Translation from Serbian Language

International Chamber of Commerce
The world business organization

International Court of Arbitration – Cour internationale d'arbitrage

AWARD

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ICC INTERNATIONAL COURT OF ARBITRATION

CASE No. 14361/AVH/CCO/JRF/GZ

UNIWORLD HOLDINGS LIMITED

(United States of America)

vs/

(1) AGENCIJA ZA PRIVATIZACIJU REPUBLIKE SRBIJE

(Serbia)

(2) SRBIJA-TURIST A.D.

(Serbia)

This document is an original of the Final Award rendered in conformity with the Rules of Arbitration of the ICC International Court of Arbitration.

INTERNATIONAL COURT OF ARBITRATION

of the

INTERNATIONAL CHAMBER OF COMMERCE

Final Award of the Arbitral Tribunal

ICC Case No. 14361/AVH/CCO/JRF/GZ

In arbitral proceedings between

UNIWORLD HOLDINGS LIMITED
(The Claimant)

and

(1) AGENCIJA ZA PRIVATIZACIJU REPUBLIKE SRBIJE
(The First Respondent)

and

(2) SRBIJA-TURIST A.D.
(The Second Respondent)

Place of arbitration: Belgrade, Serbia

Arbitral Tribunal:

Chairperson of the Tribunal: Laurence Mitrovic
Arbitrator: Prof. Miodrag V. Orlic, PhD
Arbitrator: Prof. Jelena Perovic, PhD

Secretary General of Arbitral Tribunal: Nemanja Despotovic

In Case No. 14361/AVH/CCO/JRF/GZ

between

UNIWORLD HOLDINGS LIMITED, 11601 Wilshire Blvd., 5th floor, Los Angeles CA 90025, U.S.A. (UHL, Claimant or Buyer), represented by attorneys Aleksandar Lojpur (Visegradska 6, 11000 Belgrade), Milorad Belic (Pariska 20/1, 11000 Belgrade), Nebojsa Stankovic (Obrenoviceva 36/4, 18000 Nis), Dejan Nikolic, Ivana Rackovic, Senka Gajin and Milan Lazic (law firm Karanovic & Nikolic, Lepenicka 7, 11000 Belgrade);

vs/

AGENCIJA ZA PRIVATIZACIJU REPUBLIKE SRBIJE (PRIVATIZATION AGENCY OF THE REPUBLIC OF SERBIA), Terazije 23, 11000 Belgrade (the First Respondent or Agency) previously represented by attorneys Nikola Jankovic and Julijana Jevtic (Carlija Caplina 37, 11000 Belgrade) and Miroslav Paunovic (Knez Mihajlova 30, 11000 Belgrade) and currently represented by attorneys Rajko Ignjacevic and Aleksandar Todorovic (Starine Novaka 3, 11000 Belgrade);

and

SRBIJA-TURIST AD, 7. jula 2a, 18000 Nis (the Second Respondent or “Srbija-Turist”) represented by attorney Djordje Djurisic (Krunska 60, 11000 Belgrade);

The Claimant, the First Respondent and the Second Respondent are hereinafter collectively referred to as “the parties”.

The Arbitral Tribunal consisting of Mrs. Laurence Mitrovic, and members of Tribunal, Prof. Miodrag Orlic, PhD and Prof. Jelena Perovic, PhD, has rendered by majority votes, in Belgrade, the following:

FINAL AWARD

I The Arbitral Tribunal rejects the Respondents' procedural and formal legal objections, concerning the Claimant's claims;

II The Arbitral Tribunal declares that the Contract on sale-purchase of social capital by public tender No. 1-2169/03-505/02 signed on 16 September 2003 between Uniworld Holdings Limited, joint stock company for catering, tourism, foreign and domestic trade and games of chance Srbija-Turist – NIS, and Privatization Agency of the Republic of Serbia (hereinafter: "Contract") is existent and remains in force;

III The Arbitral Tribunal accepts the Claimant's request number I and orders the Privatization Agency and Srbija-Turist to recognize compliance with contractual obligations by UHL and to fulfill their share of contractual obligations, as well as to return or undertake all necessary and required measures towards returning of 997,824 shares of Srbija-Turist in favor of the Claimant, which shares were acquired by UHL by purchase of share in this company's capital, within 15 days from the date of this Final Award (since the Claimant's request for return of 997,824 shares of Srbija-Turist is contained in several pleadings with diverse subjects of claim, the Arbitral Tribunal decides to accept this request entirely and to include in this dispositive part all alternating claims for the return of 997,824 seized shares in Srbija-Turist);

IV The Arbitral Tribunal partly rejects the Claimant's requests number II and III (concerning the amount of funds invested in Srbija-Turist by UHL) and determines that USD 5,637,003 were invested in Srbija-Turist in the period from 1 January 2004 to 31 December 2005 and that USD 4,173,311.23 were invested in 2005 on the same grounds. The Arbitral Tribunal partly agrees with the Claimant's requests number II and III and declares that the Contract is existent and remains in force;

V As concerns the Claimant's request number IV, the Arbitral Tribunal declares that the Claimant has fulfilled all social obligations under the Contract and based on the stated declares that the Contract is existent and remains in force;

VI As concerns the Claimant's request number V, the Arbitral Tribunal declares that UHL has fulfilled its obligation to maintain the business activities from Clause 8.3.5 of the Contract, and declares that the total income of Srbija-Turist in 2004 as compared to 2003 was increased by 15%, and in 2005 as compared to 2004 by 36%;

VII The Arbitral Tribunal partly accepts the Claimant's request number VI. Thereby, the Arbitral Tribunal first declares that the Contract is existent and remains in force. The Arbitral Tribunal then partly rejects the Claimant's requests number VI determining that until 31 December 2005, UHL invested USD 5,637,003 (instead of USD 6,780,000 as quoted by the Claimant). Accordingly, the Arbitral Tribunal declares that the Claimant is obliged to invest in Srbija-Turist additional USD 3,362,997 in order to fulfill all obligations stipulated by the Contract;

VIII The Arbitral Tribunal rejects the Claimant's request number VII for return of RSD 96,000,000 with statutory default interest from 15 May 2005 to the date of full payment on account of regressive taxation of Srbija-Turist due before 31 December 2003;

IX The Arbitral Tribunal partly rejects the Claimant's request number VIII to order the Privatization Agency to compensate the amount of EUR 12,000,000 to UHL for all kinds of inflicted damages arising from illegitimate termination of the Contract (with Central European Bank interest rate starting from the date of unilateral Contract termination until payment) and orders (at its own discretion and in conformity with Article 224 of Civil Procedure Code of the Republic of Serbia) to the Privatization Agency to pay to UHL, based on the damage caused by unjustified Contract termination, the amount of EUR 3,000,000 with statutory interest starting from 30 June 2006, within 15 days from the date of this Final Award;

X As concerns the Claimant's request number IX, the Arbitral Tribunal orders the Privatization Agency to pay the amount of USD 1,000,000 to the Claimant on account of unfounded collection of performance guarantee, in equivalent dinar amount, applying the middle exchange rate of the National Bank of Serbia on the date of payment to the Claimant, with domicile interest starting from 7 March 2007 until full payment, within 15 days from the date of this Final Award;

XI The Arbitral Tribunal decides that UHL and Privatization Agency shall bear USD 150,000 and USD 360,000 respectively, in the total of USD 510,000 costs of ICC arbitration, and orders the Privatization Agency to pay to UHL the amount of

USD 210,000 on account of reimbursement of arbitration costs paid to ICC, within 15 days from the date of this Final Award;

XII The Arbitral Tribunal decides that each party shall bear its own costs as well as the costs and fees of their respective legal representatives;

XIII The Arbitral Tribunal decides that UHL and Privatization Agency shall bear 50% each of the costs related to the work of Independent Expert of Arbitral Tribunal (PWHC) and orders UHL and Privatization Agency to pay the amount of EUR 42,949.50 (VAT excluded), within 15 days from the date of this Final Award;

XIV The Arbitral Tribunal rejects all requests of Privatization Agency (except for partial acceptance of request concerning distribution of ICC arbitration costs from item XI and costs related to PWHC from item XIII) and leaves it to bear its own costs and fees of attorneys;

XV The Arbitral Tribunal rejects all requests of Srbija-Turist and leaves it to bear its own costs and fees of attorneys;

XVI Except for the parties' requests discussed in the above dispositive part, the Arbitral Tribunal rejects any other parties' requests.

This Award of the Arbitral Tribunal is final and binding.

CONTENTS OF REASONING

Reasoning

I Introduction

1 This document is the Final Award of Arbitral Tribunal (hereinafter: "Final Award"). The Arbitral Proceedings in this case are subject to rules stipulated by Rules of Arbitration of International Chamber of Commerce (hereinafter: ICC) from 1998 (hereinafter: "ICC Rules" or "Rules").

II Parties to the Dispute

A *The Claimant*

2 Uniworld Holdings Limited (hereinafter: "UHL" or "Claimant" or "Buyer"), as follows from the Contract on sale and purchase of social capital by public tender No. 1-2169/03-505/2, signed on 16 September 2003 (hereinafter: Contract[1]) between the joint stock company for catering, tourism, foreign and domestic trade and games of chance Srbija-Turist AD – 7. jula 2a, 18000 NIS (hereinafter: Srbija-Turist or the Second Respondent), Privatization Agency of the Republic of Serbia (hereinafter: Agency or the First Respondent). UHL is a company established and existing under the laws of California, USA, head office at the address 11601 Wilshire Blvd, 5th floor, Los Angeles, California, registered at the Secretary of California State on 21 November 2001, registration number 2366594.

3 At hearings held on 14 May and 26 November 2007, UHL was represented by the attorney Milorad Belic from Belgrade (Pariska 20/1, 11000 Belgrade), from the hearing held on 25 February 2008 joined by the attorney Aleksandar Lojpur, also from Belgrade (first at the address Kneza Milosa 53, 11000 Belgrade, then Visegradska 6, 11000 Belgrade). Starting from the hearing held from 24 to 28 November 2008, the attorney Aleksandar Lojpur alone represented the Claimant and from the hearing held on 27 January 2009 he was joined by the attorney Nebojsa Stankovic from Nis (first at the address Ucitelj Tasina 2/7, Nis, and then Obrenoviceva 36/4, 18000 Nis). Finally, starting from 30 November 2009, the Claimant was represented in this case also by Dejan Nikolic, Ivana Rackovic, Senka Gajin and Milan Lazic, from law firm Karanovic & Nikolic in Belgrade (Lepenicka 7, 11000 Belgrade).

[1] The terms written in italic letters in this Award which are no specifically defined in the Award shall bear the meanings defined by the Contract.

B *The First Respondent*

4 The Privatization Agency of the Republic of Serbia (hereinafter: "the First Respondent" or "Agency"), Terazije 23, 11000 Belgrade, Serbia, is a state authority established pursuant to the Law on Privatization Agency ("Official Gazette or RS" No. 38/2001, hereinafter "Privatization Law" or "PL") with capacity of legal entity in charge of social and state capital sale in the privatization process in the Republic of Serbia.

5 At the beginning of proceedings, the Agency was represented by the attorney Miroslav Pavlovic PhD (Knez Mihajlova 30, 11000 Belgrade) and attorneys Nikola Jankovic and Julijana Jevtic (Carlija Caplina 37, 11000 Belgrade). Starting from the hearing held on 26 November 2007, the Agency was represented by the attorney Rajko Ignjacevic (Starine Novaka 3, 11000 Belgrade), thus replacing the preceding attorneys. Starting from the hearing held on 25 February 2008, the attorney Rajko Ignjacevic was joined by the attorney Aleksandar Todorovic (Svetogorska 22, 11000 Belgrade).

C *The Second Respondent*

6 Joint stock company for catering, tourism, foreign and domestic trade and games of chance "Srbija-Turist AD" – Nis (hereinafter: Srbija-Turist or the Second Respondent) is a company established and existing in conformity with laws of the Republic of Serbia, with its registered head office at the address 7 Jula 2a, 18000 Nis, registered in the court register of the Commercial Court in Nis under the registry number 1-1639.

7 From the beginning of proceedings, Srbija-Turist was represented by the attorney Djordje Djurisic from Belgrade (Krunska 60, 11000 Belgrade).

III Arbitration Agreement

8 The Arbitration Agreement which determines the competence of the Arbitral Tribunal is contained in Clause 10 (paragraphs 10.2 and 10.3) of the Contract, reading:

> *"10.2 Settlement of Disputes*
>
> *"Any dispute or misunderstanding arising from this Contract, or any violation, termination or invalidity of the Contract, which may not be*

settled amicably, shall be settled by means of written notice of one Party to the other Parties that the case shall be finally settled before the Court of Arbitration of the International Chamber of Commerce, in conformity with Rules of Arbitration of the International Chamber of Commerce. The place of arbitration shall be Belgrade, the language of arbitration shall be Serbian, and the Court of Arbitration shall consist of three arbitrators designated in compliance with Rules of Arbitration of the International Chamber of Commerce."

9 Further to Clause 10.1 of the Contract, the law of the Republic of Serbia is designated as the authoritative law in this dispute.

"10.3 Final and Binding Decision

"Any decision of the Court of Arbitration rendered in compliance with Clause 10 shall be final and binding upon the Parties. The award as per any such decision may be entered in any jurisdiction, or a plea may be submitted to any court of competent jurisdiction to recognize such a decision, or court recognition of such decision, and any order to recognize, or another legal instrument, as the case may be."

IV Rules of Procedure

10 Article 15 paragraph 1 of ICC Rules stipulates:

"The proceedings before the Arbitral Tribunal shall be governed by ICC Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."

11 In the Partial Award of Arbitral Tribunal dated 23 September 2008, the Arbitral Tribunal stated that the parties agreed that these proceedings shall be governed by ICC Rules, and the matters which are not regulated by these Rules shall be governed by subsidiary Civil Procedure Code of the Republic of Serbia ("Official Gazette of RS", No. 125/2004, hereinafter: "Civil Procedure Code" or "CPC").

12 Provisions of procedural character in the Partial Award of Arbitral Tribunal dated 23 September 2008 constitute an integral part of this Final Award.

V Arbitral Proceedings

A *Arbitral Tribunal*

13 Further to Claimant's proposal and in conformity with Article 9(1) of ICC Rules, the International Court of Arbitration confirmed the appointment of Mr. Tibor Varadi as an arbitrator in this case on 8 December 2006. Further to joint proposal of respondents and in conformity with Article 9(1) of ICC Rules, the International Court of Arbitration confirmed the appointment of Mrs. Maja Stanivukovic as an arbitrator in this case on 8 December 2006. Further to Article 9(3) of ICC Rules, the International Court of Arbitration (upon proposal of the French Committee of ICC) appointed Mrs. Laurence Mitrovic as the Chairperson of Arbitral Tribunal in this case on 2 February 2007.

14 At the hearing held on 14 May 2007 in Belgrade, in the presence of all participants in this case, Mr. Tibor Varadi and Mrs. Maja Stanivukovic resigned their appointments. Pursuant to Article 12(1) of ICC Rules, the International Court of Arbitration accepted the above resignations on 8 June 2007. Pursuant to Article 9(2) of ICC Rules, on 17 July 2007, the Secretary General of the International Court of Arbitration confirmed appointment of Mr. Miodrag Orlic (upon Claimant's proposal) and Mrs. Jelena Perovic (upon Respondents' proposal) in the capacity of arbitrators in this case.

B Mission Statement and Program of Arbitral Proceedings

15 At the hearing scheduled for 14 May 2007, the Arbitral Tribunal passed, by mutual assent of all participants in this case, the Mission Statement which was signed on that occasion and forwarded to the ICC Secretariat. The Program of Arbitral Proceedings was also forwarded to ICC Secretariat on 11 December 2007, after consultations with all participants in this case. The Program of Arbitral Proceedings was regularly updated and modified throughout the procedure duration. The latest and final version of the Program of Arbitral Proceedings was sent by electronic mail to ICC Secretariat on 7 November 2010.

16 In Post-Hearing Brief of 15 May 2010 (paragraph 13, page 19), the Privatization Agency placed, for the first time after the Mission Statement signing (14 May 2007), the objection that the Arbitral Tribunal, after reconstitution of the Arbitral Tribunal, failed to comply with provisions of Article 12(4) of ICC Rules when appointing Mr. Miodrag Orlic and Mrs. Jelena Perovic as arbitrators in this case (17 July 2007), because it did not determine from the period before reconstitution of Arbitral Tribunal, concluding that the newly appointed arbitrators (Mr.

Miodrag Orlic and Mrs. Jelena Perovic) did not agree with the wording and contents of Mission Statement.

17 The Arbitral Tribunal finds this objection unfounded, bearing in mind that after signing of Mission Statement, subsequent resignations of Mr. Tibor Varadi and Mrs. Maja Stanivukovic and appointment of Mr. Miodrag Orlic and Mrs. Jelena Perovic as arbitrators in this case, no new procedural actions have taken place and there was no need to repeat the whole procedure. Also, the newly appointed arbitrators accepted by tacit consent (*facta concludentia)* the Mission Statement signed by their predecessors, given the fact that they repeatedly referred to it during the arbitration, primarily by accepting and signing of numerous Conclusions of Arbitral Tribunal made after their appointment for arbitrators in this case (refer to paragraph 20 below).

18 However, at the very end of these proceedings, on 22 June 2010, Mrs. Jelena Perovic, in capacity of Arbitral Tribunal member, submitted a letter to the Parties, ICC Secretariat and other members of Arbitral Tribunal, wherein she remarks that the conditions for her acceptance of Mission Statement have been fulfilled, with a reserve that *"Article V.3.5, as well as other articles of Mission Statement pertaining to assessment of constitutionality and legitimacy of general legal acts of the Republic of Serbia by the Arbitral Tribunal should not have been included in the Mission Statement."*[2]

C *Minutes*

19 At the hearing held on 26 November 2007, the parties agreed to provide a written record in the form of "word to word" minutes and an audio recording of all forthcoming hearings (refer to page 41 of Minutes of the Hearing dated 26 November 2007).

D *Procedural Orders*

20 During the procedure**,** the Arbitral Tribunal issued the following eighteen procedural orders:

[2] *"For the quoted reasons, it is my opinion that Article V.3.5 as well as other articles of Mission Statement pertaining to assessment of constitutionality and legitimacy of general legal acts of the Republic of Serbia by the Arbitral Tribunal should not have been included in the Mission Statement. However, as the Mission Statement does not prejudice the opinions of the Arbitral Tribunal regarding the matters contained in the document, I find that, in broadest terms, the conditions for its acceptance on my part were fulfilled, taking into account the said reserve".*

(i) Procedural Order No.1 about a number of legal and technical matters, adopted by the Arbitral Tribunal after conclusion of hearing held on 26 November 2007;

(ii) Procedural Order No.2, further and related to objection about incompetence raised by respondents, adopted by the Arbitral Tribunal after the hearing held on 25 February 2008;

(iii) Procedural Order No.3 allowing to act on the counterclaim of the First Respondent, adopted by the Arbitral Tribunal on 30 September 2008;

(iv) Procedural Order No.4 rejecting the Claimant's request to render a partial award, adopted by the Arbitral Tribunal on 30 September 2008;

(v) Procedural Order No.5 on acceptability of Arbitral Award No. 13798/AVH from arbitral proceedings "Putnik", adopted by the Arbitral Tribunal on 30 September 2008;

(vi) Procedural Order No.6 on a number of decisions made after conclusion of the hearing held from 24 to 28 November 2008, adopted by the Arbitral Tribunal on 28 November 2008;

(vii) Procedural Order No.7 on acceptability of evidence in electronic form and request of the First Respondent to submit evidence, adopted by the Arbitral Tribunal on 24 January 2009;

(viii) Procedural Order No.8 on acceptability of testimony of Mr. Srba Ilic, owner of UHL, adopted by the Arbitral Tribunal on 26 January 2009;

(ix) Procedural Order No.9 on a number of decisions made after conclusion of the hearing held from 26 to 30 January 2009, adopted by the Arbitral Tribunal on 30 January 2009;

(x) Procedural Order No.10 on acceptability of certain evidence, adopted by the Arbitral Tribunal on 4 May 2009;

(xi) Procedural Order No.11 on a number of decisions made after conclusion of the hearing held from 4 to 8 May 2009;

(xii) Procedural Order No.12, also concerning a number of decisions made after conclusion of the hearing held from 4 to 8 May 2009, adopted by Arbitral Tribunal on 5 June, 2009;

(xiii) Procedural Order No.13 on a number of decisions made after conclusion of the hearing held from 29 to 30 June 2009, adopted by the Arbitral Tribunal on 30 June 2009;

(xiv) Procedural Order No.14 on the task of expert testimony and appointment of the audit firm PricewaterhouseCoopers as the Independent Expert Witness of the Arbitral Tribunal (in compliance with Article 20(4) of ICC Rules), adopted by the Arbitral Tribunal on 20 October 2009;

(xv) Procedural Order No.15 on parties' requests to pronounce temporary measures and partial award, adopted by the Arbitral Tribunal on 17 November 2009;

(xvi) Procedural Order No.16 on the First Respondent's request to exclude evidence (CX-225 and CX-226) submitted by the Claimant at the hearing held on 25 and 26 January 2010 and further course of procedure, adopted by the Arbitral Tribunal on 27 January 2010;

(xvii) Procedural Order No.17 on parties' letters delivered after issuance of Procedural Order No.16, adopted by the Arbitral Tribunal on 9 April 2010;

(xviii) Procedural Order No.18 on conclusion of proceedings and delivery of Program of Arbitral Proceedings to all participants in this case, adopted by the Arbitral Tribunal on 7 November 2010.

E *Independent Expert Testimony*

21 On 30 September 2008, the Arbitral Tribunal agreed on the draft Task of Expert Testimony which was thereupon (in compliance with Article 20(4) of ICC Rules) forwarded to the parties for consultations (refer to Procedural Order No.4, paragraph 7).

22 Upon conclusion of the hearing held from 24 to 28 November 2008 and consultations with the parties, the Arbitral Tribunal decided to adopt the version of Task of Expert Testimony of 31 October 2008 (refer to Procedural Order No.6, paragraph 6).

23 Since the Arbitral Tribunal left it to the parties to agree on the person in charge of expert testimony, the parties agreed and opted for the audit firm PricewaterhouseCoopers (hereinafter: "PWHC"), with whom the agreement on implementation of Task of Expert Testimony (hereinafter: "Letter of Engagement) was signed on 4 May 2009, with attached version of Task of Expert Testimony of 31 October 2008 in the form of Annex A.

24 Upon rejection of proposed estimated PWHC service fees and costs on 5 July 2009 (at the amount of EUR 310,000), and after signing of Letter of Engagement and beginning of work on Task of Expert Testimony, there arose the necessity to reduce the scope of Task of Expert Testimony assigned to PWHC in order to reduce the costs. On 18 September 2009, the Arbitral Tribunal proposed to the parties an updated version of the Task of Expert Testimony (with rather reduced scope compared to the Task of Expert Testimony from Annex A to the Letter of Engagement). On 28 September 2009, the Claimant accepted the proposed draft updated Task of Expert Testimony. The First Respondent opposed to the proposal and proposed its own version of the reduced scope of Task of Expert Testimony on 29 September 2009.

25 Mindful of the fact that the First Respondent agreed of his own accord on PWHC service fees and costs necessary for completion of work on the version of Task of Expert Testimony proposed by the Agency (at the amount of EUR 125,899, VAT excluded) and thereupon offered to pay the difference of remaining EUR 50,000, the Arbitral Tribunal decided to accept the updated version of the Task of Expert Testimony proposed by the Agency (refer to Procedural Order No.14). Pursuant to Article 20(4) of ICC Rules, the final updated version of the Task of Expert Testimony is enclosed as Annex to Procedural Order No.14 of the Arbitral Tribunal of 20 October 2009.

26 On 8 January 2010, PWHC submitted its report (hereinafter: "PWHC Report") which was thereupon forwarded to all participants in this case.

F *Course of Procedure*

27 On 28 April 2006, the Claimant instituted the arbitral proceedings before the ICC International Court of Arbitration. In their response to the request to institute the arbitral proceedings dated 17 August and 7 November 2006, the respondents disputed the jurisdiction of the Arbitral Tribunal.

28 At the session held on 8 December 2006, pursuant to Article 6(2) of ICC Rules, the International Court of Arbitration decided to proceed with the subject procedure.

29 After reception of a number of objections of procedural character related to Claimant's claims (by the respondents), the Arbitral Tribunal, upon Claimant's request and after having heard the First Respondent and the Second Respondent who opposed to this request, starting from the expediency principle in general and flexibility of arbitral proceedings in particular, decided to allow an additional 15-day period to the Claimant in order to, in its words, "specify" ("rephrase") its claim (item 4 of Procedural Order No.1 dated 26 November 2007). Acting in conformity with this conclusion, the Claimant submitted on 7 December 2007 a brief, quoting "*that one part of specified claim pertains to assessment of claimant's rights, whereas the other part of the claim is of condemnatory nature against the respondents* (…)" (page 3 of Claimant's brief dated 7 December 2007, *in fine*).

30 In its brief of 28 March 2008, the First Respondent filed a counterclaim. The Arbitral Tribunal decided on 30 September 2008 to allow action on the First Respondent's counterclaim (refer to Procedural Order No.3 dated 30 September 2008).

31 On 23 September 2008, acting on respondents' objections to formulations of claims, the Arbitral Tribunal passed a partial award on acceptability of Claimant's claims, thereby notifying the competent authorities that it acts in this case (hereinafter: "Partial Award"). On that occasion, the Arbitral Tribunal also passed a number of decisions related to respondents' claims and decided to state its opinion on acceptability of particular claims on occasion of rendering the final award.

32 Hearings with the parties were held in Belgrade at below listed times:

(i) 14 May 2007;
(ii) 26 November 2007;
(iii) 25 February 2008;
(iv) from 24 to 28 November 2008;
(v) from 26 to 30 January 2009;
(vi) from 4 to 8 May 2009;
(vii) from 29 to 30 June 2009;
(viii) from 25 to 27 January 2010.

33 In total, 31 witnesses were heard (out of which Mr. Srba Ilic twice and Mrs. Darka Radovic three times), starting with arbitration hearing held from 24 to 28 November 2008 and up to and inclusive of the hearing held from 29 to 30 June 2009 (the witnesses were heard at four arbitration hearings). At each of the above hearings, the following witnesses were heard:

Hearing held from 24 to 28 November 2008 (total of 9 witnesses):

i. witness Milen Tatic;
ii. witness Srba Ilic;
iii. witness Darka Radovic;
iv. witness Nenad Vulic;
v. witness Branko Kujundzic;
vi. witness Miodrag Stojkovic;
vii. witness Dima Trajkovic;
viii. witness Goran Mihajlovic;
ix. witness Tomislav Milanovic.

Hearing held from 26 to 30 January 2009 (total of 15 witnesses):

x. witness Tea (Sujic) Kovacevic;
xi. witness Nebojska Stankovic;
xii. witness Slobodan Vrzic;
xiii. witness Srba Ilic;
xiv. witness Branislav Jovanovic;
xv. witness Radomir Stamcevic;
xvi. witness Gordana Sejic;
xvii. witness Dragisa Blagojevic;
xviii. witness Milorad Milijev;
xix. witness Ratomir Markovic;
xx. witness Stevan Blagojevic;
xxi. witness expert Prof. Milorad Zlatanovic;
xxii. witness Branislav Zec;
xxiii. witness Snezana Dabovic;
xxiv. witness Dobrivoje Dzipkovic.

Hearing held from 4 to 8 May 2009 (total of 5 witnesses):

xxv. witness expert Miladin Kovacevic;
xxvi. witness Dejan Rajcic;
xxvii. witness Slobodan Vuckovic;

xxviii. witness Darka Radovic;
xxix. witness Nebojsa Kesic.

Hearing held from 29 to 30 June 2009 (total of 5 witnesses):

xxx. witness Nebojsa Stojanovic;
xxxi. witness Miodrag Djordjevic;
xxxii. witness Miroljub Nikolic;
xxxiii. witness Novica Toncev;
xxxiv. witness Darka Radovic.

34 The arbitration hearing held from 25 to 27 January 2010 was dedicated to oral and final pleadings of the parties.

35 As concerns the First Respondent's request to exclude the evidence marked CX-135 (Contract on Execution of Works on Reconstruction of the "Nis" Hotel between Srbija-Turist and SC Euro Invest Expert Limited (hereinafter: "Euro-Invest" or "EIE") signed on 16 November 2005), for the reason of alleged inauthenticity of that document, and the evidence marked CX-4 (report Consultant Audit which contains in Annex 6 another version of the contract marked CX-135), the Arbitral Tribunal decided to consider those request on occasion of final award rendering (refer to Procedural Order No.12 dated 5 June 2009, paragraphs 3 and 4).

36 During the proceedings, the parties addressed to the Arbitral Tribunal several briefs, communications, pieces of evidence and correspondence (by electronic mail, etc.). In conformity with the lists of evidence submitted by the parties to the Arbitral Tribunal and to each other, the Claimant's evidence is marked CX-1 to CX-228 (evidence marked CX-227 and CX-228 is excluded from this procedure by Procedural Order of the Arbitral Tribunal No. 17 dated 9 April 2010) whereas the respondents' evidence is marked RX-1 to RX-236. The Arbitral Tribunal duly scrutinized all reasons, testimonies, oral expositions, communications and evidence of the parties, including those which are not explicitly mentioned in this reasoning.

37 Pursuant to Article 24(2) of ICC Rules, the International Court of Arbitration:

(i) at the session held on 9 November 2007, adopted the decision to extend the deadline for delivery of Final Award in this case until 29 February 2008;

(ii) at the session held on 14 February 2008, adopted the decision to extend the deadline for delivery of Final Award in this case until 31 May 2008;

(iii) at the session held on 7 May 2008, adopted the decision to extend the deadline for delivery of Final Award in this case until 31 August 2008;

(iv) at the session held on 22 August 2008, adopted the decision extend the deadline for delivery of Final Award in this case until 30 November 2008;

(v) at the session held on 7 November 2008, adopted the decision to extend the deadline for delivery of Final Award in this case until 28 February 2009;

(vi) at the session held on 5 February 2009, adopted the decision to extend the deadline for delivery of Final Award in this case until 31 May 2009;

(vii) at the session held on 14 May 2009, adopted the decision to extend the deadline for delivery of Final Award in this case until 31 August 2009;

(viii) at the session held on 6 August 2009, adopted the decision to extend the deadline for delivery of Final Award in this case until 31 December 2009;

(ix) at the session held on 3 December 2009, adopted the decision to extend the deadline for delivery of Final Award in this case until 30 April 2010;

(x) at the session held on 1 April 2010, adopted the decision to extend the deadline for delivery of Final Award in this case until 31 July 2010;

(xi) at the session held on 1 July 2010, adopted the decision to extend the deadline for delivery of Final Award in this case until 31 October 2010;

(x) at the session held on 1 April 2010, adopted the decision to extend the deadline for delivery of Final Award in this case until 31 July 2010;

(xi) at the session held on 1 July 2010, adopted the decision to extend the deadline for delivery of Final Award in this case until 31 October 2010;

(xii) at the session held on 7 October 2010, adopted the decision to extend the deadline for delivery of Final Award in this case until 30 December 2010;

(xiii) at the session held on 2 December 2010, adopted the decision to extend the deadline for delivery of Final Award in this case until 28 February 2011;

(xiv) at the session held on 3 February 2011, adopted the decision to extend the deadline for delivery of Final Award in this case until 31 March 2011;

(xv) at the session held on 10 March 2011, adopted the decision to extend the deadline for delivery of Final Award in this case until 30 April 2011.

38 Pursuant to the ICC Secretariat's notice dated 28 April 2011, on the decision of International Court of Arbitration adopted at the session of 7 April 2011 to extend the deadline for delivery of Final Award (in conformity with Article 24(2) of ICC Rules), the existing deadline for delivery of Final Award in this case lasts until 31 May 2011.

39 Pursuant to Article 22 of ICC Rules, the Arbitral Tribunal declared the proceedings closed on 7 November 2010 (refer to Procedural Order of Arbitral Tribunal No.18).

40 During 2010, the Arbitral Tribunal held several closed-to-public sessions of Arbitral Tribunal whether in Belgrade or by conference calls in order to reach the Final Award. With that regard, on 28 January 2010, and from 9 to 11 April 2010, the Arbitral Tribunal held hearings in Belgrade. With consent of all Tribunal members and in order to deliver the Final Award, the Arbitral Tribunal also held discussions by conference calls[3] on 20 and 21 March and 8 and 9 May 2010 and 12 June 2010. In the presence of all members of Arbitral Tribunal, the final session for discussion and decision of Arbitral Tribunal was held in Belgrade from 6 to 7 November 2010.

41 On 1 November 2010, the attorneys of the Privatization Agency notified the Arbitral Tribunal Chairperson (failing to transmit a copy of that notice to other parties in this case) that in their opinion there occurred a violation of the principle of confidentiality of Arbitral Tribunal work, because of alleged publishing of contents of draft Final Award of the Arbitral Tribunal in public (and for the reason of alleged awareness of trade union representatives of Srbija-Turist of the contents of the draft Final Award of the Arbitral Tribunal during a meeting held at the premises of the Ministry of Economy and Regional Development in Nis and for the reason of announcing the information at local television station in Nis on 28 October 2010).

42 In her correspondence of 1 and 6 November 2010, the Chairperson of the Arbitral Tribunal informed the attorneys of the Privatization Agency that she has no knowledge of the mentioned events and rejected the representations of her alleged violation of confidentiality principle pertaining to the work of Arbitral Tribunal.

43 Failing to wait for the response of the Chairperson of Arbitral Tribunal to the correspondence of the attorneys of Privatization Agency dated 3 November 2010 on subject matter (the copy of which was not transmitted to other parties in this case, either), on 5 November 2010, the attorneys of the Privatization Agency addressed the request to the ICC Secretariat to disqualify the Chairperson of the Arbitral Tribunal (which was again not transmitted to Srbija-Turist).

[3] Mrs. Perovic had already confirmed her consent to holding Arbitral Tribunal sessions by conference calls in the electronic mail sent on 2 April 2010 to the Chairperson of the Arbitral Tribunal.

44 At the session held on 9 December 2009, the International Court of Arbitration passed the decision to reject the request to disqualify the Chairperson of Arbitral Tribunal.

45 Thereafter, the Chairperson of the Arbitral Tribunal forwarded to the arbitrators on 13 December 2010 a modified version of draft Final Award and draft Minutes of discussions and voting of Arbitral Tribunal at the non-public session of the Arbitral Tribunal held in Belgrade from 6 to 7 November 2010, asking Mrs. Perovic to confirm whether she still wishes to state a separate opinion.

On 21 December 2010, Mrs. Perovic responded: *"Please be informed that I shall state my separate opinion in writing and withhold my signature to the award"*.

46 All versions of draft Final Award (working versions) were at the same time forwarded to all members of Arbitral Tribunal by the Chairperson of Arbitral Tribunal and all members of Arbitral Tribunal participated in discussions and voting towards delivery of Final Award although the Arbitral Tribunal did not reach the unanimous majority on all matters in this case.

47 After the Chairperson of Arbitral Tribunal and Mr. Orlic reached an agreement on contents of draft Final Award on 22 December 2010, the same draft was transmitted to ICC Secretariat on 25 December 2010. On 5 April 2011, Arbitral Tribunal continued discussions on the basis of newly submitted draft Final Award (sent by electronic mail by the Arbitral Tribunal Chairperson to the arbitrators, before the discussions). The discussions ended on 8 April 2011, with the conclusion that Mr. Orlic and the Chairperson of Arbitral Tribunal have reached an agreement on the version of Final Award while Mrs. Perovic confirmed that she wishes to submit a Separate Opinion. As a consequence of the above, the Chairperson of Arbitral Tribunal forwarded to ICC Secretariat the draft Final Award on 13 April 2011, within the deadline defined by ICC Secretariat.

