The Dispute Resolution Review

Third Edition

Editor
Richard Clark

Law Business Research

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THE DISPUTE RESOLUTION REVIEW

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CONTENTS

Chapter 15

CZECH REPUBLIC

Jan Tomaier and Matúš Hanuliak[*]

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

i Czech legal system

Traditionally, the Czech legal system is characterised as a 'continental' or a 'civil law' system. Although such classification presents the risk of overgeneralisation, if it allows us to see the Czech legal system as a hierarchical structure of written acts and statutes with the substantial areas of law codified, it might be accepted. Neither custom nor previous judicial decisions are formally sources of law, albeit that the higher courts decisions (especially those selected in a review published by the Supreme Court) are treated by the judges as being of strong persuasive authority and are frequently referred to before the courts by the parties. Since the Czech Republic is a unitary state, the legal order is unified for the whole territory. The ratified international agreements and, since the accession to the European Union ('the EU') in 2004, European law, constitute an integral part of the legal order.

The core of the codes currently in effect (the Civil Code, Commercial Code and Civil Procedure Code) is inherited from the former state of Czechoslovakia, obviously with numerous amendments since 1993, especially in connection with the accession process and the membership of the EU. Due to historical reasons, similarities can be discerned with Austrian and German law and naturally with Slovakian law. Despite the continental nature of the Czech legal system, more exotic sources of inspiration can be discerned, from time to time, in the recent legislation (e.g., the new Insolvency Act is based chiefly on the United States' legislation).

The complex re-codification of the Czech civil law, with the new 'commercialised' Civil Code, the Act on Commercial Companies and Cooperatives and Act on International Private Law and Procedure, has been in preparation since the early 2000s. In spite of the

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fact that the government had already approved the three bills in May 2009, the legislative process in Parliament was abandoned on account of the general elections. Presently, the bills are once again being revised by the government committees. If the bills are approved by Parliament, given the *vacatio legis* of two years actually proposed, the new codes could probably not enter into effect before 2014.

On the contrary, the Civil Procedure Code is only progressively – and rather frequently – modified in order to answer the urgent need for a more effective procedure. It seems that the emphasis is put more on the reform of the different elements of the judicial system than on a complex remodelling of the civil procedure, which is still not being considered.

ii Judicial system

The Czech judicial system is a four-tier system with, generally, two-instance proceedings, consisting of 86 district courts (including 10 district courts in Prague and the Municipal Court of Brno), eight regional courts (including the Municipal Court of Prague), two high courts (one in Prague for Bohemia, the other one in Olomouc for Moravia) and the Supreme Court. Specialised chambers within the regional courts and the Supreme Administrative Court constitute the administrative judiciary. The Constitutional Court as a specialised body responsible for the protection of the constitutionalism stands outside the general (ordinary) court structure.

In civil proceedings, courts consider and decide any and all private law matters, namely, matters arising from civil, labour, family, entrepreneurial and commercial relationships and other legal matters specifically provided for by substantive law. Therefore, there are no specialised courts competent in private law cases.

The district courts generally serve as the first instance courts in civil proceedings.

The regional courts act principally as the appellate courts in cases where the district court served as a first instance court. In the cases specifically listed in the Civil Procedure Code, the regional courts act as the first instance courts. This list is rather complex and casuistic and includes, for example, the area of protection of personhood, copyright and intellectual property and certain specific cases arising from labour disputes. Moreover, the regional courts act as the courts of first instance in a broad area of commercial law disputes, especially in corporate law cases, cases concerning the Commercial Register, insolvency, capital market and in principle all the claims arising from commercial obligations in which the pecuniary performance exceeds 100,000 korunas.

The two high courts act chiefly as the appellate courts over decisions issued in the first instance by the regional courts.

The highest position in the hierarchy of general civil courts is occupied by the Supreme Court of the Czech Republic with its seat in Brno. Its main task is to decide on extraordinary appellate measures against the final decisions of appellate courts. Additionally, the Supreme Court has the role of unifying the case law of lower courts. The Supreme Administrative Court plays a similar role in public (administrative) affairs.

First instance proceedings are generally held before a single judge, which applies to both district as well as regional courts. Appeals are heard before a panel (senate) which consists of two judges and one presiding judge. The labour disputes are heard by

a single judge accompanied by two lay judges. The jury system is not in use in the Czech Republic.

