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THE  
INTERNATIONAL  
ARBITRATION  
REVIEW

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EDITOR  
JAMES H CARTER

LAW BUSINESS RESEARCH

THE INTERNATIONAL  
ARBITRATION REVIEW

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SECOND EDITION

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JAMES H CARTER

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# CONTENTS

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<b>Editor's Preface</b> .....	<b>vii</b>
<i>James H Carter</i>	
<b>Chapter 1</b> <b>Investment Arbitration</b> .....	<b>1</b>
<i>Stephen Jagusch, Anthony Sinclair and David Stranger-Jones</i>	
<b>Chapter 2</b> <b>Argentina</b> .....	<b>18</b>
<i>Alberto DQ Molinario and Maria Laura Velazco</i>	
<b>Chapter 3</b> <b>Austria</b> .....	<b>28</b>
<i>Christian W Konrad and Philipp Peters</i>	
<b>Chapter 4</b> <b>Brazil</b> .....	<b>40</b>
<i>Luiz Olavo Baptista and Mariana Cattel Gomes Alves</i>	
<b>Chapter 5</b> <b>Bulgaria</b> .....	<b>60</b>
<i>Assen Alexiev and Boryana Boteva</i>	
<b>Chapter 6</b> <b>Canada</b> .....	<b>71</b>
<i>David R Haigh QC, Louise Novinger Grant, Sonya Morgan and Romeo Rojas</i>	
<b>Chapter 7</b> <b>Chile</b> .....	<b>88</b>
<i>Davor Harasić and Karina Cherro</i>	
<b>Chapter 8</b> <b>China</b> .....	<b>99</b>
<i>Brenda Horrigan, Felix Hess and Siew Lin Mok</i>	
<b>Chapter 9</b> <b>Cyprus</b> .....	<b>114</b>
<i>Alecos Markides</i>	
<b>Chapter 10</b> <b>Czech Republic</b> .....	<b>124</b>
<i>Juraj Alexander</i>	
<b>Chapter 11</b> <b>England &amp; Wales</b> .....	<b>135</b>
<i>Deborah Ruff and Matthew Page</i>	
<b>Chapter 12</b> <b>Finland</b> .....	<b>151</b>
<i>Jan Waselius, Tanja Jussila and Kirsi Peltomäki</i>	
<b>Chapter 13</b> <b>France</b> .....	<b>161</b>
<i>Jean-Christophe Honlet, Barton Legum and Anne-Sophie Dufêtre</i>	

Chapter 14	<b>Germany</b> .....	172
	<i>Hilmar Raeschke-Kessler</i>	
Chapter 15	<b>Greece</b> .....	186
	<i>John C Kyriakides</i>	
Chapter 16	<b>Hong Kong</b> .....	195
	<i>Joseph Kwan and Kwok Kit Cheung</i>	
Chapter 17	<b>Hungary</b> .....	204
	<i>András Szecskay and György Wellmann Jr</i>	
Chapter 18	<b>India</b> .....	214
	<i>Shardul Thacker</i>	
Chapter 19	<b>Ireland</b> .....	226
	<i>Klaus Reichert SC</i>	
Chapter 20	<b>Israel</b> .....	235
	<i>Shraga Schreck</i>	
Chapter 21	<b>Italy</b> .....	261
	<i>Michelangelo Cicogna and Andrew Paton</i>	
Chapter 22	<b>Japan</b> .....	272
	<i>Peter Godwin and Raelene Leonard</i>	
Chapter 23	<b>Kazakhstan</b> .....	282
	<i>Aigoul Kenjebayeva and Yuliya Mitrofanskaya</i>	
Chapter 24	<b>Korea</b> .....	288
	<i>Benjamin Hughes and Beomsu Kim</i>	
Chapter 25	<b>Lithuania</b> .....	298
	<i>Ramunas Audzevicius, Tomas Samulevicius and Mantas Juozaitis</i>	
Chapter 26	<b>Malaysia</b> .....	307
	<i>Chong Yee Leong</i>	
Chapter 27	<b>Mexico</b> .....	319
	<i>Jose Maria Abascal</i>	
Chapter 28	<b>Netherlands</b> .....	332
	<i>Jan Willem Bitter and Charlotte de Vink</i>	
Chapter 29	<b>Nigeria</b> .....	345
	<i>Babajide Ogundipe and Lateef Omoyemi Akangbe</i>	
Chapter 30	<b>Pakistan</b> .....	347
	<i>Mansoor Hassan Khan</i>	