48 Before full dedication to the merits and matters of essential relevance for deciding in this case, the Arbitral Tribunal shall first state its view on certain matters of procedural character which are not included in the Partial Award of Arbitral Tribunal of 23 September 2008.

VI Objections of Procedural Character Concerning the Claimant's Claims

A *Claimant's Claims in Compliance with Article 188 of the Civil Procedure Code*

49 The Arbitral Tribunal is primarily obliged to decide whether the Claimant's claims (contained in the request for institution of arbitral proceedings dated 28 April 2006 (hereinafter: "Claim"), in amendment to Claim dated 4 July 2006, reply of 6 February 2007 and Claimant's brief of 7 December 2007) constitute the requests for assessment of facts[4] or else requests for declaration of existence of legal relationship (such as existence of Contract and invalidity of decision on its termination)[5].

50 Mindful of the above, the Arbitral Tribunal is obliged to decide whether the claims are allowed in terms of provisions of Article 188 of Civil Procedure Code of the Republic of Serbia (hereinafter: "Civil Procedure Code" or "CPC"), reading:

> *"A complaint may be filed for such purposes as to declare whether a party is or is not entitled to a right or whether there is or is not a particular legal relation or to prove the validity or invalidity of a document.*
> *This kind of complaint may be filed in accordance with special regulations, if the plaintiff has a legal interest that the court declare whether or not there is certain disputable right or legal relation before the effective date of an agreement, or whether a document is authentic or not, or if the plaintiff has other legal interest in bringing such action."*

51 The fact that in his Claim of 28 April 2006 the Claimant filed a request to make a declaratory decision on requests stated under ordinal numbers I, II and III (declaratory claim), before the Contract was terminated on 30 June 2006, is not disputable. With that regard, the First Respondent also finds it a claim for declaration[6]. The purpose of that kind of claim was that the Arbitral Tribunal declares whether the Claimant has fulfilled his obligations from the Contract in order to prevent its termination (if declared that the contractual obligations are fulfilled).

52 After termination of Contract on 30 June 2006, the Claimant submitted a new claim on 4 July 2006 (under ordinal number V), also of declaratory nature, requesting from Arbitral Tribunal to (i) declare that the Contract is still valid

[4] Refer to Agency's response to the Claim and amendment to Claim dated 17 August 2006, page 4-13.
[5] Refer to Claimant's brief dated 28 August 2006, page 2.
[6] Refer to Agency's response to Claim dated 17 August 2006, IV 2.1, page 4.

despite the termination declared by the First Respondent and (ii) declare the Agency's decision on termination and on transfer of Srbija-Turist's shares to the Share Fund of the Republic of Serbia (hereinafter: "Share Fund") void and invalid.

53 In his reply of 6 February 2007, the Claimant submitted new declaratory claims (under ordinal number I, IV and VI) requesting from Arbitral Tribunal to declare (i) that the Contract is still in force, which makes it necessary to return the seized shares of Srbija-Turist, (ii) that the Claimant has fulfilled the obligations from Social Program and (iii) that the outstanding amount of investment into Srbija-Turist equals USD 2,200,000.

54 Finally, on request of the Arbitral Tribunal formulated after the hearing held on 26 November 2007, the Claimant in his brief of 7 December 2007 submitted the same declaratory claim (under ordinal number I, II, III, IV, V and VI), requesting from the Arbitral Tribunal to declare that *"the Contract on purchase and sale of social capital by public tender No. I-2169/03-505.02 dated 16 September 2003 exists"* and *"remains in force* (…)" for the following reasons: fulfillment of contractual obligations in general and in particular, fulfillment of made investments in Serbia-Turist, fulfillment of obligations from Social Program and fulfillment of the obligation to maintain the scope of business activities[7].

55 The Claimant also stated that (pursuant to Article 19 of ICC Rules and Articles 193 and 194 of CPC) *"partly specifies and repeats formulation of his claims from the brief dated 27 March 2007, and partly amends the claims from the said brief"* and *"that it is now beyond doubt that a part of specified claims pertains to declaration of Claimant's rights, whereas the other part of the claim is condemnatory by its legal nature in relation to the Respondents"*.

56 The Arbitral Tribunal first finds that the claims of declaratory nature contained in the brief of 27 March 2007 are identical to those contained in the reply of 6 February 2007. Also, in its Partial Award of 23 September 2008, the Arbitral Tribunal already decided that the Claimant's brief of 7 December 2007 does not contain any new claims as compared to the brief of 27 March 2007, and that the brief of 7 December *"contains simple specification of claims"* set out in the brief of 27 March 2007[8].

[7] Subject requests from paragraphs 51 to 54 are summarized in Claimant's letter dated 15 May 2010 (Post Hearing Brief) and discussed in paragraphs 479 *et seq.* of this Final Award.
[8] Refer to Partial Award of 23 September 2008, paragraph 39, page 12.

57 Mindful of the above, while deciding on conformity of the Claimant's requests provisions of Article 188 of CPC, the Arbitral Tribunal shall rely solely on the claims of declaratory nature, as formulated in Claimant's letter of 7 December 2007.

58 The Arbitral Tribunal first finds that the Claimant no longer requests from the Arbitral Tribunal to assess fulfillment of his contractual obligations but instead only to declare that the Contract is still in force. In other words, the Claimant request from the Arbitral Tribunal to declare that the legal relationship exists or, more precisely, that there is ongoing contractual relationship between the parties with continuous implementation, and not to assess the truthfulness or untruthfulness of any document (in this case, authenticity of report of Consultant – Audit – evidence marked CX-4).

59 With respect to the fact that in the Claimant's opinion the Contract remains in force because of invalidity of termination declared by the First Respondent, the Claimant has legal interest to request from the Arbitral Tribunal to declare existence of continuous legal relationship between the parties (which arises from the said Contract and its implementation), to be used as grounds for ordering the return of seized (in Claimant's opinion, unfounded seizure) of shares of Srbija-Turist.

60 In the opinion of the Arbitral Tribunal, the respondents' view that acceptability of declaratory claims would contradict the provisions of Article 188 of CPC because the requests are formulated after maturity of performance notice[9], is not acceptable in this case because the said restriction pertains only to the first paragraph of Article 188 of CPC. With that regard, the Article 188 of CPC reads:

"*Civil Procedure Code*

Article 188

[9] Refer to the brief of the Second Respondent dated 29 February 2008, paragraph 2, page 1.

A complaint may be filed for such purposes as to declare whether a party is or is not entitled to a right or whether there is or is not a particular legal relation or to prove the validity or invalidity of a document.

This kind of complaint may be filed in accordance with special regulations, if the plaintiff has a legal interest that the court declare whether or not there is certain disputable right or legal relation before the effective date of an agreement, or whether a document is authentic or not, ***or*** *if the plaintiff has another legal interest in bringing such action."*

61 Pursuant to paragraph 2 of Article 188 of CPC, acceptability of declaratory claims is allowed in case *"the plaintiff has another legal interest"*. The meaning of the word "*or*" in the second part of the second paragraph of Article 188 of CPC actually leads to the conclusion that this paragraph is interpreted independently from the provision quoted in the first part of the same paragraph.

62 Since the Claimant has justified existence of legal interest independently from the sole declaration that the Contract is still in force, and since the Claimant's legal interest is reflected in his intention to preserve the rights arising from the capacity of shareholder and to return the shares of Srbija-Turist in case the Arbitral Tribunal determines that the Contract is unfoundedly terminated and thus still in force, the declaratory claims from Claimant's brief of 7 December 2007 are (with that regard) in conformity with provisions of Article 188 of CPC.

63 Further to the above, this opinion is confirmed also by the court practice of Serbian courts, where there is clear recognition of allowing claims for declaration that a contract on capital sale is in force and proving that conditions for contract termination are not fulfilled (refer to the Decision of Higher Commercial Court Pz 9899/2008 dated 21 January 2009, enclosed to Claimant's Post-Hearing Brief of 15 May 2010).

B *Allowed Combining of Request for Assessment of Legal Relationship Existence with Condemnatory Claims*

64 As it has been determined that the Claimant has a legal interest to submit declaratory claims in this case, the Arbitral Tribunal should decide, in the context of Article 188 of CPC, whether it is possible to combine the request for assessment of legal relationship existence with condemnatory claims.

65 In respondents' opinion, *"if a respondent's liability is due, the claimant may not request declaration of legal relationship, because he has no legal interest therein, and may only request a specific performance order i.e. file a condemnatory claim"*[10].

66 The Arbitral Tribunal does not oppose application of the above legal principle which is obviously grounded on legal doctrine and practice of Serbian courts (refer to legal doctrine and court practice enclosed to Agency's brief of 3 March 2008).

67 Nevertheless, the Arbitral Tribunal states, based on legal doctrine and court practice submitted by the First Respondent[11], that this legal principle contains an exception applicable to this case. The Arbitral Tribunal hereby states that the honored authors and connoisseurs of Serbian legislation, whose works have been kindly submitted by the First Respondent, first highlight the existence of the above legal principle:

> *"Legal interest in exclusively declaratory protection, as a rule, does not exist when full legal protection may be achieved by a condemnatory or constitutive claim. Then, as a rule, there are no grounds to allow the claimant to engage court in special determination of that which anyway can and has to be determined for the purpose of providing condemnatory, or constitutive legal protection";*

and then foresee an exception to the said rule:

> *"However, if the legal interest for determination has a meaning which surpasses the objective of specific litigation and if, accordingly, the determination appears to be legally justified both from the aspect of some other rights or interests – then there exist the grounds for independent declaratory legal protection* (…). *In the context of these abstracts, it would be hard to accept a radical disputing of the right to declaratory protection if the claimant's specific performance order has already become mature* (…).
>
> *As a rule, it should be assumed that there exists a claimant's legal interest when requesting determination of contents of a legal relationship in order*

[10] Refer to the First Respondent's brief of 3 March 2008, paragraph 3, page 2, and the Second Respondent's brief of 29 February 2008, paragraphs 3 and 4, page 1.
[11] Refer to evidence marked RX-13: S. Triva, V. Belajec, M. Dika, "Civil Litigation Procedure Law", (1986), page 320.

to eliminate the dangerous incertitude caused by uncertainty or by dispute on its contents, as well as when the claimant reveals probability of pending risk that the respondent might jeopardize by its demeanor the exercise of the former's rights in close future. VsH (Gz 4514/75 – NZp 10/77-43) highlights that a legal interest exists when the claimant, due to actual incertitude about his rights, feels threatened in his legal position, and there is a justified need to clarify such incertitude in court; such a need may comprise exercise of some of his further rights or knowing how to behave in the future."

68 In subject case, the relevance of the Claimant's legal interest in declaration surpasses the objective of these particular proceedings since even despite the need to declare existence or inexistence of a continuous legal relationship, or declaration of current effect and existence of the Contract which would enable the return of the seized shares, the Claimant has another legal interest, not related to the course of ongoing arbitration (e.g. interest in exercising the rights arising from the capacity of shareholder of Srbija-Turist or in alienation of ownership in Srbija-Turist after expiry of the deadline stipulated by the Contract).

69 The Claimant's interest in subject case is to seek the assessment of the contents of legal relationship (in fact, legal interest in declaration of existence of legal relationship even despite – in Claimant's opinion unjustified – termination of the Contact by the Agency on 30 June 2006), in order to eliminate the dangerous incertitude caused by uncertainty or dispute on its contents (in subject case, the uncertainty related to justified or unjustified grounds for termination and possibility to implement the Contract). The Claimant therein revealed the probability of risk that the respondent might jeopardize, by its demeanor, the exercise of the former's rights in close future (primarily, by possible depriving of the Claimant of his ownership rights over the shares in Srbija-Turist and, as a consequence of the above, depriving him of the shareholder's rights which are not subject to these proceedings).

70 Mindful of the above, the Claimant's legal interest is that the Arbitral Tribunal should clarify the issue of justification of Contract termination although the claim is of declaratory character and mature for performance (i.e. request for return of 997,824 shares emitted by Srbija-Turist). As a consequence of the above, the Arbitral Tribunal hereby concludes that combining of Claimant's requests for

assessment of existence of legal relationship with condemnatory claims is allowed[12].

C *Allowed Rendering of Award Constituting an Execution Title Based on Claim to be Adjudicated*

71 The Arbitral Tribunal is obliged to determine whether on the basis of claim for declaration it is possible to make an award which represents an executive document, and whether on the basis of declaratory decision (declaratory award), it may request enforced performance.

72 In subject case, the declaratory claim has the purpose that the Arbitral Tribunal determines whether the Contract exists and remains in force or, in other words, whether the Contract termination (on 30 June 2006) by the Agency is justified.

73 Indisputably, on 30 June 2006, the Agency terminated the Contract on the basis of Article 41a paragraph 2 of the Privatization Law[13] (CX-37).

74 Article 41a of the Privatization Law of the Republic of Serbia stipulates that:

> *"Contract of sale of capita and/or property shall be deemed terminated for non-compliance if, even within subsequently defined deadline for performance, the buyer:* (…)
>
> *2) fails to invest in the subject of privatization in the manner, form and within deadline stipulated by contract;"*

and that

> *"Upon termination of contract as per paragraph 1 of this Article* (…), *the capital which is subject to sale shall be transferred to the Share Fund."*

[12] This standpoint is confirmed by legal doctrine quoting that "*request for declaration may be joined in complaint with another one. The Claimant most often joins it to the request for specific performance order from the relationship which is claimed to be inexistent by the responding party even before the proceedings. This is particularly the case with a relationship implying periodical performance. The Claimant, in order to prevent discussions on existence of legal relationship in a possible future litigation for further performance from the same relationship, highlights, besides the request for order, the request for declaration of existence of such relationship .*" (refer to B. Poznic, Comments to the Civil Procedure Code, Official Gazette 2009, page 432).

[13] Official Gazette of RS, number 38/2001, 18/2003, 45/2005 and 123/2007 dated 26 December 2007.

Based on the above article and as a consequence of alleged non-compliance with contractual obligations by UHL, the Claimant's ownership share in Srbija-Turist has been transferred to the Share Fund. From the above said, it arises that the Claimant has a legal interest first to submit a declaratory claim for declaration that the Contract is still in force (for the reason of fulfillment of contractual obligations) and then a condemnatory claim for return of the shares transferred to the Share Fund (given that the condemnatory claim in this case represents a logical consequence of declaratory claim).

75 This standpoint is confirmed by legal opinion of Serbian courts expressed in privatization cases (in this context, refer to the court practice submitted by the Claimant as an attachment to the letter of 15 May 2010):

> *"Privatization Law does not exclude the right to compensation of damages, therefore the buyer may, in a court procedure, provided that he proves not to be negligent, request compensation of damages caused by termination of contract. Further to the above, the buyer may file a complaint requesting to declare that the contract is in force and produces legal effect as well as performance of obligations of the other contract party."*[14]

76 Even if assuming that the decision on declaratory claim in itself (i.e. the decision which declares that the legal relationship is still in force) does not constitute an executive title, the declaratory claim of the Claimant represents a logical assumption for condemnatory claim, the latter being the basis for condemnatory arbitral award ordering the return of seized shares. Such an award is executive by its nature. The reason for which the declaratory claim (i.e. plead to declare that the contract is existent and in force) is logically a necessary assumption for passing of condemnatory decision ordering return of assets (or shares) results from the fact that a simple application of Article 41a of the Privatization Law (assuming that its application is justified, which shall be discussed further on in this Final Award) cannot provide for return of shares in favor of the Claimant in case the Contract is declared to be terminated for justified reasons due to non-compliance with contractual obligations by the Claimant. The claim requesting declaration that this is not the case, in fact the claim requesting to declare that the Claimant has fulfilled the obligations stipulated by Contract and that the Contract was not terminated on justified grounds and that, as a consequence, it exists and

[14] Legal opinion adopted at the session of the Commercial Disputes Division of the Higher Commercial Court dated 13 May 2006.

remains in force, thus constitutes a logical assumption for submission of condemnatory claim for return of the seized shares.

77 The Arbitral Tribunal also states that the legal doctrine, submitted by the First Respondent, confirms the possibility of simultaneous submission of condemnatory and declaratory claim of prejudicial relevance (i.e. declaration of existence of contractual relationship and enforceability of contractual obligations) for decision on the main claim (i.e. the claim for return of seized shares from the Share Fund).[15]

78 Thus defined legal doctrine is compliant with the law, since the Article 189 of CPC expressly stipulates that:

> *"if a decision on a dispute depends on whether or not there exists a legal relationship which has become disputable in the course of proceedings, the claimant may add to the existing claim also a claim for the court to declare that such a relationship exists, or does not exist, if the court of ongoing litigation is competent for such a claim."*

[15] Refer to the evidence marked RX-13 ("Civil Litigation Procedure Law", S. Triva, V. Belajec, M. Dika, 1986, page 321) quoting that: *"If the decision on a dispute depends on whether or not there exists a legal relationship, which has become disputable in the course of proceedings, the claimant may, in addition to the existing claim, exhibit also the claim for the court to declare that such a relationship exists or does not exist, provided that the court of litigation is also competent for decision on this new claim (187/3). The disputed relationship must be of prejudicial relevance for decision on the principal claim. Although it does not actually matter when this prejudicial issue has become disputable, such a claim, according to the law, could not be filed when submitting the principal claim, probably because there is still no procedural legal interest in simultaneous exhibition of both claims. We cannot agree with this rule. First of all because, as a rule, the disputable nature of particular prejudicially relevant legal relationship only* ***becomes apparent*** *during the proceedings, whereas* ***it has already been disputable*** *between the parties, before institution of proceedings. If the claimant is aware of that disputable nature, he should be allowed, at the same time with preparing the claim on principal matter, to undertake the necessary actions for institution of proceedings. If there is no dispute, no damage shall be caused by the instituted incidental claim. If there is a dispute, the court would have to decide prejudicially on that matter anyway. Therefore, it should be considered that there is generally room for exhibition of such a claim already when filing the claim on the principal matter. The expressed attitude should be particularly defended regarding the claimant's request for the court, in addition to decision on condemnatory claim (e.g. claim for payment of price), to declare by a declaratory award the existence of legal relationship which gives rise to the claim, to insert in the award the so called* ***declaratory preamble****, a necessary logical assumption of condemnatory judicate. The court has to discuss the relationship anyway and take a prejudicial attitude. Decision on basic legal relationship is particularly important in situations when the claimant exercises in a litigation only a part of his powers to act, and the declaratory award on existence of basic relationship may be used as the basis for an essentially identical trial in the next proceedings, in which the same claimant shall exercise the next condemnatory claim from the same relationship* (…)".

79 In subject proceedings, when filing the Claim of 28 April 2006, the existence of legal relationship was not challenged, since the Contract was still in force at the time (in fact, the Contract was not terminated). By filing the claim of 28 April 2006, the Claimant actually tried to prevent the Contract termination and for that reason he submitted on that occasion a number of declaratory claims for assessment that the contractual obligations were fulfilled (and not in order to assess existence of continuous contractual relationship). The existence of continuous contractual relationship was subsequently challenged on 30 June 2006, in fact, during the earlier instituted proceedings. At the time, the Claimant (UHL) considered the terminated Contract still in force and accordingly requested from the Arbitral Tribunal to declare that the Contract still produces legal effects.

80 Further to the above, the Arbitral Tribunal finds that provisions of Article 188 of CPC should be applied in this case, since the possibility for making a decision on Claimant's condemnatory claims depends on prior decision on declaratory claim whether the contractual relationship still exists (which claim has a prejudicial relevance in this case). Therefore, the issue of possibility of forced execution of decision made on the basis of declaratory claim is not legally relevant because the declaratory decision in this case is not made isolated in itself, but instead serves as the basis for decision on condemnatory claims, contained in the same claim. There lies the point of application of Article 189 of CPC which foresees the possibility for the claimant to add to the existing declaratory claim also the condemnatory claims *"if decision on the dispute depends on whether there is or there is not a legal relationship which has become disputable in the course of proceedings,*" as is the case herein.

81 The Arbitral Tribunal finally states that the responding party considers the declaratory claim inacceptable because its enforcement would contradict the provisions of Article 188 of CPC.[16]

82 Without indulging in a more profound analysis of Article 188 of CPC and court practice which arises therefrom, the Arbitral Tribunal understands that Article 189 of CPC pertains and applies in case of exhibiting of claim to declare during the proceedings, as a special case, whereas application of Article 188 of CPC pertains to general acceptability of declaratory claims.

[16] Refer to the Second Respondent's brief of 29 February 2008, paragraph 1 and 4: *"Article 188 of CPC allows for submission of claim for declaration of existence, or inexistence, of a right or legal relationship, or authenticity, or inauthenticity, of a document, before maturity of notice to perform,"* and *"Court practice also takes the attitude that there is room for declaratory claim only before maturity of notice to perform and/or condemnatory claim."*

83 Further to the above, the Arbitral Tribunal states that the Claimant's claims of declaratory nature are allowed in conformity with provisions of Article 189 of CPC and with provisions of Article 188 of CPC (on which the Arbitral Tribunal, inter alia, has already stated its mind in the previous part of this expose in favor of the Claimant's declaratory claims pursuant to Article 188 of CPC (refer to paragraph 62).

84 After the exposed consideration of the above objections of procedural-legal character, the Arbitral Tribunal shall focus on debate on the merits of this case in the next part of this award.

VII Debate on Merits

A *State of Facts, Nature of Transaction and Dispute*

85 Having considered the minutes of previous hearings, written briefs, evidence, testimonies, oral expositions of parties (including those which are not explicitly quoted in the text) and Report of Independent Expert Witness of Arbitral Tribunal (PWHC), the Arbitral Tribunal determined the following state of facts.

86 In conformity with Privatization Law (hereinafter: "Privatization Law" or "PL"), public tender for sale of Srbija-Turist was organized and conducted by the Privatization Agency. After the public competition, the Contract on Sale of Social Capital was signed with UHL, wherein Srbija-Turist (the Second Respondent) is the seller, and UHL (the Claimant) the buyer. The third party named, with no specified role in this Contract, is the Privatization Agency (the First Respondent).

87 Draft Contract was proposed by the Privatization Agency (refer to the testimony of Mr. Branislav Zec in the Minutes of Hearing dated 29 January 2009, pages 890 to 896). Two companies participated at the tender, whereas UHL was the only one to submit a bid for purchase of Srbija-Turist.[17].

88 The Contract was signed and verified at the court on 16 September 2003. Based on the Contract, the Claimant purchased 70% social capital of Srbija-Turist. The

[17] Refer to the testimony of Srba Ilic at the hearing held on 24 November 2008 (Minutes, page 153: *"As concerns Srbija-Turist, one privatization attempt failed because nobody applied. At the second privatization attempt, where we participated, two firms purchased the dossier, but only Uniworld Holdings submitted a bid. Accordingly, our bid was the only one. By the rules and so on, the Agency accepted that bid as it was. Not because a stimulating price was agreed").*

Contract specified the purchase-selling price of Srbija-Turist's shares, at the amount of USD 1,100,000, paid on 26 and 29 September 2003 (RX-23 and RX-24). On that basis, the buyer acquired 997,824 ordinary shares in Srbija-Turist, each with nominal value of RSD 1,000. Out of the remaining part of social capital in Srbija-Turist, 15% was distributed to employees and ex employees (213,819 shares), whereas 15% of capital was entered in the so called Privatization Register.

89 The Contract foresees a series of Claimant's obligations, the principal ones being: payment of purchase-selling price, investment in Srbija-Turist and fulfillment of social program (hereinafter: "Social Program" stipulated by Annex 6 to the Contract).

90 The Contract stipulated that Social Program was supposed to be completed within five (5) years (refer to Clause 8.1 of the Contract) whereas the deadline for investment program (contained in Clause 8.1.1 and Annex No.4 to the Contract (hereinafter: "Investment Program")) was determined for the period of three (3) years from Contract signing.

91 The Investment Program determined the Claimant's obligation to make investments in Srbija-Turist at the amount of USD 9,000,000 (from 1 January 2004 to 31 December 2006), according to time schedule specified in Annex 4 to the Contract.

92 The Investment Program was supposed to be implemented in three 12-month successive phases, the first one counted from 1 January 2004 and ending on 31 December 2004. Each following phase of Investment Program implementation was supposed to start after the end of the previous one and to last for 12 months. In the specified investment periods, investment in Srbija-Turist was supposed to amount to USD 2,000,000, USD 3,000,000 and USD 4,000,000, respectively for each phase.

93 The Investment Program for the year 2004 was supposed to cover the initial reconstruction of City Hotel Park and initial repairs and improvement of Motel Nais.

94 The Investment Program for the year 2005 was supposed to cover completion of refurbishment of the City Hotel Nis (its improvement up to international standards), reconstruction of the Hotel Ambasador and completion of works on the Motel Nais (improvement according to international standards for motels).

95 The Investment Program for the year 2006 was supposed to cover finalization of business center and Hotel Ambasador and reconstruction of a hotel in Niska Banja.

96 The Claimant was supposed to implement investments either in the form of direct investment (*"in cash or tangible in-kind contribution"*), or in the form of loan to Srbija-Turist. The investment was supposed to be followed by increase in capital in Srbija-Turist, by way that the Buyer (Claimant) registers his part of shares in proportion with increase in capital and allow all the other shareholders to participate in shares subscribing in compliance with law.

97 The Contract also defines the other Buyer's obligations: declaration and payment of dividends to shareholders of Srbija-Turist for each fiscal year in compliance with law (Clause 8, item 8.1.2 of the Contract); maintenance of business activities of Srbija-Turist and its affiliates *"in substantial scope"* and in compliance with proposed business plan on the level as at the time of Contract signing (Clause 8, item 8.3.5 of the Contract); prohibition of alienation of Srbija-Turist's property over certain amount (Clause 8, item 8.3.3 of the Contract); and prohibition of undertaking any activities which might lead to liquidation of Srbija-Turist and its affiliates (Clause 8, item 8.3.4 of the Contract).

98 The Claimant was also obliged to submit successively three bank guarantees as performance security (in compliance with Clause 8, paragraph 8.2 of the Contract).

99 According to Article 1 of the Contract, performance guarantee is defined as unconditional bank guarantee of a first-rate bank rated at least A, payable on first demand (guarantee form defined by Annex No.5).

100 The documents made available by Srbija-Turist and Agency to UHL during "data room" contained information that Srbija-Turist, up to and inclusive of 31 July 2003, has RSD 37,603,846 of tax debt. Regarding the period from 31 July 2003 to the date of purchase, the Buyer, as he himself stated, relied upon the contract provision from Clause 5.2.4 of the Contract, stating that Srbija-Turist has no additional tax liabilities.

101 After the Contract signing, on 26 September 2003, the Claimant submitted to the Agency the first performance guarantee issued by Eksim Bank A.D. Belgrade, at the amount of USD 1,000,000 in dinar equivalent, with validity until 1 March 2005 (RX-25).

102 According to Clause 8.2 of the Contract, the Claimant was obliged until 30 January 2005 at the latest to submit to the First Respondent the second performance guarantee at the amount of USD 1,500,000 with validity from 30 January 2005 until 1 March 2006.

103 The third bank guarantee at the amount of USD 2,000,000 was supposed to be submitted to the Agency until 30 January 2006 at the latest, with validity from 30 January 2006 until 1 March 2007.

104 In the capacity of majority owner, the Claimant registered increase in capital of Srbija-Turist on 24 October 2003 (RX-104).

105 After the Contract signing, taxation authorities demanded payment of outstanding tax debts from Srbija-Turist for the period before privatization (with interest). After that, in May 2005, the taxation authorities confiscated the amount of RSD 96,000,000 at the account of Srbija-Turist and executed forced collection of taxes (CX-7). In order to avoid blockade of the account of Srbija-Turist, the Claimant paid the amount of RSD 96,000,000 and demanded from the Agency to reimburse the same amount, with statutory default interest from 15 May 2005 until full payment, on account of regressive taxation of Srbija-Turist due before 31 December 2003.

106 In May 2003, several months after the Contract signing, the Claimant purchased majority share in capital of the joint stock tourist company Putnik, Belgrade (hereinafter: "Putnik") dealing with tourist activities. According to Claimant's allegations, his intention was to create a powerful tourist company in Serbia and to introduce river cruises. According to that plan, Srbija-Turist was purchased to joint the Srbija-Turist hotels to the Putnik hotels and thus establish one powerful group of hotels. For those reasons, immediately after overtaking of Srbija-Turist, the Claimant centralized the management of Putnik and Srbija-Turist.[18]

107 During the first year of Contract implementation, business of Srbija-Turist faced difficulties, i.e a conflict with small shareholders and employees. The same kind of difficulties was faced in Putnik, immediately after overtaking of that company, leading to institution of arbitration proceedings before the ICC by the Claimant against the Agency (15 April 2005).

108 Pursuant to Clause 8.1.1 of the Contract, the first 12-month period of the Contract ended on 31 December 2004. According to Clause 8.1.4 of the Contract, the

[18] Refer to Claimant's reply of 6 February 2007, paragraph 3.2.1.1, page 12.

Claimant took upon himself to submit to the First Respondent, at each 12 month intervals, until 30 January of the next year of 2005/2006/2007, the report of an audit firm (prepared at Claimant's cost), selected with previous approval of the Agency. That report was supposed to *"confirm compliance (or incompliance) with Buyer's obligations according to Clauses 8.1.1 up to and inclusive of 8.1.3 of the Contract"*. Besides this report, according to Clause 8.1.4 of the Contract the Claimant was supposed to submit to the Agency *"excerpt from court register proving the registration of increase in capital in compliance with law"*. Pursuant to the same article, the Agency had the right to inspect the books and records of the Seller (i.e. the Second Respondent or Srbija-Turist) *"in order to ensure conformity with obligations from this Clause 8, and the Buyer and the Seller shall upon Agency's request, delivered at least 3 days earlier, enable the access and make available to the Agency such books and documents at any time"*. The Agency was also left the opportunity, within 30 days from reception of confirmation stipulated by Clause 8.1.4 of the Contract, to determine the penalty for Claimant's violation of obligations arising from Clause 8.4 of the Contract or to notify him about withdrawal of such opportunity.

109 Pursuant to Clause 8.1.4 of the Contract, the Claimant hired the audit firm KPMG which submitted to the Agency the auditing report on Srbija-Turist business activities for the year 2004, on 12 January 2005 (RX-28). According to KPMG's certificate, on the date of checking (22 December 2004), the Claimant had fulfilled the obligations from Article 8.1.1 of the Contract in all material respects, and had done nothing (according to information available and state of facts identified by KPMG) to violate the obligations from Clause 8.1.2 (payment of dividends) and 8.1.3 of the Contract (fulfillment of obligations from Social Program foreseen by Annex 6 to the Contract).[19]

110 In Agency's opinion, KPMG's report was incomplete, therefore on 28 January 2005, the Agency sent a request to the Claimant to submit supplements to the auditing report and additional documents for estimate of fulfillment of obligations from the Investment Program. On 1 February 2005, the Claimant delivered to the Agency the requested supplements to auditing report (refer to CX-44, RX-29 and RX-30, page 2, item III).

[19] KPMG's report reads: *"In our opinion, based upon evidence available to us, the Buyer has, as at the date of our review, and in all material respects, demonstrated compliance with the requirements concerning its investment commitments as set out in section 8.1.1 of the SPA for the period ended 31 December 2004. Based upon our work completed as at, and for the period to 22 December 2004, no matters come to our attention that indicate that the Buyer has not complied with its commitments under sections 8.1.2 and 8.1.3 of the SPA respectively* (RX-28, page 2, paragraph 5).

111 In order to check the fulfillment of contractual obligations by the Claimant, the Control Department of the Privatization Agency visited Srbija-Tourist on 10 February 2005, and carried out control of executed investments in situ.

112 The next day, 11 February 2005, the Agency notified the Claimant about institution of proceedings towards collection of contracted penalty, with remark that the Claimant failed to fulfill his contractual obligation from the Investment Program, both in terms of scope and structure, and that he failed to increase the capital in the court register (CX-44).

113 The Agency concluded that in the year 2004 the Claimant fulfilled his obligations from Clause 8 of the Contract, except for obligations arising from provisions of Clause 8.1.1 (obligation of investment) and 8.2 of the Contract (submission of the second bank guarantee). In Agency's understanding, the Claimant failed the fulfill his obligations from the Investment Program, in particular (i) failed to increase the capital based on investment and (ii) failed to observe the structure of investments (UHL was obliged to start reconstruction of the Hotel Park and repair and improvement of the Motel Nais in 2004; USD 1,039,564.11 was invested in Motel Nais, and there were no investments in Hotel Park); and (iii) release of allocated funds was lower than the commitment from the Investment Program (by the amount of USD 682,996.54 (RX-30)).

114 After consultations and negotiations with the Agency, on 23 February 2005 the Claimant forwarded to the Agency the proposal for amendments and modifications to the Contract which was signed on 1 March 2005 as Annex between the Agency and the Claimant (amendments and modifications to the Contract No.1 – CX-2). The agreed amendments and modifications made changes in Clause 2.2, 8.2 and Annexes 4 and 5 to the Contract, correcting the error related to the price of shares and rearranging the investment commitments for each of the three investment periods in particular.

115 By the said changes, the Claimant committed himself to invest USD 1,300,000 in 2004, USD 3,700,000 in 2005 and USD 4,000,000 in 2006.

116 Annex 4 to the Contract, describing the kind of investments, was also modified by deletion of specification of structures to be subject to investments in particular years, so as to open up the opportunity to invest in any of the named structures in that period. In fact, the modified Investment Program includes investments in *"extension, reconstruction, improvement, refurbishment and repair of the hotels Nis, Ambasador, hotel in Niska Banja, Motel Nais and/or Hotel Park"* (RX-12).

117 Here below follows a reproduced clip from evidence marked RX-12 (in English version which is the only authoritative version):

- Initial version of Annex 4 to the Contract:

ANNEX NO 4 TO SPA

INVESTMENT PROGRAM

Uniworld hereby commits to the following investment program. Uniworld's minimum commitments under this program are as follows:

Investment Program (over 3 years)
$ 9,000,000

The specifics of the Investment Program are as follows:
Uniworld commits to the recommended investment program as shown in the attached summary. Specifically:

Year 2004
$2,000,000
This includes the initial reconstruction in the cit hotel ("PARK")
Initial repairs and upgrades for motel "NAIS"

Year 2005
$3,000,000
Completion of the renovation of the city hotel "NAIS" (upgrade to international standards)
Reconstruction of the hotel "Ambassador". Completion of motel "NAIS" (international motel standards)

Year 2006
$4,000,000
Finalization of the business center of hotel "Ambassador"
Reconstruction of the hotels in Niska Banja

Uniworld estimates that the total cost of this investment program will be USD 9,000,000 and will be incurred over a 3 year time period.

- Amendment to Annex 4 to the Contract:

The Buyer's Investment Program attached to the Agreement as Annex 4 is amended to read as follows:

"ANNEX No. 4 TO SPA
BUYER'S INVESTMENT PROGRAM

Period	Amojnt (US$)	Description
Year 2004	1,300,000.00	Extension, reconstruction, improvement, refurbishing and repair of hotels: "Nis,", "Ambassador", hotel in Niska Banja, motel "Nais" and/or hotel "Park"
Year 2005	3,700,000.00	
Year 2006	4,000,000.00	
Total	9,000.000.00	

118 The performance guarantee envisaged by Clause 8.2 of the Contract was also modified, so that the amounts of USD 1,500,000 and USD 2,000,000 defined by the Contract for the period from 30 January 2005 to 1 March 2006 and from 30 January 2006 to 1 March 2007, respectively, were reduced to the amount of USD 1,000,000. On 3 March 2005, the Agency returned to Eksim Bank, as irrelevant, the original of the first bank guarantee issued on 26 September 2003 to the amount of USD 1,000,000 (RX-26), while the Claimant provided for issuance of the second performance guarantee at the amount of USD 1,000,000 (in dinar equivalent) at Komercijalna Banka a.d. from Belgrade (agreement on issuance of performance guarantee was signed with this bank on 25 February 2005). This new performance guarantee of 1 March 2005 was submitted to the Privatization Agency (with validity date until 1 March 2006, subsequently extended to 27 February 2007, refer to amendment No.1 of 27 February 2006).