Currently, over 3,000 professional judges are employed in the Czech court system. The lay judges elected by the local councils and assisting a professional judge in the labour law cases represent the sole non-professional element of the judicial system.

iii Dispute resolutions procedures

The standard dispute resolution method under Czech law is still represented by the civil proceedings before the courts. However, more recently, the arbitral proceedings governed by the Arbitration Act have become increasingly popular not only for the settlement of disputes in the domain of international trade, but also in purely domestic trade or even commercial relationships in general. Nowadays, the insertion of arbitration clauses in contracts has become quite common.

II THE YEAR IN REVIEW

During 2009 and 2010, the implementation of 'eJustice' progressed with the introduction of compulsory data mailboxes for Czech legal entities (including the Czech branches of foreign legal entities, provided that these branches are registered in the Czech Commercial Register), replacing the traditional methods of delivery of documents and allowing supposedly more effective, cheaper and even more eco-friendly communication with public authorities, including the courts. This technical modification is closely related to another complex amendment of the Civil Procedure Code, probably the most significant since 2000/2001. The changes concern not only the service of documents, the recording of court hearings, simplifications to the procedure and decision-making. The amendment increased the minimum monetary value of a dispute in order to be allowed to file an appeal from 2,000 korunas to 10,000 korunas and for extraordinary appeals from 20,000 korunas to 50,000 korunas (for commercial disputes: from 50,000 korunas to 100,000 korunas).

In 2010, after nearly 50 years, a new Criminal Code entered into effect, improving, *inter alia*, the regulation of criminal acts committed in connection with economic activities (such as unfair competition and other anti-competitive conduct).

III COURT PROCEDURE

i Overview of court procedure

The civil procedure in the Czech Republic is governed by the Civil Procedure Code and several other acts related mainly to the organisation of the judicial system, legal statutes of the judges, the administration of the courts, etc.

The Czech civil litigation is principally adversarial and the judge has, generally, rather a passive role – being an 'impartial third party' who oversees the proceedings and resolves the conflict between the parties on the basis of the evidence they have proposed and does not go beyond the scope of facts defined by the parties. On the other hand, the judge may examine evidence other than that proposed by the parties if a need for such

evidence emanated from the proceeding. The judge can also examine the witnesses and usually do that.

In civil matters other than disputes (such as the protection of minors) the position of the judge is much stronger and his role is more inquisitorial.

ii Procedures and time frames

There are no compulsory steps that a party must take before issuing civil proceedings. In particular, there is no pretrial discovery under Czech law. Special pre-action proceedings regarding an interim injunction or securing of evidence, if such evidence threatens to be lost, are available if such measures are needed for the protection of claimant's rights (see *infra*). A claimant may also consider proposing that the court attempt to mediate the dispute. A mediated settlement will be enforceable as a binding decision if such settlement is reached.

The commencement of civil proceedings depends on the nature of the case. Civil disputes are initiated by a legal action (petition) filed by the claimant. Civil matters other than disputes can be commenced either upon an action or *ex officio*. The legal action must contain the following essentials: the identification of the parties, description of the decisive facts, specification of the evidence and specification of claimant's relief sought. The court will commence the proceedings only after the claimant's payment of the court fees has been received.

The timing for filing the legal action depends mostly on the limitation period. Under Czech civil law, statutes of limitation are considered a substantive law matter, not a procedural law issue. As a general rule, claims are not enforceable once they become statute-barred, provided, however, that the defendant raises an objection to the expiration of a relevant limitation period before the court. After the expiration of a limitation period, the right does not cease to exist but it becomes unenforceable in civil court proceedings. The general limitation period of civil claims is three years and four years in commercial relations. However, there are a number of exceptions to these general rules (shorter or longer limitation periods).

Czech law generally distinguishes between statutory procedural time limits (e.g., the time limit for the filing of appeals, which is generally 15 days from the delivery of the respective court's decision), and a judge's procedural time limits, which are determined by the court itself for the fulfilment of certain acts. However, in principle (except for, e.g., interim injunctions, see *infra*), there is no time limit for the length of civil proceedings, which depends mostly on the complexity of the case and, on the other hand, of the workload and the efficiency of the competent court. Given the fact that the European Convention on Human Rights constitutes a part of the legal order, the parties have right to a hearing within a reasonable time. This fundamental right is protected not only by the Constitutional Court, but also by the European Court of Human Rights.[1]

Once the proceedings have been initiated, the court shall act, even without subsequent motions, to consider and adjudicate the case as expeditiously as possible

1 On 25 November 2010, in the case *Antoni v. Czech Republic*, the Court considered that proceedings lasting some 12 years violate the rights guaranteed by the Convention.

and shall strive for an amicable settlement of the dispute. The procedure is primarily managed by the judges. The judge also takes care that the hearing proceeds in a dignified and undisturbed way and that the case is being heard completely, equitably and without delay.

