ABSTRACT

Concept of the arbitration agreement from a comparative perspective

The theme of this doctoral thesis is a detailed analysis of the concept of the arbitration agreement under international conventions, specifically the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), the European Convention on International Commercial Arbitration (the "European Convention"), under the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") and under Czech and German Law. The thesis covers all aspects of the arbitration agreement, analysing it from the perspective of material norms. The regulation of any conflict of rules is mentioned only if it is appropriate for an analysis of the substantive norms of the elements of an arbitration agreement.

The individual chapters of this thesis address the concept and elementary characteristics of the arbitration agreement and the formal and material requirements, effects, extent and ending of the arbitration agreement. Special attention is paid to arbitration agreements concluded regarding disputes arising from and in connection with agreements entered into between consumers and entrepreneurs (sellers or suppliers), because the Czech regulation of such arbitration agreements was regarded as insufficient for a long time and contributed to the enactment of the most significant and extensive amendment to Act no. 216/1994 Coll. on Arbitral Proceedings and Enforcement of Arbitral Awards (the "Czech Arbitration Act") so far.

Chapter One deals with the basic characteristics of the arbitration agreement, particularly the definition of the arbitration agreement, the types of arbitration agreement and the separability doctrine of the arbitration clause.

The following chapter addresses the legal character of the arbitration agreement under Czech and German law. On the basis of a detailed analysis of different theories regarding the arbitration agreement, the thesis comes to the conclusion that under Czech law, the theory that combines procedural and contractual elements prevails. Under German law, the procedural theory of the arbitration agreement prevails. Nevertheless, the theories have only a little influence on legal practice. For a comparison with the legal theory of the common law legal

system, chapter one also mentions that the contractual theory of the arbitration agreement prevails in common law countries.

Chapter Three analyses the parties to an arbitration agreement, particularly who can enter into an arbitration agreement and under which conditions. Chapter Three also explores whether under Czech and German Law, the capacity to act in court proceedings or the capacity to enter into a contract is the decisive criterion for entering into an arbitration agreement. In this respect it partly touches on the theories governing arbitration agreements. Chapter Three also deals with the restrictions on the capacity of natural persons and legal entities to enter into an arbitration agreement and with the concept of a power of attorney granted for the conclusion of an arbitration agreement.

Chapter Four addresses arbitrability, which is the crucial concept of the arbitration. In connection with the regulation contained in the New York Convention, the European Convention and the Model Law, the thesis also briefly covers the conflict of law rules relating to the arbitration agreement. Other parts of Chapter Four concentrate exclusively on the material regulation of arbitrability. Further, Chapter Four describes the regulation of arbitrability in foreign law and current trends in the development of the concept of arbitratibility in arbitration law, the trends being the so-called “second look” doctrine and extending the group of disputes being eligible for settlement by arbitration.

The main topic of Chapter Four is the regulation of arbitrability under Czech and German law. The criteria stipulated by these regulations differ significantly. Czech law sticks to the classic concept of arbitrability. The criteria which a dispute has to meet in order to be amenable to arbitration are as follows: the dispute relates to an asset, a court must be competent to decide in the dispute and the dispute can be settled between the parties. German law approaches the concept of arbitrability differently and provides for the arbitrability of all disputes relating to an asset, irrespective of the possibility of the parties to settle on the matter of the dispute. German law was inspired by the Swiss regulation in this respect. Current German law also provides for the arbitrability of disputes not relating to an asset which the parties can end by a settlement. Further, German law allows the arbitration of certain claims arising under public law.

It is immediately apparent that the group of disputes that are capable of settlement by arbitration is much larger under German law than under Czech law. The only exception in this respect are certain disputes arising from provisions of Act no. 127/2005, Coll., on Electronic Communication which fall under the competence of an administrative authority. German law does not provide for any similar exception. Chapter Four further addresses particular types of disputes whose arbitrability is generally questionable from the perspective of Czech and German law. The analysis in this respect confirms the conclusion that the concept of arbitrability under the Czech law is much narrower that under the German law.

Chapter Five addresses the form of the arbitration agreement entered into for all disputes except for disputes arising from agreements between consumers and entrepreneurs. In comparison with other chapters, Chapter Five describes the regulation contained in the New York and European Conventions more deeply because the form of the arbitration agreement is governed by material norms contained in these conventions. An analysis of the respective norms contained in both conventions is supplemented by an analysis of foreign case law relating to the provisions of the New York Convention governing the form of the arbitration agreement.