119 In order to document the execution of contractual obligations for the year 2005, the Claimant hired the audit firm Consultant-Audit (previously approved by the Agency on 21 November 2009, refer to CX-5), which on 18 January 2006 submitted its report confirming that *"total available funds for investments"* made available to Srbija-Turist in 2005 amount to USD 3,136,666. According to that report, total amount made available to Srbija-Turist by the Claimant amounted to USD 5,186,194, out of which USD 2,951,204.84 "*funds spent on investments according to the Program in compliance with Annex 4 to the Contract"* during the year 2005.

120 On 17 February 2006, the Agency notified the Claimant that it accepts the value of investments for the year 2005 at the amount of USD 431,459.41, and order him to fulfill the remaining obligations from the Investment Program for 2005 within additional time period of 90 days (according to Article 41a of Privatization Law). On that occasion, the Agency announced the intention to terminate the Contract unless the Claimant acts in compliance with the said order within the specified deadline. Finally, the Agency informed the Claimant that in its opinion the

Claimant failed to fulfill its obligation defined by Clause 8.3.5 of the Contract, stipulating maintenance of business activity of the Seller (CX-49).

121 After several unsuccessful attempts to reach agreement on subject matters, the Claimant submitted the claim to the ICC International Court of Arbitration on 28 April 2006, seeking to declare that he has fulfilled the contractual obligations in order to prevent the Agency from terminating the Contract.

122 On 30 June 2006, the Agency notified the Claimant that the Contract is terminated, in compliance with Article 41a item 2 of the Privatization Law, for non-compliance with investment commitment stipulated by the Contract at the amount of USD 3,268,540.59 for the year 2005 (refer to Clause 8.1.1 and Annex 4 to the Contract). The Agency also notified the Claimant that it shall initiate the procedure for collection of existing performance guarantee (CX-54).

123 On 28 February 2007, the Claimant was notified by Komercijalna Banka a.d. Belgrade that the beneficiary of existing performance guarantee (i.e. Agency) activated on that day the said guarantee, one day before expiry of its validity (1 March 2007). The bank subsequently confirmed the information in its letter dated 1 March 2007 (CX-90). In continuation thereto, the Claimant supplemented the existing Claim with a new claim to return the collected guarantee at the amount of USD 1,000,000 (with statutory interest, starting from 1 March 2007).

124 Since the subject case is primarily related to (i) Contract implementation and (ii) validity of its termination (as a consequence of its alleged non-compliance), the Arbitral Tribunal shall primarily focus on these matters in the following part of this reasoning.

B *Issue of Compliance with Contractual Obligations*

a) *Compliance with Contract Obligations by the Claimant*

125 The Claimant's (Buyer's) contractual obligations, after the purchase of the Second Respondent (Seller), are stipulated by Clause 8 of the Contract. The Contract also foresees execution of the said obligations within five (5) years from the date of its signing.

126 Clause 8.1.1 of the Contract stipulates the obligation to invest in the Seller in compliance with the Investment Program attached as Annex 4, in aggregate amount specified in that program and by (i) cash or tangible in-kind contribution,

to a fully paid-up capital increase of the Seller or by (ii) loan from the Buyer or any of his Affiliates (excluding the Seller). The Investment Program foresees three successive phases of investments in the privatization subject (Seller), during three years (obligation to invest during 2004, 2005 and 2006), the implementation of which necessitates a confirmation by the auditor, authorized and approved by the Agency (refer to Clause 8.1.4 of the Contract).

127 Since the Contract was terminated before expiry of the last year of Investment Program (during 2006), the Claimant (Buyer) submitted the report of authorized auditor for the first two years of investments, in compliance with Clause 8.1.4 of the Contract. The Auditing Report for the first year of investments (2004) was prepared by the audit firm KPMG, whereas the Auditing Report for the second year of investments (2005) was prepared by the audit firm Consultant – Audit. Selection of this audit firm was previously approved by the Privatization Agency (the First Respondent) (RX-28, RX-29 and CX-4).

(i) *Execution of Investment Program*

1 Execution of Investment Program in 2004

128 For the year 2004, the auditing report by KPMG concludes that the Claimant (Buyer) fulfilled his investment obligations in compliance with Clause 8.1.1 of the Contract.[20]

129 However, after carrying out its own control, from the amount of USD 3,513,000 as was the scope of investments in 2004 according to KPMG confirmation, the Agency recognized only the amount of USD 1,317,003.46. This created the difference of USD 682,000, compared to the amount of USD 2,000,000 as was originally foreseen by Annex 4 to the Contract for the year 2004 (RX-30)[21]. Accordingly, the Privatization Agency notified the Claimant on 11 February 2005 that it intends, pursuant to Clause 8.1.4 of the Contract, to apply contractual

[20] Auditing Report by KPMG for 2004 reads: *"In our opinion, based upon the evidence available to us, the Buyer has, as at the date of our review, and in all material respects, demonstrated compliance with the requirements concerning its investment commitments as set out in section 8.1.1 of the SPA for the period ended December 31 2004"*. (RX-28, page 2).

[21] The loan of USD 3,000,000 granted by UHL to Srbija-Turist on 22 November 2004, entered in the books of Srbija-Turist under the ordinal number 5039 (RX-35), is enclosed (version in English) as Annex to the evidence marked RX-28.

penalty for non-compliance with obligations stipulated by Clause 8.1.1 of the Contract (CX-44).

130 The said contractual penalty was not exercised and after the negotiations the parties agreed to make an amendment to existing Contract so as to reduce the investment commitment for 2004 to the amount of USD 300,000 (CX-2).

131 During the hearing held on 26 January 2009, to the question asked by the Chairperson of the Arbitral Tribunal why the contractual penalty was not applied, the witness Kovacevic replied: *"Because we found that solution to make an annex to that investment program… It means that we then waived the contractual penalty and said OK, we accept that you invested USD 1,300,000 and we shall raise it for the next year. For that purpose, we shall not charge the contractual penalty"* (page 77 of Minutes).

132 However, in the counterclaim dated 28 March 2008, the Privatization Agency claims that out of USD 1,300,000, the Claimant actually invested USD 717,331[22] in the year 2004 (refer to page 29, paragraph 11.2.9) and calculates the contractual penalty based on invested USD 493, 217 for the year 2004 (refer to page 73 of counterclaim, paragraph 12.4.2), thus contradicting its previous standpoint (RX-30).

- Conclusions of Privatization Agency on Investments in 2004

133 The Arbitral Tribunal is addressed to decide whether the Agency can reopen the issue of Buyer's investment commitment execution in compliance with investment program for 2004, and whether its opposition to the value of executed investments has become outdated due to expiry of the time period stipulated by the Contract (according to Claimant's representations[23]).

[22] *"… i.e. the represented investments at the amount of USD 1,317 million are not realistic (…)"* (refer to paragraph 2, page 31).

[23] Refer to Claimant's brief of 19 December 2008, page 6, paragraph 5: *"The Agency cannot dispute the KPMG's finding for 2004 after expiry of all time limits from the contract and law, and cannot present to the Arbitral Tribunal as a subject of hearing on counterclaim the UHL operation in execution of privatization Contract in 2004 contrary to the findings of KPMG false, and completely irrelevant for parties' claims…"*.

134 With that regard, the Arbitral Tribunal states that the Contract does not contain any relevant provisions except for the one which is stipulated by Clause 8.1 of the Contract, reading[24]:

> *"As soon as the Agency has received a certificate under this Clause, it shall have a period of 30 days to notify the Buyer of any penalty for non-compliance under Clause 8.4 or any waiver of penalty."*

135 The Auditing Report by KPGM of 12 January 2005, prepared in compliance with Clause 8.1 of the Contract, was delivered to the Privatization Agency on 12 January 2005 (refer to the stamp of Privatization Agency on the first page of evidence marked RX-28). Having found the KPGM's auditing report incomplete, the Agency in its letter dated 28 January 2005 requested to have it supplemented (CX-45). On 1 February 2005, KPGM sent the supplemented version of auditing report for 2004, received on the same day by the Privatization Agency (RX-29). After that, on 11 February 2005, within 30 days as stipulated by Clause 8.1 of the Contract, the Privatization Agency informed the Claimant (Buyer) that:

> *"Therefore in compliance with Clause 8.1.4 of the Contract, and related to Clause 8.4, the Privatization Agency notifies the Buyer that it shall exercise all of its authorities under Clause 8.4.1 and shall charge the contractual penalty to the Buyer on the ground of non-compliance with obligations under Clause 8.1.1".* (CX-44).

136 It arises from the above that the Privatization Agency observed the 30-day deadline stipulated by Clause 8.1 of the Contract.

137 The Arbitral Tribunal is also addressed to decide whether the Privatization Agency can disprove the findings contained in the report of 23 February 2005.

138 In fact, the Agency represents in its counterclaim, although it recognized in the report of 23 February 2005 the investments for 2004 at the amount of USD 1,317,003.46 (RX-30), that the findings from that report are wrongful and that the

[24] The English version of the Contract is authoritative for decision in case of conflict or controversy with the Serbian version of the Contract (Clause 9.3 of the Contract). Serbian version of the Contract uses the term "penalties" both in Clause 8.1.1 and in Clause 8.4 of the Contract, whereas the English version of the Contract makes differentiates between the term "*penalty*" and "*fines*", and for that reason only the English version of this text is quoted.

Agency did not carry out a detailed control of all financial statements of Srbija-Turist.[25]

139 The Arbitral Tribunal finds that the parties agreed and that by signing of Amendment they modified the provisions of the Contract pertaining to the investment commitment in 2004, and that they are bound by the said mutual assent. The Arbitral Tribunal finds that the parties reached an agreement by signing of the Amendment. As a consequence of the above, the Arbitral Tribunal declares that the Claimant invested USD 1,300,000 in privatization subject (Seller) in 2004 (RX-30).

140 As a consequence of the above, the Arbitral Tribunal finds that by application of the principle *"venire contra factum proprium non valet"*, the Privatization Agency cannot now refute what it previously agreed to. For that reason, the Arbitral Tribunal rejects the citations of the Privatization Agency that the Claimant in 2004 invested into the privatization subject only USD 717,331.

- The term "investment"

141 The Arbitral Tribunal is addressed to interpret the meaning of the word "investment" in the wording of the Contract, and to define its legal notion. In Clause 8..1.1 of the Contract, it is said that the Buyer is obliged to:

> *"make investments into the Seller in accordance with its investment program attached as Annex 4, …, such investments to be made only by (i) cash or tangible in-kind contribution to a fully-paid capital increase of the Seller … or (ii) loans from the Buyer or any of its respective Affiliates…".*

142 The Arbitral Tribunal first states that the contents of the original version of Annex 4 to the Contract are identical to the wording proposed by UHL in the bid for purchase of privatization subject of 3 July 2003 (RX-16). Therefrom it arises that UHL is the one who proposed and estimated the amount of investments in the three-year period.[26]

143 The Arbitral Tribunal also states that the original version of Annex 4 bears the title *"Investment Program"* whereas the new version of Annex 4 (modified by

[25] Refer to counterclaim of the Agency page 26, paragraph 11.2.3 *"The same conclusion by equal method, without detailed control of all financial statements of ST for 2004, was accepted by the Agency in its control (RX-30)".*

[26] *"Uniworld estimates that the total cost of this investment program will be USD 9,000,000 and will be incurred over a 3 year period"* (refer to the last page of evidence marked RX-16).

Amendment) bears the title *"Buyer's Investment Program"*, indicating that the parties wished to highlight the fact that the investment commitment rests upon UHL (Buyer) and not on the part of Srbija-Turist (Seller).

144 The Arbitral Tribunal further states that the method of investment stipulated by Clause 8.1.1 of the Contract (by (i) cash or tangible in-kind contribution to a fully paid-up capital increase of Srbija-Turist or (ii) loans from Buyer or any of this Affiliates) was not modified by the Amendment.

145 The updated version of Annex 4 contains a table with amounts of investments for each of the three years of investment program as well as the subject of investment, in particular *"extension, reconstruction, improvement, refurbishing and repair of hotels: "Nis", "Ambasador", hotel in Niska Banja, motel "Nais" and/or hotel "Park"* (CX-2 and RX-12)). The Arbitral Tribunal concludes that the Claimant thus committed himself to invest solely in compliance with the investment program subject, and to invest solely into extension, reconstruction, improvement, refurbishment and repair of hotels Nis, Ambasador, hotel in Niska Banja, motel Nais and/or hotel Park.

146 Also, the amount of USD 3,700,000 foreseen for investment in 2005, could have been spent for works on any of the named hotels, redirected to extension, reconstruction, improvement, refurbishment and repair of some of them or only one of the name structures, bearing in mind the expression *"and/or"*[27] from Annex 4 to the Contract.

147 The draft new version of Annex 4 proposed by UHL on 23 February 2005 (RX-9) contains the sentence *"The Buyer shall ensure that the Seller uses the funds invested by the Buyer for the purpose of reconstruction, upgrading to higher categorization level, refurbishment and repair: hotels in Nis, namely: "Nis", "Park", "Ambasador", and/or "Nais", hotels in Niska Banja"*. This indicates that UHL agreed to the commitment to control the funds made available to Srbija-Turist but did not commit to spending of such funds by Srbija-Turist within a specified time period. However, this sentence is not overtaken in the final and updated version of Annex 4 (by Amendment), anyway.

148 The Arbitral Tribunal also states that the updated and final version of Annex, unlike the initial version:

[27] This is at the same time the Claimant's interpretation (refer to the UHL's brief of 21 April 2009, paragraph II.1, page 2).

(i) makes no provision for commitment of *"upgrading to a higher level of categorization"* based on the draft amendment proposed by UHL (RX-9);
(ii) does not use the terms such as *"completion"* or *"finalization";*
(iii) does not mention the commitment to achieve *"international standards"*.

149 Among other, in the updated and final version of Annex 4, the description of the investment subject pertains to all the three years of Investment Program (whether the year 2004, 2005 or 2006). In other words, unlike the initial version of Annex 4 where the works for each year of Investment Program differ depending on the structure they refer to, the updated and final version of Annex 4 foresees the same description of works and subject of investments for all the three years of Investment Program.

150 It arises from the above that from the text and from the obvious intention of the editor of the updated and final version of Annex 4 to the Contract it was not possible to judge on compliance with Investment Program before expiry of the three-year deadline (before 1 January 2007).

151 The Arbitral Tribunal concludes from the above that the updated and final version of Annex 4, created as result of negotiations between the parties in which the UHL's proposals were not fully accepted (as arises also from non-acceptance of proposal to declare that in 2004 USD 3,490,000 were invested in Srbija-Turist; the amount which was subsequently reduced to the final USD 1,300,000).

152 As concerns the understanding of the term "investments", the Claimant believes that the investment commitment consists of making available certain amount to the privatization subject (Srbija-Turist). From the aspect of the respondents, the investment commitment implies, besides making available certain amount to Srbija-Turist, also the obligation to complete the works foreseen by Annex 4 to the Contract.[28]

[28] Refer to the Claimant's brief of 24 August 2009, page 5, paragraph II.6: *"The parties are in dispute concerning the Agency's statement that the investment commitment before expiry of the deadline in which certain investment commitment is an obligation of results, in terms that the investment in reconstruction of a structure was made only when works are completed and equipment mounted in the structure, and UHL's statement that such an interpretation is not founded either in the Contract or in the law or in the practice of the Agency itself, and represents a unilateral interpretation of the Contract tending to unilaterally modify the Contract contents as well as that the word "investment" has one meaning at the end of the three-year period when it means "completed reconstruction", and another meaning during the three-year period, when it only mean "investment of money and/or assets"*.

153 The said disagreement between the parties about interpretation of the investment commitment arises from communications exchanged after the Contract signing. In Claimant's proposal for amendment to the Contract of 23 February 2005, the following sentence is contained:

> *"New Clause 8.1.1.4 shall be added following the sequence of ordinal numbers, reading: "Buyer's investment commitment under Clause 8.1.1 (i) when executed in cash or credit, shall be deemed fulfilled on the date of depositing of subject funds at the Seller's account, and (ii) when executed by contribution of assets, shall be deemed fulfilled on the date of transfer of ownership over such assets from the Buyer to the Seller."*

154 Due to the fact that this provision is not contained in the updated and final version of Annex 4, the Arbitral Tribunal concludes that the proposed text was rejected by the Agency, and that the agreement on its application was not reached.

155 Following the same logics, the fact that the Agency's view, on the basis of which the investments for each year imply completion of works at the amount envisaged for each of them, is not contained in the updated and final version of Annex 4 to the Contract, implies that such a view was rejected by UHL.

156 It arises from the above that even the updated and final version of Annex 4 to the Contract did not eliminate the doubt about proper interpretation of the parties' will concerning and related to investment commitments.

157 Since the parties reached an agreement resulting in the updated, and thus final version of Annex 4 to the Contract, on 4 March 2006 the Claimant addressed to the Agency a letter stating that in February 2005 the Agency provided the following interpretation of the investment commitment (CX-20):

> *"It is required not only that the funds should enter ST, but also that there should exist a Contract regulating the payments from those funds, as a proof that the funds entered for intended purpose".*

158 The same letter quotes that the Agency changed its view thereafter, and that it subsequently demanded that the works should be completed to call it an "executed investment".

159 As a response to UHL's letter of 4 March 2006, the Agency replied with the letter of 3 April 2006 (CX-21) highlighting:

"from the quoted Clause 8.1.1 of the Contract, it undoubtedly arises that the Buyer is obliged to provide funds for financing of commitments from the Investment Program and to place such funds for intended purpose in compliance with the schedule and structure foreseen by the Investment Program, provided that the commitments demonstrated within fulfillment of Investment Program shall be recognized up the value of their finalization (e.g. value of delivered equipment, value of executed works/services). In that context, the amounts of advance payments to suppliers hired in order to complete the commitments from the Investment Program may not be recognized as amounts of executed investment commitments".

160 Mindful of the obvious disagreement between the parties on interpretation of the contractual obligation of "investment", the Arbitral Tribunal shall consider in further exposition the meaning of the Clause 8.1.1 of the Contract, comparing the English and Serbian version of the text.

161 The Arbitral Tribunal first states that the English version of the Contract uses the term *"to make investments"*, whereas the Serbian version of the same document quotes that *"such investments shall be implemented as* (…)", which indicates that the Serbian version of the Contract was obviously closer to the Privatization Agency's interpretation according to which the investment commitment implies "completion" of investments, unlike the simple investment of financial proceeds into the privatization subject.

162 However, since in case of discrepancy between the two versions of the Contract, *"the English version shall be authoritative"* (Clause 9.3 of the Contract), the Arbitral Tribunal shall interpret the Contract observing the English version of the Contract.

163 The Privatization Agency qualifies the investment obligation as an obligation of result and goal with defined duration of three years.[29]. However, the Privatization Agency did not quote as arguments either the court practice or the understanding of legal theory in the domain of privatization procedure.

164 From the very arguments of the Privatization Agency it may be concluded that, during qualification of investment obligation as an obligation of result or goal, the Agency relies upon the term "general interest" related to the character of the Privatization Law itself. In that context, the Privatization Agency refers to the

[29] Refer to counterclaim, page 16, paragraph 6.2.

relevance, or legal nature of privatization procedure, since this concerns a legal affair with consequences for life and safety of employees in privatization subject, wherefrom arises that obligation of strict observing of deadlines and any other contractual obligations of the investor.[30]

165 On the other hand, UHL also agrees with qualification of investment obligation as an obligation of goal and result with the reserve that *"fulfillment of that obligation is estimated in one way (by investment of money or objects) during the time period while there exists the investment obligation, and in another way at the very end of that time period"* (refer to the UHL's brief of 17 June 2009, paragraph 15.2, page 7).

166 Without challenging the "general interest" of obligations arising from the privatization contract, the Arbitral Tribunal states that Article 41a of Privatization Law (which was the basis for termination of Contract by the Agency) foresees, as a reason for privatization contract termination, the case in which *"the buyer invests in the privatization subject in a manner, in the form and within the deadline as stipulated by contract"*. In other words, the Arbitral Tribunal states that Article 41a of the Privatization Law indicates to the contract in order to assess the obligations the non-compliance with which might lead to contract termination but that the same article does not define either the notion or the contents of investment obligation. It arises therefrom that the Privatization Law does not regulate the matter of contents of investment obligation and thus it can not lead to the answer to the question whether the investment obligation implies "completion" of investments or is it enough to make certain funds available to the privatization subject.

167 Further to the above, the Arbitral Tribunal concludes that neither the used term "general interest" nor the relevance nor goal of the Privatization Law, indicate to the qualification of investment obligation as an obligation of results (goal), which would then require application of different rules about the burden of proof compared to obligation of funds.

168 Among other, there arises the question of possibility to fulfill the obligation within the three-year period as envisaged by the Investment Program in case of adopting the respondents' interpretation which implies that it is necessary to complete the works before expiry of each of the three years (in three-year period),

[30] Refer to counterclaim, page 4, paragraph 1.9 and 1.11. *"**Retention of amount paid on account of contract price arises from the relevance, i.e. legal nature of sale-purchase transaction,** since this concerns a legal affair of general interest, reflected in the fact that sale of social capital of a privatization subject may disturb the economic life and safety of employees in that subject."*

mindful of the state of facts at the time of Contract signing (unclear ownership relations in hotel "Park", inexistent construction documents for hotel "Ambasador", alienation and sale of a room in hotel "Nis")[31]. It needs to be mentioned that the actions necessary to meet certain conditions for construction of a hotel, such as application and obtaining construction permits, were directly within the competence of Srbija-Turist (Seller), and not UHL, although UHL possessed majority shares in that company.

169 At the same time, Article 100 of the Law on Obligations stipulates that "In case a contract is signed with its contents printed in advance, or when a contract was in another way prepared and proposed by one contract party, unclear provisions shall be interpreted in favor of the other party".

170 In subject case, the Contract was prepared and proposed by the Privatization Agency[32] meaning that the provisions of Clause 8.1.1 of the Contract and Annex 4 should be interpreted in favor of UHL.

171 At the same time, PWHC's report concerns the question of investment by the Buyer (*"Question in relation to the investment of funds by the Buyer",* refer to page 7 of PWHC report).

172 Further to the above, the PWHC report suggests several definitions of the term "investment" (refer to paragraphs from 4.28 to 4.31 on page 30 to 31).

173 Nevertheless, as concerns the interpretation of the term "investment", PWHC report indicates to the Arbitral Tribunal as the only authority competent to state its mind on the matter: *"In order to answer the question whether UHL met its obligations under the SPA and Amendment, these interpretations would need to be considered from a legal perspective by the Arbitral Tribunal, as there is no guidance in the SPA which would offer an accounting and/or economic understanding of the term"* (refer to paragraph 4.32 and 4.35, page 32 of PWHC report).

174 Pointing out that it is in no way bound by the PWHC findings[33], the Arbitral Tribunal also states that the Clause 8.1.1 of the Contract may be interpreted in

[31] Refer to evidence marked CX-40.
[32] Refer to minutes of the hearing held on 29 January 2009, testimony of Mr. Branislav Zec, page 890 to 896.
[33] Refer to Fouchard, Gaillard, Goldman on International Commercial Arbitration, paragraph 25 page 18 and 19: *"The role of a court-appointed expert is strictly limited to giving an opinion to enlighten the court on specific technical issues. The expert's opinion binds neither the parties nor the court. The same is true,*

several ways and that the interpretations proposed in PWHC[34] report are not exclusive.

175 One of the possible interpretations foresees that UHL is obliged to make available to Srbija-Turist the funds specified for each of the three years of Investment Program, with obligation that such funds shall be used in conformity with the subject of Investment Program but without any obligation to implement the works envisaged by the Investment Program.

176 The Manual for application of Privatization Law (Z. Albaneze, Poslovni Biro d.o.o., Belgrade, 2008, page 108) quotes that the investor is obliged to invest certain amount of money but not to guarantee execution of works on privatization subject: *"*(…) *That **amount** shall be entered in the contract of sale of capital, to be agree by the buyer by signing the contract* (…) *The Buyer is obliged to invest the **amount** from the contract within a year from the date of contract signing, unless it concerns an investment exceeding 1,000,000 euro, in which case the buyer signs an agreement on the schedule of investments with the Privatization Agency".*

177 The Arbitral Tribunal also states that in the UHL bid of 3 July 2003 (RX-16) the Investment Program was expressed solely in money, i.e. dollars: *"Uniworld estimates that the total cost of this investment program will be USD 9,000,000 and will be incurred over a 3 year period."*

178 It needs to be mentioned that none of the Contract provisions explicitly stipulates that the works shall be completed until 1 January 2007. The Contract specifies only that the amount envisaged for investment in certain period shall be spent for its intended purpose (actually spent for works and improvement of structures), wherefrom it arises that it is necessary to check whether the funds were properly spent on works envisaged by Investment Program and accordingly to include in calculations only such works which are envisaged by Annex 4 to the Contract.

179 For the specified reasons, the Arbitral Tribunal cannot accept the interpretation by Privatization Agency that the works envisaged by Annex 4 to the Contract had to be completed upon expiry of the three-year investment period and, it can even harder accept the interpretation that completion of works is evaluated upon expiry of each of the three years of Investment Program.

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in principle, where an expert is appointed by an international arbitral tribunal. Even if the expert is required to give all parties a fail hearing, in no way his or her report constitutes an arbitral award."

[34] Section IV, paragraph 4.28 etc., page 30

180 The Arbitral Tribunal concludes that UHL was obliged to make available to Srbija-Turist the amounts specified in the Investment Program and spend them for intended purpose foreseen by Annex 4 to the Contract. At the same time, the Arbitral Tribunal finds proper the interpretation of the Contract that the implementation of the Investment Program shall be evaluated upon expiry of the three-year period envisaged by the Investment Program, i.e. after 31 December 2006, and not for each year in particular.

- Right of the Privatization Agency to Oppose the Auditing Report

181 The Arbitral Tribunal is addressed to state its mind on the Claimant's (Buyer's) representations claiming that the Agency had no right to unilaterally, without finding of another auditor, oppose the auditing report submitted by the Claimant in conformity with Clause 8.1.4 of the Contract.[35]

182 The relevant provisions are stipulated under Clause 8.1.4 of the Contract, reading:

> *"The Agency shall have the right to inspect the books and records of the Seller in order to ensure compliance with obligations from this Clause 8, and the Buyer and Seller shall on Agency's request, delivered at least 3 days earlier, enable access and make available to the Agency such books and records at any time. As soon as the Agency receives confirmation pursuant to this Clause, it shall avail with a 30-day period to notify the Buyer on any penalty for non-compliance under Clause 8.4 of the Contract or any waiver of such penalty."*

183 The Arbitral Tribunal states that Clause 8.1.4 of the Contract stipulates that the Agency may, upon reception of auditor's confirmation of Buyer's compliance, check the foundation and harmonization of auditor's report and, in case it does not agree with the auditor's report, apply the contractual penalty although the auditor's report confirmed the Buyer's compliance with contractual obligations.

184 The Arbitral Tribunal also states that the Contract does not envisage the auditor's report from Clause 8.1.4 of the Contract to be final and binding, and that the

[35] *"Naturally, conditionally speaking, the Agency had the right to dispute the auditor's findings, but it certainly did not have the right to make the decision that investment in 2005 was not compliant with the Contract, without previous report by another authorized auditor, i.e. an objective estimate of an authorized expert in compliance with the Contract"* (refer to CX-19 and respondents' reply dated 6 February 2007, page 37, paragraph 4.2.2).

auditors (KPMG and Consultant Audit) were paid only by the Claimant (Buyer)[36]. With that regard, so as to be able to consider it an independent expert's opinion, as suggested by the Claimant[37] (refer to reply of 19 February 2007, paragraph 4.4.3, page 42), the parties should bear even shares of the auditor's report costs[38].

185 Among other, Article 41 of the Privatization Law envisages a confirmation of auditor's report by the Privatization Agency (*"When the buyer of capital, or property, executes the obligations from the contract of sale of capital, or property, which is proved by Agency's certificate* (…)) thus rounding up the opinion that the Agency has the right to oppose the auditor's report, and to assess whether the contractual obligations are fulfilled even after submission of auditor's report.

186 Besides, the Claimant requested, when proposing modifications to the Contract (proposal to modify Annex 4, RX-9), to add to the Contract a new clause but it was not accepted in the final version of the modified Contract (Amendment). Therefrom it arises that the Claimant agreed to leave the Agency the right to dispute the auditor's findings (envisaged by Clause 8.1.4 of the Contract)[39].

187 Further to the above, the Arbitral Tribunal concludes that the Privatization Agency had no relation to the auditor's report from Clause 8.1.4 of the Contract.

- Fulfillment of other obligations under Clause 8 of the Contract

188 Having settled the issue of Contract interpretation and having stated that in 2004 the investment obligation was executed at the amount of USD 1,300,000 (stipulated by Clause 8.1.1 of the Contract), the Arbitral Tribunal shall consider the issue of whether the Claimant has fulfilled the other obligations under Clause

[36] *"This raises the issue of the purpose of hiring an independent auditor foreseen by the Contract and whose expert services did the claimant pay dearly, if the Agency does it all again"* (refer to the reply of UHL of 6 February 2007, paragraph 3.2.2.8, page 23).

[37] *"Therefore, it is beyond doubt that the audit firm "Consultant-Audit" was not selected by unilateral claimant's decision, but instead based on joint decision of the claimant and Agency, to act as an authorized auditor in compliance with Clause 8.1.4 of the Contract".*

[38] Mr. Milen Tadic from Consultant-Audit, at the hearing held on 25 November 2008, testified that *"Well, we did not have a Contract with the Agency, but only with the client who is present here".*

[39] *"After (i) the Investment Program is fully executed by the Buyer and (ii) the Agency does not make objections to confirmations submitted to it by the Buyer pursuant to Clause 8.1.4 within 30 days from the date of reception of each confirmation, it shall be deemed that the Investment Program is timely and fully executed up to and inclusive of the date of submission."*

8 of the Contract, in fact whether he has fulfilled the obligation to pay dividends to shareholders (under Clause 8.1.2 of the Contract), obligations from social program (under Clause 8.1.3 of the Contract); obligations of submitting the performance guarantee (under Clause 8.2 of the Contract), obligations of non-compliance (under Clause 8.3.1 and 8.3.4 of the Contract) and obligations of maintaining the business activity of the privatization subject (under Clause 8.3.5 of the Contract).

189 According to the report of Privatization Agency dated 23 February 2005 (RX-30), UHL fulfilled all obligations under Clause 8 of the contract in 2004 (among other, observing the obligations arising from the Social Program from Annex 6 and obligation to maintain business activity of the privatization subject under Clause 8.3.5 of the Contract)[40] except for the obligation to invest in compliance with Clause 8.1.1 of the Contract and obligation to submit the performance guarantee from Clause 8.2 of the Contract[41].

190 Pursuant to Clause 8.2 of the Contract, UHL took upon itself to submit the performance guarantee to the Agency by 30 January 2005, to the amount of USD 1,500,000 with validity date until 1 March 2006 and the Agency stated that UHL was late with issuance of guarantee (refer to I. page 1, RX-30).

191 However, the Arbitral Tribunal states that the parties agreed by means of Amendment (composed after the report of Privatization Agency of 23 February 2005 (RX-30) and modifying the amount of investments for 2004) and that the amount of the said guarantee was reduced from USD 1,500,000 to USD 1,000,000, provided that UHL is obliged to extend the guarantee until 1 March 2007 (RX-12), and that the Claimant has fulfilled thus modified obligation (refer to Amendment No.1 to performance guarantee No. 4524-0-02469 issued on 27 February 2006 by Komercijalna Banka d.o.o. Belgrade (CX-3)).

192 Thereby it arises that although UHL did not fulfill all of its obligations from the Investment Program for 2004 before expiry of the guarantee (before 31 December 2004), the parties agreed to modify the contractual obligations of UHL in that period, by which act the Agency waived the possibility to refer to UHL's non-compliance with contractual obligations for 2004 (RX-30).

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[40] Control Department of Privatization Agency stated that the level of activities of Srbija-Turist has grown after privatization of that company and that with that respect the Buyer's obligations under Clause 8.3.5 of the Contract (RX-30) are fulfilled. The Arbitral Tribunal states that during the first year of Investment Program (2004) that issue was not disputed between the parties.

[41] Refer to the sentence on page 4 (RX-30).

193 Since the parties modified the Contract by Amendment, in the part pertaining to contractual obligations of UHL in 2004, the Arbitral Tribunal rejects the unfounded citations of the First Respondent that UHL allegedly failed to comply with the contractual obligation of investment in 2004.

2 Execution of Investment Program in 2005

194 Pursuant to Clause 8.1.4 of the Contract, in 2005 the Claimant hired the audit firm Consultant-Audit d.o.o." ("Consultant Audit") in order to check the contractual obligation of investment during the second phase of Investment Program (the end of which is stipulated by the Contract as 1 December 2005).

195 Pursuant to Clause 8.1.4 of the Contract, the Privatization Agency confirmed appointment of Consultant Audit for auditor in 2005 on 21 November 2005 (CX-5).

196 On 18 January 2010, Consultant Audit submitted its report (CX-4) confirming that in 2005 UHL invested (made available) in the privatization subject USD 5,186,194, out of which USD 2,951,204.84 represents *"funds spent in investments according to Program in compliance with Annex 4 to the Contract"*.

197 On 17 March 2006, the Privatization Agency notified UHL that it accepts the value of investments for 2005 at the amount of USD 431,459.41, and leaves it an additional 90-day deadline to fulfill the outstanding investment obligations for 2005 (in compliance with Investment Program) and announced termination of Contract unless the Buyer acts in conformity with the order within the specified deadline (pursuant to Article 41a of Privatization Law). On that occasion, the Agency informed the Buyer that it deems that the Buyer did not fulfill the obligation defined by Clause 8.3.5 of the Contract, stipulating maintenance of business activity of Srbija-Turist (CX-49).

198 Upon completed control on 3 February 2006, targeted towards checking of auditing report of Consultant Audit for 2005, on 21 February 2006 and 2 June 2006 the Privatization Agency forwarded to the Claimant (Buyer) its conclusions on compliance with contractual obligations of UHL (pursuant to Clause 8.1.1 (Investment Program), 8.1.2 (payment of dividends) and 8.1.3 (Social Program) of the Contract (CX-50)).

199 Further to the above mentioned definition of "investments" (refer to *supra* paragraph 180), the Arbitral Tribunal shall first investigate the value of investments in privatization subject, pursuant to Clause 8.1.1 and Annex 4 to the Contract, in fact the amount of financial funds made available by UHL to Srbija-Turist in 2005.

200 From the report of Consultant Audit for 2005 (CX-4), it arises that the Claimant (Buyer) made available to Srbija-Turist the amount of USD 3,136,666 based on investments for 2005. The Arbitral Tribunal, however, believes that the amount of USD 500,000 should be deducted from that sum, as the amount intended for settlement of tax debt because as such it does not belong to the term "investments" from Annex 4 to the Contract (the amount of USD 500,000 from the first table (page 2) of the report by Consultant Audit, explained as follows: *"Loan Agreement No. 169 dated 9 February 2005 intended for settlement of tax debt and other liabilities in order to maintain liquidity"*). As a consequence of the above, the Arbitral Tribunal concludes that UHL made available to Srbija-Turist, in the form of special-purpose loan, the amount of USD 2,637,000 (Investment Loan Agreement No.4704, dated 24 November 2005; Loan Agreement No.4788/05 dated 12 December 2005 and Loan Agreement No.4866 dated 20 December 2005).