Chapter 31	<b>Poland</b> ..... 352 <i>Wojciech Kozłowski, Michał Jochemczak and Katarzyna Kempa</i>	352
Chapter 32	<b>Portugal</b> ..... 360 <i>José Carlos Soares Machado and Mariana França Gouveia</i>	360
Chapter 33	<b>Romania</b> ..... 367 <i>Tiberiu Csaki</i>	367
Chapter 34	<b>Russia</b> ..... 377 <i>Mikhail Ivanov and Inna Manassyan</i>	377
Chapter 35	<b>Scotland</b> ..... 389 <i>Lord Dervaird</i>	389
Chapter 36	<b>Singapore</b> ..... 396 <i>Chong Yee Leong</i>	396
Chapter 37	<b>South Africa</b> ..... 410 <i>Gerhard Rudolph and Darryl Bernstein</i>	410
Chapter 38	<b>Spain</b> ..... 423 <i>Diego Saavedra</i>	423
Chapter 39	<b>Sweden</b> ..... 438 <i>Hans Bagner and Helena Dandenell</i>	438
Chapter 40	<b>Switzerland</b> ..... 443 <i>Martin Wiebecke</i>	443
Chapter 41	<b>Turkey</b> ..... 456 <i>Utku Coşar and Margaret Ryan</i>	456
Chapter 42	<b>Ukraine</b> ..... 465 <i>Vladimir Zakhvataev and Ulyana Bardyn</i>	465
Chapter 43	<b>United Arab Emirates</b> ..... 475 <i>Kaashif Basit</i>	475
Chapter 44	<b>United States</b> ..... 485 <i>James H Carter and Suman Chakraborty</i>	485
Chapter 45	<b>Venezuela</b> ..... 506 <i>Ramón J Alvins, Elisabeth Eljuri and Pedro Saghy</i>	506
Appendix 1	<b>About the Authors</b> ..... 525	525
Appendix 2	<b>Contributing Law Firms' Contact Details</b> ..... 555	555

## EDITOR'S PREFACE

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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 analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, 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**

Dewey & LeBoeuf LLP

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## Chapter 10

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# CZECH REPUBLIC

*Juraj Alexander\**

### I INTRODUCTION

In the Czech Republic, arbitration has long been recognised as an appropriate method for resolving international commercial disputes. In 1995, a new law<sup>1</sup> enabled domestic disputes to be resolved by arbitration as well. Since then, arbitration has become a common dispute resolution mechanism for domestic disputes. Prior to 1989, under the communist regime, a state-controlled institutional dispute resolution mechanism for state-owned enterprises existed under the name of ‘economic arbitration’, but this mechanism had little in common with arbitration in non-communist countries.

Today, Czech courts generally heed arbitration agreements. State courts refrain from hearing disputes when the parties have agreed to an arbitration agreement<sup>2</sup> and enforce arbitral awards unless there is a legitimate 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 and international arbitrations when no international convention is applicable. The Arbitration Act 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 the enforcement of arbitral awards and challenges to arbitral awards.

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

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

2 By arbitration agreement we understand a separate agreement on the 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 to the European Convention on International Commercial Arbitration.<sup>4</sup>

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 the decisions of public administrations and other public institutions. General courts are organised into four levels: (1) district courts hearing most non-commercial disputes in the first instance, 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 may be challenged before the Constitutional Court if they concern the alleged infringement of constitutional rights.

Any challenges to an 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 were no arbitration agreement (i.e., the respective district or regional court).

#### **i Arbitrability and arbitration agreements**

The Czech Arbitration Act limits the scope of both domestic and international disputes that may be resolved through arbitration.<sup>5</sup> This is an important element of the Czech law, as Czech courts will refuse to enforce any (including foreign) arbitral awards issued with respect to disputes that Czech law considers as being non-arbitrable.

