an appeal against a decision to terminate enforcement proceedings (see paragraph 42 above). In fact, the enforcement court in the present case acknowledged that in the reasoning of its decision (see paragraph 29 above). The Constitutional Court's observation in passing to the contrary (see paragraph 35 above) does not address in any way this statutory rule and the Government have failed to respond to the applicant company's argument essentially submitting that the suggestion that an appeal had been available was in fact mistaken.

59. Irrespective of that, the Court notes that the observation of the Constitutional Court in issue was made as an aside which did not prevent it from examining the substance of the applicant company's arguments against the decision to allow the NPF's objection, and the termination of the enforcement proceedings was a direct consequence of that decision (see paragraphs 29 and 42 above).

60. In these circumstances, there is no room for accepting the Government's objection and it must be dismissed.

3. Conclusion

61. The Court notes that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

62. The applicant company complained that the non-enforcement of its award had constituted an interference with its possessions that had been neither lawful nor justified in terms of pursuing any legitimate aim or being proportionate.

63. The Government pointed out that the domestic courts at all levels had found the applicant company's award unenforceable on a multitude of

grounds. Those identified by the Regional Court had been complementary to those relied on by the District Court. The courts' decisions had been congruous, consistent with established practice, adequately reasoned, free from arbitrariness, and had resulted from proceedings that had been procedurally fair.

64. The Court notes that the domestic courts found that it was impossible to have the applicant company's adjudicated claim enforced. As the Court has found this claim to constitute a possession, its non-enforcement amounted to an interference with it. This interference constituted neither a deprivation of possessions within the meaning of the second sentence of Article 1 of Protocol No. 1 nor a measure of control of the use of property within the meaning of its third sentence. It must accordingly be examined under the general rule embodied in its first sentence (see *Stran Greek Refineries and Stratis Andreadis*, cited above, §§ 67 and 68).

65. It is an essential condition for an interference to be deemed compatible with Article 1 of Protocol No. 1 that it be lawful, with the Court's power to review compliance with domestic law being limited to instances of manifestly erroneous application of the impugned legal provisions or arbitrary conclusions being reached (see, for example, *Beyeler v. Italy* [GC], no. 33202/96, § 108, ECHR 2000-I, with further references). Noting that the Government have advanced no arguments on this aspect of the case, for the reasons laid out below, the Court has grave concerns as to the compatibility of the domestic courts' conclusions in the present case with the principle of lawfulness within the above definition.

66. It notes the domestic courts' assessment to the effect that the enforcement was precluded because (i) there had effectively been no arbitration clause in place to establish the jurisdiction of the ICC Tribunal, (ii) the award did not specify a time frame for compliance and was not accompanied by a certificate of the date of its becoming enforceable, (iii) the award concerned a large sum of money that would have to be paid at the expense of the tax payers, (iv) prior to the award the parties had waived the right of recourse, and (v) the transaction underlying the awarded amount had had to do with the protection of competition.

67. As regards point (i), the Court observes that, as acknowledged by the domestic courts, under the applicable domestic law a recission of a contract as such has no impact on the validity of an arbitration clause. In view of this rule, it finds it arbitrary for the District Court to hold, without any analysis, that the 2008 settlement subsumed the arbitration clause in the SPA and for the Regional Court to offer no specific conclusion on this question (see paragraph 10 and 27 above). In addition, the Court notes that under the ICC Tribunal's terms of reference the parties submitted their dispute to the ICC Tribunal and that neither of them objected to its jurisdiction in the course of the arbitration proceedings.

68. Concerning point (ii), it cannot be brought into question that the award contained an order for payment which was binding on the parties and that by submitting their dispute to the ICC Tribunal the parties had undertaken to abide by the award without delay, as provided for by the ICC Arbitration Rules and certified by the ICA Secretary General in his statement of 19 December 2012. The Court likewise notes that, under the general rules of procedure before the ordinary courts in Slovakia at the relevant time, which were to be used if the given matter was not addressed by the specific rules concerning arbitration, a tribunal's order was to be complied with within three days of it becoming final and binding, unless the order provided otherwise (see paragraphs 38 and 40 above). Furthermore, the Court observes that this ground for refusing enforcement was established by the court of appeal beyond and above the grounds advanced by the NPF in its objection without giving the applicant company an opportunity to respond.