201 Apart from the funds paid to the account of Srbija-Turist in 2005, the unspent funds paid by UHL in 2004, transferred in initial status for 2005, amount to USD 2,049,528 (refer to the middle of second page of Consultant Audit's report the second paragraph after the first table).

202 The Arbitral Tribunal states that the Contract does not exclude the possibility of funds transfer from one year to another, or the possibility to transfer the surplus special-purpose investments. The Arbitral Tribunal states that, taking into account the amount of funds invested by UHL in 2005 (USD 2,637,000) and the amount of funds made available to Srbija-Turist and those transferred from 2004 (USD 2,049,528), the amount specified in Investment Program for 2005 was actually exceeded (USD 2,637,000 + USD 2,049,528 = USD 4,686,194).

203 The Arbitral Tribunal still finds that from the amount of USD 2,049,528 transferred from 2004 to 2005 should be reduced by USD 513,216.77, the amount paid in three successive monetary payments (USD 371,778.42 + USD 121,438.35 + USD 20,000 = USD 513,216.77) made in the first year of Investment period on account of increase in capital of Srbija-Turist (refer to page 22-23 of PWHC Report). However, having in mind that formal conditions related to increase in

capital have not been fulfilled in conformity with Clause 8.1.1 of Contract[42] (refer to evidence marked RX-194, report of the company Koncept on execution of investment commitments in 2004), the Arbitral Tribunal states that in 2005, UHL made investments in the amount of USD 4,173,311.23 ((USD 2,637,000 + USD 2,049,528) – USD 513,216.77 = USD 4,173,311.23). Since the amount of USD 4,173,311.23, invested by UHL in 2005, exceeds the minimal amount at the value of USD 3,700,000 as specified by the Amendment to the Contract for that year (CX-2), the Arbitral Tribunal finds with majority votes that the Claimant has fulfilled the obligations to make investments in 2005 as stipulated by the Contract.

204 Further to the above and taking into account the interpretation of the term "investments" by the Arbitral Tribunal, the Arbitral Tribunal finds that UHL has fulfilled the obligation to make investments in 2004 and 2005, having made available to Srbija-Turist the amount of funds stipulated by the Investment Program. The Arbitral Tribunal also finds that this conclusion is in conformity with the view of the Independent Auditor of the Arbitral Tribunal (refer to the second table on page 17 of PWHC Report).

205 Nevertheless, without prejudice to the above conclusion of the Arbitral Tribunal, the Arbitral Tribunal shall here below make a reference to misunderstandings and oppositions of the Privatization Agency and Consultant Audit regarding the fulfillment of obligations from Clause 8.1.1 of the Contract (Investment Program):

1) The Privatization Agency refuses to accept the amount of USD 42,609.09 (paid mostly to the contractor of works as advance payment) on account of investments into the hotel "Park" finding that, in the absence of certificate of completion, it is impossible to check whether the works from the

[42] With that regard, Clause 8.1.1 of Contract stipulates that the Buyer has committed to invest into the privatization subject either by increase in capital or by loan:

"8.1 Buyer's Covenant
The Buyer covenants and agrees with the Agency to take the Following actions within a period of 5 years from the Closing Date:
8.1.1 to make investments into the Seller in accordance with its investment program attached as Annex 4, in an aggregate amount as specified in that investment program, such investments to be made only by (i) ***cash or tangible in kind contribution to a fully paid capital increase of the Seller in which the Buyer or any of its Affiliates agrees to subscribe for its proportion of the new shares (and to allow all other shareholders to participate according to law)*** *or (ii) loans from the Buyer or any of their respective Affiliates (excluding the Seller); the investment program will be performed in three 12 month stages …etc."*

contract with main contractor, company Euro Invest, have been really completed.[43]

The Arbitral Tribunal first finds that the parties do not question the payment of the amount of USD 42,609.09 as advance payment to the contractor of works. The Arbitral Tribunal also finds that this does not concern assessment of investments made by the Claimant (Buyer) into the privatization subject (Srbija-Turist or Seller) in conformity with Clause 8.1.1 and Annex 4 to the Contract, but the issue of payments made by Srbija-Turist to the main contractor of works (Euro Invest). Since Srbija-Turist made an advance payment to Euro Invest (and not UHL) and that such funds were allocated for the purpose of works implementation stipulated by Annex 4 to the Contract, the Arbitral Tribunal finds that the Privatization Agency unduly refused to accept the amount of USD 42,609.09 on account of funds invested in the hotel "Park".

2) As concerns the investments made in the hotel "Nis", out of the amount of USD 2,184,123.19 paid as advance payment for that purpose to Euro Invest, the Agency refuses to accept USD 399,068.42, finding that the amount is generated by sale of one company from assets, in fact from sale of the hotel "Srbija".

From correspondence between UHL and Consultant Audit of 3 and 24 January 2006 (RX-81), it arises that the funds allocated to investments in Srbija-Turist were spent in order to cover the needs of Srbija-Turist which are not envisaged by the Investment Program[44] (refer to counterclaim, page 55).

According to assertion of the Privatization Agency, thus spent funds were subsequently shown to be returned to UHL, from sale of the hotel "Srbija".

According to UHL's assertions, the funds generated from sale of the Hotel were paid to the account of Srbija-Turist where, among other, there were also the funds paid by UHL for the purpose of Investment Program implementation so that it was impossible to separate those and other funds paid to the Srbija-Turist's account.[45]

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[43] *Final statement has not been delivered for the insight of the control center so it is not possible to determine whether the works from the contract with the company "SC Euro Invest Expert Limited" d.o.o. from Belgrade have been really completed. For that reason, the control center refused to accept the amount of USD 42,609.09..."*(CX-50).

[44] Updated version of Annex 4 to the Contract is titled *"Buyer's Investment Program"* which indicates that the parties considered it a UHL's and not a Srbija-Turist's program.

[45] *"All funds generated from sale of the hotel were paid to the ST's account where, at the time (December 2005) there were also the funds paid by UHL for the purpose of investment. All ST's liabilities were also*

The Arbitral Tribunal finds that Annex 10 to auditing report of Consultant Audit (CX-4) indicates that the sale of hotel Delta Matic d.o.o. (hereinafter: "Delta Matic") was effected on 12 December 2005. Clause 3 of the contract on hotel purchase stipulates that payment of the purchase-selling price, at the amount of EUR 350,000 shall be effected immediately after the court verifies this contract. The contract was thereafter verified at the court on 14 December 2005 (refer to the last page of the contract) and further to accounting records of the Srbija-Turist, on 15 December 2005, the company Delta Matic paid to Srbija-Turist the amount of RSD 30,205,070 on account of "another transaction" and on the same day, Srbija-Turist made two successive payments to Euro Invest (RSD 18,621,027.38 + RSD 10,000,000) at the total amount of RSD 28,621,027.38 on account of "investments in structures and equipment".

The Arbitral Tribunal finds that Mr. Srba Ilic, in his e-mail sent to Consultant Audit on 3 January 2006, admitted that that a part of the purchase-selling price of the hotel "Srbija", in approximate amount of RSD 30,000,000, was spent for severance pay for voluntary termination of labor contract with employees in Srbija-Turist and for advance payment to Euro Invest[46].

It is derived from the above said that the purchase-selling price of the Hotel (at the amount of RSD 30,205,070) was partly used to cover the advance payment to Euro Invest (at the amount of RSD 28,621,027.38). The return of the amount of RSD 30,205,070 intended for the Investment Program to the account of Srbija-Turist may be analyzed as premature repayment of UHL loan to Srbija-Turist for the works specified in Annex 4 to the Contract. Among other, the advance payment to Euro Invest at the amount of RSD 28,621,027.38 from the amount received from sale of the Hotel (RSD 30,205,070) and returned to the specific-purpose account of Srbija-Turist (refer to RX-78) may be analyzed as an amount implicitly made available or as a new loan from UHL to Srbija-Turist. However, the Arbitral Tribunal finds that this viewpoint is not envisaged by relevant documents.

Moreover, in loan agreements approved on 2 November 2004, 8 February 2005, 24 November 2005, 12 December 2005 and 20 December 2005, there was no stipulation for possible use of funds from specific-purpose

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paid from those funds, so that it is not possible to separate the purposes for which funds from one and from the other source were used." (Refer to Claimant's letter of 19 December 2008, paragraph 9.3, page 9).

[46] *"Out of the received money (about 30 million dinars) – ST paid severance pays to 16 employees who applied for voluntary termination of labor contract. The remaining app. 28.5 million dinars were paid to EIE – and that was considered the return to UH of money taken from the specific-purpose account for covering of other costs throughout the year."*

account for any other purposes, except for those specified in Annex 4 to the Contract.

But, given the standpoint of the Arbitral Tribunal that the investment commitment implies making the funds available to Srbija-Turist, and not spending of such funds by Srbija-Turist (refer to supra paragraph 180), the payment and other transactions from the specific-purpose account of Srbija-Turist have no relevance for fulfillment of the Investment Program for 2005 by UHL.

3) As concerns the amount of USD 2,366,035.99, invested in the hotel "Nis", the Privatization Agency refuses to accept the amount of USD 2,184,123.19 pertaining to advance payment by Srbija-Turist to Euro Invest. In other words, out of the paid USD 2,366,035.99, the Privatization Agency recognizes USD 206,912.82 as an investment (refer to table on page 4 CX-53).

From audit report of Consultant Audit it is derived that the sum paid as advance payment to Euro Invest, at the amount of USD 2,366,035.99, consists of USD 399,068.42 generated from sale of the Hotel and USD 1,785,054.77.[47]

The Privatization Agency also refuses to accept as investment the amount of USD 399,068.42, since that amount is not generated from the funds paid by UHL but from the sale of one of the hotels from Srbija-Turist's assets.

It is clear from the above analysis that this standpoint of the Agency cannot be accepted, since the investment commitment is to be judged based on the funds made available to Srbija-Turist for specific purpose, and not based on the manner in which the funds were subsequently spent by Srbija-Turist. Thereby, the Arbitral Tribunal states that the PWHC Report finds that Euro Invest used almost the entire amount of advance payment so that there is no reason to doubt that such funds were used for specific purpose (for the works specified in Annex 4 of the Contract and, in this case, for reconstruction of the hotel "Nis).

In communications of 3 and 13 March 2009, the Privatization Agency refers to existence of two versions of contract between Srbija-Turist and Euro Invest on reconstruction of the hotel "Nis". The first version of contract is dated 16 November 2005 whereas the second version, filed under the number 2493, is dated 24 November 2005 (CX-135 and RX-77 attached as Annex No.6 to evidence marked CX-4). In the first of the two versions of contract (RX-77), Clause 3.1 stipulates that the contract price

[47] Refer to page 44 paragraph 6.6 of PWHC Report, where these two amounts are quoted.

shall be paid depending on interim and final statement in compliance with the schedule of financing from Annex 3 to the Contract. In the second version of contract (CX-135), Clause 3.1 stipulates that the contract price shall be paid by 40% advance payment in compliance with the schedule of financing, interim or final statement.

Mrs. Darka Radovic Rapic, during the hearing held on 8 May 2009, exposed her views and explanation of the discrepancy between these two versions of contract, stating that the contract "lived" and was implemented in compliance with the version submitted as evidence marked CX-135 (stipulating that the contract price is payable as advance payment in the amount of 40% contract price (EUR 2,592,000)).

In the letter dated 21 April 2009, UHL asserts that the Contract version submitted as evidence marked RX-77 and as Annex 6 to evidence marked CX-4 is actually a copy of the previous draft Contract which, by mistake, failed to be destroyed and was forwarded to Consultant Audit by act of negligence, and that there is no original version of that Contract version (refer to UHL's brief of 21 April 2009, paragraph II.2.3.2, page 7).

In Procedural Order No.12, the Arbitral Tribunal concluded that there is no room for claims that the above said testimony of Mrs. Darka Radovic Rapic about existence of two contract versions is false. Since the situation has not changed ever since, i.e. none of the parties has submitted evidence proving the claim that Mrs. Darka Radovic Rapic made a false testimony, the Arbitral Tribunal rejects the request to exclude from the proceedings the evidence submitted under ordinal number CX-135. The Arbitral Tribunal also finds that the parties do not question execution of one of the obligations from the said Contract, in fact execution of payment to Euro Invest at the amount of USD 2,184,124.19 in 2005 (which is somewhat less than 40% contract price).

The Arbitral Tribunal finds that the advance payment made by the main contractor of works to sub-contractors is common practice in construction business. In other words, there is no work without advance payment in construction business, therefore the existence of a contract such as is the document marked as evidence CX-135 is neither surprising nor abnormal in the eyes of the Arbitral Tribunal.

The Privatization Agency also claims that Euro Invest was created by UHL (RX-76) and from the fact that the advance payment of USD 2,184,124.19 was paid to Euro Invest it derives the conclusion that UHL, through Euro Invest, out of the borrowed funds, irretrievably alienated monetary funds of Srbija-Turist at the amount of at least USD 2,500,000 (refer to Agency's letter of 3 March 2009, paragraph 5.4, page 4).

Nevertheless, the Arbitral Tribunal cannot agree with such assertions since the report of independent auditor, PWHC, finds that almost the entire amount (USD 1,985,107.13) out of the paid USD 2,284,124.19, has been paid by Euro Invest to sub-contractors on reconstruction of the hotel "Nis".

4) The Privatization Agency also refuses to accept the amount of USD 318,013.17 paid on the basis of investments in administrative building, claiming that this kind of investments is not in line with the goal and subject of Annex 4 to the Contract (CX-50).
The amount of USD 318,013.17 paid on the basis of investments in administrative building actually represents a reimbursement for investments in upgrading of Srbija-Turist's activities, i.e. a fee for the works on network infrastructure of the server room in the hotel "Nis" and on computer network (procurement of computer, telecommunication equipment, installations for these purposes, software, etc.) (refer to CX-4 and Annex 4).
In so far as this kind of works improves operations and functioning of the hotel, the said works represent an improvement in terms of provisions of Annex 4 to the Contract. Further to the above, the Arbitral Tribunal concludes that the objection raised by the Privatization Agency is unfounded.

206 Finally, in the letter dated 16 February 2010 (paragraph 8, page 6), the Privatization Agency claims that the loans approved by UHL to Srbija-Turist on 24 November and 12 and 20 December 2005 are actually paid by Mr. Srba Ilic, as a physical person, and not by UHL. The Arbitral Tribunal finds that the claim is supported with evidence (refer to documents of Vojvodjanska Banka, CX-219, CX-220 and CX-221).

207 Thereby, the Privatization Agency regards this as: *"business management without an order which is in this case unallowable and cannot be regarded as an act of execution of UHL's obligation to provide monetary funds as per Clause 8.1.1 of the Contract"* and finds that such an act might be characterized as money laundering.

208 In response to the said claims, UHL, in its letter dated 2 March 2010, claims to have fulfilled the obligations as per Clause 8.1.1 of the Contract, by approving of a loan to Srbija-Turist in November and December 2005, at the amount of USD 2,637,000, and that the circumstance of that money having been paid from the account of Mr. Srba Ilic, as a physical person, is irrelevant. Among other, the

Claimant asserts that the amount of USD 2,637,000 is only a part of the amount of USD 3,225,079, approved and paid out as a loan arrangement in favor of UHL by Mr. Srba Ilic. The Claimant at the same time disputes the notions of the Privatization Agency about money laundering, mentioning, among other, that the income of Mr. Srba Ilic in 2004 exceeded USD 6,000,000.

209 As concerns the fact that three loans of 24 November, 12 and 20 December 2005 were paid by Mr. Srba Ilic, as a physical person, the Arbitral Tribunal first finds that the assertion was first pronounced at the very end of these proceedings by the Privatization Agency (after the parties' closing arguments at the hearing held at the end of January 2010). Besides, the argumentation of loan payment by Mr. Srba Ilic was not an issue before, although the bank documents related to those loans (CX-219, CX-220, CX-221) were submitted to the Privatization Agency as Annex to the report of Consultant Audit from January 2006 (CX-4). The Arbitral Tribunal also finds that although the Contract Clause 8.1.1 stipulates the possibility to make investment by *"loan from the Buyer or from any of his Affiliates"*, the Contract does not provide for the consequences of non-compliance with that provision. The Arbitral Tribunal also finds that the Contract was not terminated on those grounds.

210 The Arbitral Tribunal also finds that payment of loan by Mr. Srba Ilic, as a physical person, by no means restricted the use of such funds by Srbija-Turist. Thereby, the Arbitral Tribunal concludes that the resulting financing of Srbija-Turist was in no way disturbed[48] and that the said loans should be taken into account before deciding on UHL's compliance with obligations as per Clause 8.1.1 of the Contract.

211 As concerns the allegations on money laundering (or another kind of fraud), the Arbitral Tribunal has already stated in Procedural Order No.17 dated 9 April 2010 that such allegations are not supported with evidence. In the meantime, none of the parties has submitted any new evidence to support such allegations, thereby the Arbitral Tribunal remains with the standpoint from Procedural Order No.17 and accordingly rejects the allegations of the Privatization Agency as unfounded and unsupported with evidence.

212 Further to the above, the Arbitral Tribunal concludes that the Claimant (Buyer) fulfilled his obligation to make investments in the privatization subject in 2005. as stipulated by the Contract.

[48] PWHC report concludes on page 35 paragraph 5.4 that: *"c) long term liabilities increased in 2004 and 2005 mainly due to loans received from UHL. These loans improved the working capital position of Srbija-Turist."*

3 Execution of Investment Program in 2006

213 Unlike the years of 2004 and 2005, the report on compliance with investment commitments in 2006 was not submitted because the Agency terminated the Contract at the end of the first half of the investment period (on 30 June 2006, refer to CX-37).

214 Thereby it is not possible to assess whether the obligation to make investments in 2006 was fulfilled as on 31 December 2006, when the compliance should have been estimated, the Contract had already been terminated.

215 According to PWHC Report, UHL made no investments in 2006 in favor of Srbija-Turist, either by loans or by increase in capital. But during 2006, UHL imported objects and equipment in the value of USD 257,654, which he intended to calculate as investment in the privatization subject (CX-187, CX-189, CX-190). Further to available documents, the value of those items was not entered in accounting books of Srbija-Turist (refer to PWHC Report, paragraph 4.11 and 4.12, page 24).

216 In its letter dated 29 May 2009 (refer to paragraph 33 page 11), the Privatization Agency claims that UHL, given the fact that the amount invested in 2004 was reduced to USD 1,300,000, sought to supplement the planned amount of USD 9,000,000 specified by the Investment Program by signing a contract with Euro Invest on reconstruction of the hotel "Nis" at the equivalent value of USD 7,700,000 (EUR 6,480,000) (CX-135, RX-77). Besides, the Privatization Agency criticizes the UHL's interpretation that the Claimant (Buyer), according to the updated version of Annex 4, could make an investment of the specified USD 9,000,000 in any of the hotels listed in Annex 4 to the Contract.

217 The Arbitral Tribunal does not avail with sufficient information to judge on the market value of commitments from the contract signed with EIE on reconstruction of the hotel "Nis" or whether the price of services and materials from the contract is disproportional to the value of contracted works. The Arbitral Tribunal, nevertheless, finds that the price offered by a competitive firm (Expo Italia) (RX-147) was lower by more than a million euro (EUR 5,281,200). However, that circumstance is insufficient for the Arbitral Tribunal to conclude that the contract with EIE is fictional and signed in order to supplement the difference of USD 7,700,000 from the Investment Program.

218 The Arbitral Tribunal finds the UHL's interpretation of the updated version of Annex 4 to the Contract possible, mindful of the term *"and/or"* in the English version of subject document. However, the Arbitral Tribunal also finds that there is some uncertainty about the parties' intentions when signing this document, but that uncertainty cannot be eliminated.

219 To conclude, the Arbitral Tribunal hereby finds that UHL was unable to comply with the obligation to make investments in 2006 for the reason that the Agency had terminated the Contract on 30 June 2006 and that the same finding is adopted in PWHC Report (refer to footnote No.50 on page 31 of PWHC Report).

220 After the investment commitment as per Clause 8.1.1 of the Contract, the Arbitral Tribunal is addressed to state its mind on compliance with obligations from Clause 8.1.2 of the Contract (payment of dividends to shareholders), 8.1.3 (compliance with obligations from Social Program), 8.2 (submission of performance bank guarantee) and Clause 8.3 of the Contract (further obligations of the Buyer).

(ii) *Payment of Dividends to Shareholders (Cl.8.1.2 of the Contract)*

221 As concerns compliance with the obligation to pay the dividends to shareholders (Clause 8.1.2 of the Contract), the Privatization Agency agrees that there is no room for application of Clause 8.1.2 of the Contract, since UHL operated with losses until the Contract termination (CX-50 and RX-5 page 7).

(iii) *Compliance with Obligations from Social Program (Cl.8.1.3 and Annex 6 to the Contract)*

222 As concerns compliance with obligations from Social Program, the Privatization Agency finds that the obligation to raise salaries of all employees by 10% of the amount of existing earnings (stipulated by Annex 6 to the Contract) has been complied with (refer to CX-50 and RX-5 page 8).

223 The Privatization Agency further agrees that no sale of capital has taken place (refer to CX-50 page 8).

224 The Privatization Agency recognized the UHL's right to establish branch offices where it retains the ownership over capital, such as the hotel "Nis", and finds that no abuse took place since the branch office has not been sold or overtaken by third parties or alienated by another form of capital transfer, bankruptcy, liquidation, etc. (refer to CX-50 and RX-5 page 8).

225 At the same time, the Privatization Agency agreed that there has been no dismissal of employees in Srbija-Turist from the date of Contract signing until 16 September 2005.

226 In compliance with Social Program from Annex 6 to the Contract ("Social Program"), UHL committed itself to 10% increase in salaries of all employees (estimated value of liability in the 3-year period: USD 300,000) and that no employees shall be dismissed for redundancy within 2 years from the date of Contract signing unless otherwise agreed with trade unions in the companies. It was also agreed that all severance pays (in case of voluntary termination of labor contract) should amount to RSD 10,000 per year of service in the company, limited to RSD 150,000 per employee (RX-13, RX-197).

227 The Privatization Agency concluded that the above commitments from the Social Program have been fulfilled by UHL (RX-30). The costs of 10% salary raise in 2003 amounted to USD 140,139 (RX-28). According to the auditing report of Consultant Audit (page 5), until 31 December 2005, 178 employees amicably terminated the labor contract, against payment of severance pay in compliance with Annex 6 to the Contract, i.e. at the amount of RSD 10,000 per year of service in the company (up to the maximum amount of RSD 150,000 per year of service). The Arbitral Tribunal finds that the Privatization Agency did not oppose the amounts paid for severance pays.

228 In the letter dated 29 May 2009 (paragraph 28, page 9), the Privatization Agency claims that Srbija-Turist has violated the law by failure to pay the tax and social duties and contributions for all employees, so that the debt remained due for payment and that Srbija-Turist became aware of the fact only after completed control by taxation officers.

229 The Arbitral Tribunal finds that the Privatization Agency does not submit any evidence to support such allegations. Besides, the Arbitral Tribunal finds that the liability to pay taxes and social contributions burdens Srbija-Turist and that Annex 6 of the Contract makes no provision that UHL is obliged or has accepted the liability to compensate such duties. The Arbitral Tribunal thereby finds that the allegations of the Privatization Agency about UHL failing to pay the tax and social duties and contributions, are not supported with evidence and do not constitute a breach or non-compliance with any of the contractual obligations from the Social Program specified in Annex 6 to the Contract.

230 In Post-Hearing Brief of 14 May 2010, Srbija-Turist claims that UHL has not complied with its social obligations pursuant to provisions of Clause 8.1.3 of the Contract, and has not raised the salaries of all employees in Srbija-Turist, which raise implied an increase at the minimal amount of USD 100,000 a year or at 10% rate. This allegation is contradictory to the allegations of the Privatization Agency (refer to RX-30 for obligations from Social Program for 2004, and RX-5 for obligations from Social Program for 2005). Thereby, these allegations of the Privatization Agency are rejected by the Arbitral Tribunal as unfounded.

231 Srbija-Turist also claims that UHL failed to comply with its obligation to calculate and pay contributions to salaries for mandatory social security, so that further to the decision of the Ministry of Finance of the Republic of Serbia, Tax Administration, Center for Large Taxpayers, No. 47-00566/2008-CVPO-010 dated 23 March 2009, forced collection from the account of Srbija-Turist was executed on account of outstanding liabilities for contributions for mandatory social security at the amount of RSD 8,933,171.92 with accrued interests on the date of payment.

232 The Arbitral Tribunal finds, the same as in case of allegations of the Privatization Agency, that this liability burdens Srbija-Turist, and not the majority owner of the privatization subject (UHL), and thereby rejects the said allegation as unfounded.

(iv) *Performance Guarantee (Cl. 8.2. of the Contract)*

233 Pursuant to Clause 2 of the Amendment, UHL undertook the obligation to submit a performance guarantee to the amount of USD 1,000,000 and with validity date until 1 March 2006. At the same time, UHL undertook the obligation to submit by 1 February 2006 an annex extending the validity of the said performance guarantee until 1 March 2007. In compliance with the form of guarantee enclosed as Annex 5 (subsequently modified by the Amendment), the guarantor bank was supposed to undertake the commitment to pay out to the Privatization Agency the amount of USD 1,000,000, on call and written demand of the Agency, in case UHL's non-compliance with investment obligations (as per Clause 8.1.1 of the Contract), failure to extend the validity period the performance guarantee (as per Clause 8.2 of the Contract) or in case of non-compliance with the Social Program (as per Clause 8.1.3 of the Contract).

234 On occasion of regular control on 3 February 2006 (RX-5), the Privatization Agency assessed that UHL submitted the said annex on 17 February 2006, thus extending the guarantee validity with delay, in fact after expiry of the deadline until 1 February 2006, as stipulated by the Amendment.

235 Due to the said delay, the Agency requested from UHL to:

1) extend the validity of existing guarantee until 1 July 2006, in order to guarantee for performance of contractual obligations for 2005 within 90 days;
2) submit to the Privatization Agency a new bank guarantee to the amount of USD 1,000,000, with validity date until 1 March 2007, in order to secure compliance with contractual obligations for 2006;

236 Based on evidence marked CX-89 (Amendment No.1 to the performance guarantee No. 4524-0602469), the Arbitral Tribunal states that the amendment extending the bank guarantee validity (attached as Annex to the Claimant's brief of 27 March 2007) bears the date 27 February 2006 and that it was faxed to the Privatization Agency on 6 March 2007.

237 By letter dated 3 April 2006 (CX-24), the Privatization Agency confirmed that UHL has submitted the performance guarantee with validity date until 1 March 2007, and thus fulfilled the conditions from Clause 8.2 of the Contract and Clause 2 of the Amendment.

238 The Arbitral Tribunal finds that the fulfillment of UHL's obligation to submit the performance guarantee was delayed. However, the said delay is insignificant (about one month) and the Arbitral Tribunal points out that in this case the Contract does not provide for a contractual penalty for delay, unlike other cases when such a contractual penalty is foreseen for non-compliance with contractual obligations. The Arbitral Tribunal concludes that non-compliance with contractual obligations in this matter is insignificant and insufficient for justification of Contract termination (since termination of Contract certainly constitutes one of the most drastic sanctions in case of failure to fulfill one of the contractual obligations).

(v) *Further Obligations of the Buyer (Cl.8.3 of the Contract)*

239 Pursuant to Clause 8.3 of the Contract, UHL committed itself not to undertake certain measures without prior consent of the Privatization Agency. The obligations stipulated by Clause 8.3.1 (the obligation not to alienate the shares of

the privatization subject), 8.3.2 (the obligation not to constitute pledge, burden or security over shares of the privatization subject) and 8.3.4 (the obligation not to cause liquidation, bankruptcy or receivership over the privatization subject) are not subject to dispute between the parties and thus not subject to this award and reasoning.

240 Pursuant to Clause 8.3.3 of the Contract, UHL undertook the obligation that within five (5) years it shall not sell, transfer or in any other way alienate any significant property of Srbija-Turist (Seller) or the Seller's affiliates, either in one transaction or several transactions at the amount exceeding 10% of total value of the Seller calculated in compliance with the last final statement of account on the date of such transaction. Income generated from such sale, transfer or another disposal would be invested in the Seller, or used for repayment of Seller's debts.

241 In continuation to the above, the Arbitral Tribunal shall here below in this reasoning consider the issue of (1) alienation of the motel "Medijana" and the right of municipal land use, (2) sale of the hotel "Srbija" and (3) alienation of the land opposite the motel "Nais".

1. Motel "Medijana" and the Right of Municipal Land Use

242 The Privatization Agency criticizes the sale of the motel "Medijana" effected on 7 April 2005, to the "Company for Engineering and Trade Pro-Global d.o.o. Nis" (hereinafter: "Pro-Global"), a company whose address in formal correspondence bears the same street name and number, i.e. address, as Srbija-Turist (refer to e.g. RX-43 and RX-45), because according to allegations of the Privatization Agency, that company was established by, and remained under control and instructions of UHL (RX-46).[49]

243 Further to the allegations of the Privatization Agency, after the sale of Pro-Global for EUR 530,000 (USD 680,000), at the same time financed by means of loan approved by Srbija-Turist, the Company for Production and Trade "Tus" d.o.o. Belgrade (hereinafter: "Tus", a company which is at the same time a shareholder in Pro-Global) purchased Pro-Global for EUR 1,300,000 (refer to the Agency's brief of 25 March 2009, paragraph 9.1, page 7).[50]

[49] Refer to the brief of the Privatization Agency of 25 March 2009 (page 7, paragraph 8) with preliminary analysis of evidence and focus of written evidence on certain matters and facts.

[50] The Arbitral Tribunal finds certain contradiction with the Privatization Agency concerning the overtaking of Pro-Global by the company Tus, as in the counterclaim (paragraph 11.3.3 page 37) and in the reply of 30 October 2008 (paragraph 10, page 6), the Privatization Agency claims that Pro-Global sold only

244 The Arbitral Tribunal finds that UHL, by letter dated 23 June 2006, informed the Privatization Agency that Pro-Global intends to sell the motel "Medijana" (not specifying the price (CX-57)).

245 The Arbitral Tribunal also finds that the Privatization Agency, by letter dated 1 August 2005, approved of the sale of motel "Medijana" to Pro-Global (and approved of the sale of motel "Nais" and a hotel in Niska Banja (refer to CX-4 appendix 10 and RX-11)), that is after the sale of motel "Medijana", provided that the funds gained by such sale shall be used for repayment of its debts. Since the Clause 8.3.3 of the Contract stipulates that UHL may sell, within a five-year period and within one or more transactions, any significant property of Srbija-Turist which does not exceed the value of 10% total value of Srbija-Turist, provided that the income from such sale shall be used for repayment of debts of Srbija-Turist, this gives rise to the question whether the Agency's approval for sale of motel "Medijana" and hotels was necessary, since the value of those two companies approximates 4% of the value of Srbija-Turist[51].

246 Based on the bank accounts of Srbija-Turist (CX-4, appendix 10), the funds generated by sale of the motel "Medijana" (USD 680,000) were deposited to the account of Srbija-Turist on 15 April 2005.

247 In its letter dated 25 March 2009, the Agency claims that the funds generated by sale of the motel "Medijana" were not spent for works on reconstruction of structures within Srbija-Turist (paragraph 9, page 7).

248 At the same time, in the letter dated 29 May 2009, the Privatization Agency claims that the motel "Medijana" was sold to Pro-Global together with the right of use on construction land on nearby terrain covering 35,628 m^2 (paragraph 27 *et seq*., page 9). Based on expertise by Professor Zlatanovic, the Privatization Agency also claims that the terrain value is EUR 2,062,674 (RX-206) and that the funds from that sale are not included in the value of transaction.

249 On the other hand, UHL opposes the expert finding of Professor Zlatanovic, finding that the price per are used during estimate of the terrain value is not compliant with the land prices as in 2005 (refer to UHL's brief of 17 June 2009, paragraph 15.4, page 9).

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the motel "Medijana" to the company Tus, whereas in the brief of 25 March 2009 (paragraph 9.1, page 7), the Privatization Agency claims that the company Tus purchased and overtook the entire company Pro-Global.

[51] Refer to PWHC Report, page 48, paragraph 7.6.

250 The Privatization Agency also claims that Srbija-Turist was damaged by the amount of EUR 1,500,000 bearing in mind that Tus subsequently purchased Pro-Global (with motel "Medijana" and right of construction land use) having paid EUR 1,500,000 more than the purchase price (the Arbitral Tribunal finds that the overpaid amount varies between EUR 1,300,000 and EUR 1,500,000 in communications of the Privatization Agency dated 25 March (refer to paragraph 9.1 page 7) and 29 May 2009 (refer to paragraph 27, page 9)).

251 The Arbitral Tribunal first finds that the PWHC Report specifies on page 50 (paragraph 7.13 *et seq.*) that the expertise on terrain value (RX-206) was made in May 2009, four years after the sale to Pro-Global, with no comment on the expertise of Professor Zlatanovic. The Arbitral Tribunal also finds that Clause 1 of the sale contract signed between Pro-Global and Srbija-Turist does not provide for sale of ownership over construction land but only for sale of the land use right. Thereby, the expertise on the subject land value (in fact the selling value of ownership right in May 2009) is not relevant for these proceedings.

252 The owner of the company Pro-Global and a relative of Mr. Srba Ilic (owner of UHL) is Mr. Petar Ilic[52]. Petar Ilic is also employed at Srbija-Turist (refer to the contract of 21 November 2005 (RX-135) quoting that the named person occupies the position of *"outsourcer with the task to perform activities for needed by the Client* [Srbija-Turist] *to be defined by an appropriate order"*).

253 The contract on sale and purchase between Srbija-Turist and Pro-Global (represented by Petar Ilic) was signed on 7 April 2005 and together with the amendment of 8 April 2005 constitutes an integral part of evidence marked RX-47.

254 The evidence marked RX-96 indicates that Mr. Petar Ilic, on behalf of Pro-Global, signed a contract with the company Hotel "Nis" d.o.o. (hereinafter: hotel "Nis", a newly established branch office for control and management over the hotel "Nis") represented by Mr. Nebojsa Stojanovic, who is at the same time the director of Srbija-Turist, in order to render various services on reconstruction of the hotel "Nis". For the services rendered on reconstruction of the hotel "Nis", Pro-Global was supposed to be paid a fee in the amount of 10% total funds paid based on implementation of works on reconstruction of the structure, gross.

[52] Refer to RX-43, RX-44, RX-45, RX-47, RX-48, RX-49.

255 Pro-Global paid to Srbija-Turist the selling price for the motel "Medijana" and for the right of construction land use, thanks to the loan approved by Srbija-Turist to Pro-Global.

256 The Arbitral Tribunal at the same time states that Mr. Robert Ceh, representative of the company Tus which is the only shareholder of the company Pro-Global, is also one of the former directors of Pro-Global (RX-46). Thereby, the sales of these companies were performed by mediation of persons with shared interests and with close mutual relationships.

257 The Arbitral Tribunal is thereby addressed to decide whether the existence of shared interests between owners of Srbija-Turist, Pro-Global and company Tus contradicts the laws of the Republic of Serbia and to determine the possible consequences of such actions.

258 The Arbitral Tribunal first finds that the Contract does not prohibit sale of the motel "Medijana" and the rights of construction land use. Indeed, the accounting records show that the motel "Medijana" and the right of construction land use were sold at the bookkeeping value to Pro-Global, but this company is (officially) independent from Srbija-Turist, thereby it cannot be concluded that Srbija-Turist was damaged by sale to Pro-Global. The Arbitral Tribunal also finds that in the tendering procedure (RX-43) only two participants submitted bids for purchase of "Medijana" and that their bids (at the amount of EUR 500,000 and EUR 300,000) were lower than the bookkeeping value of the motel "Medijana" and than the price offered by Pro-Global (RX-44).