Generally, a dispute is arbitrable if (1) it involves property rights, (2) the parties are free to settle the dispute, (3) a Czech court would normally have jurisdiction to hear the dispute in the absence of an arbitration agreement and, surprisingly, (4) no public health-care centre established by law is involved. Arbitration under Czech law is conceived as a private law mechanism whereby the arbitrators clarify the legal relationships between the parties based on their appointment by the parties. Arbitrators therefore do not exercise any delegated public authority.<sup>6</sup>

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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., Constitutional Court, File No. IV. US 174/02, dated 15 July 2002.

The first condition (for arbitration involving property rights) for arbitrability led to debates as to whether declaratory actions may be resolved by arbitration.<sup>7</sup> The Supreme Court, however, has clarified the situation by ruling that arbitral tribunals may issue declaratory judgments.<sup>8</sup> For an extended period of time, the arbitrability of disputes relating to title and other rights *in rem* concerning real estate was also debated, but currently there appears to be a consensus that such disputes can be submitted to arbitration.

The second condition (the 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 has removed this possibility.<sup>9</sup>

The third condition (jurisdiction of Czech courts) is relevant only in respect to specific disputes (such as disputes in the area of telecommunications)<sup>10</sup> which, under Czech law, must be heard by administrative agencies instead of courts.

Czech law generally follows the Kompetenz-Kompetenz principle by allowing arbitrators to decide upon their own jurisdiction.<sup>11</sup> However, if a party raises an objection to the jurisdiction of the arbitral tribunal, the decision of the tribunal on such an objection may later be subject to the review of a state court. If a party does not raise any objection to the jurisdiction of the arbitral tribunal, it is precluded from subsequently challenging the tribunal's jurisdiction.

If the arbitration takes place in the Czech Republic, the law applicable to determining the validity of the arbitration agreement differs depending on whether the European Convention applies or not. If the European 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>12</sup> When the European Convention does not apply, a Czech court will review any issues related to the validity of the clause under Czech law. 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 (i.e., written or electronic), compliance with the rules applicable at the place where the parties have expressed their consent to the arbitration agreement is sufficient. This is quite important given

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7 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.

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

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

10 A draft amendment to the Arbitration Act (see below) will enable parties to submit disputes to arbitration in the telecommunications area (a) between operators, if the claimant requests a monetary award or (b) between an operator and a consumer.

11 Arbitration Act, Section 33.

12 European Convention, Article VI(2).

that Czech law requires an arbitration agreement to be made in writing (although the signatures of the parties do not have to be on the same document) or through electronic communications that truly capture the content of the agreement and identify the persons making the agreement.<sup>13</sup> An ordinary telegram, fax or e-mail message might not meet these requirements (whereas an electronically signed e-mail message will), although the conclusive acceptance of a written proposal of a more complex contract containing an arbitration clause is sufficient, even if not made in writing.

If a party files a claim covered by a valid arbitration agreement with a regular court, such a court shall dismiss the case upon the defendant's objection. However, the defendant must raise an objection in *limine litis* as it will be barred from raising an objection at a later point in time.<sup>14</sup>

## ii Institutional arbitration

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

- a the arbitration court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic ('the AK HK Court'), which is the most widely used institution and hears all types of disputes;<sup>15</sup>
- b the arbitration court attached to the Prague Stock Exchange, which hears disputes relating to trades on the stock exchange; and
- c the arbitration courts attached to the commodity exchanges: currently there are arbitration courts at the Czech–Moravian Commodity Exchange in Kladno and 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 generally accepted as 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, any reference to the rules of an institution that has not been established by law is not binding.<sup>16</sup> Therefore, although there are other institutions in the Czech Republic holding themselves out as permanent arbitration courts, selecting such an institution may lead to the invalidity of the entire arbitration agreement, or at least such a selection, with the

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13 Arbitration Act, Section 3.

14 Code of Civil Procedure, Section 106.

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

16 High Court in Prague, decision File No. 12 Cmo 496/2008, dated 28 May 2009. See also Footnote 29, *infra*.

consequence that, in the former case, the dispute will be resolved by the courts or, in the latter case, the dispute will be resolved by *ad hoc* arbitration.

