

---

THE  
INTERNATIONAL  
ARBITRATION  
REVIEW

---

EDITOR  
JAMES H CARTER

LAW BUSINESS RESEARCH

# THE INTERNATIONAL ARBITRATION REVIEW

---

Reproduced with permission from Law Business Research Ltd.

This article was first published in *The International Arbitration Review*,  
1st edition (published in July 2010 – editor James H Carter).

For further information please email [Adam.Sargent@lbresearch.com](mailto:Adam.Sargent@lbresearch.com)

THE  
INTERNATIONAL  
ARBITRATION  
REVIEW

---

Editor  
JAMES H CARTER

LAW BUSINESS RESEARCH LTD

PUBLISHER  
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER  
Adam Sargent

MARKETING ASSISTANT  
Hannah Thwaites

EDITORIAL ASSISTANT  
Nina Nowak

PRODUCTION MANAGER  
Adam Myers

PRODUCTION EDITOR  
Joanne Morley

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  
© 2010 Law Business Research Ltd

© Copyright in individual chapters vests with the contributors  
No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of June 2010, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – [gideon.roberton@lbresearch.com](mailto:gideon.roberton@lbresearch.com)

ISBN 978-1-907606-07-6

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:

ABASCAL, SEGOVIA & ASOCIADOS

ALLEN & OVERY LLP

ANWALTSBÜRO WIEBECKE

BURNET, DUCKWORTH & PALMER LLP

COŞAR AVUKATLIK BÜROSU

DEACONS

FRANK ADVOKATBYRÅ AB

GÓMEZ-ACEBO & POMBO ABOGADOS

HARASIĆ Y LÓPEZ

HERBERT SMITH

JSA

KAMILAH & CHONG

L.O. BAPTISTA ADVOGADOS

MACLEOD DIXON

MARVAL, O' FARRELL & MAIRAL

MOTIEKA & AUDZEVICIUS

MULLA & MULLA & CRAIGIE BLUNT & CAROEO

PROFESSOR HILMAR RAESCHKE-KESSLER

RAJAH & TANN LLP

RUDOLPH, BERNSTEIN & ASSOCIATES

SALANS LLP

SHIN & KIM

SOFUNDE, OSAKWE, OGUNDIPE & BELGORE

SULLIVAN & CROMWELL LLP

SZECSKAY ATTORNEYS AT LAW

WHITE & CASE W DANIŁOWICZ, W JURCEWICZ I WSPÓLNICY  
– KANCELARIA PRAWNA SPK

# CONTENTS

---

<b>Editor's Preface</b> .....	vii
<i>James H Carter</i>	
<b>Chapter 1</b> ARGENTINA .....	1
<i>Alberto DQ Molinario and Maria Laura Velazco</i>	
<b>Chapter 2</b> BRAZIL .....	13
<i>Luiz Olavo Baptista and Mariana Cattel Gomes Alves</i>	
<b>Chapter 3</b> CANADA .....	31
<i>David R Haigh QC, Louise Novinger Grant, Sonya Morgan and Romeo Rojas</i>	
<b>Chapter 4</b> CHILE .....	48
<i>Davor Harasic and Karina Cherro</i>	
<b>Chapter 5</b> CHINA .....	58
<i>Brenda Horrigan, Felix Hess and Siew Lin Mok</i>	
<b>Chapter 6</b> CZECH REPUBLIC .....	70
<i>Juraj Alexander</i>	
<b>Chapter 7</b> ENGLAND & WALES .....	79
<i>Stephen Jagusch and Andrew Pullen</i>	
<b>Chapter 8</b> FRANCE .....	98
<i>Jean-Christophe Honlet, Barton Legum and Anne-Sophie Dufêtre</i>	
<b>Chapter 9</b> GERMANY .....	106
<i>Hilmar Raeschke-Kessler</i>	
<b>Chapter 10</b> HONG KONG .....	117
<i>Joseph Kwan and Kwok Kit Cheung</i>	
<b>Chapter 11</b> HUNGARY .....	127
<i>András Szecskay and György Wellmann Jr</i>	
<b>Chapter 12</b> INDIA .....	136
<i>Shardul Thacker and Siddharth Thacker</i>	