259 The Arbitral Tribunal is also addressed to state its mind on the issue of whether the conditions of sale of the right of construction land use and motel "Medijana" to Pro-Global - and subsequently to the company Tus (although the Contract does not provide for prohibition of their sale), are contrary to the prohibition of acquiring property by fraudulent actions in Serbian legislation. In order to state its mind on this matter, the Arbitral Tribunal first has to determine the benefits for Srbija-Turist acquired by the sale and the manner and use of funds from the sale, in fact, to determine whether the funds from the sale were used in compliance with Clause 8.3.3 of the Contract and with the letter of Privatization Agency, wherein it issues its approval of the sale (RX-11).

260 From PWHC Report, it arises that the funds acquired by sale of the motel "Medijana" and by sale of the right of construction land use (at the amount of RSD 42,813,820) were fully spent to cover the needs of Srbija-Turist (refer to paragraph 7.12, page 49), whether this being payment of salaries to employees

(payment of debts with that respect), repayment of bank loans (repayment of short term loans), payment of liabilities to suppliers or payment of taxes and other duties. The Arbitral Tribunal concludes thereby that the funds acquired by sale of the motel "Medijana" and of the right of construction land use were spent in conformity with Clause 8.3.3 of the Contract and with the letter of Privatization Agency whereby it issues its approval of the sale.

261 As concerns the Agency's allegations (refer to paragraph 27, page 6 of the brief of Privatization Agency dated 29 May 2009) on resale of the company Pro-Global to the company Tus for EUR 1,500,000 (allegations which remained unsupported with evidence), the Arbitral Tribunal finds that the information on the said sale of Pro-Global to the company Tus, and on the assets or liabilities of the company Pro-Global, is insufficient. As a consequence of the above and in the lack of evidence, the Arbitral Tribunal is compelled to reject the allegations of the Privatization Agency that the values of the motel "Medijana" and of the rights of construction land use were fictively reduced, with the intention to achieve illicit gain and thus harm the interests of Srbija-Turist.

262 Thereby, the Arbitral Tribunal finds that the criminal charges of minority shareholders in Srbija-Turist because of the sale of the motel "Medijana" have remained without a legal epilogue (refer to CX-129, paragraph 9.1, page 8 of UHL's brief of 19 December 2008).

263 The Arbitral Tribunal concludes that it has not been proved that the sale of motel "Medijana" and the sale of the right of construction land use contradict the Contract or to the principle of good faith (bona fides) while complying with contractual obligations, and may not be characterized as fraud.

2 Sale of Hotel Srbija

264 The Privatization Agency also criticizes the sale of the hotel (refer to page 38 of counterclaim). This hotel was sold (together with immovable property located in the hotel "Srbija", such as inventory and equipment (except for laundry equipment)) at the price of EUR 350,000 to the company Delta Matic d.o.o. (which is not claimed to be in close relationship with UHL, Srbija-Turist or their management).

265 The sale contract of 12 December 2005 (RX-50) stipulates in the second paragraph of introductory part that the management board of Srbija-Turist approved of the sale on 3 June 2005, whereas the approval of the Privatization

Agency for this sale, dated 1 August 2005, is enclosed as evidence marked RX-11.

266 From the evidence marked RX-49, it is derived that the bookkeeping value of the hotel of EUR 359,000, approximates the price achieved by the hotel sale contract (EUR 350,000).

267 Review of enclosed documents shows that there were three bids (one of which was estimated as frivolous, refer to RX-52) but the Arbitral Tribunal is not familiar with the prices offered by such other bidders, thus it is unable to compare the submitted bids in order to determine the market price of the hotel "Srbija".

268 It still remains to be determined whether the funds gained from hotel sale were spent in compliance with Clause 8.3.3 of the Contract and in compliance with the approval issued by the Privatization Agency (RX-11).

269 From PWHC Report, it appears that the funds received from Srbija-Turist (EUR 350,000 or 30,205,070 in dinar equivalent) were spent within the Investment Program, i.e. that such funds were used for financing of advance payments to EIE in the value of RSD 18,621,027.38 and RSD 10,000,000 (refer to paragraph 7.22, page 52 of PWHC Report). The difference of RSD 1,600,000 was then used for severance pays for voluntary termination of labor contract (refer to e-mail of Mr. Nebojsa Stojanovic sent to Mr. Srba Ilic on 15 December 2005 (RX-51)).

270 At the same time, the audit report of Consultant Audit specifies that the funds gained from the hotel sale were used for regular needs of Srbija-Turist.

271 The Arbitral Tribunal finds that the funds gained from the hotel sale were used in compliance with Clause 8.3.3 of the Contract and in compliance with the approval issued by the Privatization Agency, since the advance payments to EIE and severance pays to employees constitute and integral part of liabilities (and debts) of Srbija-Turist. As a consequence of the above, the Arbitral Tribunal rejects the allegations of the Privatization Agency as unfounded.

272 The same as in case of the sale of motel "Medijana" and the sale of the right of construction land use, the Arbitral Tribunal finds that the criminal charges of minority shareholders of Srbija-Turist concerning the hotel sale have remained without a legal epilogue (refer to CX-130, paragraph 9.2, page 9 of UHL's brief dated 19 December 2008).

273 The Arbitral Tribunal concludes that it has not been proved that the hotel sale contradicts the Contract or the principle of good faith (bona fides) while complying with contractual obligations.

3 Land Opposite the Motel "Nais"

274 The Privatization Agency claims in its counterclaim that UHL intended to sell the land located on the other side of the highway opposite the motel "Nais". The Privatization Agency thereby acknowledges that this intention, revealed to the Privatization Agency from which UHL asked the consent, was not implemented (refer to paragraph 11.3.2, page 39 of counterclaim)[53].

275 In its reply to allegations of the Privatization Agency, UHL claims that *"for more than one year, ST tried to sell the land, published announcement of sale to which nobody responded, so that the Agency's allegation that a large amount is concerned and that UHL had the intention to appropriate that amount, is only one of the allegations in a series of untrue allegations and unfounded charges against UHL"* (refer to paragraph 9.4, page 9 of UHL's letter dated 19 December 2008).

276 Since this sale never took place, the Arbitral Tribunal finds that no breach of Contract or of the principle of good faith (bona fides) has been proved in the course of fulfillment of contractual obligations.

4 Compliance with Obligation to Maintain Business Activity (Cl. 8.3.5 of the Contract)

277 In the letter dated 30 June 2006, wherein UHL is notified that the Contract is terminated (CX-37), the Privatization Agency claims that the reason for termination of Contract (apart from non-compliance with investment obligation from Clause 8.1.1 of the Contract) is non-compliance with obligation to maintain the business activity of the privatization subject from Clause 8.3.5 of the Contract, which binds UHL (the Buyer):

> *"to substantially maintain the business activities of the Seller and Seller's Affiliates in accordance with the objects stated in the Articles of Association and it will use best endeavors to operate the Seller and Seller's Affiliates in line with the proposed business plan and such that the current volume of services and scope of operations at the Signing Date is maintained."*

[53] *"However, even despite the desperate intention to benefit from the land sale, UHL did not succeed."*

278 In case of non-compliance with this obligation, Clause 8.4.9 of the Contract stipulates a contractual penalty at the amount of 50% the contract price, leaving it possible for the Privatization Agency to claim the whole amount of compensation for actual damage and lost profit.

279 The Claimant opposes the allegations of the Privatization Agency about non-compliance with obligations from Clause 8.3.5 of the Contract, pointing out that the total income of the privatization subject was increased by 36% in 2005 as compared to 2004, and by 15% in 2004 as compared to 2003 (refer to Claim, page 5, and reply of 19 February 2007, paragraph 5.1.1 page 45).[54]

280 In the report for 2004 dated 23 January 2005 (refer to RX-30 page 3), the Privatization Agency states that after privatization *"the scope of business activities in the privatization subject has intensified, as indicated by summaries of gross earned income from services in 2001, 2002, 2003 and 2004"*. This statement is supported with a table showing that the total income was increased from RSD 127,410,356 in 2001 to RSD 181,275,295 in 2004. The Privatization Agency thereafter concludes that the UHL's obligations as per Clause 8 of the Contract have been observed by the investor (except for obligations as per Cl. 8.1.1 and 8.2 of the Contract), including the obligation from Clause 8.3.5 of the Contract (refer to RX-30, page 4).

281 Thereafter, in the report for 2005, dated 21 February 2006 (refer to RX-5, paragraph 5, page 10), the Privatization Agency concludes that UHL failed to comply with obligations as per Clause 8.3.5 of the Contract, concerning the number of beds and nights. In that report, the number of beds in 2003 was reduced from 77,850 to 66,947 in 2005, and the number of beds in 2003 from 845 to 705 in 2005.

282 In its letter dated 14 March 2006, UHL demanded from the Privatization Agency to specify the understanding of the term *"maintenance of business level"*[55] (CX-20).

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[54] In the e-mail sent to the Privatization Agency, quoted on page 5 of the Claim, Mr. Srba Ilic states that the total income in the last 3 years amounts to: 143,895,297 thousand dinars in 2003; 162, 295,963 thousand dinars in 2004; and 220,802,393 thousand dinars I n2005. The Arbitral Tribunal finds that these amounts are not identical to those from evidence marked RX-30.

[55] *"Understanding of the term 'maintenance of level of business activities' in the way as done by the Agency, is inacceptable and contrary to business practice. Indisputably, in the world and in Serbia, TOTAL INCOME is the most relevant indicator, valuator of business success – growth, drop, and even "maintenance of level of business activities", and as you might well know, the total income of SRBIJA-TURIST has grown."*

283 In the letter of 14 March 2006 (CX-21), the Agency replied that *"analysis of maintenance of business activity is conducted based on physical parameters of the scope of rendered and charged services, i.e. scope of production and degree of utilization, service/production capacities, because in that way one obtains the most adequate data on maintenance of primary business activity of the subject. The balance item of total income represents the sum of business, financial, other and extraordinary income, and in the context of provision 8.3.5 of the Contract it cannot be treated as the only indicator of maintenance of business activities, or scope of services. Also, it should be kept in mind that the total income is expressed in dinars and accordingly for the purpose of comparison of total earned income in the period before privatization and those earned in 2005, it is necessary to take into account the fluctuations of exchange rate of dinar to "hard" currencies, i.e. the inflation rate. In analysis of maintenance of business activities of the privatization subject, a cumulative summary of the number of used beds and number of nights in 2005 excluding refugees was applied, as obtained during the control"*.

284 Thereafter, on 2 June 2006, the Privatization Agency submitted a report quoting that it considers the obligations from Clause 8.3.5 of the Contract unfulfilled (refer to page 14, RX-7). Therein, the Privatization Agency recognized a drop in "natural" factor such as the reduced number of beds and nights. As concerns the factors of "financial" character, the Agency recognized a relative stability of income between 2002 and 2005 and increase in costs, i.e. total expenditures in the same period. The same report quotes that the employees were on strike from 27 December 2005, and that Srbija-Turist did not earn income from utilization of hotel capacities.

285 In the letter of 21 January 2010 (refer to paragraph IV, page 8), UHL comments the PWHC report which shows, according to the Claimant's allegations, that the total income of Srbija-Turist in 2005 was by 22% lower than in 2004 (and that this resulted in increased income regardless of inflation, the rate of which did not exceed 22%). UHL also claims that the number of nights cannot be a criterion for evaluation of income, because in 2005, refugees and displaced persons whose stay caused much higher costs than income for Srbija-Turist, were moved from the facilities of Srbija-Turist. UHL claims that the table in item 5.5 of PWHC Report shows that the income of Srbija-Turist drastically dropped when the Agency overtook Srbija-Turist. In fact, UHL claims that the Privatization Agency caused damage in the form of drastic drop in circulation, failure to complete the reconstruction and to include the hotel "Nis" in the Holiday Inn chain of hotels, and that the income at the time while UHL managed Srbija-Turist (during 2004

and 2005) stabilized, that the salaries grew and were paid in time and that it was the time when Srbija-Turist was on the way to recuperation, but with the Contract termination everything started going down the hill again.

286 The Arbitral Tribunal first finds that the parties do not agree with compliance with obligations contained in the second part of Clause 8.3.5 of the Contract, stipulating that:

> *"*[UHL] *will use best endeavors to operate the Seller and Seller's Affiliates in line with the proposed business plan and such that the current volume of services and scope of operations at the Signing Date is maintained"*

"Business plan" from the second part of Clause 8.3.5 of the Contract has not been submitted during the arbitration. However, the Privatization Agency has submitted business plans for 2004 and 2005, composed after the Contract signing, showing that a hypothetical income of EUR 1,248,252 in 2004 and EUR 722,892 in 2005 was earned (refer to RX-215 and RX-216).

287 The Arbitral Tribunal also finds that the obligation to maintain the current volume of services and scope of operations is not defined by the Contract and that the Privatization Agency obviously believes that this obligation implies maintenance of number of nights and beds whereas UHL believes that this obligation pertains to increase in gross income.

288 The Arbitral Tribunal also finds that the Privatization Agency did not apply the criterion of occupied nights and beds in the report for 2004, relying solely upon the criterion of gross income (RX-30) and that the additional criterion of the number of nights and beds was for the first time used in the report for 2005 (RX-5 and RX-7).

289 Among other, if adhering to the interpretation given by the Privatization Agency, there would appear a contradiction between the obligations from Clause 8.3.5 of the Contract and Annex 4 to the Contract, since it would not be possible to maintain the number of nights and beds if there would occur partial or total closing of certain motels and hotels (envisaged by Annex 4 to the Contract) in order to enable the reconstruction works.

290 The refugees who were partly accommodated in the hotels of Srbija-Turist were permanently relocated from 2005 on, so that their nights are no longer included in

calculations (refer to the UHL's reply of 6 February 2007, paragraph 3.2.1.2, page 14)[56]

291 Mindful of the above, the Arbitral Tribunal finds the interpretation as by the Privatization Agency, evaluating the compliance with obligations from Clause 8.3.5 of the Contract solely on the basis of the number of nights and beds, wrongful given the circumstances and obligations from Annex 4 to the Contract.

292 The Arbitral Tribunal rejects the allegations of the Privatization Agency concerning the failure to comply with obligations from Clause 8.3.5 of the Contract and finds that the total income of Srbija-Turist in 2003 and 2004 has been constantly growing (refer to the table on page 14 of evidence marked RX-7).

293 After having considered the compliance with obligations from the Contract by the Claimant (Buyer), the Arbitral Tribunal shall here below consider the compliance with Contract obligations by the respondents. Since Srbija-Turist (Seller or the Second Respondent) acting as the privatization subject has a passive attitude concerning the compliance with obligations from the Contract, the Arbitral Tribunal shall here on primarily focus on compliance with obligations from the Contract by the Privatization Agency (the First Respondent).

b) *Issue of Compliance with Obligations from the Contract by the Privatization Agency*

(i) *Claimant's Reference to the Negligence of Privatization Agency during Execution of Obligations from the Contract and Issue of Unequal Positions of Contract Parties*

294 In the reply dated 6 February 2007 (refer to paragraph 2.1.3, page 7), UHL claims that the Privatization Agency failed to maintain the necessary communication and cooperation with the Claimant and thus violated the principle of equality of participants in contractual relationship. According to the Claimant's allegations, the Agency believed that, as the seller, it has no obligations towards the buyer, except for the right, as a state authority, to control whether the buyer has complied with its obligations from the Contract.

[56] *"Refugees were encountered in three hotels. That was a special burden for Srbija-Turist. Since 2005, it has been known as certain that their nights are no longer included in calculations. Earlier, their nights were included, therefore the Agency completely unfoundedly, based on "reduced number of nights", accused Uniworld Holdings of failing to maintain the level of business activities".*

295 In response to UHL's allegations, the Privatization Agency remarks, in the brief of 2 April 2007 (refer to paragraph 25 page 7) that the obligatory-legal effects of the contract on purchase and sale of social capital regarding the Agency's obligations are exhausted at the time of Contract signing and that this standpoint is generally accepted and confirmed in the practice of Serbian courts. The Privatization Agency also claims that the Contract does not provide for fulfillment of any obligation on its part and that it (the Contract) cannot be included in the category of simple contracts of commercial character, but instead the Contract on Privatization has the character of a combined contract which produces obligatory-legal effects, but also has the features of a status contract.[57] The Privatization Agency further claims that UHL's view that it has acted negligently (*mala fide*) is inacceptable, since during execution of control of compliance with investor's obligations, the Privatization Agency actually performs its lawful duty – not to act as a contract party but as the holder of public powers.

296 The Arbitral Tribunal, however, finds that the Privatization Agency has also some of the contractual obligations towards the Claimant even after the Contract signing, such as the obligation to compensate damages as per Clause 6 of the Contract or the obligation to negotiate "in good faith" (*bona fides*) as per Clause 9.4 of the Contract. Accordingly, the obligations of the Privatization Agency may not be considered exhausted after the Contract signing.

297 The Arbitral Tribunal also finds that the facts are not in favor of the Claimant's allegation that there has occurred total breakup in communication and cooperation between the Privatization Agency and UHL. The submitted documents show that the parties have met on several occasions and negotiated (refer to CX-23, CX-51, CX-57 – UHL's letter to the Agency dated 14 March 2006). The Privatization Agency, among other, agreed to modify the Contract by signing of the agreed Amendment, thus agreeing to reduce the value of performance guarantee and

[57] *"Contract on Privatization is an obligatory-legal contract because it constitutes the rights and obligations of contract parties, provided that it is a contract with momentary prestation for the Agency as the First Respondent, whereas from the aspect obligations of the buyer of capital it is a contract with permanent prestations. At the same time, the privatization contract is a status contract, because it represents both a kind of status act of the privatization subject, which modifies the legal status, founder, structure of capital, and even the form of subject's organization, and a document required (among other) for registration of relevant changes in the company register. It is important to remark that such a nature of privatization contract, as well as the nature of legal affair of social capital sale, necessarily causes that the contract parties in the privatization contract are not and cannot be completely equal, in the sense as envisaged by the Law on Obligations. The Privatization Agency, in fact, has (at least double capacity – it is a contract party, which sells social capital (although disputable whether it is a seller in the classical contractual terms), but at the same time the holder of precisely defined public powers, based on the Privatization Law and Law on Privatization Agency…"*

waiving the exercise of contractual penalty for the first year of Investment Program (CX-2).

298 Accordingly, the Arbitral Tribunal rejects the UHL's objection that there has occurred total breakup in communication and cooperation with the Privatization Agency, at least in the period from the beginning of cooperation and signing of the Contract until institution of arbitral proceedings in the Putnik case (April 2005), which could logically lead only to a deterioration in the relationship between the two parties.

299 The Claimant also takes offence at the Privatization Agency for failing to deny the rumors about violation of Contract by UHL (refer to paragraph 2.2.2 page 8 of the reply dated 6 February 2007). Thereupon, the Privatization Agency finds that it is not its duty to deny any rumors about the Claimant or to make public statements to confirm the compliance with obligations stipulated by the Contract on part of the Claimant. The Privatization Agency also denies that it has encouraged the employees in Srbija-Turist to oppose to the newly appointed ownership structure (refer to the Agency's reply of 17 August 2006, page 17 *et seq.* and Agency's brief of 2 April 2007, paragraph 30 *et seq.*, page 10).

300 The Privatization Agency also denies that it has encouraged the strike of employees by rejecting the findings of the auditing report of Consultant Audit, emphasizing that the strike began (according to the Claimant's allegations) at the end of December 2005, whereas its opposition to the findings from the auditing report of Consultant Audit was forwarded to the Claimant much later (in February 2006). The Privatization Agency emphasizes thereof that the Claimant himself admits that the discontent of minority shareholders and employees in Srbija-Turist was caused primarily by dismissal of redundant employees found in the company when the Claimant overtook it.

301 The Arbitral Tribunal finds, on the basis of evidence submitted under the ordinal number CX-63 (letter by the Privatization Agency to minority shareholders of Srbija-Turist dated 15 April 2004), that the communication with minority shareholders of Srbija-Turist started much earlier. At the beginning of the first year of investment period, the minority shareholder of Srbija-Turist addressed the Privatization Agency asking to carry out a revision or to seek for termination of Contract, to which the Agency replied that there was no material breach of Contract by UHL by which the termination could be justified. On that occasion, the Privatization Agency forwarded to the minority shareholders of Srbija-Turist the conclusions of completed control, remarking in the last section of its letter that it expects full understanding of minority shareholder. This document shows that

the Agency did not encourage the problems between the majority and minority shareholders and that, after the request for intervention by minority shareholders, it endeavored to relieve the tension by sending the letter at the beginning of the year 2004 wherein it confirmed that the investor had fulfilled the most important obligations from the Contract. Further to the above, the Arbitral Tribunal concludes that the Claimant's critics and allegations related to this matter are unfounded.

302 The Arbitral Tribunal also believes that the Privatization Agency is not obliged to deny the accusations against the investor and finds that the investor himself organized a press conference in Nis, on 23 June 2006, in order to issue a denial of the accusations (CX-14 and CX-19). In the previous part of this reasoning, the Arbitral Tribunal has concluded that the Privatization Agency is not obliged to accept the findings from auditor's report submitted in compliance with Clause 8.1.4 of the Contract. Further to the above, the Privatization Agency did not have to agree with the investor concerning and in relation to fulfillment of contractual obligations and it reserved the freedom to decide whether it should or should not deny the declarations made in public on that matter.

303 As concerns the Claimant's allegations that the Privatization Agency encouraged the strike in Srbija-Turist because of refusal to accept the findings from auditor's report by KPMG for 2004[58], the Arbitral Tribunal finds that the striking activity started much earlier than the delivery of the said report to the Privatization Agency at the beginning January 2005 (refer to RX-28 and RX-29), also confirmed by the evidence marked CX-63 dated 14 April 2004, showing that the Agency, at least in the beginning, endeavored to calm down the tensions between the majority and minority shareholders of Srbija-Turist.

304 The Arbitral Tribunal finds that, according to the words of the Claimant himself, obstruction by employees towards the Claimant started from the beginning, i.e. from overtaking of Srbija-Turist (refer to paragraph 3.2.1.3, page 14 of UHL's reply dated 6 February 2007).

305 The causal link between the strike in Srbija-Turist and the Agency's conclusions about non-compliance with contractual obligations by UHL arises from the letter sent by the Privatization Agency to the trade unions, mayor and town assembly of Nis on 24 March 2006 (refer to CX-67), which might lead to the conclusion that

[58] *"…Its activities, as well as all actions, indicate that the Privatization Agency acted contrary to the Contract and the new local situation related to the strike, which was created primarily by the Agency itself, disputing the auditor's opinion that the claimant failed to comply fully with its contractual obligations for the first year"* (refer to the reply by UHL – dated 6 February 2007, paragraph 2.2.3, page 8.)

the Management Board of Srbija-Turist decided to put on hold the plan for dismissal of workers while waiting for the decision of the Privatization Agency on non-compliance with the Investment Program for 2005.

306 From the submitted documents, it may be concluded that the announcement of the redundancy dismissal plan gave rise to the strike which started on 27 December 2005, and not the opposition of the Privatization Agency to the findings of the auditing reports for 2004 and 2005. Thereby, the Arbitral Tribunal concludes that the strike started at the end of December 2005 cannot be considered force majeure, as claimed by the Claimant (refer to paragraph 3.2.3.3, page 28 of UHL's reply dated 6 February 2007), mindful of the fact that the strike was caused by an event which could have been foreseen and the existence of which was under reasonable control of one of the contract parties, whether it be Srbija-Turist or UHL, and that the strike could have probably avoided by a more thoughtful social policy of the company's management.[59]

307 Since the disapprobation of the employees in Srbija-Turist started immediately after overtaking of Srbija-Turist by new management, the Arbitral Tribunal finds that Srbija-Turist and UHL, by failure to undertake preventive measures, and with a view to animosity of employees to the new management, could have prevented the unpleasant but also predictable consequences of the announced dismissal of employees (e.g. by use of services of firms dealing with communication, delaying the date of dismissal or by gradual dismissals in several successive stages, in order to prevent sudden and mass dismissal of employees, etc.)

308 In its letter dated 24 March 2006 (CX-67), the Privatization Agency confirmed that the Social Program from Annex 6 to the Contract has been complied with by the investor (envisaging prohibition of dismissal of employees within two years from company overtaking), which directly contradicts the Claimant's allegations that the Privatization Agency directly encouraged and supported the discontent of minority shareholders and employees of Srbija-Turist.

309 Consequently, the Arbitral Tribunal rejects as unfounded the Claimant's allegations that the actions of the Privatization Agency directly contradict the

[59] According to the definition from the Contract "force majeure" *means an extraordinary and external event outside the reasonable scope of the Party's control and the occurrence of which could not have been prevented by the exercise of reasonable care by such Party (Including but not limited to: Act of God, industry wide strikes, riots, explosion, fire, flood, war and other hostilities, civil commotions, governmental acts, regulations of Orders)."*

basic principles of the Law on Obligations, such as: principles of elementary fairness, good faith and equal value of performances in bilateral contracts.[60]

310 In the reply of 6 February 2007 (refer to paragraph 3.2.2.2 page 20), UHL claims that the Privatization Agency unconscientiously encouraged UHL to continue with investments in Srbija-Turist, having sent the letter of 20 October 2004 wherein it states that the contract of privatization of the company Putnik is separate from the Contract on Privatization of Srbija-Turist (CX-43) even though the performance guarantee in the Putnik case had been activated in August 2004, and that there were no disagreements on that matter between the parties at the time. Therefore, UHL claims that at the time the Privatization Agency had already decided to exclude UHL from the privatization procedure of the company Putnik and Srbija-Turist.

311 The Arbitral Tribunal finds that UHL has not supported its allegations with evidence. Moreover, the Arbitral Tribunal states that UHL initiated the termination of the contract on privatization of the company Putnik and that six months after the reception of the above letter of the Privatization Agency dated 20 October 2004, in April 2005, it instituted arbitral proceedings against the Privatization Agency in the Putnik case (refer to CX-26).

312 Further to the above, the Arbitral Tribunal also finds this Claimant's allegation unfounded.

313 The Claimant also takes offence at the Privatization Agency for taking in trade unions and political structures of the town of Nis during the accounting controls in Srbija-Turist even despite the Contract does not provide for presence of third parties during inspection and that fact that the documents given for the Agency's insight are confidential (refer to paragraph 3.2.2.5 *et seq.*, page 21 and paragraph 3.2.2.12, page 15 of UHL's reply dated 6 April 2007).

314 Despite that fact that in the letter dated 24 March 2006 the Privatization Agency reminded that the Contract produces no legal effects towards third parties (refer to CX-67), the Privatization Agency believed that the consequences produced by the Contract for third parties justify the practice of inviting third persons to participate in control of the privatization subject:

> *"The practice of the Privatization Agency as concerns the control of all companies privatized by the method of tender is the same – the company*

[60] Refer to UHL's reply dated 6 February 2007, paragraph 2.2.10, page 9.

director or his authorized representative, as well as representatives of relevant trade unions, employees and minority shareholders in the management and supervisory board (if elected) are invited to attend the control. These persons are invited because particular provisions of the contract on sale of social capital pertain to them (payment of dividends, prohibition of dismissal, etc.). The said practice is positive in controls performed by the Privatization Agency in order to make the activities of social capital buyers transparent and to avoid misleading information" (refer to paragraph 56.2, page 21 of the brief by Privatization Agency dated 2 April 2007).[61]

315 The Arbitral Tribunal finds that the shares of Srbija-Turist were distributed in the following manner: UHL, as majority owner, held 70% shares, employees and ex employees of Srbija-Turist 15% shares, and the Share Fund of the Republic of Serbia also 15% shares. (refer to RX-13, page 3 and 4).

316 Further to the above, the Arbitral Tribunal finds that the minority owners of Srbija-Turist, who were at the same time its shareholders, found legal interest in attending the company control and, as such, cannot be considered third parties. The Arbitral Tribunal therefore finds the practice of the Privatization Agency to invite minority shareholders to attend the control of privatization subject correct.

317 As concerns the politicians from the town of Nis, the Privatization Agency claims that Mr. Srba Ilic himself requested a joint visit to the Nis town assembly after the completed control (refer to paragraph 56.3, page 21 of the brief by Privatization Agency dated 2 April 2007).

318 Among other, the Arbitral Tribunal finds that participation of local government in company control followed the UHL's invitation (refer to UHL's letter dated 29 March 2006, asking for assistance of the Nis mayor, Mr. Smiljko Kostic, in order to stop the strike (CX-79)), either the UHL's attorney (CX-82) or upon invitation of minority shareholders in Srbija-Turist (CX-80, CX-81), EIE (CX-83) or upon the Claimant's invitation addressed to the Privatization Board (CX-85, letter dated 16 February 2005).

319 Consequently, and bearing in mind that the presence of local authorities during the control of Srbija-Turist was among other requested by the Claimant himself, the Privatization Agency's invitation to local authorities to attend the company

[61] *"Apart from that, nothing in the Contract on purchase and sale of social capital gives any person, except for the contract parties, any rights or legal remedies in relation to the Contract on purchase and sale of social capital."*

control may not be considered inappropriate. Therefore, the Arbitral Tribunal finds unfounded the Claimant's allegation that the Privatization Agency abused the right to control compliance with the Contract on purchase and sale of social capital and that it failed to proceed with this control in good faith (refer to paragraph 3.2.4.2, page 31 of UHL's reply dated 6 February 2007).

320 In the brief of 6 February 2007, the Claimant declares that the Privatization Agency acted contrary to the principle of good faith as it approved and encouraged the negative campaign in the media against the Claimant, thus inflicting damage to his business reputation and operations of Srbija-Turist (refer to paragraph 3.2.4.1 of UHL's reply).

321 After having reviewed the press clips referred to by the Claimant, the Arbitral Tribunal finds that these contain nothing insulting. The fact that the Privatization Agency only partially accepted compliance with the obligation to make investments and thus expressed the opinion that UHL failed to observe the Investment Program, is an integral part of the Agency's right to disagree with findings of auditing reports submitted under Clause 8.1.4 of the Contract. Consequently, the Arbitral Tribunal rejects the Claimant's allegations as unfounded.

(ii) *UHL's Reference to Falsity of Agency's Representations and Guarantees Concerning Settlement of Tax Liabilities of Privatization Subject*

322 Clause 5.2 of the Contract stipulates that all representations and guarantees made by the Privatization Agency (except for reserves from the Disclosure Letter and in conformity with limitations specified in Clause 6 of the Contract) are true and correct on the date of Contract signing, to the best of the Agency's knowledge. The Privatization Agency made representations and guarantees under this Clause of the Contract whereas Srbija-Turist (the Second Respondent) made no such representations (refer to Clause 5.3 of the Contract).

323 With that regard, the Privatization Agency, among other, made representations and guarantees concerning the taxation status of the privatization subject, in fact representations and guarantees that Srbija-Turist had made reserves or settled the debts based on taxes due for payment to the tax administration.

324 In fact, in the Disclosure Letter (RX-13) it is quoted that until 31 July 2003, the tax debt of Srbija-Turist amounted to RSD 37,603, 846.43.

325 The Claimant claims that after the Contract signing he was forced to pay the tax debt of Srbija-Turist from the period before the Contract signing, at the amount of RSD 96,000,000 (with interests) in order to prevent enforced performance of taxation authorities and to enable undisturbed operation of Srbija-Turist (refer to CX-7 and paragraph 3 page 49 *et seq.* of the Claimant's Post-Hearing Brief dated 15 May 2010). The Arbitral Tribunal also finds that on 9 February 2005, the Claimant raised the loan No.169 at the amount of USD 500,000 intended for settle the tax liabilities towards preservation of liquidity (CX-4, page 2).

326 The Arbitral Tribunal finds that even though the tax debt of Srbija-Turist after the Contract signing exceeded the amount specified in Disclosure Letter, the discrepancy as compared to the representations and guarantees from the Contract is not sufficient for characterization of the Privatization Agency as negligent or as intending to mislead the Buyer.

327 At the same time, the Claimant states in the Post-Hearing Brief of 15 May 2010 (refer to paragraph 3, page 50) that he demanded from the Privatization Agency reimbursement of payments based on the taxes from the period before the Contract signing.[62]

328 However, the Arbitral Tribunal finds that despite the call of the Arbitral Tribunal to submit documents confirming that the request for payment of tax debt of Srbija-Turist as per Clause 5 of the Contract (refer to Procedural Order 6, item 7) was submitted, UHL has failed to submit evidence that within the deadline stipulated by Contract (one year) it submitted to the Privatization Agency the request for reimbursement of tax debts from the period before the Contract signing (as per Clause 6.2.3 and 9.11 of the Contract).

329 Since the Claimant failed to submit the requested evidence, the Claimant's allegations on that matter are rejected as unfounded, thus it is not necessary to proceed with evaluation of their justification.

330 The Arbitral Tribunal concludes that, based on exposed allegations, the actions of the Privatization Agency during the Contract implementation may not be characterized as negligent and/or contrary to the principle of equality of parties in a contractual relationship.

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[62] *"As the respondent failed to respond to the Claimant's notices under the Contract to pay the tax debts due before the Contract signing, or to ensure that the tax authorities relieve the privatization subject from payments of such taxes due before the Contract signing…"*

331 Further on in this reasoning, the Privatization Agency shall consider the issue of justification of Contract termination.

(iii) *Issue of Justification of Contract Termination by the Privatization Agency*

332 On 30 June 2006, the Privatization Agency sent to UHL the notice of Contract termination (CX-75) referring therein to the letter dated 17 February 2006 (CX-6) wherein (i) it recognizes the investments made in 2005 at the amount of USD 431,459.41 and (ii) specifies the 90-day deadline for compliance with the rest of obligations for 2005. In the letter dated 17 February 2006 (CX-6), the Privatization Agency also remarked that *"if the Buyer fails to act in compliance with the placed order within the specified deadline, the Privatization Agency shall terminated the Contract on purchase and sale, as the conditions for such termination stipulated by law shall be then met, and consequently the Buyer of the capital shall not be entitled to refund of the amount paid on account of contract price."*

333 Having found that the Claimant (Buyer) failed to comply with the contractual obligation to make investments in 2005 (at the amount of USD 3,268,540.59), the Privatization Agency declared the Contract terminated for non-compliance as per Article 41a paragraph 1 item 2 of the Privatization Law. The Privatization Agency also notified the Claimant (Buyer) that it has passed the Decision on transfer of the capital of the company Srbija-Turist to the Share Fund and that it shall initiate the procedure for collection of the bank performance guarantee.

334 Pursuant to Article 41a of the Privatization Law:

> *"A contract on sale of capital and/or property shall be considered terminated for non-compliance if, even within subsequently specified deadline for compliance, the buyer:*
> *1) fails to pay the contract price, or any of the due installments;*
> *2) fails to make an investment in the privatization subject in the manner, form and within the deadline specified by the contract;*
> *3) avails with the property of the privatization subject contrary to the provisions of contract;*
> *4) fails to provide for continuity in performance of registered line of business for the performance of which the privatization subject was established;*
> *5) fails to submit the guarantee for investments in the manner as stipulated by the contract;*

6) fails to comply with provisions concerning the method of dealing with employee issues;

6a) fails to make full payment of minimum wages to employees in the privatization subject and the contributions thereto, for a period of at least nine months in one calendar year;

7) in any other cases stipulated by the contract.

By termination of contract as per paragraph 1 of this Article, the employees of the privatization subject shall preserve the ownership rights over the capital acquired in compliance with provisions of Article 42 to 44 of the Law, and the capital which was subject to sale shall be transferred to the Share Fund.

In case of termination of a contract on sale of capital and/or property due to buyer's non-compliance with contracted obligations, the buyer of the capital, as the party in default, shall have not right to reimbursement of the amount paid on account of contract price, towards protection of general interests."