69. In relation to point (iii), the Court notes that the debtor under the award was the NPF, that this entity was in fact an agency of the State, that the payments it was ordered to make under the award originated from an investment transaction it had entered into with the applicant company on the basis of a contract of a private-law nature, and that, as noted by the courts themselves, the payment under the award would ultimately have to be made from the State budget. However, as previously recognised by the Court, a lack of funds cannot justify an omission by a State authority to honour a judgment debt (see *Burdov v. Russia*, no. 59498/00, § 41, ECHR 2002-III).

70. As to points (iv) and (v), the Court observes first of all that, similarly to point (ii), they had not been advanced by the NPF but had been relied on by the court of appeal without giving the applicant company an opportunity to respond. The former of these grounds relied on the provision of Article 28 § 6 of the ICC Arbitration Rules concerning a waiver by the parties to an ICC arbitration of the right to recourse. However, under the provision in question, any such waiver was clearly intended only "insofar as [it could] validly be made". To the extent the court of appeal referred to the notion of the protection of competition as a component of point (v), the Court likewise finds it difficult to follow its rationale. It is uncontested that the transaction intended under the SPA necessitated approval by the AMO and that no such approval was issued within the time frame defined by the SPA, which was the reason for the NPF's rescinding of that contract. However, there is no indication that the lack of approval within a given time frame amounted to an actual refusal of the transaction. In fact, no decision on the merits of this matter was ever taken by the AMO. There is accordingly no indication that the intended transaction was contrary to the rules on competition. Moreover, and irrespective of that, the transaction was effectively rescinded, the payment to be made under the award concerned claims related to that rescission, and there has not been any suggestion that the satisfaction of those claims would in any way impact on competition.

71. In view of the above considerations, it would appear that the grounds relied on by the domestic courts were not given and/or fell outside the legal framework for denying enforcement of a foreign arbitration award allowed by the provisions of the domestic law and the New York Convention (see paragraphs 37, 41 and 44 above). Be that as it may, and even assuming that denying enforcement of the award on these grounds served a general interest, it has not been shown that it was proportionate to that aim. In that regard, the Court notes again that the Government have advanced no arguments on this aspect of the case and that, while focusing on elements which purportedly precluded the enforcement by reason of public policy or procedural formalities, the domestic courts took no account of the requirements of the protection of the applicant company's fundamental rights and the need for a fair balance to be struck between them and the general interest of the community rights (see *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 69, Series A no. 52).

72. The foregoing considerations are sufficient to enable the Court to conclude that the refusal to enforce the applicant company's arbitration award was not justified for the purposes of Article 1 of Protocol No. 1.

73. There has accordingly been a violation of Article 1 of Protocol No. 1.

II. REMAINING ALLEGED VIOLATIONS

74. Relying on Articles 6 and 13 of the Convention, the applicant company complained that the refusal to enforce a final and binding arbitration award in its favour had been arbitrary and contrary to the principle of legal certainty and that it had had no effective domestic remedy in that regard.

75. The Government argued non-exhaustion of domestic remedies as in relation to the complaint under Article 1 of Protocol No. 1. In addition, they recapitulated the reasoning behind the domestic courts' decisions, acknowledging that those of the Regional Court complemented those of the District Court. The applicant company's arguments had been duly examined and answered in a way that was contrary neither to its right of access to court nor to any other component of its right to a fair hearing.

76. Having regard to the facts of the case, the submissions of the parties, and its findings above, the Court considers that the objection as to the exhaustion of domestic remedies must be dismissed and that, on the substance, it has already examined the main legal questions raised in the present application. It thus considers that the applicant company's remaining complaints are admissible but that there is no need to give a separate ruling on them (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. The parties' submissions

(a) The applicant company

78. The applicant company made the following claims in respect of pecuniary damage.

79. Firstly, it claimed the amount it had been awarded by the ICC Tribunal, that is a principal amount of 1,894,597.52 euros (EUR) and interest of 14.25% per annum on EUR 1,853,584.45 for the period from 13 March 2009 until full payment of the award.

80. As regards this part of its claim, the applicant company pointed out that Article 201 § 1 (b) of the Enforcement Code specifically excluded the possibility of having enforcement proceedings reopened. It was accordingly not possible for it to pursue its claim at the domestic level on the basis of a finding of a violation of its rights by the Court.

81. Secondly, the applicant company claimed EUR 103,996.52 in compensation for the costs of accounting and auditing services which in its submission it had incurred on account of the violation complained of. In that regard, the applicant company submitted that since 2012 its sole operational purpose had been the collection of the adjudicated amount. Due to the ensuing litigation, it had been prevented from winding down and had continued to be bound by law to ensure accounting and auditing services, which had entailed the costs in question.