The most popular permanent arbitration court, the AK HK Court, has two sets of rules for domestic and international disputes, maintains a list of arbitrators and acts as an appointing authority. Moreover, it hears domain name disputes, hears online disputes and has specific rules for consumer disputes. The fee for filing a claim in a domestic dispute is 4 per cent of the amount in dispute, but the percentage decreases when the fee exceeds 2 million koruna.<sup>17</sup> The claimant is required to pay this fee. The fees for filing claims in international disputes have different rates than for domestic disputes. They are higher than fees for domestic disputes when the amount in dispute is below 10 million koruna but are slightly lower when the amount in dispute is larger. In addition to these basic fees, the claimant must pay an advance on costs for the arbitral proceedings.

### 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 will apply, although a Czech court may refuse to enforce an award if certain 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 who has been appointed in the case of *ad hoc* arbitration. It is important to organise the filing of a claim very well so that there are no disputes as to the appointment of the arbitrator or the actual filing of the claim.

In the case of *ad hoc* arbitration, and also according to the Rules of the AK HK Court, the claimant and the respondent may each appoint one arbitrator and the two party-appointed arbitrators then appoint the presiding arbitrator. Each arbitrator must accept his or her appointment in writing. If the two party-appointed arbitrators cannot reach an agreement on the nomination of the third arbitrator, or if either party does not appoint an 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 will appoint 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.<sup>18</sup> If such facts appear after he or she has already been 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>19</sup>

The procedure followed by arbitrators, unless otherwise agreed by the parties or provided for by the rules of a permanent arbitration court, follows the rules set forth for

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17 Based on a fee schedule valid as of 1 May 2011. Previously, the fee was 3 per cent, but not more than 1 million koruna.

18 Under the draft amendment, each appointed arbitrator will be obliged to disclose to the parties or to a court any facts that might render him or her biased and, in the case of the arbitration of a consumer dispute, any arbitrations where a party to the current proceeding is or was a party.

19 Arbitration Act, Sections 8, 11 and 12.

general civil litigation in the Code of Civil Procedure, except that the proceedings are private and, unless otherwise agreed upon by the parties, the tribunal must always hold a hearing.<sup>20</sup> The arbitral tribunal has the right to hear witnesses and experts, although if a witness or an expert refuses to appear voluntarily, the arbitrators can only request a state court to issue a subpoena to hear the witness or expert and then proceed on the basis of a transcript of the hearing (or the arbitrator(s) may participate in the hearing).<sup>21</sup>

A regular court of law cannot generally (except as previously mentioned) interfere with 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>22</sup> A court cannot, contrary to the rules of general litigation, issue an injunction providing for an interim arrangement of the legal relationship between the parties to a dispute pending resolution via 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 unclear whether an interim order or award may be issued in an arbitration subject to the AK HK Court's rules of arbitration.

An arbitration proceeding is terminated by the issuance of an arbitral award, which must 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 must countersign each award and thereby certify the signatures of the arbitrators.<sup>23</sup> The award must be reasoned unless the parties have agreed otherwise. The arbitrators generally rule on the dispute according to the applicable law, although the parties may instruct them to decide the dispute *ex aequo et bono* (i.e., according to the arbitrators' sense of equity).

Parties may agree that the arbitration award can be appealed and determine the conditions for such an appeal. If no appeal is agreed upon, however, the arbitration award is final and becomes legally valid and enforceable upon service to both parties. The service of an arbitration award to the parties must comply with the rules for service of regular court judgments and, if it does not, the award does not acquire legal force and cannot be enforced.<sup>24</sup> Arbitrators in *ad hoc* arbitrations must deliver one original of the award and documents showing the course of the arbitral proceedings to the district court of the place where the award was issued.<sup>25</sup> Arbitral 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 may 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

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

21 Arbitration Act, Section 20.

22 Arbitration Act, Section 22.

23 Rules, Article 35(3).

24 Supreme Court, File No. 20 Cdo 3011/200823 Cdo 2675/2007, dated 28 June 2010, File No. 20 Cdo 4096/2008, dated 21 October 2010, File No. 20 Cdo 1694/200930 October 2009, dated 30 November 2010 or File No. 20 Cdo 2949/2009, dated 14 December 2010.

25 Arbitration Act, Section 29(2).

parties and a state court may vacate the award in certain cases of procedural irregularities (see ‘Enforcement of arbitral awards’, *infra*). The filing of such an action does not suspend the enforceability of the award, but a court may decide upon such a suspension. If the award is vacated, but there is a valid arbitration agreement, the parties may restart the arbitration, but the originally appointed arbitrators are precluded from hearing the dispute.<sup>26</sup> If there is no valid arbitration agreement, the court will rule on the dispute.