335 The Arbitral Tribunal first states that the Contract was terminated pursuant to item 2 Article 41a of the Privatization Law, and on the basis of the finding of the Privatization Agency that in 2005 the Buyer failed to make investments in the privatization subject in the manner, form and within the deadline stipulated by the Contract (CX-75), and that the Contract termination is not motivated by non-compliance with any other remaining obligations from the Contract for 2005 (such as the obligation to maintain the business activities, the obligations arising from the Social Program or provision of bank's performance guarantee within specified time limits).

336 Assuming that the Claimant (Buyer) has failed to comply with some of the obligations under the Contract except for those stipulated by Clause 8.1.1 of the Contract which binds him to make investments in the privatization subject in the scope and within the framework defined by the Investment Program and which was the basis for termination of the Contract, the Privatization Agency was obliged to define an additional, appropriate deadline for UHL to fulfill such other obligations before the Contract termination on such basis as well. It is necessary to remark that the deadline from Article 41a of the Privatization Law has to be appropriate (refer to "Privatization Law", Official Gazette, Belgrade, 2005, foreword by Jelisaveta Vasilic, page 18: *"The Privatization Agency, as a contract party, is obliged to define an additional, appropriate deadline for fulfillment of any of contractual obligations in case of non-compliance"*.

337 Thereupon, by means of letter dated 17 February 2006 (CX-6), the Privatization Agency defined to UHL an additional 90-day deadline to fulfill the obligation to make investments in 2005 and an additional 10-day deadline to submit the bank's performance guarantee. However, failing to define a deadline for compliance with obligations as per Clause 8.3.5 of the Contract (the obligation to maintain business activities), although claiming that this contractual obligation was violated as well, the Privatization Agency violated Article 41a of the Privatization Law to the application of which it itself refers to.

338 Further to the above and bearing in mind that the Arbitral Tribunal assessed with majority votes that UHL did comply with the obligation to make investments in 2005, the Arbitral Tribunal concludes that the Contract was terminated solely on the basis of alleged non-compliance with obligations as per Clause 8.1.1 of the Contract (for the reason of alleged non-compliance with the obligation to make investments according to the Investment Program for 2005).

339 In the previous part of this award, the Arbitral Tribunal determined that the Contract makes no provision for the obligation to make investments and presented its interpretation of this term, finding the investor (i.e. majority shareholder) obliged to make available to the privatization subject certain funds, in the manner and within deadlines as stipulated by the Contract, but he is not obliged to guarantee for performance of works from Annex 4 in each year (refer to paragraph 180). The Arbitral Tribunal concludes for that reason that the Buyer, acting as the investor, did fulfill the obligation to make investments in 2005, given the fact that he invested in that period more than the agreed USD 3,700,000.

340 Therefore, and if starting from the assumption that Article 41a of the Privatization Law, which was the basis for Contract termination by the Privatization Agency, is applicable in this case (which shall be discussed further on in this reasoning), the legal conditions for application of this article were not met at the time of Contract termination, thus the Contract termination is considered unfounded. In other words, the Arbitral Tribunal finds that the Privatization Agency terminated the Contract unfoundedly.

C *Legal Consequences of Contract Termination*

a) *Application of Article 41a of the Privatization Law*

341 In consideration of legal consequences of Contract termination, it is necessary first to assess the legal grounds for the termination in itself, since the Privatization

Agency terminated the Contract applying Article 41a of the Privatization Law from 2005, although the Contract was signed in 2003, i.e. almost two years before this law came in force.[63]

(i) *Parties' Opinion on Applicability of Article 41a of the Privatization Law*

1 Claimant's Opinion

342 In Post-Hearing Brief of 15 May 2010 (refer to page 36 *et seq.*), the Claimant made recapitulation of the arguments on absence of justification and incapacity to apply Article 41a of the Privatization Law which stipulates contract termination by virtue of law (*ipso jure*) in case the Buyer fails to fulfill his obligations from the Contract.

343 In the said brief, the Claimant listed the following four reasons for incapacity to apply Article 41a of the Privatization Law.

- incapacity of retroactive application of law

344 Referring to the fact that the Contract was signed before Article 41a of the Privatization Law came in force, the Claimant finds that the rights acquired by UHL at the moment of Contract signing and/or investment include the right to refund of the selling price in case of termination pursuant to provisions of the Law of Obligations (hereinafter: LO). Article 41a of the Privatization Law introduced a deviation from LO provisions, stipulating that in case of termination the buyer has no right to refund of contract price.

345 Since the retroactive application of law is prohibited by Article 191 of the Constitution of the Republic of Serbia from the period before the Contract signing as well as by Article 197 of current Constitution of the Republic of Serbia and since the Privatization Law does not provide for retroactive application of Article 41a for the reason of general interests, the said article cannot be applied retroactively.

- conflict of Article 41a of the Privatization Law with Article 9 of the Law on Foreign Investments

[63] Article 41a of the Privatization Law springs from Article 19 of the Law on Amendments and Modifications to the Privatization Law of 31 May 2005, which came in force on 8 June 2005 (refer to Official Gazette RS, number 45/2005).

346 Article 9 of the Law on Foreign Investments (hereinafter: "Law on Foreign Investments" or "LFI") stipulates that the rights of a foreign investor acquired at the time of such foreign investment registry in the court register cannot be reduced by subsequent amendment to the law or other regulations.

347 This provision is raised on the level of constitutional principle by application of Article 87 of the Constitution of the Republic of Serbia which stipulates that the rights acquired by investment of capital based on law cannot be reduced by law.

348 As the Article 41a of the Privatization Law reduces the rights of foreign investor since this article foresees the possibility to seize such invested funds without compensation, this regulation cannot be applied on the Contract.

- absence of agreement between the parties or a contractual provision which would foresee that the Contract has to be implemented within specified deadline

349 In case of absence of an agreement between the parties or of specific circumstances which would justify the Contract termination in case of failure to implement in within specified deadline (which would attribute the characteristics of "fixed contract"), Article 125 of LO which stipulates termination of Contract by virtue of law in case of non-compliance within particular deadline is also inapplicable in this case, because the deadline defined by the Contract does not constitute a significant element of the privatization contract.

350 At the same time, the Contract provides for the possibility of delay, or deviation from execution of contractual obligations within specified deadline (refer to Clause 8.4 of the Contract), thus proving that the deadline for execution of such obligations does not constitute a significant element of the Contract.

- The Privatization Agency cannot terminate the Contract, it being the party in breach of the Contract which did not abide by the Contract

351 Pursuant to Article 124 paragraph 1 of LO, the right to contract termination belongs to the party which has fully complied with its share of contractual obligations, which is not the case with the Privatization Agency.

352 Therein, should the interpretation of the term "investments" as given by the Privatization Agency be accepted, Article 126 paragraph 2 of LO stipulates that

"if the creditor wishes to terminate the contract, he must provide the debtor with an appropriate additional deadline for compliance".

353 The 90-day deadline for completion of works on hotel reconstruction at the value of USD 3,000,000 was not appropriate, thus the Contract termination by the Privatization Agency is unfounded and deprived of legal effects.

2 Respondents' Opinion

354 The recapitulation of the opinion of the Privatization Agency on the grounds for Contract termination is contained in the reply of 16 August 2006 (refer to paragraph 2.2 *et seq*., page 21), reply of 2 April 2007 (refer to paragraph 84.3 *et seq.* page 30) and in Post-Hearing Brief dated 15 May 2010 (refer to page 5, 17 *et seq*.)

355 The Privatization Agency primarily refers to the following arguments:

- Article 41a of the Privatization Law does not produce retroactive effect

356 According to the Privatization Agency, this is not a retroactive application of the new law, but only the direct effect of the new law. In a situation when it was contracted that the investment obligation shall be fulfilled successively per phases, the application of the updated Article 41a of the Privatization Law must be viewed through the theory of time duration of the law. Since this implies a permanent obligation of the Buyer to fulfill the investment obligation successively, in several phases, this represents an ongoing legal situation.

357 Regarding the duration of the law validity, the parties decisively agreed that the authoritative law, as the effective one, shall be the law which is at the relevant time in force in Serbia. Accordingly, by their autonomous will and choice, the parties accepted and confirmed that at relevant moments, as required, they shall apply the provisions of such laws which are in force at the time, regardless of earlier status or modifications.

358 In order to confirm this standpoint, the Privatization Agency refers to the sentence of Supreme Court Prev. 511/08 dated 19 November 2008 and the sentence of the Supreme Court of Serbia Prev. 127/08 dated 17 June 2008, providing for interpretation of Article 41a of the Privatization Law not in terms of retroactive

application of the law, but in terms of duration of the law applicability to ongoing situations.[64]

359 The same argumentation is adopted by the Second Respondent (Srbija-Turist) in Post-Hearing Brief of 14 May 2010 (refer to paragraph d) page 13).

- Article 41a of the Privatization Law is not conflicted with the provision of Article 9 of the Law on Foreign Investments

360 According to the Privatization Agency, UHL as a foreign person, as concerns action according to national regulations and obligations under the contract, does not have a privileged position compared to domestic persons, and for those reasons, his reference to Article 9 of the Law on Foreign Investments (hereinafter: "Law on Foreign Investments" or "LFI") has no effect.

361 The Privatization Law is a *lex specialis* compared to LFI, because as a special law, it regulates the privatization procedure (the subject of this law is the state and/or social capital, and not other capital which may be acquired by foreign legal persons in Serbia) and, as such, it has priority over LFI.

362 The Decision of the Constitutional Court IU 166/05 dated 25 December 2008 (RX-229) finds that Article 41a of the Privatization Law does not contradict the Constitution of the Republic of Serbia.

363 LFI pertains to status rights of a foreign investor, therefore the law has a status-legal character and does not apply to his property rights, as confirmed by Article 9 paragraph 2 and 3 of LFI.

364 Accordingly, the Privatization Agency concludes that Article 9 of LFI does not apply to contractual and obligation rights of a foreign investor.

365 Srbija-Turist agrees with the Privatization Agency, remarking that Article 41a of the Privatization Law does not contradict Article 9 of LFI (refer to Post-Hearing Brief of Srbija-Turist dated 14 May 2010, paragraph e) page 13, quoting: *"A foreign investor enjoys full legal security and legal protection with regard to the rights acquired by investing at the moment of registration of such foreign investment in the court register and those rights may not be reduced by subsequent amendments to the law or other regulations. Accordingly, this*

[64] A copy of these sentences is enclosed by the Privatization Agency within the brief of 24 June 2010 (RX-227 and RX-228).

concerns protection of rights acquired by investing, as well as ensuring of national treatment – equal position with domestic persons, free transfer of currencies, conversion of national into foreign convertible currency, free holding of foreign currency on foreign currency accounts and free disposal or such funds. The Claimant's position as a foreign investor is not modified contrary to provision of Article 9 or another article of the Law on Foreign Investments."

3 Arguments and Reasoning of the Arbitral Tribunal

- Mutual Assent of Parties on Applicable Law

366 Pursuant to the provision of Clause 10.1 of the Contract, the latter shall observe and be interpreted in conformity with the "Applicable Law" implying:

> *"the laws, decrees or regulations or any other type of primary or secondary legislation which is at the relevant time in force in the Republic of Serbia and Serbia and Montenegro (S&M or any successor state) provided that if relevant laws of S&M cease to have legal effect in the Republic of Serbia for any reason, that the Applicable Law shall be that of the Republic of Serbia.*

367 The question raised in this part of decision is the following: should the term *"at the relevant time"* be interpreted as the time when the Contract is signed (Claimant's standpoint), which leads to freezing or "stabilization" of authoritative law at the form and scope which existed at the time of Contract signing (known under the term "stabilization clause" or *"clause de gel"* Fr.) or should it be interpreted as the time after the Contract signing which actually identifies live law as the authoritative one, i.e. the law which tends to change during the period of Contract implementation (Respondents' standpoint)[65]?

368 The Arbitral Tribunal finds that Clause 10.1 of the Contract may be interpreted both ways, thus this method cannot determine the parties' agreement to stabilize the law applicable at the time of Contract signing.

- Issue of Constitutionality of Article 41a of the Privatization Law

[65] *"Such autonomy of will or choice by the parties determines the live law, applicable in its contents and at the moment of application, regardless of earlier conditions and modifications"* (refer to the Agency's reply of 17 August 2006, paragraph 2.2.4, page 21).

369 The Claimant opposes application of Article 41a of the Privatization Law for the reason of retroactive effect of that provision which is, in his words, prohibited by the Constitution of the Republic of Serbia. The respondents oppose that standpoint, finding that the retroactive effect of certain regulation is not the issue, but instead the application of time validity of law for ongoing situations.

370 The Arbitral Tribunal first finds that the legislator did not explicitly foresee that the Law on Amendments and Modifications to the Privatization Law (Official Gazette of 31 May 2005), and Article 19 of this law pertaining to updated version of existing Article 41a of the Privatization Law, shall be applied to contracts signed prior to its coming in force and still ongoing. Article 37 of this law stipulates only that: *"this law comes in force on the eighth day from the date of its publishing in "Official Gazette of the Republic of Serbia"*.

371 The Constitutional Court of Serbia has considered the issue of validity of several provisions of the Privatization Law and, among other, rejected the proposal and did not accept the initiatives for assessment of non-constitutionality of provisions of Article 41a (Decision of Constitutional Court I U number 166/05 dated 25 December 2008, Official Gazette of the Republic of Serbia No.17/2009 of 13 March 2009) (RX-229).

372 The First Respondent, the Agency, referred to that Decision as follows: *"The initiative for assessment whether this articles is contrary to Constitution was rejected by the Constitutional Court as unfounded."* (Agency's Post-Hearing Brief of 15 May 2010, item 5, page 6, underlined in the brief).

373 The Arbitral Tribunal finds that the decisions of Constitutional Court bind everybody and anybody in Serbia. ("Everybody is obliged to observe and execute the decisions of the Constitutional Court", Article 171, paragraph 1 of the Constitution of the Republic of Serbia; "Decisions of the Constitutional Court are final, enforceable and generally binding", Article 7 paragraph 1 of the Law on Constitutional Court, Official Gazette of RS No.109/2007 dated 28 November 2007).

374 For that reason, the Arbitral Tribunal paid due attention to clarification of the meaning and assessment of the reach of the Decision of Constitutional Court.

375 The Arbitral Tribunal finds that during consideration of the issue of constitutionality of the Privatization Law in general and Article 41a of the Privatization Law in particular, the Constitutional Court concentrated on two

levels: a) the level of the law validity in principle and b) the plane of its application.

a) The Issue of Constitutionality in Principle

376 On the level of principle, the Constitutional Court pronounced that the legislator had the constitutional authority (Art.86 para.2 of the Constitution of the Republic of Serbia) to prescribe by imperative legal norms a legal regime in the privatization procedure (as well as sanctions on property in case of contract termination), thus deviating from the principle of consensus and autonomy of wills of contract parties, on which the general contractual relationship of obligation law is based. In its reasoning, the Constitutional Court stated:

> *"As concerns the proposer's allegations that the disputed provisions of Article 41a of the Privatization Law violate the principle of equality of citizens, the Constitutional Court had in mind that, unlike the principle of consensus and autonomy of wills of contract parties, on which the general contractual relationship of obligation law is based, the legal regulation of a contractual relationship in privatization procedure is a reflection of constitutional authorities of the legislator to regulate such matters. From the imperative character of legal provisions which regulate the privatization procedure, it arises that the relationships established within that process cannot be modified by will of either contract party in privatization procedure, but instead the whole relationship is governed by the law. Therefore, the disputed provisions of Article 41a of the Privatization Law do not challenge the equality of participants in contractual relationship. Proposer's allegations that the disputed provisions of Article 41a of the Law do not ensure equal position of contract parties and deprive them of the right to settlement of disputed relationship at court, are considered unfounded by the Constitutional Court, because the final evaluation of compliance with legally stipulated conditions for termination rests upon the Court, and not the Privatization Agency. In the process of court control, which is instituted on request of a contract party, the existence of legally stipulated conditions for termination shall be assessed. Therefore, the initiator's allegations that the disputed provisions of Article 41a of the Privatization Law open up the possibilities for the Privatization Agency to unfoundedly retain the amount received based on the contract which is now terminated, in fact not to return the received amount to the other party, are also considered unfounded. Retention of the amount paid in the process of privatization*

contract implementation is a legally recognized consequence of privatization contract termination for non-compliance, based on the constitutional authority of the legislator, in case of contract termination, to prescribe sanctions on property in the form of assumed damage from non-compliance by the contract party in default. Constitutional commitment whereby in the way as stipulated by law the social property assessed as a form of ownership becomes transformed into private-owned property, is the basis for legal pronouncement of a special legal regime which regulates the obligations of participants in the process of privatization of social capital and sanctions for non-compliance with such obligations." (Decision of Constitutional Court I U 166/05 dated 25 December 2008, Official Gazette RS, No. 17/2009, page 138-139, item 15).

377 Accordingly, the retention of amounts paid on account of purchase price represents, in the opinion of the Constitutional Court, a legally stipulated consequence of contract termination, also based on the constitutional authority of the legislator to pronounce sanctions on property in case of non-compliance with obligations by the buyer of the social capital.

378 To the understanding of the Arbitral Tribunal, legal regulation of contractual relationships in privatization procedure introduces a special legal regime, which establishes asymmetrical relationship between the contract parties, because only one of the contract parties, the Agency, is recognized the right to retain the paid (amount on account of purchase price), in case of termination for non-compliance, whereas the other party has no such right. All the while, this regulation is in conformity with the Constitution when the Law stipulates the validity foreseen for the future, such as is generally the rule in validity of the Law. On one hand, the legislator had the constitutional authority to sign such a special legal regime, and on the other hand, the persons wishing to invest capital, are informed in advance about the legal regime of investments and may freely decide whether they agree, under such unfavorable conditions, to sign an investment contract; thereupon the Constitutional Court was enabled to pronounce that there is no violation of the principle of equality of contract parties, even though the legal regime foresees the unequal position of the parties, because both parties are equal in having the freedom to enter thus regulated contractual relationship.

379 The Constitutional Court formulates its standpoint on constitutionality (in principle) of Article 41a of the Privatization Law in the middle part of the Decision, as follows:

*In the opinion of the Constitutional Court, the disputed provision of Article 41a of the Privatization Law, stipulating that the party in default in the contract on sale of social capital and/or property has no right to refund of amount paid under the contract which is terminated according to the conditions defined by law, do not regulate the matter of seizure (deprival), or limitation of property rights of participants in privatization, in a way incongruent with provisions of Article 58 of the Constitution and Article 1 of the Protocol 1 to the European Convention. Accordingly, the Court determines that the disputed provision of the Law does not regulate the relationship between the state and the holder of property rights which, as an absolute right has erga omnes effect, but the contractual relationship entered into of the persons' **free will** and wherein they availed with their own property rights, **agreeing** to all conditions stipulated by law, not only to signing, but also to execution and termination of contract on sale of social capital. Therefore, the disputed provisions of Article 41a of the Privatization Law do not challenge the said provisions of the Constitution and Convention, pertaining to protection of property rights in case of unallowable intrusion of state on the property of an individual."* (Decision of the Constitutional Court I U 166/5, page 139, first column, item 15).

380 In the findings of the Arbitral Tribunal, the Constitutional Court set an important condition for validity of the expressed general standpoint. In fact, to enable application of the sanction on property implying retention of amounts paid on account of selling price as stipulated in Article 41a of the Privatization Law, it is necessary that the parties entered the contractual relationship regulated by the said imperative regulations of the Privatization Law, of their own free will (Constitutional Court says *of free will*) *agreeing* to all legally stipulated conditions not only for signing but also for execution and termination of the contract on sale of social capital. Entering a contractual relationship *of free will* and *agreeing* with stipulated conditions represent the main reason why, in the opinion of the Constitutional Court, seizure of the amount paid as selling price in favor of the Agency does not mean unallowable intrusion of state on the property of individuals (which would contradict not only Article 58 of the Constitution of the Republic of Serbia but also Article 1 para.1 of the First Additional Protocol to the European Convention on Human Rights).

381 The Arbitral Tribunal finds that the Constitutional Court limited the validity of the standpoint expressed in the Decision (on the constitutionality of provisions from Article 41a of the Privatization Law, including the provision on retention of amount paid on account of contracted price in case of contract termination in

favor of the Privatization Agency) to such persons who of their own free will entered a contractual relationship regulated by imperative provisions of Article 41a of the Law, and who, in addition, agreed to all stipulated conditions. Beyond that reach, according to antithesis, Article 41a of the Law may not be applied to the persons who did not enter a contractual relationship of their own free will (as said by the Court) and did not agree to the conditions stipulated by law.

382 The general standpoint of the Constitutional Court is also applicable to the cases when the contract on privatization was signed before the Law on Amendments and Modifications to the Privatization Law in 2005, when Article 41a was updated, came into force. In such situations, as is the case here, the investor, in this case UHL, as a matter of fact, was not able to decide of his own free will whether under new, less favorable conditions than those under which he signed the contract, he wishes to enter the contractual relationship regulated by imperative provisions of Article 41a of the Law and, even more important, UHL did not agree to such conditions stipulated by law.

b) Issue of Constitutionality in Application

383 According to the findings of the Arbitral Tribunal, the Constitutional Court did not indulge in evaluation of constitutionality of application of Article 41a of the Privatization Law. With that regard, the Decision states that the Constitutional Court, pursuant to provisions of Article 167 of the Constitution, is not authorized to evaluate proper application of regulations, because that matter falls within jurisdiction of other state authorities. (Decision I U 166/05, page 139, first column, item 16).

- Issue of Retroactive or Not Retroactive Application of Article 41a of the Privatization Law

a) Parties' Standpoint

- Claimant's Standpoint

384 In his claim during the proceedings, and in the brief dated 15 May 2010, the Claimant made an allegation that Article 41a of the Privatization Law cannot be applied to this case because such retroactive application of law would contradict the principles of our legislation and because according to the Law on Foreign

Investments the rights of a foreign investor cannot be reduced by subsequent modifications to the law or other regulations.

- Standpoint of the Privatization Agency

385 In its Post-Hearing Brief of 15 May 2010, the Privatization Agency made an allegation *"that this cannot be treated as retroactive application of this legal act and since this concerns court practice as the source of law, this standpoint is thereby a part of authoritative law applicable to this case which should represent a firm starting point for the Arbitral Tribunal in application of the authoritative law"* (brief of the Privatization Agency dated 15 May 2010, page 5, item 4).

386 The Privatization Agency elaborated its standpoint in the following manner:

> *"The provision of Article 41a of PL has no retroactive effect. However, in the situation when it was agreed to fulfill the investment obligation successively in phases, the application of the updated Article 41a must be viewed through the theory of temporal validity of a law. Since this concerns a permanent obligation of the Buyer to make investments in several phases, successively, than it constitutes an ongoing situation. Fulfillment of the Buyer's obligation is in progress, and it has not been completed yet. Therefore, to this situation, when the Buyer still has not completed his obligation, the new law does apply, which law defines in a different way the norms of legal consequences of non-compliance and the conditions and character of contract termination. Thereupon, the Privatization Agency may upon expiry of extended deadline notify the Buyer that the Contract on sale of capital has been terminated by virtue of law, which contract was signed before the Law on Amendments and Modifications to the PL from 2005 came in force, with all legal effects regardless of the fact that the preceding law did not stipulate these conditions for termination. UHL was perfectly aware of that, with his expert team, and had never objected or demanded an amendment to the contract with that regard."* (Agency's brief dated 15 May 2010, page 17, item 11, letter a).

b) Standpoint of the Constitutional Court of Serbia

387 The Arbitral Tribunal finds that the Constitutional Court did not consider the issue of retroactive application of Article 41a of the Privatization Law with the focus on its application, but only on the general standpoint on the constitutionality. *"Interpreting the contents of the disputed provision… the Constitutional Court*

has estimated that this provision does not regulate the past relationship and therefore has no retroactive effect." (Decision of the Constitutional Court, page 139, first column, item 16). In reference to the proposer's allegations that the Agency applied the disputed provision even in cases of termination of privatization contracts signed before the law came to force, the Decision states that the Constitutional Court, pursuant to provisions of Article 167 of the Constitution, is not authorized to evaluate proper application of regulations, because that role belongs to courts and other state authorities. (Decision, page 139, first paragraph, item 16, infra).

388 The Arbitral Tribunal finds that, according to the standpoint of the Constitutional Court, it is in charge of settlement of both the disputes about application of the Privatization Law in general, and also the disputed issue of retroactive application of Article 41a of the Law, in particular. The standpoint of the Constitutional Court about jurisdiction of courts is also applicable to Arbitration when its jurisdiction is stipulated by contract.

c) Standpoint of the Arbitral Tribunal

389 The Arbitral Tribunal first considered the Decision of the Constitutional Court of Serbia in the part where the Court generally stated its mind about the issue of whether Article 41a of the Privatization Law produces retroactive effect. Thereupon the Court pronounced the following:

> *"We find unfounded the proposer's allegation that the disputed provision of Article 41a of the Privatization Law is incongruent with the constitutional provisions on prohibition of retroactive effect of law and other general acts, which provisions stipulate that the laws and any other general acts have no retroactive effect, and that, exceptionally, only particular provisions of law may produce retroactive effect, if thus imposed by the general interest determined when passing such law (Article 197, para.1 and 2). Having interpreted the contents of the disputed provision of Article 41a paragraph 3 of the Privatization Law, stipulating that in case of termination of a contract on sale of capital and/or property due to non-compliance with contractual obligations by the buyer of the capital, the buyer of the capital as the party in default, has no right to refund of amount paid on account of contract price, towards protection of general interests,* ***the Constitutional Court has determined that this provision does not regulate the past relationships and therefore it has no retroactive effect. "General interest", mentioned in the disputed provision of Law, does not represent a "general interest" in terms of***

> ***Article 197 paragraph 2 of the Constitution, which is determined in the process of passing the law to a provision of which the retroactive effect is attributed,*** *but instead the reason on which the justification of signing the sanction of loss of property is based, which sanction was pronounced for non-compliance with privatization contract. For those reasons, the Court finds that the disputed provision of Article 41a paragraph 3 of the Law is based on the Constitution, both from the aspect of constitutional authorities of the legislator to regulate the matter to which the disputed provision pertains, and from the aspect of constitutional prohibition of retroactive effect of regulations.* ***The Initiator's indication that the disputed provision of the Law has been applied retroactively by the Privatization Agency is not a matter of evaluation of constitutionality, because the Constitutional Court, pursuant to provisions of Article 167 of the Constitution, is not authorized to evaluate proper application of regulations, but instead the disputes arising from application of regulations, according to the Constitution, shall be settled by courts, or other state authorities."*** (Decision of the Constitutional Court I U 166/05 page 139, first column infra – underlined text – Arbitral Tribunal).

390 In the findings of the Arbitral Tribunal, the quoted text in general, and particularly the explanation that "general interest" mentioned in Article 41a constitutes the reason on which the justification for the sanction of loss of the amount paid as contract price in case of non-compliance with contract is based, and not the "general interest" which is in terms of Article 197 paragraph 2 of the Constitution determined in the process of passing a law, to a provision of which the retroactive effect is attributed, indicates to a different interpretation from the one attributed to it by the Agency. In the understanding of the Arbitral Tribunal, the Court's standpoint "that this provision (meaning Article 41a) does not regulate the past relationships and therefore it has no retroactive effect", should be thus understood that the Law on Amendments and Modifications to the Privatization Law from 2005, which introduced the modification to Article 41a, was passed in order to regulate the future legal relationships and not the past ones. From that standpoint it is concluded that legislation which was previously in force, i.e. before coming in force of the modified Article 41a of the Privatization Law, is to be applied to legal relationships and rights acquired in the past.

391 As the Arbitral Tribunal finds, the Constitutional Court believed that it should state its mind only on the general aspects of possible retroactive effect of Article 41a of the Privatization Law. The same as in the matter of evaluation of constitutionality, the Court did not indulge in consideration of proper or improper

application of law, leaving that matter to the courts. Thereon the Court stated as follows:

> *"The Initiator's indication that the disputed provision of the Law has been retroactively applied by the Privatization Agency is not a matter of constitutionality evaluation, because the Constitutional Court, pursuant to provisions of Article 167 of the Constitution, is not authorized to evaluate proper application of regulations, but instead the disputes arising from application of regulations, in compliance with the Constitution, shall be settled by courts, or other state authorities."* (Decision I U 166/05, page 139, first column, *infra*).

392 The standpoint about courts is also applicable to arbitration, therefore the Arbitral Tribunal is competent, when its jurisdiction is foreseen by the contract, to consider among other the issue of retroactive effect of Article 41a of the Privatization Law applicable to this dispute.

d) Reasons of the Arbitral Tribunal

393 It is generally accepted in Serbian legislation that laws, in principle, apply only to the future. That principle is contained in Article 121 paragraph 1 and 2 of the Constitution of Serbia from 1990, which was in force at the time of Contract signing:

> *"The law, other regulations or general acts may not produce retroactive effect. It can only be stipulated by law that particular provisions, if thus required by a general interest recognized in the process of passing a law, shall produce retroactive effect."*

394 This principle is likewise presented in the new Constitution of the Republic of Serbia which came in force on 8 November 2006 (Official Gazette of RS No. 98/2006). Pursuant to Article 197, paragraphs 1 and 2:

> *"The laws and any other general acts may not produce retroactive effect. Exceptionally, only particular provisions of law may produce retroactive effect, if thus imposed by a general interest".*

395 From thus formulated wording of the Constitution, it may be deduced that the retroactive effect may be established only by law, and not in any other way, for example by colliding legal will of contract parties. Indeed, the contract parties may choose the law governing their dispute, but the conflict of laws in time,

within the chosen law, shall be settled by principles and norms applicable in that law, and not by colliding legal will of contract parties.

396 In our case, the Privatization Law does not stipulate for the provisions contained in the modified Article 41a of the Privatization Law to have a retroactive effect. Accordingly, Article 41a may not have a retroactive effect.

397 The opinion that provisions of Article 41a cannot be applied with retroactive effect in this dispute is supported by the fact that in the process of passing the Law on Amendments and Modifications to the Privatization Law from 2005 (Official Gazette of RS, No. 45/2005), no general interest was identified, which is the condition for particular legal provisions to produce such effect.

398 The Constitutional Court stated its mind on this side of the matter in its Decision I U 166/05 dated 26 December 2008, as follows:

> *"Having interpreted the disputed provisions of Article 41a paragraph 3 of the Law… (superfluous part of the text omitted – remark by the Arbitral Tribunal) the Constitutional Court has found that this provision does not regulate the past relationships and therefore has no retroactive effect. "General interest", mentioned in the disputed provision of the Law, does not represent a "general interest" in terms of provision of Article 197 paragraph 2 of the Constitution, which is to be identified in the process of passing a law to a provision of which the retroactive effect is attributed, but instead it represents the reason on which the justification for signing the sanction of property loss due to non-compliance with privatization contract is based"*. (Decision of the Constitutional Court I U 166/05 page 138, first column, *infra*).

399 Since the conditions stipulated by the Serbian Constitution for retroactive effect of a law have not been met, the provisions of Article 41a may not produce such retroactive effect and may not apply to this case.

400 In fact, the Contract subject to this dispute was signed on 16 September 2003 between the Joint Stock Company Srbija-Turist a.d. from Belgrade and Privatization Agency on one part, and UHL on the other part. At the moment of Contract signing, the contractual relationships and the rights of contract parties were governed, among other regulations, by the Civil Procedure Law, Law on Foreign Investments (Official Gazette RS No. 3/2002) and the Privatization Law in its original wording (Official Gazette of RS No. 38/2001) and the Law on Amendments and Modifications from 2003 (Official Gazette of RS, No. 18/2003).

401 Within the legal regime based on the rules of those laws, the Claimant as the Buyer indisputably paid the contract price at the amount of USD 1,100,000 and acquired the ownership right over 997,824 shares which is 70% capital of Srbija-Turist. As the Agency claims, in those contractual obligations, after coming in force of the Law on Amendments and Modifications to the Privatization Law, i.e. from 8 June 2005, the legal regime should be changed introducing the new, modified Article 41a of the Law. This would simply mean that the Article 41a is attributed a retroactive effect, and the Arbitral Tribunal does not accept that standpoint.

402 Indeed, the Agency quotes *"that in the situation when it has been contracted to fulfill the investment obligation successively in phases (in Agency's test "in phases of installments"), application of the updated Article 41a must be viewed through the theory of temporal validity of the law"*. (Agency's brief dated 15 May 2010, page 17, item 11, letter a).

403 In the opinion of the Arbitral Tribunal, it is necessary to ask the question what the application of Article 41a of the Privatization Law applies to in this case. This concerns the Claimant's investment (purchase price) of USD 1,100,000, by which the Claimant purchased 70% shares of Srbija-Turist. Based on the contract on sale (and purchase) and effected payment, the Claimant acquired ownership rights, and some other legal effects were established between the parties according to the rules and principles of the Law of Obligations and other laws applicable at the time. The question about retroactive effect of Article 41a of the Privatization Law is in this case asked primarily referring to the invested amount of USD 1,100,000, and to all the other rules and obligations under the contract, which have or have not been complied with.

404 In the opinion of the Arbitral Tribunal, the Agency's allegation that this dispute deals with an ongoing situation cannot be accepted. It is true, as the Agency quotes, "that this concerns a permanent obligation of the Buyer to fulfill the investment obligations in several phases successively" and "that the fulfillment of the Buyer's obligation is still ongoing, and the execution is not completed yet." However, the fact that the execution of the Claimant's obligation was still ongoing at the time of passing the updated Article 41a, and was not completed, does not change the fact that by payment of the amount of USD 1,100,000 the Claimant became the owner of 997,824 shares or 70% share in the capital of Srbija-Turist. At the time of acquiring the ownership right, it was not an ongoing situation but done facts. The ownership right over the shares belonged to the Claimant, and that was not a legal hope or legal expectation, but a true and

subjective right. Of course, the Claimant could have lost it in case of contract termination due to non-compliance, but even in that case he would be entitled to refund of the paid amount (Article 132 paragraph 2 and 3 of the Law on Obligations), according to the principle of equality of contract parties (Article 11 of LO) and principle of equal value of performance (Article 15 of LO), which principles characterize the legally well balanced system of the Law on Obligations. According to the Law on Obligations, the right to restitution is a true and subjective right, and not merely a legal hope or legal expectation, and thus enjoys the legal protection.

405 The changes in legal regime introduced by Article 41a of the Privatization Law are large and far-reaching. The legislator could introduce a legal regime which deviates from the basic principles of the Law of Obligations into the legal system because he had the constitutional authority to do so, but he also had in mind the future legal relationships. The legislator could, as he also had the constitutional authority for that, provided that it is thus imposed by a general interest, stipulate that particular provisions of Article 41a and Privatization Law shall produce retroactive effects, but he did not do so. In the opinion of the Arbitral Tribunal, if the legislator did not stipulate that provisions of Article 41a of the Privatization Law shall produce a retroactive effect, than neither can the court, not even the arbitration, attribute such application to them.

406 Possible application of Article 41a of the Privatization Law in this dispute is opposed by another argument, mentioned earlier when discussing the issue of constitutionality.

407 On that occasion, the Constitutional Court stated that the condition for application of the special legal regime introduced by Article 41a of the Privatization Law is the free will and agreement of persons to legally stipulated conditions:

> *"Accordingly, the Court points out that the disputed provision of the Law does not regulate the relationship between the state and the holder of property right which, as an absolute right has an erga omnes effect, but instead the contractual relationship entered by the parties of their own free will while availing with their own property rights, agreeing to all conditions stipulated by law, not only the signing but also the execution and termination of contract on sale of social capital."* (Decision of the Constitutional Court I U No.166/05, page 139, first column)

408 The persons' free will and agreement were therein the reason why the seizure of amount paid in favor of the Agency was not treated as intrusion of the state on the

property of individuals, whereas herein the same elements play the role of conditions preventing the possibility to apply the legal regime from Article 41a of the Privatization Law retroactively.