(b) The Government

82. As to the former part of the claim, the Government proposed that the best solution would be for the applicant company to lodge a new application for enforcement of the award. There were no specific statutory rules concerning the application of the principle of *res judicata* in enforcement proceedings. A decision to terminate enforcement proceedings could in principle be seen as a substantive decision preventing the initiation of new enforcement proceedings. However, this should only apply if there was no change in the relevant circumstances. The Court's finding of a violation of the applicant company's fundamental rights should be accepted as a new

relevant circumstance in the light of which the principle of *res judicata* should not preclude the opening of new enforcement proceedings.

83. As regards the second part of the claim, the Government contested its causal link to the violations of the applicant company's rights alleged in the present proceedings before the Court.

2. The Court's assessment

84. The Court reiterates that a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 32, ECHR 2000-XI).

85. In relation to the first part of the applicant company's claim (principal amount and interest under the award), the Court notes that it essentially corresponds to what the applicant company would have asserted at the national level, where it is prevented from doing so by the fact that the enforcement proceedings have been terminated. Unlike with proceedings before the ordinary courts where such a possibility is expressly provided for by law (see, for example, *Borovská and Forrai v. Slovakia*, no. 48554/10, §§ 76-77, 25 November 2014), in relation to enforcement proceedings the national law specifically excludes the possibility of their reopening (see paragraph 43 above), be it on the basis of a finding by the Court of a violation of individual human rights or fundamental freedoms or otherwise. The Government's suggestion that the applicant company might seek enforcement of the award by way of a fresh application on the basis of new facts appears in substance to be akin to such a reopening. In the absence of any regulatory framework or jurisprudential support, the Court is unconvinced that such a possibility is in fact available.

86. The Government's objection in relation to the second part of the claim (accounting and auditing costs) consisted of arguing the lack of a causal connection between such costs and the violations alleged. However, it has not been contested that the applicant company's sole purpose is the collection of its claim under the award. Thus, the Court finds that had the awarded amounts been paid, the applicant company's continued existence would no longer have been justified, it could have been wound up, and the expenses in question would not have been incurred. Accordingly, in line with the *restitutio in integrum* principle, the Court finds that a causal nexus between the costs in question and the violation found has been established.

87. Nevertheless, as to the amount of the claim, the Court finds that the question of the application of Article 41 is not ready for decision. It is therefore necessary to reserve the matter, due regard being had to the possibility of an agreement between the respondent State and the applicant company (Rule 75 §§ 1 and 4 of the Rules of Court).

88. As no claim has been made in respect of non-pecuniary damage, there is no call for any ruling in that respect.

B. Costs and expenses

89. The applicant company also claimed EUR 33,257.79 for the legal and translation costs at the domestic level and EUR 287,316.38 for legal fees and associated expenses incurred before the Court.

90. The Government requested that the matter be resolved in accordance with the Court's case-law. As to the claim concerning the proceedings before the Court, the Government contested the amount as being manifestly excessive and "speculative". To that effect, while acknowledging that the claim had been supported by invoices, they pointed out that no evidence had been submitted that those invoices had actually been settled. Moreover, arguing that the applicant company was in fact making a financial loss, the Government found it incomprehensible that it should be hiring the most expensive lawyers even though lawyers with Convention experience working at much more reasonable rates were available on the market.

91. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum (see, for example, *Iatridis*, cited above, § 54).

92. Regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 30,000, plus any tax that may be chargeable to the applicant company, covering costs under all heads, incurred up to the adoption of the present judgment.

C. Default interest

93. The applicant company submitted that the default interest in relation to the above claims should be set at 9% per annum.

94. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention;

3. *Holds* that there is no need to examine on the merits the complaints under Articles 6 and 13 of the Convention;

4. *Holds* that the question of the application of Article 41 of the Convention in relation to the amount of the claim in respect of pecuniary damage is not ready for decision and accordingly:
   (a) *reserves* the said question;
   (b) *invites* the parties to submit, within six months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
   (c) *reserves* the further procedure and delegates to the President of the Chamber the power to fix the same if need be;

5. *Holds*
   (a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 30,000 (thirty thousand euros), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses incurred up to the adoption of this judgment;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant company's claim for just satisfaction.

Done in English, and notified in writing on 30 June 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Marko Bošnjak
Registrar	President