<b>Chapter 13</b>	JAPAN.....	147
	<i>Peter Godwin and Raelene Leonard</i>	
<b>Chapter 14</b>	KAZAKHSTAN.....	157
	<i>Aigoul Kenjebayeva and Yuliya Mitrofanskaya</i>	
<b>Chapter 15</b>	KOREA.....	165
	<i>Benjamin Hughes and Beomsu Kim</i>	
<b>Chapter 16</b>	LITHUANIA.....	175
	<i>Ramunas Audzevicius, Tomas Samulevicius and Mantas Juozaitis</i>	
<b>Chapter 17</b>	MALAYSIA.....	183
	<i>Chong Yee Leong</i>	
<b>Chapter 18</b>	MEXICO.....	194
	<i>Jose Maria Abascal</i>	
<b>Chapter 19</b>	NIGERIA.....	205
	<i>Babajide Ogundipe and Lateef Omoyemi Akangbe</i>	
<b>Chapter 20</b>	POLAND.....	208
	<i>Witold Jurciewicz and Arkadiusz Korzeniowski</i>	
<b>Chapter 21</b>	ROMANIA.....	218
	<i>Tiberiu Csaki</i>	
<b>Chapter 22</b>	RUSSIA.....	226
	<i>Mikhail Ivanov and Anna Zbukova</i>	
<b>Chapter 23</b>	SINGAPORE.....	236
	<i>Chong Yee Leong</i>	
<b>Chapter 24</b>	SOUTH AFRICA.....	249
	<i>Gerhard Rudolph, Darryl Bernstein and Michelle Wright</i>	
<b>Chapter 25</b>	SPAIN.....	260
	<i>Diego Saavedra and Guillermo Bayas</i>	
<b>Chapter 26</b>	SWEDEN.....	271
	<i>Hans Bagner</i>	
<b>Chapter 27</b>	SWITZERLAND.....	282
	<i>Martin Wiebecke</i>	
<b>Chapter 28</b>	TURKEY.....	294
	<i>Gulay Aydin, Margaret Ryan and Simge Ugur</i>	

<b>Chapter 29</b>	UNITED ARAB EMIRATES ..... 303 <i>Kaashif Basit</i>
<b>Chapter 30</b>	UNITED STATES ..... 312 <i>James H Carter and Joseph E Neuhaus</i>
<b>Chapter 31</b>	VENEZUELA ..... 331 <i>Ramón J Alvins, Elisabeth Eljuri and Clovis Treviño</i>
<b>Appendix 1</b>	ABOUT THE AUTHORS ..... 346
<b>Appendix 2</b>	CONTRIBUTING LAW FIRMS' CONTACT DETAILS ..... 365

## EDITOR'S PREFACE

---

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more lawyer hours of reading than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. But there is a niche to be filled for analytic review of what has occurred in each of the important arbitration jurisdictions over the past 18 months, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

**James H Carter**  
Sullivan & Cromwell LLP  
New York  
June 2010

## Chapter 6

---

# CZECH REPUBLIC

*Juraj Alexander\**

### I INTRODUCTION

In the Czech Republic, arbitration has long been recognised as a relevant means of resolving international commercial disputes. In 1995, a new law<sup>1</sup> enabled domestic disputes to be resolved by arbitration as well and since then, arbitration has become a common dispute resolution mechanism. Before 1989, under the communist regime, a state-controlled institutional dispute resolution mechanism for state-owned enterprises was also included under the name ‘economic arbitration’, but this did not have much in common with arbitration in western countries.

Today, Czech courts generally acknowledge arbitration agreements. The courts refrain from hearing disputes where the parties have agreed to an arbitration agreement<sup>2</sup> and enforce arbitral awards unless there is a genuine reason not to do so.