#### iv Enforcement of arbitral awards

An arbitral award is enforced in a similar manner to a regular court judgment. The winning party submits the award either to a competent court or to a private bailiff, along with a request for enforcement. Subsequently, a state court typically orders the enforcement of the award and the losing party becomes subject to certain limitations in respect of its use of property. In particular, this party cannot sell its real estate.<sup>27</sup> Only then the losing party can challenge the arbitral award by appealing the decision ordering the enforcement.

A Czech court will refuse to enforce an arbitral 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 improperly appointed or who was ineligible participated in the tribunal;
- d* the award was not rendered by the majority of the arbitrators;
- e* the defendant had no opportunity to present its case to the arbitrators;
- f* the award orders performance that was not requested by the claimant (*ultra petita*), that is (legally) impossible or that would be illegal; 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 that were not previously available).

It should be noted that the grounds under (f) (but only with respect to *ultra petita* awards) and (g) cannot be invoked in respect of arbitral awards issued abroad in a country that is a party to the New York Convention, as these are not grounds to deny enforcement under the New York Convention.

## II THE YEAR IN REVIEW

### i Developments affecting arbitration

In May 2011, the Czech government approved a draft amendment to the Arbitration Act, which is being submitted to the Parliament for final approval.<sup>28</sup> This amendment

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26 Arbitration Act, Section 34.

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

28 Resolution of the Government of the Czech Republic No. 367 of 18 May 2011, approving the draft amendment of the Arbitration Act (‘the Draft Amendment’).

focuses in particular on issues related to the arbitration of consumer contracts, but it also contains a few modifications relevant to commercial arbitration.

The amended regulations concerning consumer contracts is in reaction to numerous litigations and conflicting decisions of various courts in respect of abusive practices of certain rogue arbitration courts.<sup>29</sup> Under the amendment, arbitration agreements related to consumer contracts will need to be set out in a separate document that must contain significant disclosure to the consumer. Only lawyers without a criminal record will be able to act as *ad hoc* arbitrators for consumer contracts. Finally, the conditions for the invalidation of arbitration awards are relaxed so that the consumers are protected against abusive practices.

## ii Arbitration developments in local courts

In a dispute involving a challenge to a decision of the AK HK Court denying its own jurisdiction, the Supreme Court confirmed that the AK HK Court is a legal entity (despite the silence of the law in this respect). The plaintiffs in this case, two individuals, petitioned the AK HK Court to declare the invalidity of a share purchase agreement they had made with the investment company of Ceska sporitelna (the local subsidiary of the Erste Group). The Supreme Court held that courts are not authorised to review a decision of an arbitration court refusing to hear a dispute and that the plaintiffs must submit such a dispute to regular civil proceedings. There was no *denegatio iustitiae* in this case, as the parties could continue the litigation in courts of law. The Supreme Court also clarified that the respondent to a petition challenging an arbitration award is the defendant from the arbitration, and not the arbitration court, which issued the award.<sup>30</sup>

In a case decided in May 2010, the Supreme Court quashed decisions of lower courts refusing to invalidate an award in which the AK HK Court dismissed an action of a client against Komerční banka (the Czech subsidiary of Société Générale) for irregularly transferring €1.2 million from the client's account. The AK HK Court first refused to admit evidence offered by the defendant and then based its ruling on the reasoning that by not submitting that very piece of evidence the plaintiff failed to bear its burden of proof. The Supreme Court held that the arbitration court should have informed the plaintiff of its view that a significant piece of evidence was missing.<sup>31</sup>

In March 2011, the Constitutional Court reversed numerous rulings of lower courts with respect to a litigation that lasted nearly a decade and concerned taking on bad debts of Czech banks in late 1990s.<sup>32</sup> In this dispute, Ceska sporitelna, the plaintiff, challenged a 2004 arbitral award by which the AK HK Court dismissed its claim against

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29 The Supreme Court, File No. 31 Cdo 1945/2010, 11 May 2011, handed down a decision unifying the conflicting views of various chambers of the Supreme Court declaring that the appointment of an arbitration court, which is not established by law, invalidates the entire arbitration clause and does not merely result in the arbitration being converted to an *ad hoc* arbitration.