The timetable for proceedings is generally determined by the court. However, the parties may file motions for the commencement of proceedings, change their motions or withdraw them. If the nature of the case permits, the parties may terminate the proceedings by settlement. The parties thus often have considerable influence on the course of the proceedings in practice. Moreover, any party may request that (1) the president of the respective court (as administrative body) take appropriate measures to speed-up the procedure if there are delays in the proceeding and (2) also when such measure fails to determine a time limit for the taking of the procedural step that is being delayed.

In theory, the case should be dealt with within only one hearing. For that purpose, the chairman of the panel will call the defendant to make a written defence. The court may (1) impose upon the defendant a duty to make a written defence in certain cases and (2) specify a time limit for the submission of such statement, which cannot be shorter than 30 days. If no defence is filed, a presumption of acknowledgment of the claim takes place.

Statements of facts and evidence must always be presented in the course of the proceedings before the court of first instance. In view of the progressively increasing concentration of the proceedings, the parties should ensure that they plead all factual circumstances and the supporting evidence by the end of the preliminary hearing or the first hearing (if the preliminary hearing was not ordered) at the latest. In principle, later submissions will not be taken into account. This applies, with certain exceptions, also to the appellate court, which cannot take newly presented facts or evidence into account.

As a general rule, each party carries the burden of submitting and proving those facts upon which its claim or defence is based. The evidence is always examined by the court. In limited cases, the court may also examine evidence other than that proposed by the parties if a necessity of entertaining such evidence, in order to find out the factual state, occurs in the proceedings.

Under Czech law, practically any means by which the state of facts can be ascertained may serve as evidence. As a matter of principle, the evidence given by witnesses, court-appointed experts and parties (only if a given fact cannot be proven otherwise) is given orally. Witnesses and parties may only testify orally. In the case of experts, a written opinion is also usually required. Also, upon the request of the court, all persons must inform the court gratuitously of facts having an importance for the proceedings and the court's decision.

As a general rule, the court may not exceed the petitions of the parties or adjudge something other or more than what was demanded by them.

An overview of the kinds of urgent or interim applications available, and their time frames

The court competent for the substantive proceedings may issue an interim injunction either before or during the proceedings, if it is necessary to provisionally arrange the relationships between the parties or if there is a danger that the enforcement of a judicial

decision could be jeopardized. The need for a temporary arrangement has to be proven by the claimant. A party may seek the court to order the other party particularly to deposit a sum of money or a thing into the custody of the court, not to dispose of certain things or rights or to do something, omit something or endure something. An interim measure may impose a duty even upon somebody else than the party only if such duty is fair to be demanded of them. Generally, the court has to decide within seven days of the filing of the application.

The petitioner is liable for damages caused in connection with or as a result of the interim injunction. In commercial disputes, the petitioner must provide security covering any potential damage or other prejudice of 50,000 korunas.

Prior to beginning of the proceedings, the court may also secure evidence if there are fears that it will be impossible or very difficult to obtain it later.

In general, interim remedies are not available in support of foreign proceedings unless such measures are allowed under Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I).

iii Class actions

Due to its continental nature, the Czech civil procedure law seems to be reluctant to adopt class actions as known in US law, as they pose several major and, for the time being, unresolved procedural issues (e.g., identification of the litigants, legal force and enforcement of the judgment, costs).

However, a specific form of the collective redress is permissible in cases enumerated by law. Currently, it is possible to file such actions in matters related to unfair competition, consumer protection and transformation of commercial corporations. In these matters, the legal entities established for the protection of the interests of competitors or consumers may initiate court proceedings with the same effects.

Once such petition is filed at the court, no other third person is allowed to initiate other proceedings regarding the same claim against the same defendant based on the same subject matter (such qualification may prove difficult). Such entitled third person may join the current proceedings as an enjoined party. The final judgment issued by the court in the matter is effective also for such third person regardless of whether he or she has previously joined the proceedings or not. However, if the third person is not identified as a litigant in the judgment, the third person is not formally entitled to ask for the enforcement of the judgment under existing legal provisions. We can therefore conclude that, from a practical point of view, the current environment is not suitable for the development of this kind of collective redress.

iv Representation in proceedings

In general, unless otherwise required by law, representation by a lawyer (attorney-at-law or, in restricted scope, notary) is not compulsory incivil proceedings. Representation by an attorney-at-law is required in the case of an extraordinary appeal before the Supreme Court. Similarly, such qualified representation is required in proceedings before the Constitutional Court.