409 In the opinion of the Arbitral Tribunal, the special legal regime from Article 41a could be applied in this case only provided that the Claimant has entered thus regulated contractual relationship of his own free will and agreed to the conditions stipulated by law. Since that was not the case, the Arbitral Tribunal finds that application of Article 41a of the Privatization Law would mean retroactive effect of the law applied to this particular situation.

410 In further text of this award, the Arbitral Tribunal shall consider whether there exist any other obstacles for application of Article 41a of the Privatization Law on the Contract termination by the Privatization Agency.

- Conflict of Article 41a of the Privatization Law with Provisions of Article 9 of LFI

411 The Law on Foreign Investments was published in Official Gazette of FRY No. 3/2002 on 18 January 2002 and modified by the Law on Amendments and Modifications to the Law on Foreign Investments (Official Gazette of FRY No. 5/2003) of 25 January 2003. The effective version of that law has not been modified until the Contract signing.

412 The opinion that Article 41a of the Privatization Law cannot apply to this dispute is supported by the argument derived on the basis of Article 9 paragraph 2 and 3 of the Law on Foreign Investments from 2002 (Official Gazette of FRY, No. 3/2002). Article 9 of LFI stipulates:

> (…) *"A foreign investor enjoys full legal safety and legal protection concerning the rights acquired by investment.*
>
> *The rights of a foreign investor acquired at the moment of his registration in the court register may not be reduced by subsequent modification to the law and other regulations.*
>
> *The investment of a foreign investor and the property of a company with foreign investment may not be subject to expropriation or other measures of equal effect undertaken by the state, except when a public interest is*

identified by the law or arising therefrom and against payment of compensation (…)".

413 The said rules of the Law on Foreign Investments (which shall be discussed later on, as a special basis), from this aspect, directly contradict the possibility to apply Article 41a of the Privatization Law in this case.

414 In the opinion of the Arbitral Tribunal, the real meaning of the Law on Foreign Investments in general and of the Article 9 paragraph 2 of the Law in particular, is to prevent the chances for a later law to abolish or reduce the rights of foreign investors. Accordingly, the provisions of Article 41a of the Privatization Law may not apply to this dispute, as they would subsequently abolish (or at least reduce) the Claimant's rights, acquired under the earlier signed Contract, Law of Obligations and other laws of relevance at the time of Contract signing.

415 To consider the conflict between the provisions of these two laws, it is necessary first to consider the argumentation of the Privatization Agency, quoting: *"LFI pertains to status rights of a foreign investor, since that law has a status-legal character but does not pertain to his ownership rights"* (refer to Post-Hearing Brief of the Agency, paragraph 12 d), page 18).

416 Thereupon, the Arbitral Tribunal finds that Article 3 of LFI foresees that a foreign investment implies: *"acquisition of any other ownership right of a foreign investment by which he exercise his business interests in FR Yugoslavia"*.

417 Article 7 of this Law also stipulates that a foreign investment may be also an investment *"in companies dealing with all kinds of activities towards gaining profit, unless otherwise provided by this law",* whereas the Article 9 of LFI stipulates the principle which guarantees for a foreign investor's investments even in cases when this is implemented by means of investments in companies from Article 7 LFI.

418 Further to the above, the Arbitral Tribunal finds that LFI contains the necessary mechanisms for protection of ownership rights of foreign investors acquired in companies in the territory of the Republic of Serbia and finds the restrictive interpretation of this law by the respondents unfounded. LFI is applicable to UHL's investments in Srbija-Turist, since UHL is a foreign legal person seated abroad (in terms of Article 2 LFI) and since his investment was implemented by means of purchase of shares in the company as stipulated by Article 4 item 2 of LFI.

419 The Arbitral Tribunal shall here below consider the matter of whether the application of Article 41a of the Privatization Law, since it came in force after the Contract signing, contradicts Article 9 of LFI, in terms that its application would: (i) violate the right of the foreign investor *"to full legal safety and legal protection concerning the rights acquired by investment"*; (ii) reduce the rights of *"the foreign investor acquired at the time of registration of investment in court register"*; or would it lead to *"expropriation or other measures of equal effect undertaken by the state"* if the investor should lose the right to refund of amount paid on account of contract price (towards protection of general interest).

420 The Constitution of the Republic of Serbia, effective as of 8 November 2006, raises the rights of foreign investors to protection of their investments to the rank of constitutional principle, stipulating in Article 84 paragraph 3 that *"the rights acquired by investment of capital in compliance with law may not be reduced by law"*.

421 At the time of Contract signing (16 September 2003), Article 41a of the Privatization Law read as follows:

> *"If the contracted price is to be paid in several installments, and the buyer fails to pay an installment within the agreed deadline, the contract shall be terminated, and the capital subject to sale shall be transferred to the Share Fund."*

422 The Arbitral Tribunal hereby finds that the Privatization Law, at the time of Contract signing, provided for the possibility to terminate the Contract solely in case the investor fails to pay an installment within the agree deadline (if provided by the contract that the contract price shall be payable in several installments).

423 Further to the above, the Arbitral Tribunal concludes that in the period before coming in force of the updated Article 41a of the Privatization Law (version of 20 May 2005), in case of the Contract termination not due to failure to pay an installment within the specified deadline but for another reason, the Contract could have been terminated only pursuant to the Law on Obligations, used in this case as *lex generalis*.

424 Pursuant to Article 124 LO:

> *"in bilateral contracts, when one party fails to fulfill its obligation, the other party may, unless otherwise stipulated, request fulfillment of obligations or, under the conditions stipulated in the following two*

articles, terminate the contract by simple notice, if the contract termination does not arise by virtue of law, but in any case entitled to compensation of damages".

425 The Arbitral Tribunal finds that Serbian legislation allows for unilateral termination of contract, if one of the parties fails to comply with its obligation under the contract.

426 The Arbitral Tribunal finds that the updated Article 41a of the Privatization Law deteriorated the situation for investors by stipulating the possibility of termination by virtue of law (*ipso jure*), based on discretion of the Privatization Agency. Evaluation of justification for the executed contract termination is in that case on Agency's side, because in case the investor finds the termination unfounded, he may address the court to declare the opposite. In that context, contract termination based on the updated Article 41a of the Privatization Law produces effects of contract termination by virtue of law, but the effects of such termination may not be considered final until confirmed by a court sentence that the Contract termination indeed is justified, and that in subject case the conditions envisaged by the updated Article 41a of the Privatization Law have been met. Otherwise, the court may decide that the Contract is still in force, having found that the decision of the Privatization Agency to terminate the contract is unfounded due to non-compliance with conditions stipulated by law.

427 The doctrine submitted by the Privatization Agency confirms the above opinion (RX-221):

> "(…) *the sale contract remained in force, but in the proceedings of privatization subject against the Privatization Agency and Share Fund, if determined by an irrevocable court decision that subject contract on sale of capital and/or property has remained in force. Only as of the moment when the buyer of the privatization subject becomes the creditor for return of the capital he purchased from the Privatization Agency, and which is transferred to the Share Fund after termination of the contract on sale of capital and/or property by the Privatization Agency. If at the moment of validity of the court sentence determining that the named contract is still in force, the Share Fund had sold on stock exchange the shares transferred after termination of contract, then the buyer of privatization shall acquired the right to compensation of damages at the amount of selling price or at the amount of the value of capital of the privatization subject sold at the stock exchange (depending on the circumstances in specific case)."* (underlining added).

428 The circumstance that the Privatization Agency is given the possibility to decide *prima facie* whether the conditions for termination of Contract have been met, leads to the conflict of interests, i.e. the situation in which the Privatization Agency is at the same time one of the contract parties and the authority in charge of evaluation of compliance with contractual obligations, which is directly contrary to the provisions of Contract by which the parties, among them the Privatization Agency, agreed that the evaluation of compliance with contractual obligations, and thus the evaluation of justification for termination of Contract, shall be subject to arbitration in case of dispute.

429 Among other, concerning the application of Article 41a of the Privatization Law from the time of Contract signing, the court practice took sides with the standpoint that the contract termination could have been executed by unilateral declaration of will, extra-judicially, only up to the moment of registration at the court register, after which the termination had to be settled in court (Legal positions assessed at the session of the department of commercial disputes of the Higher Commercial Court in Belgrade on 27 September 2004).[66] [67]

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[66] From the reasoning of legal position of the department of commercial disputes of the Higher Commercial Court in Belgrade on 27 September 2004: *"Act – letter of the Privatization Agency (hereinafter: the Agency) by which the Contract is terminated is not a sufficient basis for registration of changes in the court register. Contract on sale of social capital by public tender is, basically, an obligatory-legal contract with specific subject (social capital and/or shares). The rule of the law of the obligations that contracts are terminated by simple declaration (Article 124 of Law of Obligations– "Official Gazette of FRY", No.31/93), applies to this Contract as well, but only until the moment of registration of the Contract and sale in the court register. After registration of change in ownership over social capital and/or change in the structure of the capital in the court register, the possibility of unilateral termination of contract on sale of social capital ceases. The reason lies in the very nature and function of court register and in basic principles the procedure for registration in the court register – formality, authenticity and legal safety. Each entry or deletion from the court register is preceded by a formal, written document, expressing the will of one entity or authority, or accord of wills of several entities. The subject entry of changes in ownership and structure of capital is based, among other, on written accord of wills – Contract between the Agency as the seller and the buyer of social capital. When registration is based on contract – accord of wills, it may not be deleted or modified without accord of wills of the same persons (without consent for contract termination). When a unilateral termination is disputable, the dispute must be settled in the manner in which the disputes are normally settled, therefore in a litigation, by sentence which shall determine whether the termination is founded or not, whether the contract is terminated or not, which matters cannot be resolved by registry court in case of dispute. Thus the registry court may not modify the registered status based on contract on the basis of unilateral termination, either by deletion of earlier entry as unfounded or by a new entry, i.e. change in entered data, based on unilateral termination of contract. The quoted legal position is found in a number of decisions of the Higher Commercial Court, and accepted by the Supreme Court of Serbia."* Refer to "Current Court Practice in Law of the Obligations", Gordana Stanojcic, Poslovni Biro, Belgrade 2006, paragraph 135, page 102.

[67] Refer to Post-Hearing Brief of UHL dated 15 May 2010, page 42.

430 With coming in force of the updated Article 41a of the Privatization Law, legal safety of investor (Buyer) was reduced and challenged, because that article allows the Privatization Agency to unilaterally terminate the contract even after registration in court register.

431 The same article, among other, stipulates that the investor loses the right to return of purchase price, by virtue of law and in the form of automatic sanction for non-compliance with the contract, the justification of which is not foreseen to be estimated by court. However, that provision did not exist at the time of Contract signing. At the same time, the list of contractual obligations the non-compliance with which implies contract termination as per paragraph 1) to 7) of the updated Article 41a of the Privatization Law, disables any estimate by court of the degree of contract breach, since the contract termination become effective by virtue of law, automatically, regardless of the degree of contract breach by non-compliance with a contractual obligation in whole or partly.

432 Further to the above, the Arbitral Tribunal finds that application of the updated Article 41a of the Privatization Law is contrary to provisions of Article 9 of the Law on Foreign Investments.

433 At the same time, the application of the updated Article 41a of the Privatization Law is not of public interest in terms that there is no room for violation of public policy in case of refusal to apply this article (refer to the Claimant's Post-Hearing Brief of 15 May 2010, paragraph 2, page 38). That standpoint is confirmed by the sentence of the Commercial Court in Belgrade P. 5377/07 dated 30 November 2009, wherein the court took sides with the standpoint that the public policy of the Republic of Serbia is not violated by refusal to apply Article 41a of the Privatization Law, stating thereupon that any contrary standpoint would contradict the public policy, bearing in mind, among other, that prohibition of deterioration of position of a foreign investor by subsequent amendments to the law is a constitutional principle.[68]

[68] Refer to the sentence of the Commercial Court in Belgrade P. 5377/07 dated 30 November 2009, wherein the court took sides with the standpoint that public policy of the Republic of Serbia is not violated by refusal to apply Article 41a of the Privatization Law: *"In these proceedings, the court adheres to the reasons for examination of conditions for annulment of arbitral award specified in Article 58 of the Law on Arbitration, therefore the court investigated whether the refusal to apply the provisions of Article 41a of the Privatization Law makes the effects of arbitral award contrary to the public policy of the Republic of Serbia. This court's opinion is that the refusal to apply the said article does not violate the public policy, and that the effects of such award are not contradictory to public policy for the following reasons. The court started from the definitions of public policy. One definition is that public policy represents a group of principles which enable functioning of legal system of a country. Another definition is by Prof Slobodan Perovic, whereby the public policy represents a group of principles underlying the existence and duration*

434 The Arbitral Tribunal therefore concludes that there is no room for application of the updated version of Article 41a of the Privatization Law (and for application of Article 41a of the Privatization Law from the version which came in force after 29 June 2001 and 28 February 2003), with no need for further (and more extensive than already said) assessment of congruity of Article 41a of the Privatization Law with (i) Law on Obligations; (ii) Constitution of the Republic of Serbia; or with (iii) European Convention for the Protection of Human Rights and Fundamental Freedoms.

435 In the next section of this Award, the Arbitral Tribunal shall consider the issue of legal consequences of Contract termination in compliance with the Law on Obligations, since that is the law, as a *lex generalis*, which applies to the issue of legal consequences of Contract termination.

(ii) *Legal Regime of Contract Termination*

436 The Arbitral Tribunal first reminds that, as above mentioned, Serbian law accepts the principle of extra-judicial contract termination due to non-compliance with contractual obligations (on request of one of the contract parties)[69].

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of one legally organized community, expressed through certain legal and ethical rules which must be observed by parties in their relationships. The above definitions indicate, and this is also the court's opinion, that public policy represents a group of basic principles underlying a legal system. Public policy may by no means be made equal with all imperative (forced) norms of one society. Therefore, not every violation of an imperative norm is also a violation of public policy. This is also the standpoint of current court practice of the Supreme Court:

> *"Violation of public policy does not exist if only any of the imperative norms of national law is violated, but something more is needed – that the contents of the violated norm affect some basic values." (from the sentence of Supreme Court of Serbia, Prev. 226/99 dated 6 December 2009)*

The court further finds that effects of arbitral award, by which the party that received certain amount of money (to whose ownership certain property has been transferred) is ordered to return such amount of money (property) to the other party due to termination of contract, are not contradictory to public policy. Thereafter, the arbitral tribunal based its decision to apply Article 41a of the Privatization Law on imperative provisions of the Law on Obligations, on the constitutional principle of prohibition of retroactive effect, and on imperative provisions of the Law on Foreign Investments, which reasoning is not contradictory to public policy. Moreover, foundation of award on several bases found in applicable laws and the Constitution of the Republic of Serbia confirms that he arbitral tribunal remained within public policy of the Republic of Serbia. For the same reason, the claimant's allegation that the arbitral tribunal pronounced the award ex aequo et bono cannot be accepted, since the arbitral tribunal based its award on the positive legislation of the Republic of Serbia."

[69] *Therefore, it may be concluded that our law in principle accepts the extra-judicial contract termination due to non-compliance, and exceptionally a court termination when the nature of a contractual relationship thus dictates, which is also particularly stipulated by law".* Refer to the doctrine enclosed to Post-Hearing Brief of the Privatization Agency dated 15 May 2010, Prof Slobodan Perovic, PhD – Law of the

437 The Privatization Agency justified the Contract termination by application of Article 41a of the Privatization Law.

438 With that regard and as previously explained, Article 41a of the Privatization Law may not be applied to the Contract termination, because the application of Article 41a of the Privatization Law is contrary to application of Article 9 of LFI which was in force at the time of Contract signing. Therefrom it is concluded that justification of Contract termination should be evaluated through the prism of application of the Law on Obligations.

439 The Arbitral Tribunal finds that the Claimant requests from the Arbitral Tribunal to declare that the Contract exists and is still in force.

440 On the other hand, the Privatization Agency requests from the Arbitral Tribunal to declare that the Contract is *"terminated for non-compliance by virtue of law, upon expiry of subsequently defined deadline, with UHL being notified of the termination on 30 June 2006"* (refer to paragraph 75 page 78 of Post-Hearing Brief of the Privatization Agency dated 15 May 2010).

441 The Arbitral Tribunal is addressed to determine whether the Contract termination of 30 June 2006 for non-compliance with contractual obligations by the Buyer, is in conformity with provisions of LO, since the Arbitral Tribunal (in the previous section of this Award) decided that the conditions for application of Article 41a of the Privatization Law were not met, and that there were no conditions for Contract termination based on that article.

1 Contract Termination Pursuant to the Law on Obligations

- Relevant Provisions of LO

442 Relevant provisions of LO which regulate the general regime of contract termination for non-compliance with contractual obligations are contained in Articles 124 to 132 of LO.

Obligations, part one, page 403; Prof Oliver Antic, PhD, Law of the Obligations, paragraph 2.5 et seq., page 428.

443 The Arbitral Tribunal first finds that the Privatization Agency believes that application of Article 41a of the Privatization Law does not exclude the application of Articles 125 to 135 of the Law on Obligations[70].

444 According to the Law on Obligations, the rules on contract termination differ depending on whether the compliance with deadline is an essential element of the contract (fixed contract) or not. In the first case (Article 125), the contract shall be terminated by virtue of law. But, the creditor may keep the contract in force, if upon expiry of deadline he notifies the debtor, without delay, that he requests completion of the contract. If, in that case, the debtor fails to comply with the obligation within reasonable time limits, the creditor may declare the contract terminated (extra-judicial termination)[71].

445 When fulfillment of an obligation is not an essential element of the contract, Article 126 paragraph 1 of LO stipulates the rule to maintain the contract, and that the debtor keeps the right even after expiry of deadline to fulfill his obligation, and the contractor requests its fulfillment.[72] If the creditor wishes to terminate the contract, he has to avail the debtor with an additional, extended deadline for fulfillment. Thereby, if the debtor fails to fulfill his obligation within such extended deadline, the same consequences as in the case when deadline is an

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[70] Refer to the counterclaim of the Privatization Agency dated 28 March 2008, paragraph 12.3, page 71: *"Since the goal of the Contract on sale of social capital is not achievement of the highest possible selling price, but instead the development of economy and establishment of social stability and naturally implementation of all obligations under the Contract, this at the same time does not exclude the right of one of the parties, under the conditions stipulated by provisions of Article 125 paragraph 2 and 3 of the Law on Obligations, to declare the Contract termination. When deciding on Contract termination, the court is, inter alia, governed by provisions of Article 135 of the Law on Obligations, particularly on the matter of Contract objective and general interest (development of economy, inflow of new capital, through investments, and thereby establishment of conditions for economic reforms). However, the provision of Article 41a of the Privatization Law does not exclude application of Article 132 of the Law of Obligations in whole. Therefore, there are no obstacles to application of provisions of Law of Obligations on the matters which are not explicitly stipulated by this law. Article 132 paragraph 1 of the Law of Obligations stipulates that the contract parties are not relieved of the obligation to compensate damages. The Privatization Law does not exclude the right to compensation of damages, therefore the contract parties may claim damages caused by contract termination before the court, provided that they prove not to be negligent."*

[71] Article 125 of the Law on Obligations: *"(1) When fulfillment of an obligation within specified deadline represents an essential element of the contract, and the debtor fails to fulfill his obligation within that deadline, the contract shall be terminated by virtue of law. (2) But, the creditor may keep the contract in force, if upon expiry of deadline he notifies the debtor that he requests completion of the contract. (3) When the creditor requested fulfillment, but did not get it within reasonable time limits, he may declare the contract terminated. (4) These rules are applicable both in case the contract parties have foreseen that the contract shall be terminated if not fulfilled within specified deadline, and in case the contract fulfillment within specified deadline is an essential element of the contract due to the nature of business."*

[72] Article 126 paragraph 1 of the Law on Obligations:

essential element of the contract shall arise[73]. Otherwise, the creditor may not terminate the contract for non-compliance with a negligible part of obligation (Article 131 of the Law on Obligations)[74].

446 At the same time, the creditor may terminate the contract without availing the debtor with an extended deadline for fulfillment if it arises from the debtors demeanor that he shall not fulfill his obligation even within the extended deadline (Article 127 of LO)[75].

447 Article 128 of LO stipulates that, when it becomes obvious before expiry of deadline for fulfillment of obligations that one of the parties shall not fulfill its obligation under the contract, the other party may terminate the contract and claim damages[76].

448 When in a contract with consecutive obligations (contract with permanent fulfillment of obligations) one of the parties fails to fulfill one of its obligations, the other party may, within reasonable deadline, terminate the contract concerning any future obligations, if obvious from the given circumstances that those shall not be fulfilled either. It may terminate the contract not only with regard to future obligations, but also with regard to already fulfilled ones, if their fulfillment has bears no interest for it without the unfulfilled ones (Article 129 of LO)[77].

- Application of Relevant Provisions of LO to Subject Case

[73] Article 126 paragraph 2 and 3 of the Law on Obligations: *"(2) But, if the creditor wishes to terminate the contract, he must avail the debtor with a reasonable extended deadline for fulfillment. (3) If the debtor fails to fulfill his obligation within such extended deadline, the same consequences as in the case when deadline is an essential element of the contract shall arise."*

[74] Article 131 of the Law on Obligations: *"The contract may not be terminated due to non-compliance with a negligible part of obligation."*

[75] Article 127 of the Law on Obligations: "The creditor may terminate the contract without availing the debtor with an extended deadline for fulfillment if it arises from the debtor's demeanor that he shall not fulfill his obligation even within such extended deadline".

[76] Article 128 of the Law on Obligations: *"When it becomes obvious before expiry of deadline for fulfillment of obligations that one of the parties shall not fulfill its obligation under the contract, the other party may terminate the contract and claim damages".*

[77] Article 129 of the Law on Obligations: *"(1) When in a contract with consecutive obligations one of the parties fails to fulfill one of its obligations, the other party may, within reasonable deadline, terminate the contract with regard to all future obligations, if obvious from the given circumstances that those shall not be fulfilled either. (2) It may terminate the contract not only with regard to future obligations, but also to the already fulfilled ones, if their fulfillment bears no interest for it without the unfulfilled ones. (3) The debtor may maintain the contract provided that he furnishes adequate security."*

- **Is the Contract a fixed contract in terms of Article 125 of LO?**

449 The Arbitral Tribunal is first obliged to determine whether the Contract is a fixed contract in terms of Article 125 of LO.

450 The Arbitral Tribunal finds that the parties did not agree (in writing) that the deadline constitutes an essential element of the Contract. Moreover, Clause 8.4 of the Contract foresees the case of delay compared to deadlines specified by the Contract, not foreseeing that the Contract shall be *ipso facto* terminated in case of such delay (but instead the possibility for the Privatization Agency to request compensation of actual damages and lost profit).

451 The updated Article 41a of the Privatization Law (version from 2005 which is applicable to this dispute) stipulates contract termination in case the investor fails to comply with the deadline for fulfillment of contractual obligations (refer to item 2)[78]. However, the same article foresees the Agency's obligation to define an additional deadline for the investor to fulfill his obligation, thus making this article different from Article 125 of LO, which provides for termination by virtue of law upon expiry of the deadline specified in the Contract. Consequently, the Arbitral Tribunal finds that the privatization contract cannot be considered a fixed contract in terms of Article 125 of LO.

452 The Arbitral Tribunal finds that UHL, in its bid dated 3 July 2003, envisaged a three-year deadline for fulfillment of contractual obligations (refer to RX-16: *"Uniworld estimates that the total cost of this investment program will be USD 9,000,000 and will be incurred over a 3 year period").*

453 The practice by which the buyer himself proposes the deadline for execution of obligation to make investments arises from the statement of the witness Kovacevic during the hearing held on 29 January 2009, according to which: *"When the buyer submits his bid, he himself submits the offer from his investment program"* (refer to Minutes page 80).

454 Accordingly, the Privatization Agency simply accepted the deadline proposed by UHL without setting any particular conditions, wherefrom it may be concluded that the contractual deadline does not constitute and essential element of the Contract from the aspect of the Privatization Agency.

[78] *?... 2) does not invest in the privatization subject in the manner, form and within the deadline specified in the Contract."*

455 The Arbitral Tribunal concludes that the Contract bears no features of a fixed contract in terms of Article 125 of LO, therefore this could not have been the basis for contract termination by virtue of law as per Article 125 of LO.

- **Was the 90-day deadline an appropriate additional deadline?**

456 Article 126 of LO allow the creditor to unilaterally terminate the contracts which are not considered fixed contracts in terms of Article 125 of LO provided that he avails the debtor with an appropriate extended deadline for fulfillment of contractual obligations (as the deadline varies depending on situation).

457 For the purpose of analysis, the Arbitral Tribunal shall in the following paragraphs start from the hypothesis that the standpoint of the Privatization Agency should be accepted, which standpoint implies not only making the envisaged funds available to the privatization subject but also the execution of works within the specified deadline (standpoint contrary to the conclusions of the Arbitral Tribunal). It is also necessary to repeat that the Arbitral Tribunal finds that the Claimant (Buyer) has complied with its obligation to invest in 2005.

458 In fact, even if assuming that the term "investments" implies execution of works within specified deadlines (even despite making available the foreseen funds), the additional 90-day deadline defined by the Privatization Agency for UHL to fulfill its obligation to make investments as per Article 8.1.1 of the Contract (in order to execute the works in the value of USD 3,268,540.59) may not be considered appropriate.

459 The Arbitral Tribunal has reached agreement with majority votes that the above 90-day deadline was too short. First of all, if we rely upon the expert findings of Mr. Zlatanovic (submitted by the Privatization Agency as annex to letter dated 5 January 2009, refer to page 2), argumentation of the Privatization Agency on the matter and the evidence marked RX-194, we come to the conclusion that until 1 July 2006 UHL executed the negligible 6.67% of envisaged works (knowing that the percentage of 6.67% does not take into account the equipment and ordered and store material for the site requirements; refer also to the expert findings of Mr. Dima Trajkovic on page 33 (evidence marked RX-59) which comes to the same conclusion). Consequently, the defined 90-day deadline is far too short for execution of more than 93% works on site, given the importance and quantity of already executed works (somewhat more than 6% envisaged works) starting from

April 2006 (beginning of works) until the Contract termination (i.e. 30 June 2006)[79].

460 At the same time, the Privatization Agency was aware of the initiated negotiations between Srbija-Turist and international hotel group "Intercontinental" towards obtaining the Holiday Inn license for the hotel "Nis" (refer to letter of Nebojsa Stojanovic dated 28 December 2005, evidence marked CX-40, page 4). In order to obtain the franchise for Holiday Inn, it was necessary to modify the existing plans of Hotel "Nis", which required the necessity to extend some deadlines. Besides, Mr. Ulrich Widmer from "Intercontinental" group sent an e-mail to the Privatization Agency on 20 June 2006 (10 days before expiry of 10-day deadline), wherein he confirmed that signing of the contract on Holiday Inn franchise with Srbija-Turist, thus proving the intention of UHL to continue the started works on reconstruction of Hotel "Nis" (refer to evidence marked CX-135). Accordingly, the Privatization Agency had to know that insisting on termination of Contract after expiry of the 90-day deadline (and after that starting from 30 June 2006) challenges the cooperation between Srbija-Turist and "Intercontinental" group.

461 The Arbitral Tribunal concludes for the specified reasons that the 90-day deadline left to UHL to complete the works on reconstruction of Hotel "Nis" was insufficient.

462 Among other, if the Privatization Agency had left a deadline of appropriate length, 10.5 months, for UHL to complete the works (until 31 December 2006), that extension of deadline would not have any significant impact on the purpose and goals of the privatization defined by the Agency itself (transformation of social property into private-owned, as a key assumption for economic development and efficiency by the principles of market economy, social stability, continuity and growth of business activities of the privatization subject which should result in increased income and living standards of employees, earning profit by the owner, increase in national budget through collection of tax liabilities).[80]

463 Let us remind that the Privatization Agency has not denied that UHL was the only bidder for the purchase of Srbija-Turist[81] and that, except in case the Agency itself would be the investor, the purpose and goals of the privatization process of Srbija-

[79] According to the testimony of Mrs. Darka Radovic (in charge of execution of works), execution of works on reconstruction of Hotel "Nis" started on 1 April 2006 with planned completion of works during December 2006 (refer to Minutes from the hearing held on 30 June 2009, page 310 *et seq*.)
[80] Refer to Post-Hearing Brief of the Privatization Agency dated 15 May 2010, paragraph 23, page 24.
[81] Refer to the testimony of Mr. Srba Ilic at the hearing held on 24 November 2008 (Minutes, page 152).

Turist would not have been implemented any faster than if allowing UHL to complete the works within the deadline specified in the Contract (until 31 December 2006).

464 Among other, when determining the deadline for execution of works which expires at the very beginning of construction season, the Privatization Agency deprived Srbija-Turist of the chance to execute the works in an optimal deadline.

465 Accordingly, the Arbitral Tribunal concludes that the additional 90-day deadline left by the Privatization Agency for UHL to complete the works is not appropriate in this particular case and therefore finds it contrary to the provisions of Article 126 of LO.

466 Besides, the Privatization Agency did not leave to the Claimant (Buyer) any time to fulfill the obligation of maintaining the business activities (as per Clause 8.3.5 of the Contract) (refer to CX-6) which also constitutes a breach of Article 126 of LO.

- **Premature Contract termination**

467 Since the Privatization Agency terminated the Contract for non-compliance with obligations from Clause 8.1.1 and Annex 4 to the Contract before expiry of the deadline for execution of those obligations, i.e. before 31 December 2006, it is necessary to consider whether it was obvious, in this specific case, that the Buyer did not want to execute his obligation under the Contract (Article 128 LO).

468 The Privatization Agency finds that the Buyer did not intend to fulfill his obligations under the Contract after reception of the Agency's letter dated 17 February 2006 (CX-6), notifying UHL of its intention to terminate the Contract. The Privatization Agency founds this allegation on the fact that right in that 90-day period the Claimant was preparing for institution of court proceedings (CX-57).[82]

469 The Arbitral Tribunal finds this allegation unfounded. In fact, the submitted documents show that at the time of delivery of notification of Contract termination on 30 June 2006, the works on Hotel "Nis" were in progress and almost the entire advance payment made by Srbija-Turist to EIE was spent on sub-contractors, purchase of construction material, furniture and equipment for decoration of Hotel "Nis" (bought, paid and stored or imported from America), on

[82] Refer to the Agency's brief dated 29 May 2009, paragraph 56 et seq., page 22.

current and future site works and on negotiations with "Intercontinental" group towards obtaining the franchise for opening of Holiday Inn (refer to CX-30, CX-31, CX-35, CX-36, CX-137, CX-138, CX-139, CX-187, CX-189, CX-190).

470 Further to the above, the Arbitral Tribunal concludes that in this case it was not obvious that the Buyer shall not execute his obligation as per Clause 8.1.1 and Annex 4 to the Contract, which would justify the Contract termination before expiry of the deadline specified in the Contract (until 31 December 2006).

- **Termination of contract with consecutive obligations**

471 When in a contract with consecutive obligations (contract with permanent execution of obligations) one of the parties fails to fulfill one of the obligations, the other party may, within reasonable deadline, terminate the contract with respect to all future obligations, if obvious from given circumstances that those shall not be fulfilled (Article 129 of LO).

472 Since the Privatization Agency terminated the Contract for non-compliance with Buyer's obligations in 2005, without waiting to see whether the Buyer shall fulfill the obligations from the Investment Program before 31 December 2006, although it could not be concluded from given circumstances that the obligations obviously would not be fulfilled, the Arbitral Tribunal concludes that the Contract termination with regard to future obligations (i.e. with regard to fulfillment of obligations from the Investment Program for 2006) is unallowable.

- **Non-Compliance with a negligible part of obligations**

473 Article 131 of LO stipulates that the contract may not be terminated for non-compliance with a negligible part of obligations.

474 The Arbitral Tribunal, in the previous part of this reasoning, found that the Claimant (Buyer) has fulfilled the obligations under the Contract and that the only objection with that regard is related to the 1-month delay in submission of the bank's performance guarantee. The Arbitral Tribunal, however, finds that the Privatization Agency did not pay particular attention to that delay, since in its letter dated 3 April 2006 (CX-24) it confirmed that UHL, when having submitted the bank's performance guarantee with extended validity date (until 1 March 2007) fulfilled the obligations as per Clause 8.2 of the Contract and Clause 2 of the Amendments.

475 On occasion of Contract termination, the Privatization Agency did not refer to the delay (CX-75). Anyway, the said delay was too short in duration (negligible) as to justify the Contract termination pursuant to Article 131 of LO.

2 Conclusions of the Arbitral Tribunal on Consequences of Contract Termination

476 The Arbitral Tribunal concludes that the Contract termination is unfounded and deprived of legal effect, both in terms of provisions of Article 41a of the Privatization Law (which cannot apply in given circumstances) and in terms of general rules of the Law on Obligations.

477 The Arbitral Tribunal further concludes on the basis of the above that the Contract has remained in force and has not been terminated by virtue of law upon expiry of the additional deadline (about which the Buyer was notified on 30 June 2006 (CX-75)).

478 In the text below, the Arbitral Tribunal shall consider the consequences of these conclusions for the parties' requests.

D *Parties' Requests*

a) *Claimant's Requests*

479 In Post-Hearing Brief of 15 May 2010, the Claimant made a recapitulation of his requests in items marked by Roman numbers I to X (refer to page 58, 59, 60).

480 The Claimant requested from the Arbitral Tribunal to reject the counterclaims of the Privatization Agency and to bind it to pay to the Claimant the costs of Arbitral Proceedings together with attorney's fees.

481 The Arbitral Tribunal shall consider each of the requests by the order and numbers as used by the Claimant.

(i) Request under ordinal number I:

I. It is declared that the Contract exists and remains in force, since the Claimant UHL has fulfilled all obligations under the Contract, therefore the Respondents Agency and Srbija-Turist are ordered to recognize the Claimant's compliance with the Contract and to fulfill all their respective

obligations under the Contract, as well as to return to the property of Claimant UHL the illegitimately seized 997,824 shares emitted by Srbija-Turist, Nis, all within 15-day deadline.

482 The Arbitral Tribunal agrees with the Claimant's request for declaration that the Contract exists and is still in force, as in the previous part of this reasoning it has been concluded that the Contract termination was unfounded.

483 Consequently, the Arbitral Tribunal orders the Privatization Agency and Srbija-Turist to (i) recognize UHL's compliance with obligations and to fulfill their respective obligations and (ii) to return or undertake all necessary measures towards the return of 997,824 shares of Srbija-Turist, acquired by UHL by purchase of share in capital of this company, within 15 days from the date of this Final Award.

484 The argumentation of the Privatization Agency that it is not possible to return the shares of Srbija-Turist because of their transfer to the Share Fund of the Republic of Serbia (refer to UHL's brief dated 17 June 2009, paragraph 8, page 4 and CX-182, CX-183, CX-184, CX-185; refer to the brief of Privatization Agency dated 15 June 2009, page 7) has no legal grounds since in the opinion of the doctrine submitted by the Agency itself (RX-221) it is stated that return of shares is possible until the moment of their sale at the stock exchange market.

485 That condition is met in this dispute since the shares of Srbija-Turist are subject to temporary prohibitive measure of alienation, pronounced by Serbian courts. The Arbitral Tribunal states that the Privatization Agency has recurrently endeavored during these Arbitral Proceedings to annul this temporary measure (CX-132, CX-133, CX-180, CX-181, CX-182, CX-183).

486 The Claimant's standpoint is that, in case the Contract termination is found unjustified, the Privatization Agency should return the shares to the Buyer, and the Buyer of the capital should continue with investments, from where he stopped (refer to Post-Hearing Brief of the Claimant, page 43).