30 Supreme Court, File No. 29 Cdo 1899/2008, 25 February 2010.

31 Supreme Court, File No. 23 Cdo 3749/2008, dated 26 May 2010.

32 Constitutional Court, File No. I. ÚS 3227/07, 8 March 2011.

the Czech Republic (the Ministry of Finance) for approximately 240 million koruna of alleged incentive payments under a restructuring agreement with the former state asset management company (Ceska konsolidacni agentura). The Supreme Court had previously refused to vacate the above-mentioned rulings upon extraordinary appeal.<sup>33</sup>

The Constitutional Court first confirmed the established practice that an arbitration award cannot be challenged via a complaint to the Constitutional Court. On the merits, Ceska sporitelna argued that the arbitrators had refused to hear some suggested witnesses and had handed down a surprising award. State courts had refused to review the substance of this allegation stating that the arbitrators met all formal requirements and that the refusal to hear a witness is not a violation of due process itself. The Constitutional Court stated that the parties' decision to arbitrate does not represent a waiver of legal protection, but merely a transfer of the decision-making authority from courts of law to another institution. Therefore, if the arbitration court does not enable a party to be heard, it is a breach of mandatory provisions of the Arbitration Act. It further indicated that such a breach can also result from a 'surprising arbitration award'. In regular civil proceedings, the risk of a surprising decision is mitigated by the obligation of the court to inform the parties of its legal view of the matter, if this differs considerably from the assumptions of the parties. The Constitutional Court found that there was no reason why this rule should not also apply to arbitrations. As the general courts had refused to review this issue, the Court considered it appropriate to vacate their decisions.

This trend continued in another judgment issued in April 2011, where the Supreme Court again criticised the lower courts' deference to arbitrators' procedural decisions. This case is also interesting in that it appears to be the first case where the Supreme Court had a chance to comment on the application of the UNCITRAL Arbitration Rules under Czech law. The plaintiff, an individual, sought 123 million koruna from Tesco Stores as compensation for damages corresponding to penalties paid by the plaintiff on personal income tax. The Supreme Court was highly critical of the lower courts' reticence to review in detail the plaintiff's specific objections to the procedural approach taken by the arbitral tribunal and the alleged violations of the UNCITRAL Rules. For example, the lower courts dismissed the plaintiff's assertion that he was unable to present a final argument with the simple statement that even if it this were the case, it would not have led to the invalidation of the award. Furthermore, the court, referring to Article 25(6) of the UNCITRAL Rules, and also to local law, rejected the opinion expressed by the lower courts that an arbitration tribunal can reject submitted evidence without providing any reasoning.

In March 2011, the Supreme Court clarified its position as to the 'surprising decision' theory.<sup>34</sup> The AK HK Court had issued an award for Med' Povrly AS, a Czech metalworking company, against Consorzio Calamari-Ateco, an Italian furnace producer ('Consorzio'), for damages caused by a problem with one of the furnaces bought from Consorzio. Consorzio challenged the award arguing that the AK HK Court based its award on a different factual causation of damage than had been claimed in the arbitration.

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33 Supreme Court, File No. 32 Odo 366/2006, dated 11 September 2007.

34 Supreme Court, File No. 32 Cdo 3211/2010, dated 29 March 2011.

According to Consorzio, the AK HK Court should have informed the Consorzio about its view of the matter so that it could have adjusted its response. Czech courts held, and the Supreme Court concurred, that if the proposed evidence is sufficient to clarify the issues, then a court is not obliged to inform the parties of its legal view of the matter. If the basic facts of the case, i.e., in this case the illegal act and the consequence, are the same, the court was authorised to hear the action and to conclude that the factual causation of damage was different without informing Consorzio of its view.

In a decision of April 2011, the Supreme Court specified another due process requirement for arbitration courts, in relation to a case opposing Ceska pojistovna (the local Generali insurance company) and an individual. It is settled law that the delivery of arbitration awards is governed by the Code of Civil Procedure and cannot be subject to the parties' agreement under the Arbitration Act.<sup>35</sup> However, in this case, the parties agreed on a special procedure for delivery should the delivery be unsuccessful. As the award could not in fact be delivered to the defendant, a corporation organising the *ad hoc* (apparently rogue) arbitration appointed a custodian for delivery. The Supreme Court confirmed the decision of lower courts refusing to enforce the arbitration award with the reasoning that the defendant had not been properly served, as the custodian had been improperly appointed by the arbitration panel.