Natural persons having full legal capacity are entitled to act personally *vis-à-vis* and before a court or may be represented by an attorney with a special power given by the party. Legal entities other than natural persons are represented by their statutory body (its chairman), an employee or other authorised representative.

v Service out of the jurisdiction

The service of judicial and extra-judicial documents in civil and commercial matters within the EU Member States is governed by Council Regulation (EC) No. 1393/2007, creating a network of transmitting and receiving agencies allowing the direct service of the documents without resource to consular and other traditional diplomatic channels. The service of documents is also regulated by Regulation (EC) No. 805/2004 creating a European Enforcement Order for uncontested claims.

In other cases, the service of documents proceeds in accordance with bilateral treaties (Afghanistan, Albania, Algeria, Russia, Ukraine, states of former Yugoslavia, etc.) and multilateral treaties (e.g., the Hague Service Convention 1965), irrespective of whether a natural or legal person is served.

vi Enforcement of foreign judgments

Under Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I), which applies to judgments of the courts of Member States of the European Union, a foreign judgment will be recognised in other Member States without any special procedure being required. On the basis of Brussels I, a judgment given in a Member State and enforceable in that state shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

Reciprocity with countries outside the European Union is also ensured by a number of multilateral and bilateral treaties on legal aid and on the recognition and enforcement of judgments.

The Act on International Private Law and Procedure further provides for the recognition and enforcement of foreign judgments in the case that no international treaty which the Czech Republic is a party to is applicable. The foreign judgment shall not be recognised if reciprocity is not ensured. This rule, however, does not apply to judgments against foreign nationals or foreign legal entities.

Judgments rendered by a judicial authority of another state are enforceable in the Czech Republic if they were issued in civil matters by civil authorities. To enforce foreign judgments, all of the following pre-conditions must be fulfilled:

a the judgment must be final and its legal status must be confirmed in an affidavit issued by the competent authority of the respective state;
b the judgment must be enforceable in its state of origin; and
c the judgment must be recognised in the Czech Republic.

Judgments concerning property matters are enforceable without the requirement of any special recognition. The recognition of such judgments is decided as a prejudicial question and after that the judgment is deemed to have the same effect as it would have been given by a Czech authority.

Judgments cannot be enforced, even if the above prerequisites are met, if:

a the Czech authorities have exclusive competence in the case;

b a Czech authority has already issued a final decision in the same matter, or a final decision of an authority of a third state has already been recognised in the Czech Republic;

c the obligated party was deprived of a proper chance to participate in the procedure in which the judgment was rendered;

d the recognition of the judgment would contravene Czech public policy; or

e reciprocity between the Czech Republic and the foreign state is not evidenced.

Czech courts are not competent to review foreign judgments or their reasoning and, subject to fulfilment of the above conditions, the court must order the enforcement of the judgment to the extent to which it is requested by the entitled person if this demand is supported by the referred judgment.

Any judgment to be enforced in the Czech Republic must be officially translated.

vii Assistance to foreign courts

In order to obtain oral or documentary evidence, foreign courts may file a request for legal assistance. In relation to other EU Member States, international legal assistance is provided on the grounds of Council Regulation (EC) No. 1348/2000 on the service of judicial and extrajudicial documents in civil or commercial matters in Member States and Council Regulation (EC) No. 1206/2001 on cooperation between the courts of Member States in the taking of evidence in civil or commercial matters.

The Czech Republic is also a contractual party to the Hague Convention on Civil Procedure of 1954 and to numerous bilateral treaties on judicial assistance.

According to the Czech International Private Law, the Czech courts shall provide foreign judicial authorities with legal assistance upon their request and upon the condition of reciprocity. The legal assistance may be rejected if the requested measure violates Czech public policy. The courts shall communicate with foreign judicial authorities through the mediation of the Ministry of Justice, unless it is stipulated otherwise.

viii Access to court files

As a principle, court hearings in the Czech Republic (including the hearings in insolvency cases) are open to the public. Under certain circumstances, the public may be excluded from a hearing. Thus, the court may exclude the public if a public hearing of the case jeopardizes the secrecy of classified information protected by a special act, a trade secret, an important interest of the parties or public morality. Even if the public has not been excluded, the court may deny the access of minors or individuals where there is a danger that they might disturb the dignified course of the meeting.

The court file, which is composed of all of the briefs, documentary evidence and documents produced by the court during the proceedings, may be inspected by the parties to the respective proceedings and their legal representatives. Also, copies of the documents contained in the court file may be made. Third parties may access court records only if they are able to show a legitimate legal interest or other serious reason to

do so and if such inspection does not conflict with the legitimate interests of the parties and with protection of secret and confidential facts.