The Czech Republic is a civil law country. The Arbitration Act adopted in 1994 is a special piece of legislation regulating domestic arbitration proceedings, as well as international arbitrations where no international convention applies. This statute sets out the scope of disputes that may be submitted to arbitration, the requirements for arbitration agreements, the institutional requirements for permanent arbitration courts, certain procedural rules for arbitration and the conditions for enforcement of arbitral awards and challenges to arbitral awards.

---

\* Juraj Alexander is a senior associate at Salans LLP.

1 Act No. 216/1994 Coll., on arbitration and enforcement of arbitral awards, as amended (‘the Arbitration Act’).

2 By arbitration agreement we understand a separate agreement on submission of a dispute (future or already existing) to arbitration as well as an arbitration clause.

The Czech Republic is a party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards<sup>3</sup> and also to the European Convention on International Commercial Arbitration.<sup>4</sup> Although the basic rules applicable to international and domestic arbitrations are similar in substance, they differ as to their legislative source.

The Czech judiciary is organised into two separate branches: administrative and general courts. General courts hear civil, criminal and commercial disputes, while administrative courts hear complaints against decisions of public administrations and some other public institutions. General courts are organised into four levels: (1) district courts hearing in the first instance most non-commercial disputes, including most disputes related to real property, (2) regional courts hearing appeals from district courts and most commercial disputes in the first instance, (3) high courts hearing appeals from regional courts and (4) the Supreme Court hearing extraordinary appeals from regional and high courts. Administrative courts of first instance are organised as a separate division of the regional courts and any appeals are heard by the Supreme Administrative Courts. Decisions rendered by both Supreme Courts can be challenged before the Constitutional Court in a case of infringement of constitutional rights.

Any challenges to the arbitration agreement or any other issues that have to be decided by a general court during an arbitration are brought before the court that would normally hear the dispute if there was no arbitration agreement (i.e., the respective district or regional court).

*i Arbitrability and arbitration agreements*

The Czech Arbitration Act limits the scope of disputes that may be resolved through arbitration. This limitation also applies to international disputes.<sup>5</sup> This is an important element of the Czech law, as Czech courts will refuse enforcement of any (including foreign) arbitral award issued in a dispute that Czech law considers as being non-arbitrable.

Generally, a dispute is arbitrable if (1) it involves property rights, (2) the parties would be free to settle the dispute, (3) a Czech court would normally have jurisdiction to hear the dispute except for the arbitration agreement and, surprisingly, (4) no public health-care centre established by law is involved.

The first condition (property rights) led to discussion as to whether declaratory actions could be resolved by arbitration,<sup>6</sup> but the Supreme Court clarified the situation

---

3 Signed by the former Czechoslovak Republic on 10 June 1958, enforceable in former Czechoslovakia since 10 October 1959, published under No. 74/1959 Coll. ('the New York Convention').

4 Signed by the former Czechoslovak Republic on 21 April 1961, enforceable in former Czechoslovakia since 11 February 1964, published under No. 176/1964 Coll. ('the European Convention').

5 Arbitration Act, Section 36(1); New York Convention, Article V(2)(a).

6 See e.g., High Court in Prague, 19 January 2005, File No. 7 Cmo 28/2004, as quoted in the decision of the Supreme Court, File No. 29 Odo 870/2005.

by ruling that arbitral tribunals may issue declaratory judgments.<sup>7</sup> For a long time, discussions have been held regarding the arbitrability of disputes relating to title and other rights *in rem* in respect of real estate, but currently there seems to be a consensus among the relevant authorities that such disputes can be submitted to arbitration.

The second condition (possibility of settlement) leads to the exclusion of certain disputes involving personal status, both in case of natural persons and legal entities (i.e., disputes relating to the validity of the appointment of the directors of a company). Until June 2008, some disputes relating to mergers could, by explicit statutory authorisation, be resolved through arbitration, but a new Act on Transformations of Companies removed this possibility.<sup>8</sup>

The third condition (jurisdiction of Czech courts) is relevant only with respect to some specific disputes (such as certain disputes in the area of telecommunications), which under Czech law have to be heard by administrative agencies instead of courts.