487 On the other hand, the standpoint of the Privatization Agency is that an award ordering return of the seized shares could not be subject to enforcement.[83]

[83] Refer to CX-182, page 3: *"for the stated reasons and the Arbitral Proceedings should settle the disputed issue of the amount of investments, primarily in the two disputed hotels, can by no means result in such a manner that the shares of the privatization subject shall be returned to the executive creditor. The outcome of the said proceedings may only answer the question whether the executive creditor is entitled to compensation of damages on the basis of then made investments, or not."*

488 The Arbitral Tribunal finds that the Privatization Agency issues orders for sale of shares to the Share Fund (as per Clause 9, paragraph 2 of the Law on Share Fund, "Official Gazette of RS", No.38/2001, 45/2005). Consequently, the Privatization Agency is naturally able to issue an order for return of the seized shares of Srbija-Turist.

489 Among other, the updated Law on Privatization Agency ("Official Gazette of RS", No. 38/2001, 135/2004 and 30/2010) stipulates under Article 12, paragraph 2, that the Privatization Agency is the legal successor of the Share Fund. In the second paragraph of this article, it is stated that: *"the shares from the portfolio of the Share Fund which have been transferred to the Fund based on terminated contracts, until the effective date of this law, are transferrable to the Agency."*

490 Article 13 of the Law on Privatization Agency also stipulates that: *"Central register shall ex officio execute the transfer of shares from the proprietary account of the Share Fund to the proprietary account of the Agency further to the decision delivered to it by the Agency."*

491 Accordingly, the Privatization Agency is able to issue an order requesting from the Central Register to effect transfer of shares in Srbija-Turist from the proprietary account of the Share Fund to its own proprietary account, whereupon it shall execute restitution of the said shares.

(ii) Request under ordinal number II:

> *II. It is declared that the Contract exists and remains in force, as the Claimant UHL, under the Contract, invested in Srbija-Turist on 31 December 2005 the total of USD 6,780,000, which has to be recognized by the respondents, therefore the Respondents are obliged to return the illegitimately seized 997,824[84] shares of Srbija-Turist to the property of the Claimant, all within 15-day deadline.*

492 The Arbitral Tribunal rejects the request to declare that UHL invested USD 6,780,000 in Srbija-Turist, since the PWHC expert opinion (refer to paragraph 4.4 page 22) shows that UHL invested in Srbija-Turist from 1 January 2004 to 31 December 2005 the amount of USD 6,650,216.77 (and not 6,780,000).

[84] In paragraph II of UHL's Post-Hearing Brief (page 58) there is an obvious error in the number of shares (937,824 instead of 997,824).

493 The Arbitral Tribunal further finds that the loan in the amount of USD 500,000 of 9 February 2005 No. 169, intended for settlement of tax liabilities and other duties in order to maintain liquidity of the company, cannot be considered fulfillment of obligation to make investments as per Clause 8.1.1 of the Contract (refer to paragraph 200 of this Final Award). In other words, the Arbitral Tribunal finds that the loan amount of USD 500,000 has to be deducted from the mass of funds invested by the Claimant (USD 6,650,216.77 – USD 500,000 = USD 6,150,219.77).

494 At the same time, the Arbitral Tribunal finds that formal conditions for increase in capital of the privatization subject in 2004, in the form of monetary funds amounting to USD 513,216.77, were not met under Clause 8.1.1 of the Contract[85] (refer to paragraph 203 of this Final Award) and that this amount has to be deducted from the funds invested in the privatization subject (USD 6,150,219.77 – USD 513,216.77 = 5,637,003).

495 Consequently, the Arbitral Tribunal finds that in the period from 1 January 2004 to 31 December 2005, the Claimant invested in the privatization subject the total of USD 5,637,003.

496 Despite rejecting to declare that until 31 December 2005 UHL invested in Srbija-Turist USD 6,780,000, thereby declaring that until 31 December 2005 UHL invested in Srbija-Turist USD 5,637, 003, the Arbitral Tribunal finds that the Contract exists and remains in force and orders the Privatization Agency and Srbija-Turist to (i) recognize compliance with contractual obligations by UHL and to execute their respective part of contractual obligations and (ii) to effect the return or to undertake all the necessary measures towards the return of 997,824 shares of Srbija-Turist, acquired by UHL by purchase of share in the capital of this company, within 15 days from the date of this Final Award.

(iii) Request under ordinal number III:

III. It is declared that the Contract exists and remains in force, since the Claimant UHL made the investment in 2005 in the amount of USD 5,186,194 in the privatization subject Srbija-Turist as per Clause 8.1.1. of the Contract, which has to be recognized by the Respondents, therefore the Respondents are obliged to return the illegitimately seized 997,824 emitted by Srbija-Turist to the Claimant's property, all within 15 days

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[85] Refer to evidence marked RX-114: e-mail from the company Koncept dated 6 October 2004.

497 The Arbitral Tribunal rejects this request to declare, since the loan of 9 February 2005 No. 169 intended for settlement of tax liabilities and other duties in order to maintain the liquidity of the company cannot be considered a fulfillment of the obligation to make investments as per Clause 8.1.1. of the Contract, finding that in 2005 the total of USD 4,173,311.23[86] was invested in Srbija-Turist (and not USD 5,186,194).

498 The Arbitral Tribunal therefore declares that in 2005 UHL invested in Srbija-Turist USD 4,173,311.23 and that the Contract exists and remains in force. The Arbitral Tribunal thereby orders the Privatization Agency and Srbija-Turist to (i) recognize compliance with contractual obligations by UHL and to execute their respective part of contractual obligations and (ii) to effect the return or to undertake all the necessary measures towards the return of 997,824 shares of Srbija-Turist, acquired by UHL by purchase of share in the capital of this company, within 15 days from the date of this Final Award.

(iv) Request under ordinal number IV:

IV. It is declared that the Contract exists and remains in force, since all social obligations from the Social Program have been fulfilled by the Claimant UHL, which has to be recognized by the Respondents, therefore the Respondents are obliged to return the illegitimately seized 997,824 shares emitted by Srbija-Turist to the Claimant's property, all within 15 days.

499 The Arbitral Tribunal agrees with this request for the reason of fulfillment of obligations from the Social Program.

500 Accordingly, the Arbitral Tribunal declares that the Contract exists and remains in force and that all social obligations under the Contract have been fulfilled by the Claimant. Consequently, the Arbitral Tribunal orders the Privatization Agency and Srbija-Turist to (i) recognize compliance with contractual obligations by UHL and to execute their respective part of contractual obligations and (ii) to effect the return or to undertake all the necessary measures towards the return of 997,824

[86] USD 3,137,000 – USD 500,000 = USD 2,637,000; (USD 2,637,000 + USD 2,049,528) – USD 513,216.77 = USD 4,173,311.23

shares of Srbija-Turist, acquired by UHL by purchase of share in the capital of this company, within 15 days from the date of this Final Award.

(v) Request under ordinal number V:

V. It is declared that the Contract exists and remains in force, because the company Srbija-Turist fulfilled the obligation to maintain the scope of business activities, i.e. the total income in 2004 as compared to 2003 was increased by 15% and in 2005 as compared to 2004 by 36%, thereby the Claimant has fulfilled the obligation to maintain the business activities of that company, as per Clause 8.3.5 of the Contract, which has to be recognized by the Respondents, therefore the Respondents are obliged to return the illegitimately seized 997,824 shares emitted by Srbija-Turist the Claimant's property, all within 15 days.

501 The Arbitral Tribunal agrees with this request for the reason of fulfillment of the obligation to maintain the business activities as per Clause 8.3.5 of the Contract.

502 Accordingly, the Arbitral Tribunal declares that Srbija-Turist has fulfilled the obligation to maintain the scope of business activities as per Clause 8.3.5 of the Contract (and the total income in 2004 as compared to 2003 was increased by 15%, and in 2005 as compared to 2004 by 36%). Consequently, the Arbitral Tribunal declares that the Contract exists and remains in force and orders the Privatization Agency and Srbija-Turist to (i) recognize compliance with contractual obligations by UHL and to execute their respective part of contractual obligations and (ii) to effect the return or to undertake all the necessary measures towards the return of 997,824 shares of Srbija-Turist, acquired by UHL by purchase of share in the capital of this company, within 15 days from the date of this Final Award.

(vi) Request under ordinal number VI:

VI. It is declared that the Contract exists and remains in force, because under the Contract, the Claimant UHL invested in Srbija-Turist until 31 December 2005 USD 6,780,000 and fulfilled all obligations from the Contract, and therefore the Claimant is obliged to make and investment in the privatization subject in the amount of only USD 2,220,000 provided that by investment of the said amount of USD 2,220,000 the Claimant UHL will have fulfilled all contractual obligations and shall have no further obligations under the Contract towards the Respondents, Privatization Agency and Srbija-Turist, which has to be recognized by the

Respondents, therefore the Respondents are obliged to return the illegitimately seized 997,824 shares emitted by Srbija-Turist the Claimant's property, all within 15 days.

503 The Arbitral Tribunal rejects this request to declare since in the previous section of this award it was found that in 2004 and 2005 the Claimant invested USD 5,637,003 as per Clause 8.1.1 of the Contract. The amount which the Claimant is due to invest pursuant to the Investment Program thus amounts to additional USD 3,362,997 and not USD 2,200,000 (or USD 9,000,000 as specified in the Investment Program – USD 5,637,003 invested in 2004 and 2005) = USD 3,362,997.

504 Accordingly, the Arbitral Tribunal declares that until 31 December 2005, the Claimant invested in Srbija-Turist USD 5,637,003 and that the Contract exists and remains in force. Consequently, the Arbitral Tribunal orders to the Privatization Agency and Srbija-Turist to (i) recognize compliance with contractual obligations by UHL and to execute their respective part of contractual obligations and (ii) to effect the return or to undertake all the necessary measures towards the return of 997,824 shares of Srbija-Turist, acquired by UHL by purchase of share in the capital of this company, within 15 days from the date of this Final Award.

505 The Arbitral Tribunal finds that the Claimant is obliged to invest in the privatization subject the remaining amount of USD 3,362,997.

(vii) Request under ordinal number VII:

VII. The Privatization Agency of the Republic of Serbia, from Belgrade, is obliged to pay to the Claimant UHL the amount of RSD 96,000,000, with statutory default interest from 15 May 2005 to the date of full payment, on account of regressive taxation of the privatization subject Srbija-Turist, due before 31 December 2003, all within 15 days.

506 The Arbitral Tribunal rejects this request since UHL has failed to submit evidence proving that he requested from the Privatization Agency, in writing, to reimburse the amount paid on account of regressive taxation of Srbija-Turist within deadline stipulated by Clause 6.2.3 of the Contract and despite express order of the Arbitral Tribunal (refer to Procedural Order No.6, item 7).

507 Consequently, the Arbitral Tribunal declares that there is no room for issuance of order to the Privatization Agency to pay to UHL the amount of RSD 96,000,000, with statutory default interest from 15 May 2005 to the date of full payment, on

account of regressive taxation of the privatization subject Srbija-Turist, due before 31 December 2003, all within 15 days.

(viii) Request under ordinal number VIII:

VIII. The Privatization Agency of the Republic of Serbia, from Belgrade, is obliged to pay to the Claimant UHL, on account of all kinds of suffered damages, the total amount of EUR 12,000,000 with interest at the rate of the Central European Bank, starting from the date of unilateral illegitimate Contract termination by the Privatization Agency until the date of payment, all within 15 days.

508 The Arbitral Tribunal reminds that in the Claim of 28 April 2006 the Claimant reserved the right to state his mind about the claim for damages in the further course of proceedings (refer to paragraph VI. 18, page 10)[87].

509 In the reply of 6 February 2007, the Claimant requested compensation of damages at the amount of EUR 12,000,000 (refer to the seventh section, page 47-55) based on the following claims (which aggregately surpass the requested EUR 12,000,000):

(i) lost human resources (EUR 1.5-5 million);
(ii) dilapidation of structures (hotels and Olympic pool) due to the absence of maintenance and failure to undertake conservation measures (EUR 3 million);
(iii) damage at the motel Nais site (EUR 1 million);
(iv) damage from "new" management (EUR ……);
(v) loss in operation in 2006 instead of the EUR 1 million profit (EUR 3 million);
(vi) loss in operation in 2007 instead of the EUR 1.5 million profit (EUR 4 million);

[87] *"Also, the Claimant believes that by the demeanor described in the previous items, the Respondent Privatization Agency inflicted enormous damage to the Claimant, by destruction of the Claimant's business reputation as well that of Mr. Srba Ilic as the Claimant's CEO and Chairman of the Management Board of the privatization subject – Srbija-Turist. Besides, the strike of employees of Srbija-Turist, which resulted from the behavior of the respondent Privatization Agency, which behavior violated the Contract and laws, also inflicted damage, the business operations of the privatization subject were at standstill, the Claimant's investment could not develop, thus the implementation of the Claimant's investment as a whole was challenged. However, at this moment, the Claimant is unable to precisely define the amount of the claim for damages, which shall largely depend on the further developments. Therefore, at this point of time, the Claimant does not file the claim for damages, but reserves the right to file such claim later on, as an additional request in this case."*

(vii) loss of the Holiday Inn brand for motel Nais – Express by Holiday Inn (EUR 2 million);
(viii) loss of the Holiday Inn brand for hotel Nis (EUR 3 million);
(ix) lost profit from new Holiday Inn for the rest of 2006 (EUR 300,000);
(x) lost profit from new Holiday Inn for 2007 (according to study) (EUR 1,115,000);
(xi) lost profit from new Nais Express by HI, for 2007 (EUR 500,000);
(xii) EIE claim due to cessation of works, lost profit, based on corporate guarantee issued by Uniworld Holdings to EIE for entire work, the amount of which shall be defined subsequently.

510 In subject case, the Claimant submitted as evidence for his claim for damages the evidence marked CX-74 and CX-179 (expert testimony of Marketing Study BCG and Mr. Milenovic).

511 In the brief of 18 May 2009, the Claimant states that the amount of suffered damages has grown since the reply of 7 February 2007. Based on the expert testimony (CX-179) based on findings of BCG Consulting, Mr. Slobodan Vrzic (CX-74), the Claimant claims that the lost profit due to cessation of reconstruction of hotel "Nis" and prevention of inclusion of that hotel in the Holiday Inn chain of hotels, and also the unachieved increase in the value of immovable assets in hotel "Nis" until 30 April 2009, amounts to EUR 7,661,000.

512 In Post-Hearing Brief of 15 May 2010, UHL repeated its claims for damages from the reply of 7 February 2007 at the same amounts, except for the damage inflicted by "new" management (the amount of which is not specified in the reply of 6 February 2007), and requests compensation of damages EIE towards UHL due to cessation of works and lost profit. UHL also stated that it has abandoned the request for compensation of lost profit for 2008, 2009 and 2010 (item V, page 57 and 58).

513 Concerning the justification of the request for compensation of damages in principle, the Arbitral Tribunal has decided by majority votes that the Privatization Agency, by unfounded termination of Contract on 30 June 2006, caused cessation of works on reconstruction of the hotels and deprived UHL of shareholder's rights, thus causing damages related to the loss of the right to manage Srbija-Turist.

514 The request for compensation of damages is in this case justified, since the Arbitral Tribunal has decided by majority votes that the Privatization Agency, by

termination of Contract before the expiry of investment period (deadline until 31 December 2006) caused breach of Contract.

515 However, the Arbitral Tribunal finds that even despite the request for compensation of damages formulated during the proceedings (refer to Procedural Order No. 11, item 3), UHL has not submitted data and evidence which would enable the Arbitral Tribunal to check each of the claims from the reply of 6 February 2007 and Post-Hearing Brief of 15 May 2010 as well as the method of calculation of claim for damages. For the said reasons, the Arbitral Tribunal is not able to act on the Claimant's claims to the extent and at the amounts of claims.

516 In the situation in which the basis for claims is not disputable and where the Arbitral Tribunal is competent to state its mind on the amount of the claim, Article 224 from the Civil Procedure Code (former Article 223 of the Civil Procedure Code) stipulates that the Arbitral Tribunal is competent to state its mind on the claim for damages *"at its own discretion"*.[88] In subject dispute, the Arbitral Tribunal has by majority votes reach the conclusion that the basis of claim is not disputable and therefore the application of Article 224 of the Civil Procedure Code is justified. The Arbitral Tribunal still believes that even despite the justification of the basis for claim, the Claimant has failed to submit sufficient amount of evidence to support the claim for damages, which is the situation described in Article 224 of the Civil Procedure Code.

[88] Article 224 of the Civil Procedure Code stipulates with that regard: *"If it has been established that a party is entitled to compensation for damages in money or replaceable objects, but the amount or quantity of such objects cannot be established, or they might be established with inappropriate difficulty, the court shall determine the amount of money or the quantity of replaceable things at its own discretion."* Refer also to "Comments to the Civil Procedure Code, Borivoje Poznic", Official Gazette 2009, page 587: *"Decision on the height of the amount without proving was ordered for the reason of fairness and suitability. It would be inacceptable that a claim, considered justified by the court, be rejected because the party was unable to submit relevant evidence of its amount. Such a decision would prove particularly absurd when having in mind that there exist claims the size of which, due to their nature, cannot be proved. Also, it is contrary to the principle of cost efficiency, for the use of evidence to imply expenditure in time, effort and costs, which is not proportional to the significance of the disputed matter for the parties, as well as in case when in proceedings of very low value it would be necessary to carry out another and expensive expert testimony or hearing of a witness who lives in a distant part of the world. Briefly, provision of Article 223, under the stipulated assumptions, eliminates the application of the rule on burden of proof concerning the height of the amount.(…) The subject of evaluation by discretion is only the height of the amount. There is no room for such an evaluation in a dispute in which the inability or difficulties in proving concern the basis of claim. On such a matter, the rules on the burden of proof shall be applicable, and the court shall decide to the detriment of the party which bears that burden as concerns the facts relevant for existence of the basis. But the provision of Article 223 shall be applicable even when the basis is not disputable."*

517 With that regard, proving of claims based on lost human resources would certainly lead to the need to hear a large number of witnesses, either orally or by written testimonies, assuming that the persons invited to witness agree, which might be impossible in subject dispute. At the same time, proving of claim arisen as a consequence of dilapidation of structures due to absence of maintenance or assessment of the amount of claim for damages inflicted at the site of the Hotel Nais, would certainly bring about additional costs of expert testimonies and prolongation of the deadline. Also, assessment of exact amount of claims for damages formulated in items 4 to 10 of Post-Hearing Brief of 15 May 2010 (page 57-58)[89] would be quite difficult given the value and trends of capital in the future (refer to hypotheses on trends of capital and projections of profit from business operations for 2006, 2007, 2008, 2009 and 2010, from the report by Mr. Milenovic (CX-179)). Accordingly, the Arbitral Tribunal decides by majority votes that it would be inappropriate to reject the Claimant's requests for compensation of damages and lost profit for the reason of failure to submit relevant or insufficient evidence.

518 For that reason, the Arbitral Tribunal relies upon Article 224 of the Civil Procedure Code in order to determine the amount of compensation of inflicted damage and lost profit, taking into account the proportion of the Claimant's share in the capital of Srbija-Turist (70%). Pursuant to this Article, the Arbitral Tribunal may assess the amount of compensation for inflicted damage and lost profit at its own discretion, in such cases where the claim for damages is not sufficiently formulated or supported with evidence.

519 Consequently, the Arbitral Tribunal decides at its own discretion to order the Privatization Agency to compensate EUR 3,000,000 to the Claimant on account of inflicted damages and lost profit. The Arbitral Tribunal at the same time decides that the statutory interest shall be accrued to the said amount of EUR 3,000,000, starting from 30 June 2006 until the date of payment.

520 The Arbitral Tribunal finds that the Claimant in his letter dated 7 December 2007 requested payment at the amount of EUR 12,000,000 with statutory default interest (refer to request VIII page 3), whereas in Post-Hearing Brief of 15 May 2010, he requested accrual of interest at the rate of the Central European Bank

[89] Claims for damages in items 4 to 10 of Post-Hearing Brief of 15 May 2010: *"4. loss for 2006 instead of profit of EUR 1 million – EUR 3 million; 5. loss for 2007 instead of profit of EUR 1.5 million – EUR 4 million; 6. loss of Holiday Inn brand for NAIS – EUR 2 million; 7. loss of Holiday Inn brand for hotel Nis – EUR 3 million; 8. lost profit from new Holiday Inn for the rest of 2006 – EUR 300,000; 9. lost profit from new Holiday Inn for 2007 (according to the study)- EUR 1,115,000; 10. lost profit from new Express by Holiday Inn for 2007 – EUR 500,000."*

(refer to request VIII page 59-60). The purpose of Post-Hearing Brief being to make a recapitulation of previously formulated requests, the Arbitral Tribunal is unable to accept the change in interest rate as per Claimant's Post-Hearing Brief of 15 May 2010. Consequently, the Arbitral Tribunal decides to apply the statutory interest on this Claimant's request (application of interest from the Claimant's request formulated in the letter of 7 December 2007).

521 Further to the above, the Arbitral Tribunal concludes that the Privatization Agency is obliged to pay to UHL the compensation at the total amount of EUR 3,000,000 (with statutory interest, starting from 30 June 2006 until the date of payment) based on the damage inflicted by unjustified termination of Contract, within 15 days from the date of this Final Award.

(ix) Request under ordinal number IX:

IX. The Privatization Agency of the Republic of Serbia, from Belgrade, is obliged to pay to the Claimant UHL the amount of USD 1,000,000 with domicile interest starting from 1 March 2007 until the date of payment, on account of unreasonably collected performance guarantee No. 45524-0-02469 dated 7 March 2005, with Amendment thereto dated 27 February 2006, within 15 days.

522 In its letter dated 8 March 2007, Komercijalna Banka a.d. Belgrade notified UHL that the Privatization Agency had activated the bank's performance guarantee to the amount of USD 1,000,000 (CX-94).

523 The Claimant has repeatedly requested during the proceedings that the said amount be reimbursed to him with statutory interest (refer to briefs of 27 March and 31 August 2009), stating that the conditions for collection of this bank's performance guarantee (i.e. non-compliance with obligations from the Investment and Social Program) were not met.

524 The Claimant, among other, quotes that the provision by which *"the guaranteed amount shall be reduced in line with the degree of the Buyer's compliance with obligations covered by this guarantee, whereupon you are obliged to inform us in writing immediately after the determination of the degree of compliance with such obligations"* was not fulfilled (refer to the letter of Komercijalna Banka a.d. Belgrade sent to the Privatization Agency on 1 March 2005 (CX-89)). The Claimant claims that, further to the above, at the moment of guarantee's activation the paid amount should have been reduced in proportion to the degree to which

the Claimant had fulfilled his obligations, whereupon the Privatization Agency should have informed the Bank.

525 The Claimant further claims that the Privatization Agency *"malevolently collected this guarantee in compliance with its strategy of permanent, maximum pressure on the company of the Claimant Uniworld Holdings, with the ultimate goal to terminate the Contract on purchase and sale at any cost, and to overtake Srbija-Turist without any reimbursement, thus destroying the Buyer financially"* (refer to UHL's brief of 27 March 2007, page 4).

526 The Privatization Agency finds that the Claimant failed to fulfill his obligations under the Contract, thus establishing the condition for activation of the performance guarantee. The Privatization Agency claims, with that regard, that the bank guarantees *"by their function agreed as the means of security that the contractual obligations shall be complied with. The consequence of guarantee collection (and not its purpose) is covering of possible damages which might arise from non-compliance with the privatization contract, primarily, for the privatization subject itself. That is why all guarantees per privatization contracts are issued in favor of the Privatization Agency and not the privatization subject (although, as in this specific case, the subject himself is also a contract party in the privatization arrangement)"*. (refer to the brief of the Privatization Agency of 11 April 2007, paragraph 3, page 4).

527 In the brief of 11 April 2007 (refer to paragraph 7 page 5), the Privatization Agency also quotes that, given the fact that the guarantee was collected on 7 March 2007, the interest requested on that basis by the Claimant cannot run from 1 March 2007. The Privatization Agency at the same time quotes that the Serbian law prohibits charging of interest to the amounts expressed in foreign currency (refer to paragraph 12, page 8).

528 The Arbitral Tribunal finds that this concerns the bank's performance guarantee which is defined by the Contract as "Performance Bond", or as *"on-demand, unconditional bank guarantee in the form set out in Annex 5, to be issued by a reputable international bank rated at least A in favor of the Agency as security for performance by the Buyer of its Investment Commitment and Social Program in accordance with Clause 8.2"* and that the Serbian law is applicable to this guarantee and to the entire Contract.

529 Since the Arbitral Tribunal has already concluded in the previous part of this reasoning that the Contract termination for non-compliance with obligations as per Clauses 8.1.1 and 8.1.3 of the Contract was unfounded, the Arbitral Tribunal

finds that, accordingly, the Privatization Agency activated the bank's performance guarantee unfoundedly, therefore it decides that the Agency is obliged to return the funds collected with that regard to UHL.

530 Since the bank guarantee was paid out in dinars, the Arbitral Tribunal orders the Privatization Agency to return the collected USD 1,000,000 in dinar equivalent at the date of payment of this amount to the Claimant (applying the mean exchange rate of the National Bank of Serbia on the date of payment to the Claimant), with domicile interest from 7 March 2007 until the date of full payment, within 15 days from the date of this Final Award.

b) *Requests of the Privatization Agency (the First Respondent)*

531 The requests of the Privatization Agency are contained in the Counterclaim of 28 March 2008 (page 76-77) and Post-Hearing Brief of 15 May 2010 (page 78-80).

(i) Request under ordinal number 1:

1) It is declared that the Contract is terminated for non-compliance by virtue of law, upon expiry of additional deadline, of which termination UHL was notified on 30 June 2006.

532 The Arbitral Tribunal rejects this request for the reason that the Contract termination is unfounded and in conformity with provisions of Article 41a of the Privatization Law which cannot apply to this dispute, as well as it is unfounded pursuant to general rules of the Law on Obligations.

(ii) Request under ordinal number 2:

2) UHL is obliged to pay to the Privatization Agency the contract penalty at the amount of USD 11,172,714 on account of compensation of actual damages pursuant to Clause 8.1.4 of the Contract with interest at the rates of the Central American Bank starting from 30 June 2006 until the date of payment.

533 The Arbitral Tribunal rejects this request since in the previous part of this reasoning it has concluded that the Claimant has complied with his obligations as per Clause 8.1.1 of the Contract and that the Contract termination was unfounded, therefore there is no room for application of the contract penalty as per Clause 8.1.4 of the Contract.

(iii) Request under ordinal number 3:

3) UHL is obliged to pay to the Agency the contract penalty at the amount of USD 550,000 on account of compensation of damages pursuant to Clause 8.4.9 of the Contract with interest at the rates of the Central American Bank, starting from 30 June 2006 until the date of payment.

534 The Arbitral Tribunal rejects this request since in the previous part of this reasoning it was concluded that the Claimant has fulfilled the obligation to maintain business activities as per Clause 8.3.5 of the Contract, therefore there is no room for application of the contract penalty as per Clause 8.4.9 of the Contract.

(iv) Request under ordinal number 4:

4) UHL is obliged to pay to the Agency the amount of USD 1,170,000 on account of compensation of damages arising from reduction in assets of Srbija-Turist by sale of two hotels with interest rates of the Central American Bank starting from 30 June 2006 until the date of payment.

535 The Arbitral Tribunal rejects this request since (i) Privatization Agency has not proved that the price achieved with the sale of two hotels is not the market price or that the selling price was spent contrary to the Agency's approval and that, in any case, (ii) Privatization Agency may not request compensation for suffered damages which, even if proven justified, may be requested only by Srbija-Turist (given that the Privatization Agency keeps only 15% shares in the privatization subject).

(v) Request under ordinal number 5:

5) UHL is obliged to pay to the Agency the amount of USD 2,136,000 on account of lost profit due to non-compliance with the Contract, with interest at the rates of the Central American Bank starting from 30 June 2006 until the date of payment.

536 The Arbitral Tribunal rejects this request since in the previous part of this reasoning it was concluded that the Claimant was not in breach of obligations under the Contract. At the same time, as it results from the argumentation of the Agency itself (refer to paragraph 12.4.5 page 74 of counterclaim), the Agency

may not request return of lost profit in whole, given that it is a minority shareholder of Srbija-Turist (15% shares).

c) *Requests of Srbija-Turist (the Second Respondent)*

537 Srbija-Turist formulated its requests in Post-Hearing Brief of 14 May 2010 (page 14).

(i) Request under ordinal number 1:

1) The Arbitral Tribunal shall be declared incompetent to decide on claims specified in petitum of the claim under I, II, III, IV, V, and VI and shall reject the claim or (b)reject it as unfounded.

538 The Arbitral Tribunal rejects this request since in the Partial Award of 23 September 2008 it was concluded that the Arbitral Tribunal is competent to decide on claims and in the previous part of this Final Award, the Arbitral Tribunal rejected the objections of procedural and formal-legal character (refer to paragraph 49 et seq.) related to Claimant's claims.

(ii) Request under ordinal number 2:

2) Reject the claim specified in petitum of the claim under X.

539 The Arbitral Tribunal rejects this request for the above specified reasons.

d) *Costs of Arbitration*

(i) Decision of the International Court of Arbitration on the Amount of Arbitration Costs

540 At the session held on 6 August 2009, the International Court of Arbitration determined the advance payment for arbitration costs at the amount of USD 510,000 (with possibility of subsequent reevaluation). The parties have paid that

amount at the following proportion: Claimant USD 360,000 and the First Respondent USD 150,000.

541 At the session held on 28 April 2011, the International Court of Arbitration determined the amount of arbitration costs at the amount of USD 510,000.

(ii) Claimant's Requests Related to Costs of Arbitration and Costs and Fees of Legal Representatives

542 Claimant's requests related to costs of arbitration and costs and fees of legal representatives are contained in Post-Hearing Brief of 15 May 2010. More precisely, the Claimant requested the following in the request under the ordinal number I:

> *"The Privatization Agency of the Republic of Serbia, from Belgrade, is obliged to pay to the Claimant UHL all costs of proceedings, both the costs of the International Court of Arbitration and the attorney's fees and costs of legal representatives of the Claimant, according to the list of expenses which shall be submitted, within 15 days".*

543 This request is partially accepted for the following reasons:

544 Regarding the costs of arbitration which amount to USD 510,000, the Arbitral Tribunal decides that the Agency shall bear a part of costs at the amount of USD 360,000, and the Claimant the amount of USD 150,000. Thereupon, the Agency is obliged to pay to the Claimant the amount of USD 210,000, within 15 days from the date of this Final Award. When distributing the costs, the Arbitral Tribunal had in mind the Claimant's request that the costs amounting to USD 360,000 should be borne by the respondents (refer to paragraph X from Claimant's brief of 7 December 2007) and that thereafter he changed his request asking that all costs be borne by the Privatization Agency (refer to Post-Hearing Brief of 15 May 2010) and the generally accepted principle in arbitration law that the costs are to be distributed in line with the success in the proceedings.

545 Given that none of the parties received the entire amount of its accounts receivable and the Claimant's opposition to the amount of fees for legal representatives of the Privatization Agency (refer to page 2 of the Claimant's brief of 28 July 2010), the Arbitral Tribunal also decides that each party shall bear its own costs and costs and fees of their legal representatives (as well as any other incidental costs). With that regard, in his brief of 28 July 2010 (page 2), the

Claimant explained that the costs and fees of the law firm Karanovic & Nikolic amount to RSD 3,854,222.48, while the costs and fees of the attorneys Milorad Belic, Aleksandar Lojpur and Nebojsa Stankovic total in EUR 34,500.

546 The Arbitral Tribunal finally decides that UHL and the Agency shall equally participate in the costs of expert opinion of the Independent Expert Witness of the Arbitral Tribunal (PWHC Report) (in compliance with the Letter of Engagement of 29 April 2009), at the amount of EUR 125, 899, VAT excluded, or EUR 62,949 on part of UHL and EUR 62,949 on part of the Agency. Since UHL had already paid to PWHC EUR 20,000 (VAT excluded), the Arbitral Tribunal decides that UHL is obliged to pay the amount of EUR 42,949.50 (VAT excluded) to the Privatization Agency, which has covered the remaining part of PWHC price for services and costs as advance payment, within 15 days from the date of this Final Award.

(iii) Requests of the Privatization Agency (the First Respondent) Related to Costs of Arbitration and Costs and Fees of Legal Representatives

547 The requests of the Privatization Agency related to costs of arbitration and costs and fees of legal representatives are contained in Counterclaim of 28 March (page 76-77) and Post-Hearing Brief of 15 May 2010 (page 78-80). More precisely, the First Respondent requested the following in the request under ordinal number 6:

> *"6) UHL is obliged to pay to the Agency all costs of Arbitral Proceedings except for the advance payment paid per his claims."*

548 The First Respondent, in his letter dated 31 May 2010 (page 2), subsequently explained that the costs and fees of his legal representatives, the Independent Expert of the Arbitral Tribunal (PWHC) and other costs of expert findings amount to USD 1,049,760.

549 Mindful of the previous part of this Final Award (refer to paragraphs 544 to 546), the Arbitral Tribunal partly accepts this request, and decides that the Privatization Agency is obliged: (i) to bear USD 360,000 on account of costs of arbitration; (ii) to bear 50% costs of PWHC, or EUR 62,949.50 (VAT excluded) which it has already paid and (iii) to bear its own costs and fees of attorneys (or USD 742,660 on account of costs and fees of its legal representatives; USD 27,545 on account of costs of expert findings (excluding the findings of PWHC); and USD 5,285 on account of additional costs (preparation and submission of briefs, written communication)).

(iv) Requests of Srbija-Turist Related to Costs of Arbitration and Costs and Fees of Legal Representatives

550 Srbija-Turist formulated its requests in Post-Hearing Brief of 14 May 2010 (page 14). More precisely, in request under the ordinal number 3, Srbija-Turist requested the following:

> *"3) The Claimant shall be obliged to reimburse to the Second Respondent, Srbija-Turist AD, the costs of arbitration proceedings as per the list of expenses".*

551 The Second Respondent, in the list of expenses of 31 May 2010 (page 2) subsequently explained that the costs and fees of his legal representatives amount to EUR 44,000.

552 Mindful of the previous part of this Final Award (refer to paragraph 545), the Arbitral Tribunal rejects this request and leaves the costs of Arbitral Proceedings and attorney's costs and fees to Srbija-Turist.

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553 Except for the requests of parties which were discussed in the previous part of this Final Award, the Arbitral Tribunal rejects any other requests by parties.

Place of arbitration: Belgrade, Serbia

Date:

(signed) Laurence Mitrovic (Chairperson of the Arbitral Tribunal)

Prof Miodrag Orlic, PhD (arbitrator)
(signed)

Prof Jelena Perovic, PhD (arbitrator)
(signed)

ooo
END OF TRANSLATION

Belgrade, May 30, 2011
No. 19139/11

I CERTIFY HEREWITH that the above document is a true translation of the original which was submitted to me in Serbian language

MILJENKA PEROLO
Court Interpreter for English Language
29 Marsala Birjuzova St., 11000 B e l g r a d e

Appointed by the Decision of the Republic Minister of Justice,
Belgrade, Yugoslavia, No. 740-06-60/2002-04
My commission is permanent

By their repeated signatures, the Chairperson of the Arbitral Tribunal Laurence Mitrovic and arbitrator Miodrag Orlic confirm that the arbitrator Jelena Perovic withheld her signature because she disagrees with the award made by majority votes.

Date:

(signed) Laurence Mitrovic (Chairperson of the Arbitral Tribunal)

Prof Miodrag Orlic, PhD (arbitrator)
(signed)

Prof Jelena Perovic, PhD (arbitrator)