Information on the status of the proceedings, such as the date of the next hearing, issuance of a decision or the state of the proceedings, may be also found on the website of the central court database.[2]

ix Litigation funding

According to the provisions of the Civil Procedure Code, the proceedings are generally funded by the parties themselves, even if they are exempt from the payment of court fees. There are no specific rules as to litigation funding by third parties, therefore a disinterested person could provide financial support necessary for continuing the proceedings (e.g., representation and court fees). Another option is represented by a special insurance for legal costs offered by insurance companies.

On request, the court may exempt the party to proceedings or an enjoined party (and not only natural persons) from court fees. The court may also appoint a representative whose fees are covered by the state. Such exemptions have to be justified by the unfavourable financial situation of the applicant.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Attorneys-at-law are obliged to protect and enforce the rights and legitimate interests of clients and to follow their orders. The orders of clients are not binding if these are contrary to legal or professional regulations. In his practice of the legal profession, an attorney-at-law must act faithfully and with integrity.

The principal rules concerning the conflicts of interest are determined in the Act on Legal Profession and in the Code of Conduct issued by the Czech Bar Association, which is binding for the attorneys-at-law and their associates.

According to these strict rules, an attorney-at-law shall be obliged to refuse to provide legal services especially if (1) he has provided legal services in the same or a related case to someone else whose interests are contrary to the interests of the person requesting the legal services, (2) a person whose interests are contrary to the person requesting legal services has been provided legal services in the same or a related case by an attorney-at-law with whom the attorney-at-law practices law jointly, or his employer, or by attorney-at-law who is an employee of the same employer. Moreover, an attorney-at-law shall refuse to provide legal services if he possesses information on another or earlier client that may bear unlawful benefits for the person applying for the legal services, or the interests of the person requesting legal services are contrary to the interests of the attorney or a person close to the attorney.

Attorneys-at-law providing legal services jointly within a consortium or a company inform each other appropriately about legal services they provide to the extent necessary to exclude conflicts of interest. The attorney-at-law providing legal services

2 See http://infosoud.justice.cz/InfoSoud/public/search.jsp.

within a consortium or a company may not use special information to the detriment of another participant of the consortium or member, or for his own benefit or the benefit of third parties, that he obtained in connection with such provided legal services. This duty persists even after the end of his membership in the consortium or company.

Chinese walls are therefore not applicable in the Czech jurisdiction.

Lawyers are also required to keep adequate records documenting the performance of their legal services.

ii Money laundering, proceeds of crime and funds related to terrorism

Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing was implemented by Act No. 253/2008 on Certain Measures Against Money Laundering and Financing of Terrorism ('the AML Act'), which became effective as of 1 September 2008. The AML Act includes, among other things, the obligation to identify customers (for transactions of €1,000 or more), client's due diligence, identification of beneficial owners and enhanced due diligence for politically exposed persons.

Lawyers have to carry out due diligence when establishing business relationships with clients subject to the AML Act. Due diligence means:

a identifying, where applicable, the beneficial owner;

b obtaining information on the purpose and intended nature of the business relationship;

c conducting ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the lawyer's knowledge of the client, the business and risk profile and ensuring that the documents, data or information held are kept up-to-date; and

d verifying the source of the transaction funds.

An attorney-at-law must refuse any new client that refuses to undergo identification procedures.

Attorneys-at-law have to report potential suspicious transactions to the Control Committee of the Czech Bar Association. If the Committee considers the transaction suspicious, it must forward the notification to the Financial Analytical Unit of the Ministry of Finance.

Non-EU lawyers having a branch office or premises in the Czech Republic, and all EU lawyers providing their services in the Czech Republic, are subject to the AML Act to the same extent as Czech lawyers.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Attorneys-at-law are obliged to keep confidential all circumstances that they learn about in connection with the provision of legal services; this obligation may be waived only by the client or the client's legal successor and otherwise remains in force even

after an attorney is removed from the list of attorneys-at-law kept by the Czech Bar Association. This obligation may be breached in the performance of the legal duty to thwart the perpetration of a crime. The duty of confidentiality is a natural consequence of the 'privilege', protecting the persons requesting professional legal services provided by attorneys-at-law (but not the in-house lawyers). Therefore the confidentiality of the communication between the party and the attorney-at-law and of the documents in his files is protected by law. Special rules protecting confidentiality apply in the case of perquisition or other search conducted under the Criminal Procedure Code, tax or customs legislation, conducted on the premises in which the attorney-at-law practises the legal profession or where documents or other information media may be found that contain facts to which the duty of confidentiality applies.

ii Production of documents

Factual findings in civil proceedings depend on the evidence submitted by the parties. They have the burden to prove their claim or defence. The court generally does not take anything into account that is not proven by the parties.