Czech law generally follows the *Kompetenz-Kompetenz* principle by allowing the arbitrators to decide on their own jurisdiction.<sup>9</sup> However, if a party raises an objection to the jurisdiction of the arbitral tribunal, the decision of the tribunal on such objection may be later subject to the review of a general court. If a party does not raise any objection to the jurisdiction of the tribunal, it is precluded from subsequently challenging the tribunal's jurisdiction.

If the arbitration takes place in the Czech Republic, the law applicable to decide the validity of the arbitration agreement differs depending on whether the European Convention applies or not. If the Convention applies, which is generally the case regarding international trade issues, a Czech court will review the validity of the arbitration agreement (except issues related to the parties' capacity) under the law applicable to the arbitration agreement.<sup>10</sup> Where the Convention does not apply, a Czech court will review any issues related to the validity of the clause under Czech law. Otherwise, if the arbitration takes place outside the Czech Republic, the law applicable to the arbitration agreement will generally be applied.

With respect to the form of the arbitration agreement (written or electronic), compliance with the rules applicable at the place where the parties have expressed their consent to the arbitration agreement is in any case sufficient. This is quite important given that Czech law requires an arbitration agreement to be made in writing (but the signatures of the parties do not have to be on the same document) or through electronic communication, which enables true capture of the content of the agreement and identification of the person acting.<sup>11</sup> An ordinary telegram, fax or email message may not meet these requirements (whereas an electronically signed email message will), although a conclusive acceptance of a written proposal of a more complex contract containing an arbitration clause is sufficient, even if not made in writing.

---

7 See e.g., decision of the Supreme Court, File No. 32 Odo 181/2006, dated 6 June 2007.

8 Act No. 125/2008 Coll., on the transformations of companies and cooperatives.

9 Arbitration Act, Section 33.

10 European Convention, Article VI(2).

11 Arbitration Act, Section 3.

If a party files a claim covered by a valid arbitration agreement with a regular court, such court shall dismiss the case upon defendant's objection. However, the defendant has to raise the objection in *limine litis*, otherwise it is prevented from raising it.<sup>12</sup>

*ii Institutional arbitration*

The Czech Arbitration Act allows for the establishment of permanent arbitration courts. Currently, the following permanent arbitration courts have been established:

- a* the arbitration court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic ('the AK HK Court'), which is the most widely used and hears all types of disputes;<sup>13</sup>
- b* the arbitration court attached to the Prague Stock Exchange, which hears disputes arising from trades on the stock exchange; and
- c* the arbitration courts attached to the commodity exchanges, currently there is such an arbitration court at the Czech–Moravian Commodity Exchange in Kladno and at the Produce Exchange in Brno.

Permanent arbitration courts may issue rules and if the parties to an arbitration agreement select the permanent arbitration court and do not provide otherwise, their arbitration is subject to such rules. These rules generally regulate matters such as the formal requirements for claims and filings, procedure, appointment of arbitrators and costs. The rules of the AK HK Court are more or less accepted as the standard practice in the Czech Republic and professional arbitrators often use them as guidelines for institutional arbitrations as well as *ad hoc* arbitrations.

If the arbitration takes place in the Czech Republic, it cannot be referred to a permanent arbitration court other than one established by law; more importantly, reference to the rules of an institution which has not been established by law is not binding.<sup>14</sup> Therefore, although there are other institutions holding themselves out as permanent arbitration courts, selecting such an institution may lead to the invalidity of the entire arbitration agreement, or at least of such a selection with the consequence that, in the former case, the dispute will be resolved by the courts and, in the latter case, in *ad hoc* arbitration.

