The Dispute Resolution Review

Fourth Edition

Editor

Richard Clark

Law Business Research

The Dispute Resolution Review

THE DISPUTE RESOLUTION REVIEW

Fourth Edition

Editor
Richard Clark

Law Business Research Ltd

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

MARKETING MANAGERS
Nick Barette, Katherine Jablonowska

MARKETING ASSISTANT
Robin Andrews

EDITORIAL ASSISTANT
Lydia Gerges

PRODUCTION MANAGER
Adam Myers

PRODUCTION EDITOR
Anne Borthwick

SUBEDITOR
Charlotte Stretch

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN: 978-1-907606-28-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 870 897 3239

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AFRIDI & ANGELL

APPLEBY

APPLEBY (CAYMAN) LTD

APPLEBY (ISLE OF MAN) LLC

ARTHUR COX

ASHTAR ALI & CO, ADVOCATES AND CORPORATE CONSULTANTS

ASHURST AUSTRALIA

ASTERS

BONELLI EREDE PAPPALARDO

BREDIN PRAT

BUFETE HERNÁNDEZ-ROMO

BUGGE, ARENTZ-HANSEN & RASMUSSEN (BA-HR)

CRAVATH, SWAINE & MOORE LLP

CROCI, SILVA & CAJINA ABOGADOS

DE BRAUW BLACKSTONE WESTBROEK

DITTMAR & INDRENIUS

ELVINGER, HOSS & PRUSSEN

FONTES & TARSO RIBEIRO ADVOGADOS

FULBRIGHT & JAWORSKI LLP IN ASSOCIATION WITH MOHAMMED AL-GHAMDI LAW FIRM

HENGELER MUELLER

HERGÜNER BILGEN ÖZEKE ATTORNEY PARTNERSHIP

HOET PELÁEZ CASTILLO & DUQUE

HOMBURGER

HUTABARAT HALIM & REKAN

JUN HE LAW OFFICES

K&L GATES LLP

KBH KAANUUN LIMITED

LANSKY, GANZGER & PARTNER (LGP)

ŁASZCZUK & PARTNERS

LOGAN SABAPATHY & CO

LOYENS & LOEFF

MANNHEIMER SWARTLING ADVOKATBYRÅ AB

MARVAL, O'FARRELL & MAIRAL

MCGRIGORS

MOTIEKA & AUDZEVIČIUS

NISHIMURA & ASAHI

OXFORD & BEAUMONT SOLICITORS

PELLEGRINI & URRUTIA

POTAMITISVEKRIS

QUEVEDO & PONCE

RUDOLPH, BERNSTEIN & ASSOCIATES INC

SCHRECK LAW OFFICES

SLAUGHTER AND MAY

SOFUNDE, OSAKWE, OGUNDIPE & BELGORE

SZECSKAY ATTORNEYS AT LAW

TASSOS PAPADOPOULOS & ASSOCIATES LLC

TOMAIER LEGAL ADVOKÁTNÍ KANCELÁŘ S.R.O.

TSMP LAW CORPORATION

ȚUCA ZBÂRCEA & ASOCIAȚII

URÍA MENÉNDEZ

URÍA MENÉNDEZ – PROENÇA DE CARVALHO

CONTENTS

EDITOR'S PREFACE

Richard Clark

Following the success of the first three editions of this work, the fourth edition now extends to some 56 jurisdictions and we are fortunate, once again, to have the benefit of incisive views and commentary from a distinguished legal practitioner in each jurisdiction. Each chapter has been extensively updated to reflect recent events and provide a snapshot of key developments expected in 2012.

As foreshadowed in the preface to the previous editions, the fallout from the credit crunch and the ensuing new world economic order has accelerated the political will for greater international consistency, accountability and solidarity between states. Governments' increasing emphasis on national and cross-border regulation – particularly in the financial sector – has contributed to the proliferation of legislation and, while some regulators have gained more freedom through extra powers and duties, others have disappeared or had their powers limited. This in turn has sparked growth in the number of disputes as regulators and the regulated take their first steps in the new environment in which they find themselves. As is often the case, the challenge facing the practitioner is to keep abreast of the rapidly evolving legal landscape and fashion his or her practice to the needs of his or her client to ensure that he or she remains effective, competitive and highly responsive to client objectives while maintaining quality.

The challenging economic climate of the last few years has also led clients to look increasingly outside the traditional methods of settling disputes and consider more carefully whether the alternative methods outlined in each chapter in this book may offer a more economical solution. This trend is, in part, responsible for the decisions by some governments and non-governmental bodies to invest in new centres for alternative dispute resolution, particularly in emerging markets across Eastern Europe and in the Middle East and Asia.

The past year has once again seen a steady stream of work in the areas of insurance, tax, pensions and regulatory disputes. Some insolvency and employment practitioners have had busy years with the fallout from the credit crunch beginning to trickle down into the wider economy. At the time of writing, dark clouds hang over the EU in

particular as the Member States strive to save the euro from collapse and prepare for a period of uncertainty and challenging circumstances. It is too early to tell what, if any, fundamental changes will occur in the region or to the single currency, but it is clear that the current climate has the potential to change the political and legal landscape across the EU for the foreseeable future and that businesses will be more reliant on their legal advisors than ever before to provide timely, effective and high-quality legal advice to help steer them through the uncertain times ahead.

