

Czech Republic takes new approach as ECT claims loom

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The Czech Republic has abandoned its normal method of appointing counsel by public tender and says it is assembling a “dream team” of arbitration specialists to fight dozens of potential Energy Charter Treaty claims over a tax on solar power profits.

Last week the government exercised a national security exemption in the law on public tenders, claiming the number of arbitrations against the state could reach “unprecedented proportions” and “threaten the fiscal stability and security” of the country. According to a report published in online news service Czech Position last week, it has instead put together a list of lawyers used in previous arbitrations that it wants to defend the claims, including barristers **James Crawford SC** and **Zachary Douglas** of Matrix Chambers in London; partners **Stephen Anway** and **David Alexander** of Squire Sanders & Dempsey in Cleveland and Columbus; and partner **Karolína Horáková** of Weil Gotshal & Manges in Prague.



The approach is in response to threatened claims estimated at between US\$2.5 billion and US\$14.5 billion over a 26 per cent levy on profits generated by solar plants that benefited from government incentives. Among the companies that say they will bring claims over the retroactive levy are Germany’s Voltaic Network and Luxembourg’s Radiance Energy Holding, which are both members of the International PhotoVoltaic Investors Club, an association of investors in the Czech Republic. The

association is understood to have instructed a team from Freshfields Bruckhaus Deringer and local firms Glatzová & Co and Sekanina Legal to represent them.

Lukáš Nývlt, a partner at NH Partners in Prague, has confirmed he is acting for several German investors and is in negotiations to represent some Dutch ones, while CMS Cameron McKenna partner **Tomáš Matějovský** said his firm is “advising certain solar energy investors regarding their rights and potential claims”. French and Cypriot investors are also understood to have taken the first steps towards arbitration by filing notice on the Czech Republic.

The threatened claims are under the ECT and bilateral investment treaties between the investor states and the Czech Republic. Under the ECT, investors must allow a three-month cooling off period between giving notice of a dispute and filing their claims, while under BITs the period is usually six months.

All the lawyers on the Czech Republic’s list have been successful for the state before – leading finance ministry adviser Radek Šnábl, who is orchestrating the state’s defence, to describe them as a “dream team”. Crawford, Douglas and Horáková collaborated on an ad hoc arbitration against Dutch financial services company Invesmart – the first treaty claim the state won on the merits; while Douglas and Horáková defended it against an UNCITRAL claim brought by a Canadian energy company over the enforcement of a Swedish arbitration award. Anway was lead counsel for the state in its ICSID dispute with Israeli company Phoenix Action and is representing the state in two bilateral investment treaty disputes under UNCITRAL rules.

Asked whether they had accepted new instructions from the Czech Republic, Crawford, Douglas and Horáková declined to comment. Anway said that his team is “attempting to finalise the arrangement”.

The government’s decision to abandon the usual public legal tender process to select counsel has been questioned by some lawyers. **Anne K Hoffmann**, a partner at Python & Peter in Geneva who is representing a German investor in an unrelated case against the Czech Republic, says that anti-corruption organisation Transparency International has raised concerns in the past regarding the non-transparent manner in which public contracts are awarded in the country. She says the government is “fighting fire with fire” by ignoring these concerns and “circumventing its own public tender rules” to commence these proceedings.

Petr Pafaj, chairman of the Czech Republic’s Office for the Protection of Competition, tells GAR that it investigated the issue and decided that an exemption could apply if “fundamental interests of the state are endangered”.

Explaining the decision, Šnábl told local press he feared that the tender could be delayed by representatives of the solar investors filing endless objections – leaving the state effectively defenceless. He says that under Czech freedom of information legislation, “lawyers whom I’ve never heard of...are requesting internal analyses and documents about how we will choose lawyers for the state in the tenders. I’ve never seen such a thing before.”

The decision is also in line with the Czech government's recent "hands on" approach to arbitration, triggered by reports in 2009 that the state had the third highest number of arbitration claims against it and had spent US\$78 million on arbitration-related lawyers fees in a decade. Speaking to GAR that year, Snabl said the government would be managing cases more closely rather than relying on external lawyers to pick witnesses and experts and decide strategy.

The Czech Republic is not the only European state facing claims from solar investors. In March, Spanish tariff reforms prompted a group of solar companies to serve notice of 14 separate claims under the Energy Charter Treaty. A team from Allen & Overy led by partner **Stephen Jagusch** in London is representing the investors against Spain.

The Czech tax, meanwhile, is also the subject of a domestic legal challenge, after 22 Czech senators asked the country's Constitutional Court to consider its legitimacy.

Confirmed counsel to solar energy investors

Freshfields Bruckhaus Deringer

Partner **Noah Rubins** and associate **Evgeniya Rubinina** in Paris, partner **Constantine Partasides** and senior associate **Liz Snodgrass** in London, and associate **James Freda** in New York

Glatzová & Co in Prague

Ondrej Sekanina, of Sekanina Legal in Prague

NH Partners in Prague

Partner **Lukáš Nývlt** in Prague

CMS Cameron McKenna

Partner **Tomáš Matějovský**, senior associate **Lukáš Janíček** and associate **Radim Kotlaba** in Prague