The most popular permanent arbitration court, the AK HK Court, has two sets of rules for domestic and international disputes, and it also maintains a list of arbitrators and acts as appointing authority. Moreover, it hears domain name disputes, hears online disputes and has some specific rules for consumer disputes. The fee for filing a claim in a domestic dispute is 3 per cent of the amount in dispute, but not more than 1 million koruna, payable up front by the claimant. The fees for filing a claim in an international dispute vary and are not capped, but they are generally higher than in domestic disputes. In addition to the basic fees, the claimant also has to pay an advance for the costs of the arbitration proceedings.

---

12 Code of Civil Procedure, Section 106.

13 See [www.soud.cz](http://www.soud.cz).

14 High Court in Prague, decision File No. 12 Cmo 496/2008, dated 28 May 2009.

iii *Basic procedural rules*

The rules described in this Section apply only if the arbitration takes place in the Czech Republic. If the arbitration takes place elsewhere, other rules apply, although a Czech court may refuse enforcement of the award if some basic principles are not respected (see ‘Enforcement of arbitral awards’, *infra*).

An arbitration claim is filed by submitting it either to a permanent arbitration court (if such a court is selected in the arbitration agreement) or to an arbitrator already appointed in case of *ad hoc* arbitration. In these circumstances, it is important to organise the filing of the claim very well so that there are no disputes as to the appointment of the arbitrator or the actual filing of the claim.

In case of *ad hoc* arbitration, and also according to the Rules of the AK HK Court, each of the claimant and the respondent may appoint one arbitrator and the two of them appoint the presiding arbitrator. Each arbitrator needs to accept his or her appointment in writing. If the two arbitrators selected by the parties cannot reach an agreement on the nomination of the third arbitrator, or if either party does not appoint its arbitrator, either party or either already appointed arbitrator can apply to a general court for the appointment of the missing arbitrator. If the dispute is before the AK HK Court, the chairman of the AK HK Court appoints the third arbitrator.

No arbitrator may be a member of the tribunal, if there are any facts that could raise doubts as to his or her impartiality. If such facts appear when he or she has been already appointed, he or she must resign. Either party may challenge the impartiality of an arbitrator before a court of law at any time during the proceedings or thereafter.<sup>15</sup>

The procedure followed by the arbitrators, unless otherwise agreed by the parties or provided for by the rules of a permanent arbitration court, follows the rules set forth for general civil litigation in the Code of Civil Procedure, except that the proceedings are not public and, unless otherwise agreed by the parties, the tribunal must always hold a hearing.<sup>16</sup> The arbitration tribunal therefore has the right to hear witnesses and experts, although if a witness or an expert does not appear voluntarily, the arbitrators can only request a regular court to issue a subpoena and to hear the witness and then proceed on the basis of a transcript from such hearing (or participate in it).<sup>17</sup>

A regular court of law cannot generally (except as previously mentioned) interfere in an ongoing arbitration. A court may issue an interim injunction pending the resolution of the arbitration only in order to ensure that a future arbitral award can be enforced.<sup>18</sup> A court cannot, contrary to the rules for general litigation, issue an injunction to provide an interim arrangement of the legal relationship in dispute pending resolution in arbitration. The rules of the AK HK Court (contrary to the rules of most arbitral institutions) do not provide for the possibility of interim injunctions being issued by the arbitral tribunal. Therefore, it is not clear whether an interim order or award can be issued when there is an arbitration clause.

---

15 Arbitration Act, Sections 8, 11 and 12.

16 The Act No. 99/1963 Coll., as amended, Arbitration Act, Section 30.

17 Arbitration Act, Section 20.

18 Arbitration Act, Section 22.

An arbitration proceeding is terminated by the issuance of an arbitral award which has to be signed by the majority of the arbitrators. According to the rules of the AK HK Court, the chairman and the secretary of the AK HK Court countersign each award and thereby certify the signatures of the arbitrators.<sup>19</sup> The award must be motivated, unless the parties have agreed otherwise. The arbitrators shall decide the matter according to the applicable law, but the parties may instruct them to decide the dispute *ex aequo et bono* (i.e., according to their sense of equity).