No discovery or other pretrial exchange of documents or other forms of evidence exists in Czech litigation. Upon the request of a party, the judge may agree to conserve evidence before the commencement of the proceedings if there is a danger that the evidence will later not be presentable at all or that it will be impossible to present only with great difficulties.

The parties have no general obligation to discover any information that they have in connection with the case to the other party. However, everybody must, upon a request, inform the court fully of facts being of importance for the proceedings and decision. The court may require a party or third party to provide a document in its possession but proposed as evidence by the other party. The production of documents or information may be denied if it could result in a danger of criminal prosecution of the producing party himself or by the persons close to him; the court shall decide whether such denial was justified.

The Czech civil procedure law protects the duty of confidentiality of certain persons and ensures the protection of the confidentiality of secret information stipulated by a special act, particularly bank secrets. Namely, attorneys-at-law are under a strict duty to maintain confidentiality as regards their professional relationships with their clients. Attorneys-at-law are, therefore, required by law to invoke professional privilege, unless the client releases him or her.

VI ALTERNATIVES TO LITIGATION

i Arbitration

Arbitration is a standard dispute resolution tool in the Czech Republic.

Arbitration framework

Arbitration in the Czech Republic is governed by Act No. 216/1994 on arbitration proceedings and on the enforcement of arbitral awards ('the Arbitration Act').

The Arbitration Act regulates:

a arbitration agreements (clauses);

b appointment and exclusion of arbitrators, and their default selection criteria;

c permanent arbitration courts; and

d arbitral proceedings including the decision-making, questioning and setting aside of an arbitral award by the court, and special provisions related to international elements in arbitration proceedings.

In addition, the Czech Civil Procedure Code applies in relation to certain procedural rules in relation to arbitration. These rules apply to arbitration in the same manner as to court proceedings but it must be first determined whether a particular rule is appropriate for arbitration proceedings. For example, an arbitration award must be delivered to the parties according to the Civil Procedure Code rules relating to the delivery of documents or the parties must be notified that they have not fulfilled the burden of assertion or proof in relation to their claim or defence before a decision is rendered.

Arbitration agreement

Arbitration as an alternative dispute resolution may be used only in case the parties reach an agreement of such resolution of their disputes. Arbitration agreement may be concluded by the parties only regarding property disputes between them. There is an exception concerning disputes connected with the enforcement of a decision and those disputes provoked by insolvency in cases in which an arbitration agreement could not be concluded. Further, an arbitration agreement cannot be validly concluded if the dispute between the parties cannot be resolved by a judicial settlement under the Civil Procedure Code.

Arbitration agreements must be concluded in writing. The agreement is also considered as being concluded in writing if it has been concluded by telegraph, fax or electronic means that enable the recording of their content and the determination of the persons who concluded the arbitration agreement. Arbitration agreements are binding on the legal successors if such effects are not excluded in the agreement.

Arbitration agreements shall also be found to be valid when included as a part of the terms governing the basic agreement, if a written offer to conclude the agreement including the arbitration clause was accepted by the other party in a manner that its consent to the content of the arbitration agreement obviously follows.

Arbitrators

Arbitration agreements should usually determine the number and the names of the arbitrators or at least stipulate the way the number and persons of the arbitrators are to be determined. The number of the arbitrators must be an odd number. In the event that the arbitration agreement does not determine so, each party shall appoint one arbitrator and these arbitrators shall elect the presiding arbitrator. If a party entitled to appoint an arbitrator fails to do so within 30 days from the delivery of the other party's request to do so, or if the appointed arbitrators are not able to agree on the presiding arbitrator within the same time period, the arbitrator or presiding arbitrator shall be appointed by the court unless the parties have agreed otherwise. Such application to the court may be filed by any party or by any of the appointed arbitrators.

In the case that the parties have agreed on the competence of a permanent court of arbitration and have not agreed otherwise in the arbitration agreement, they are considered to have submitted to the arbitration rules of the chosen court of arbitration. These arbitration rules may determine the way to appoint the arbitrators, their number and may stipulate that arbitrator may only be chosen from a list of arbitrators kept with the respective court of arbitration.

The appointed arbitrator may be challenged if there are justifiable doubts as to his or her impartiality and the arbitrator does not resign voluntarily. The challenge procedure may be agreed between the parties or each of the parties may petition the court to remove the arbitrator from the proceedings.