Richard Clark

Slaughter and May
London
March 2012

Chapter 13

CZECH REPUBLIC

Jan Tomaier and Matúš Hanuliak[1]

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 over-generalisation, 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 decisions of the general courts 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 EU in 2004, European law, constitute an integral part of the legal order.

The core of the codes currently in effect (the Civil Code, the Commercial Code and the Civil Procedure Code ('the CPC')) 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 recent legislation (e.g., the Insolvency Act is based chiefly on US legislation).

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

1 Jan Tomaier is a partner and Matúš Hanuliak is an associate at Tomaier Legal advokátní kancelář s.r.o.

After several postponements, the bills were approved by the Chamber of Deputies (the lower house of the Parliament) in November 2011. If the bills are finally passed, the new codes shall enter into force on 1 January 2014.

On the contrary, the CPC 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.

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 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 and commercial relationships and other legal matters specifically provided for by substantive law. 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 CPC, 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. 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 and regional courts. Appeals are heard before a panel (senate) that consists of two judges and one presiding judge. 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, some 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 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. In order to clarify certain issues and prevent abuses related to the arbitration clauses in B2C contracts, the legislator was recently forced to modify the Arbitration Act (see *infra*).

II THE YEAR IN REVIEW

In 2011, a number of modifications have occurred in the field of dispute resolution or related to it.

Henceforth, parties to civil proceedings should take into consideration the substantial increase in court fees. Not only have the fees themselves been raised, but the maximum amount of the court fee has also been increased from 1 million to 2 million korunas. Moreover, in the case of actions for payment (which are the most common ones), the maximum amount of the court fee has been more than quadrupled to 4.1 million korunas if the claimed amount is 250 million korunas or higher.

As from 2012, due to the expiration of the 2009 'anti-crisis' amendment to the Insolvency Act, substantive change also relates to insolvency legislation. The debtor (legal entity or natural person – entrepreneur) shall file an insolvency petition not only in cases of insolvency (cash flow test), but also in cases of over-indebtedness (balance sheet test). In other words, debtors shall initiate the insolvency proceedings not only in the event of their inability to satisfy their due payment obligations, but newly also in the event that the market value of their company's assets slides below the total amount of all the debtor's liabilities. It should be noted that the management of companies is personally liable for damage caused to creditors by the belated or missing submission of an insolvency petition.

In addition, it should be noticed that as from 2012, criminal liability of legal entities has been introduced, as an absolute novelty, in the Czech legal system. Therefore, subject to statutory provisions, a legal entity (including foreign corporations) shall be held criminally liable for certain 'listed' crimes committed on its behalf, in its interest or within the scope of its business, when performed by a statutory body or its member, or any other person authorised to act for or on behalf of the legal entity (e.g., an employee fulfilling its job duties) or exercising controlling power or influence over the management of the entity. The list of these crimes includes insurance and credit frauds, fiscal crimes, bid rigging, money laundering, corruption, environmental crimes and participation in a criminal organisation. The penal sanctions include pecuniary punishment, forfeiture of property, prohibition to undertake professional activities or perform public contracts and even, in cases of Czech legal persons, judicial winding-up.

Finally, several modifications of the Arbitration Act will enter into force in the spring of 2012 and an Act on Mediation, currently being discussed in the Parliament, is also expected to enter into force in 2012 (see *infra*).

III COURT PROCEDURE

i Overview of court procedure

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

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 emanates from the proceedings. The judge can also examine the witnesses and usually does that.

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

ii Procedures and time frames

There are no compulsory steps that a party must take before initiating 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. If a settlement is reached and confirmed by the court, it is enforceable as a binding decision.

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 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 (prescription) 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 continues 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, on 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 the

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.[2]

Once the proceedings have been initiated, the court shall act, even without subsequent motions, to consider and adjudicate the case as expeditiously as possible 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 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 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 a single hearing. For that purpose, the chairperson of the panel will call the defendant to make a written defence. The court may impose upon the defendant a duty to make a written defence in certain cases and 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 also applies, with certain exceptions, 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 than or more than what was demanded by them.

2 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.

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 jeopardised. 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 other 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, 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 in civil 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 chairperson), 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 (with 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 event that no international treaty to which the Czech Republic is a party 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 preconditions 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 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 jeopardises 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.[3]

ix Litigation funding

According to the provisions of the CPC, 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 or her practice of the legal profession, an attorney-at-law must act faithfully and with integrity.

The principal rules concerning 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 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 he or she 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; or 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 or her employer, or by an attorney-at-law who is an employee of the same employer. Moreover, an attorney-at-law shall refuse to provide legal services if he or she 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 must 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 within

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

a consortium or a company may not use special information to the detriment of another participant of the consortium or member, or for his or her own benefit or the benefit of third parties, that he or she obtained in connection with such provided legal services. This duty persists even after the end of his or her 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'). The AML Act includes an 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. According to the Czech Bar Association, no such case has occurred so far. The effect of this procedure seems therefore to be more political than practical.