Parties may also agree that the arbitration award can be appealed and determine the conditions of such an appeal. If no appeal is agreed upon, the arbitration award is final and becomes legally valid and enforceable upon service to both parties. Arbitrators in *ad hoc* arbitrations must deliver one original of the award and all the documents attesting the course of the arbitration proceedings to the district court of the place where the arbitration award was issued.<sup>20</sup> Arbitration awards and other documentation related to arbitration proceedings conducted before permanent arbitration courts are stored by such courts for a period of 20 years and can be consulted by the parties.

An arbitration award issued in the Czech Republic may be challenged before a Czech court within three months from the date of dispatch of the award to the respective parties and a court will vacate such award in certain cases of procedural irregularities (see 'Enforcement of arbitral awards', *infra*). Filing of such an action does not suspend the enforceability of the award, but a court may decide on such a suspension. Once the award is vacated, if there is a valid arbitration agreement, the parties may restart the arbitration, but the arbitrators originally appointed are precluded from hearing the dispute.<sup>21</sup> If there is no valid arbitration agreement, the court will decide on the dispute.

*iv Enforcement of arbitral awards*

An arbitral award is enforced in a similar way to a regular court judgment. The winning party submits the award either to a competent court or to a private bailiff with a request for enforcement. On such basis, the court usually orders enforcement of the award and the obligated party is subject to certain limitations in respect of the use of property. In particular, this party cannot sell its real estate.<sup>22</sup> Only then can the obligated party challenge the arbitration award by an appeal against the decision ordering the enforcement.

A Czech court will refuse to enforce an arbitration award only in the following circumstances:

- a* the dispute is not arbitrable under Czech law;
- b* the arbitration agreement is invalid or does not cover the dispute for other reasons;
- c* an arbitrator who was not properly appointed or was incapacitated participated in the tribunal;
- d* the award was not rendered by the majority of the arbitrators;

---

19 Rules, Article 35(3).

20 Arbitration Act, Section 29(2).

21 Arbitration Act, Section 34.

22 Act No. 120/2001 Coll., on enforcement, as amended, Section 44a.

- e* the defendant had no opportunity to present its case to the arbitrators;
- f* the award orders performance not requested by the claimant (*ultra petita*), or (legally) impossible or illegal performance; or
- g* there are facts, which would allow a court of law in a civil litigation to order a new trial (i.e., new facts not previously available).

The grounds under (*f*) (but only with respect to *ultra petita*) and (*g*) cannot be invoked in respect of arbitral awards issued abroad in a country that is a party to the New York Convention, since it does not allow for such denial of enforcement.

## II THE YEAR IN REVIEW

### Developments affecting international arbitration

In May 2009, the Board of the Internet Corporation for Assigned Names and Numbers ('ICANN'), the global regulator of internet and domain names, approved an online dispute resolution system for domain name disputes implemented by the AK HK Court under the Uniform Dispute Resolution Policy ('UDRP'). The AK HK Court thus became the first international forum to provide a complete online system of dispute resolution regarding domain names. The dispute resolution is organised through a web portal<sup>23</sup> and covers domain name disputes with respect to both top-level domains<sup>24</sup> and lower-level domains under .co.nl. All disputes except those relating to .eu domains are decided according to the UDRP, whereas disputes relating to .eu domains are decided under specific rules promulgated according to the .eu domain regulation.<sup>25</sup>

### Arbitration developments in local courts

In an arbitration involving the brewery Budweiser Budvar, a national corporation, the Czech Supreme Court dismissed an appeal against several judgments refusing to vacate the award of the AK HK Court declaring Budvar liable under a beer supply contract to pay damages adding up to a substantial amount to the claimant, a French company.<sup>26</sup>

Budvar challenged the award claiming that it did not have an opportunity to be fully heard, contrary to statutory requirements. According to Budvar, the arbitral tribunal did not consider its claims that the termination of the supply contract by the claimant was wrongful, and wrongly assessed some evidence provided via fax. The court rejected these arguments, stating that the respondent submitted its observations to the arbitrators in writing, that the arbitrators thus gave an opportunity to the respondent to express its position and that they had analysed the respective evidence in the award. Therefore, the court did not find any breach of the respondent's procedural rights by

---

23 [www.adr.eu](http://www.adr.eu).