Arbitration rules

The Arbitration Act respects the overriding principle of the autonomy of the parties to select the rules of arbitration. Also, the presiding arbitrator may decide the procedural issues if he or she was empowered thereto by the parties or by all other arbitrators. If such rules are missing, the arbitrators shall conduct the arbitration in such manner as they consider appropriate and shall proceed in a manner they consider suitable for finding out, without useless formalities, a factual basis necessary for deciding on the case. The parties shall have equal opportunities for asserting their rights in the proceedings. The arbitrators are bound by mandatory provisions as to the commencement of an arbitration, the decision-making process regarding arbitrators' jurisdiction to hear the case and the formalities of the arbitration award and its issuance. The proceedings shall be oral and shall not be public, unless the parties agree otherwise. The arbitrators may examine witnesses, experts and parties only if they voluntarily appear and bear their testimony. Also, other evidence may be examined only if it has been granted to the arbitrators.

Unless the Arbitration Act stipulates otherwise, the provisions of the Czech Civil Procedure Code apply to the arbitration proceedings appropriately.

Arbitration and the general courts

The general courts may intervene in arbitration proceedings in various situations. The courts have, namely, the following competencies:

a to appoint the arbitrator or presiding arbitrator or, as the case may be, a new arbitrator;
b to decide on the challenge of the appointed arbitrator;
c to examine evidence and other procedural acts that the court is asked to undertake and that the arbitrators are unable to carry out themselves;
d to review the validity, existence and extent of the arbitration agreement under the respective provisions of the Civil Procedure Code;
e to exercise the custody of the arbitral awards;
f to set aside the arbitral award for statutory reasons; and
g to suspend enforceability of the arbitral award; etc.

The arbitrators do not have powers to grant any form of interim or conservatory relief. Such relief may be issued and enforced by civil courts if it is revealed during the proceedings or even before its commencement that the enforcement of the arbitral award

could be jeopardised, the court may order a preliminary measure upon the request of any of the parties.

Arbitral award

Czech law stipulates no time limit for the delivery of an arbitral award. It must be approved by the majority of arbitrators, made in writing and signed by at least the majority of arbitrators. The verdict of the arbitral award must be definite. Arbitral awards must contain the reasoning unless the parties have agreed that no reasoning is necessary. The arbitral award shall be delivered to the parties in writing. After the delivery to the parties, there shall be a clause proving that the award has become final and conclusive affixed to it. An arbitral award that cannot be reviewed by other arbitrators or since the period for submission of a request for such revision has expired, shall acquire the same effects as the final and conclusive judgment of a court and shall be judicially enforceable as of the date of its delivery.

Appeal and other challenges of the arbitral award

A delivered arbitral award is final and conclusive. However, the arbitration agreement may stipulate that the arbitral award may be reviewed by other arbitrators upon the request of any or both parties. Unless the arbitration agreement stipulates otherwise, the request for review shall be delivered to the other party within 30 days from the day of the delivery of the arbitral award to the requesting party. The revision of the arbitral award shall be a part of the arbitration proceedings and shall be regulated by provisions of the Arbitration Act.

An arbitral award may be set aside by the court upon the request of any of the parties if:

a no arbitration agreement could have been validly concluded in the matter in question;

b the arbitration agreement is null and void for other reasons; it was cancelled or does not apply to the matter in question;

c the arbitrator who took part in the case was not appointed to decide on the case on the basis of the arbitration agreement or otherwise or was not capable of becoming an arbitrator;

d the arbitral award was not approved by the majority of arbitrators;

e the party was not provided with the possibility to hear the case before the arbitrators;

f the arbitral award orders the party to execute a performance that was not requested by the entitled party or that is impossible or unlawful under the Czech law; or

g it is established that reasons for a retrial in the civil proceedings are given in the case (such as new evidence).

The request for the setting aside of an arbitral award must be filed within three months from the delivery of the arbitral award. Such request shall not suspend the enforceability of the arbitral award. However, the court may, upon the request of the obligated party, suspend the enforceability of the arbitral award if an immediate enforcement of the arbitral award could result in a considerable infringement to this party.

Enforceability

A final and conclusive award is enforceable in the same manner as a judicial decision issued by a civil court (see *supra*).

Enforcement of foreign awards is governed by international multilateral and bilateral treaties and the respective provisions of the Arbitration Act.

The recognition and enforcement of foreign arbitral awards shall be granted particularly in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The provisions of other international treaties on the recognition and enforcement of arbitral awards, to which the Czech Republic is a party, shall remain unaffected.