These decisions may signal a trend towards stronger review of due process in arbitrations by Czech courts and may also represent a weakening of the strong deference to arbitration under Czech law. However, it appears that in the above-mentioned cases the state courts tried in good faith to correct a failure of the arbitration panels to provide reasonable assurances of due process to the parties.

### iii Investor–state disputes

There were no ICSID cases involving Czech Republic in 2010. However, two interesting non-ICSID cases were reported.

#### *Frontier Petroleum Services*

In November 2010, the Permanent Court of Arbitration in The Hague, deciding under the Bilateral Investment Protection Treaty between the Czech Republic and Canada and the UNCITRAL arbitration rules, dismissed a claim made by Frontier Petroleum Services Ltd ('FPS') against the Czech Republic in relation to an investment in the aviation industry.<sup>36</sup> FPS had concluded an agreement with Moravan-Aeroplanes, AS ('MA'), a Czech company, under which FPS financed the purchase of assets for another aircraft company for the envisaged establishment of a joint venture with MA. Before the transaction was completed, however, MA was declared bankrupt. FPS claimed that it was not fairly reimbursed in bankruptcy proceedings and submitted a claim for damages caused by court delays, the actions of bankruptcy judges and the failure of Czech officials to assist FPS. FPS also obtained arbitration awards against MA in Stockholm, but was

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35 Supreme Court, File No. 20 Cdo 2827/2009, dated 27 April 2011.

36 *Frontier Petroleum Services Ltd v. Czech Republic*, Final Award, PCA—UNCITRAL, Arbitration Rules; IIC 465 (2010), 12 November 2010.

unable to enforce these awards. The tribunal dismissed FPS' claim on the grounds that the damage was either caused by negligence on the part of FPS due to its misunderstanding of Czech law or that the damage would have occurred even if the alleged breach of obligations of the Czech Republic under the BIT had not taken place.

### *ČSOB v. Czech Republic*

In another dispute, the ICC International Court of Arbitration in Vienna upheld a 1.6 billion koruna claim by Československá obchodní banka, AS ('CSOB'), a prominent Czech bank that is part of the KBC group, against the Czech Republic with respect to the purchase of Investiční poštovní banka, AS ('IPB') – a formerly important Czech bank, which at the time was facing great financial difficulties. Under an agreement on state guarantees the Czech Republic undertook to reimburse CSOB in connection with unrealised, invalid or ineffective transfers of bad receivables of the former IPB from CSOB to Česká konsolidační agentura ('CKA'), a state asset management agency that facilitated the restructuring of Czech banks. The issue in dispute was whether the agreement on state guarantees included an obligation of the state to reimburse CSOB for a liability that it had to cover due to its takeover of IPB. The CKA had previously paid CSOB the claimed amount and the AK HK Court had subsequently ordered CSOB to repay this amount to CKA. CSOB subsequently sued the Czech state for recovery of the repaid amount and the arbitral tribunal upheld the claim in this highly commented-upon decision.

### **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 debate about possible amendments to the Arbitration Act. However, such amendments should not materially affect international commercial arbitration. Therefore, parties to international commercial transactions are well-advised to rely on arbitration agreements when dealing with Czech entities.

## Appendix 1

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### ABOUT THE AUTHORS

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Juraj Alexander's practice focuses mainly on insolvency, litigation and real estate. He represents debtors and creditors in restructurings and litigations, as well as buyers, sellers or lenders in solvent, primarily real estate, transactions. Among other clients, he represented GE in the administration of an NPL portfolio in the Czech Republic; Tesco in the acquisition of Carrefour hypermarkets in the Czech Republic; and Ceska sporitelna, member of Erste Group, in the financing of a sale and leaseback transaction with Ceska pojistovna, a member of Generali group.

In 2009, Juraj earned a *magna cum laude* LLM from Fordham University School of Law in New York. He is a member of both the Czech and New York Bars; and he teaches at the Institute of Economic Studies of the Faculty of Social Sciences of the Charles University in Prague.

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