The regulation of the form of the arbitration agreement under both Czech and German law was inspired by the provisions of the Model Law. Nevertheless, it was supplemented by national norms in many respects. The Czech regulation of the form of the arbitration agreement derives from the previous regulation of the arbitration proceedings that was contained in Act no. 98/1963 Coll., on Arbitral Proceedings in International Business and the Enforcement of Arbitral Awards, which provided for the possibility of an arbitration agreement being entered into by virtue of certain actions in the case that the arbitration clause was a part of the terms and conditions governing the main agreement. This regulation was carried over to the Czech Arbitration Act. Further, attention is paid to the regulation of an arbitration agreement that was entered into by electronic communication with no electronic signature, as the validity of such arbitration agreement is questionable.

The regulation (stipulated in the Tenth Book of the German Procedural Code) of the form of an arbitration agreement complies with the regulation of the form of the arbitration agreement contained in the Model Law to a great extent. The German regulation is supplemented by provisions that carried over from the previous regulation of arbitration proceedings. Under

these provisions, it is possible to conclude an arbitration agreement by means of tacit acceptance expressed by means of inaction, if there such acceptance by inaction corresponds to business custom in this respect.

Chapter Six deals with the concluding an arbitration agreement under Czech and German Law focussing particularly on the concept of an arbitration agreement contained in the business terms and conditions or any other document which is referred to in the main agreement and special means of concluding an arbitration agreement - the issuance of a bill of lading containing a specific reference to an arbitration clause in the charterparty. Also, Chapter Six deals with the concept of an arbitration agreement contained in the business terms and conditions or any other document which is referred to in the main agreement from the perspective of the New York and the European Convention.

The next chapter deals with the effects of an arbitration agreement. Particular attention is paid to the effects of an arbitration agreement under the New York and the European Conventions, as the recognition and enforcement of an arbitration agreement under these conventions is essential to international commercial arbitration. Chapter Seven also analyses the procedural effects under German and Czech law. In addition, the thesis addresses the material effects of the arbitration agreement that are not generally accepted. In this respect, the thesis also describes the material effects of an arbitration agreement from the perspective of common law legal systems.

Chapter Eight deals with the extent of an arbitration agreement as regards the persons and matters falling under the ambit of an arbitration agreement from the perspective of the Czech and German law. The main topic of Chapter Eight is the assignment of an arbitration agreement and the legal succession in an arbitration agreement under Czech and German law. Further, the thesis also covers the concept of counterclaims and set-off if claims being raised by way of a set-off or a counter-action do not fall under the scope of the arbitration agreement in question.

The following Chapter analyses the ending of an arbitration agreement, which it describes from the perspective of both procedural and substantive law. Throughout this chapter, the thesis takes into consideration which manners of the ending of agreements entered into under Czech or German Civil or Commercial Code apply to an arbitration agreement by analogy.

Chapter Ten describes arbitration agreements concluded for the disputes arising from agreements entered into between consumers and entrepreneurs. The first part of this chapter describes the European regulation of arbitration proceedings. The subsequent parts analyse the Czech and German regulation of arbitration agreements concluded for disputes arising from agreements entered into between consumers and entrepreneurs. As regards Czech law, the attention is paid to both previous and current Czech regulation. Attention is also paid to the relevant case law.

Conclusions are drawn in the last chapter, which also contains a complex assessment of the Czech and German regulation of arbitration agreements. Further, certain weak points and non-compliance with international conventions are noted. Partial conclusions relating to the individual elements of an arbitration agreement form closing parts of all chapters of the thesis.

On the basis of the analysis of the particular elements of the arbitration agreement the thesis concludes that both national regulations (i.e. both the Czech and the German regulation) provide for a suitable legal framework for the conclusion and existence of an arbitration agreement. Nonetheless, the German regulation is considered as being more suitable and more in accord with current trends in the regulation of arbitration proceedings in the following respects: liberalisation of formal requirements of an arbitration agreement; extending the categories of disputes capable of settlement by arbitration (German arbitral awards can be checked in proceedings on their annulment and on their refusal due to their non-compliance with *ordre public*); and the protection of weaker parties to legal relationships, in particular consumers, employees and tenants of apartments and similar premises determined for permanent living.

Amending the current Czech regulation is not necessary at the moment. The biggest problem of the Czech legal system used to be the insufficient regulation of arbitration proceedings in consumer disputes. However, this has now been solved by an amendment to the Czech arbitration code. Ambiguity can be removed by means of proper interpretation and case law. From this perspective, the current biggest problem requiring the clarification by the way of the proper interpretation of the Czech Arbitration Act is the usage of electronic communication for the conclusion of an arbitration agreement. Although the prevailing opinion among legal scholars and also in the arbitration practice is that an arbitration

agreement can be validly entered into on the basis of normal electronic communication (i.e. with no guaranteed electronic signature), the exact opposite is in fact the case.