The Arbitration Act shall apply only in the case that no international treaty binding for the Czech Republic regulates the respective issue. Under the provisions of this act, foreign arbitral awards shall be recognised and enforced in the same way as Czech arbitral awards upon the requirement of reciprocity. The requirement of reciprocity shall be considered guaranteed also if the foreign state generally declares foreign arbitral awards enforceable upon the requirement of reciprocity. The writ of enforcement of foreign arbitral award shall always contain its reasoning.

Arbitral institutions

The most reputable arbitration institution in the Czech Republic is the Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic (Arbitration Court) (www.arbcourt.cz), which is a statutory institutional arbitral body. Other arbitration courts established by law are the Exchange Court of Arbitration at the Prague Stock Exchange (www.pse.cz) and Arbitration Court attached to the Czech-Moravian Commodity Exchange Kladno (www.rozhodcisoud.cz).

ii Mediation

Mediation is selectively governed by legislation without a comprehensive framework setting out the general outlines for mediation. There is an initiative to prepare a statutory framework for mediation by a special act but no such act has entered into force yet.

Act No. 257/2000 on Probation and Mediation Services governs the resolution of conflicts in a specified area of criminal offences. Certain rules for mediation are provided also in the Civil Procedure Code. The courts have general obligation to seek amiable resolution of the disputes between the parties. Even if the court has the duty to attempt an amicable settlement between the litigating parties, the parties cannot be forced to participate in such process. A judicial settlement having force of a judgment can be also rendered. In family law, the court may discontinue the proceedings for three months and invite the parties to pursue a mediation or family therapy.

There is also an initiative of the Ministry of Industry and Trade, Consumer associations and Economic Chambers to use alternative dispute resolution ('ADR') and mediation techniques in consumer disputes.

iv Other forms of alternative dispute resolution

The following types of ADR process are commonly used:

a mediation;
b conciliation;
c renegotiation;
d expert intervention; and
e mini-trial (in commercial relationships).

Parties that wish to use any type of ADR procedure may enter into an innominate agreement in which they stipulate at least a minimum procedural framework of a chosen type of ADR procedure. The essential characteristic of ADR is that it is voluntary (enabling the parties to withdraw from the ADR procedure in any case). The results of ADR are not enforceable unless the parties agree to conclude an agreement on the settlement in the form of a notarial deed and agree on its direct enforceability. Mediation and other ADR procedures are not institutionalised and, therefore, accepted rather cautiously.

VII OUTLOOK & CONCLUSIONS

2009 and 2010 may be considered as another transition or testing period for newly adopted legislation (amendments to the Civil Procedure Code, Insolvency Act, Public Procurement Act, and the new Criminal Code). Although the improvements are apparent, further modifications will be necessary in the future (e.g., to limit the abuses of the insolvency proceedings used to solve ordinary disputes between business partners).

Appendix 1

ABOUT THE AUTHORS

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Jan Tomaier is a partner at Tomaier & Tomaierová, Law Firm. Jan specialises in litigation and arbitration, construction law, insolvency and restructuring and public investments, antitrust and competition. Jan co-counselled prominent Czech investors in the energy industry against multinational companies in *ad hoc* arbitration proceedings under UNCITRAL Rules regarding the breach of a shareholder agreement (the value of the dispute exceeded €800 million). Jan also represented a subsidiary from an international holding group against an international construction company in a commercial arbitration in which the value of the dispute was approximately €31.8 million.

Jan was educated at Charles University, Faculty of Law, graduating in 2004. In 2003, Jan acquired a diploma of Université Panthéon-Assas Paris 2 after having passed the course 'Introduction au Droit Français'. Jan Tomaier speaks Czech, English and French.

Jan Tomaier is a recommended lawyer for the area of litigation (*Chambers Global*, 2010: 'Jan Tomaier has made an impact with his conscientious and positive approach: "He takes all the facts and risks into account and impresses with his detailed arguments." ')

MATÚŠ HANULIAK

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Matúš Hanuliak joined Tomaier & Tomaierová, Law Firm as an associate in 2010, having served as an in-house counsel (from 2002) and a member of the supervisory board (from 2007) in Czech subsidiary of Renault, advising principally on competition, public procurement and insolvency issues in the Czech Republic and Slovakia. He is a graduate from Charles University, Faculty of Law, and has also obtained a second-degree diploma in French and European commercial law (Université Toulouse 1 Capitole) and a superior diploma in French law (Université Panthéon-Assas Paris 2). Mr Hanuliak speaks Slovak, French, English and Czech.

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