24 Such as .com, .net, .org, .biz, .info, .mobi, .eu and .tel.

25 Commission Regulation (EC) No. 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu top-level domain and the principles governing registration.

26 Supreme Court, File No. 23 Cdo 2273/2007, 27 dated May 2009.

the arbitral tribunal. The Supreme Court added that any challenges to an arbitration award must be purely procedural and that no review of the substance of the decision is normally possible. In particular, the assessment of evidence by the arbitral tribunal cannot be reviewed by general courts.

In *Pro-Cons v. Züblin*,<sup>27</sup> the Supreme Court confirmed a decision vacating an award for breach of the respondent's right to have its case heard in the arbitration court. Züblin won an arbitration award of over 5 million korunas against Pro-Cons at the International Arbitration Court of the Austrian Chamber of Commerce sitting in Prague, in a dispute involving multiple mutual claims arising under construction contracts, including claims for defects. The arbitral tribunal refused to review certain claims concerning set-offs by Pro-Cons and simply stated that there were too many of these claims (almost 70), that the arbitration tribunal had no capacity to perform a review thereof and that it did not accept the set-off. The court of first instance considered this approach to be acceptable, but the court of appeal and the Supreme Court rejected it. The higher courts held that the arbitral tribunal had a duty to review evidence submitted by the respondent and that the tribunal thus did not provide respondent with an opportunity to have its case heard. The Supreme Court also referred to the case law of the European Court of Human Rights applying the concept of equality of arms in the arbitration context.

In a third case involving domestic arbitration,<sup>28</sup> the Supreme Court addressed an important question. Under the Czech Arbitration Act, a court may vacate an arbitral award or refuse to enforce it, if the award requires performance which would be illegal under Czech law. The claimant, a real estate broker, won an award of 440,000 korunas against its client, a prospective seller of a family house under a brokerage agreement. The liability of the respondent gave rise to a contractual penalty in the amount of 10 per cent of the expected purchase price of the property. The respondent challenged the award, but the first-instance court dismissed the challenge. The court of appeal vacated the award holding that the amount of the contractual penalty was excessive, contrary to good manners and constituted illegal performance.

However, the Supreme Court held that a court seised of an appeal of an arbitral award cannot review the award's substance and that the question of whether the amount of a contractual penalty is acceptable is a substantive question. The court held that an illegal performance is only a performance that is legally prohibited, such as a supply of a *res extra commercium* (e.g., drugs, parts of the human body) or performance of illegal activities. Performance under a legal claim, which could be considered *contra bonos mores* under Czech law, is not an illegal performance.

### Investor–state disputes

An interesting development occurred in *Phoenix Action Ltd v. Czech Republic*,<sup>29</sup> a case decided in 2009 by an arbitral tribunal under the auspices of the International Centre for

---

27 *Pro-Cons s.r.o. v. Züblin stavební společnost s ručením omezeným*, Supreme Court, File No. 23 Cdo 2570/2007, dated 28 May 2009.

28 Supreme Court, File No. 23 Cdo 2675/2007, dated 30 October 2009.

29 ICSID Case No. ARB/06/5, 15 April 2009.

Settlement of Investment Disputes (‘ICSID’). The request for arbitration was submitted to ICSID according to the Agreement between the Czech Republic and the State of Israel for the Reciprocal Promotion and Protection of Investments (‘the BIT’). The claimant asserted that it had been expropriated by the fact that the Czech courts improperly handled the disputes of its Czech subsidiaries with certain business partners over the ownership of shares in certain other Czech companies, which were ultimately declared bankrupt. The main dispute revolved around the question of whether the acquisition of shares of the Czech subsidiaries by the claimant constituted an ‘investment’.