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 in-house lawyers). Therefore, the confidentiality of the communication between the party and the attorney-at-law and of the documents in his or her 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 exist 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 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 him or herself or by the persons close to him or her; the court shall decide whether such denial was justified.

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.

Unless otherwise provided by the Arbitration Act, the provisions of the CPC apply to the arbitration proceedings appropriately. Thus, for example, an arbitration award must be delivered to the parties according to CPC 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 cases where the parties reach an agreement of such resolution of their disputes. An arbitration agreement may be concluded by the parties only regarding property disputes between them, except for disputes connected with the enforcement of a decision and those disputes provoked by insolvency. Furthermore, an arbitration agreement cannot be validly concluded if the dispute between the parties cannot be resolved by a judicial settlement under the CPC.

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. However, pursuant to the new legislation, in the case of B2C contracts, a separate arbitration agreement (i.e., an agreement not included in the general terms governing the contract itself) is strictly required, specifying also the competent permanent court of arbitration or an arbitrator registered in the list to be maintained by the Ministry of Justice. These and several other modifications are intended to provide a more adequate protection of the consumer in the arbitration proceedings.

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 is to be determined. There must be an odd number of arbitrators. 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 event 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 and 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 arbitration, the decision-making process regarding the 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. In addition, other evidence may be examined only if it has been granted to the arbitrators.

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 CPC;
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, and the court may order a preliminary measure upon the request of any of the parties.

Arbitral award

Czech law does not specify a 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 be reasoned unless the parties have agreed that no reasoning is necessary (however, the arbitral award in B2C disputes must always be reasoned). 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, 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).

Pursuant to the recent legislative changes, the request for setting aside an arbitral award may also be based on the principles of consumer protection.

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 (or, in B2C disputes under the new legislation, even without such a

request), 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 the 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 the Arbitration Court attached to the Czech-Moravian Commodity Exchange Kladno (www.rozhodcisoud.cz).

ii Mediation

Despite the fact that the deadline for implementation of Directive No. 2008/52/EC on certain aspects of mediation in civil and commercial matters (applicable on cross-border disputes) has already expired (in May 2011), mediation is so far only selectively governed by the Czech legislation, without any comprehensive framework defining the general outlines for mediation in non-criminal matters. A statutory framework for mediation ('the Mediation Act') has, however, been presented to the Parliament; if approved, it could enter into force in 2012. Mediation, as proposed in the government Act, could be defined as a dispute resolution method involving at least one registered mediator supporting communication between the parties in order to facilitate the fast and cost-saving conclusion of an agreement. In principle, the mediation is initiated and proceeds on a strictly voluntary basis in accordance with the conditions stipulated between the parties and the mediator (or mediators). The mediation does not exclude the commencement or continuation of the judicial proceedings. If the court considers it useful, it could stay its proceedings for up to three months and refer the parties to a registered mediator (who, in

this special case, has simultaneously to be an attorney-at-law) selected by themselves or, if this is not possible, by the court. These provisions correspond with the general obligation of the courts to seek the amiable resolution of disputes between 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 the force of a judgment can be also rendered.

Act No. 257/2000 on Probation and Mediation Services governs the resolution of conflicts in a specified area of criminal offences.

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.

iii Other forms of alternative dispute resolution

The following types of ADR process are commonly used:

a mediation (see *supra*);
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 AND CONCLUSIONS

Recent and expected legislative modifications in the field of dispute resolution are justified by the necessity to increase the effectiveness of the Czech judicial system, which is still not satisfactory. Therefore, the rise in court fees and several other changes (e.g., the announced reform of the extraordinary appeal) are intended to reduce the workload of the general courts of all instances. Improvements made to ADR (i.e., clarification of the arbitration agreement in B2C relationships, the introduction of mediation as a general method of dispute resolution), which could, henceforth, be more frequently used in non-commercial matters, have the same goal. The year 2012 shall therefore represent an important testing period for the newly adopted legislation.

Appendix 1

ABOUT THE AUTHORS

JAN TOMAIER

Tomaier Legal advokátní kancelář s.r.o.

Jan Tomaier is a partner at Tomaier Legal advokátní kancelář s.r.o. 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's 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

Tomaier Legal advokátní kancelář s.r.o.

Matúš Hanuliak is an associate at Tomaier Legal advokátní kancelář s.r.o., having previously served as an associate at Tomaier & Tomaierová, law firm (from 2010). He started his legal career as an in-house counsel (from 2002) and a member of the supervisory board (from 2007) of the Czech subsidiary of Renault, advising principally on competition, public procurement and insolvency issues in the Czech Republic, Slovakia and Hungary. He is a graduate from Charles University's Faculty of Law, and has also obtained a second-degree diploma in French and European business 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.

TOMAIER LEGAL ADVOKÁTNÍ KANCELÁŘ S.R.O.
Jankovcova 1037/49
170 00 Prague 7
Czech Republic
Tel: +420 224 217 777
Fax: +420 224 217 777
office@tomaierlegal.cz
www.tomaierlegal.cz