The claimant was the initial owner of the Czech companies, Mr Benň – originally a Czech national, who moved from the Czech Republic to Israel with his wife and daughter and then sold the companies to a company he had created in Israel. There was already an ongoing litigation over the same subject matter when the claimant instituted the ICSID proceedings. The tribunal therefore concluded that the transaction was only a redistribution of the assets within the Benň family and that its purpose was to gain access to ICSID jurisdiction.

The ICSID tribunal held that ‘according to ICSID case law, a corporation cannot modify the structure of its investment for the sole purpose of gaining access to ICSID jurisdiction, after damages have occurred’ and therefore it did not consider such transaction to be a *bona fide* investment and thus declined to exercise jurisdiction. The tribunal noted that if such transfers from the domestic arena to the international scene were granted investment treaty protection, the jurisdiction of ICSID tribunals would be virtually unlimited. The claimant’s initiation and pursuit of arbitration was recognised as an abuse of the ICSID system.

In this case, the ICSID tribunal also added to the *Salini* criteria and narrowed the definition of ‘investment’, comprising in its view the following elements:

- a* a contribution in money or other assets;
- b* a certain duration;
- c* an element of risk;
- d* an operation made in order to develop an economic activity in the host state;
- e* assets invested in accordance with the laws of the host state; and
- f* assets invested *bona fide*.

Given the abusive nature of the claimed ‘investment’ of the claimant – with respect to the BIT – in this case, the last element of this definition was missing.

### III OUTLOOK AND CONCLUSIONS

In less than 15 years, arbitration has become an accepted means of dispute resolution in the Czech Republic. Concerns about the use of arbitration in consumer disputes have led to an ongoing discussion about possible amendments to the Arbitration Act. However, such amendments should not materially affect international commercial arbitration. Therefore, parties to any international commercial transaction are well advised to rely on arbitration agreements if dealing with Czech entities.

**JURAJ ALEXANDER**

*Salans LLP*

Juraj Alexander is a senior associate in Salans' Prague office. He received his master of laws degree from Masaryk University School of Law in Brno in 2004 and LLM in banking, corporate and securities law, *magna cum laude* from Fordham University School of Law, New York, NY, in 2009. He focuses on cross-border insolvency law, real estate M&A and financing, litigation and arbitration. He has published a number of articles on various issues of Czech and international law. He is a member of the Czech Bar Association, is admitted to the New York Bar and is a member of the Association for the Development of the Real Estate Market in the Czech Republic and heads its finance practice group. In addition to his native Slovak, he speaks Czech, English, French and German.

**SALANS LLP**

22/F, Park Place Office Tower  
1601 Nanjing West Rd  
Shanghai 200040  
PR China  
Tel: +86 21 6103 6000  
Fax: +86 21 6103 6011  
bhorrigan@salans.com

Platněřská 4  
110 00 Prague 1  
Czech Republic  
Tel: +420 236 082 111  
Fax: +420 236 082 999  
prague@salans.com

5 boulevard Malesherbes  
75008 Paris  
France  
Tel: +33 1 42 68 48 00  
Fax: +33 1 42 68 15 45  
jhonlet@salans.com  
blegum@salans.com  
135 Abylai Khan Ave  
050000 Almaty  
Kazakhstan  
Tel: +7 727 258 23 80  
Fax: +7 727 258 23 81  
akenjebayeva@salans.com  
ymitrofanskaya@salans.com

General C Budisteanu 28-C  
010775 Bucharest  
Romania  
Tel: +40 21 312 4950  
Fax: +40 21 312 4951  
tcsaki@salans.com

36 Moika Embankment  
St Petersburg 191186  
Russia  
Tel: +7 812 325 84 44  
Fax: +7 812 325 84 54  
mivanov@salans.com

[www.salans.com](http://www.salans.com)