The Position of Financial Arbitrator among other alternative dispute resolution

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Abstract
Czech Financial Arbitrator was established in the year of 2003. It is a conciliation body resolving chosen disputes between financial institutions and their clients. It can be listed among out-of-court dispute resolutions that are less time and money consuming, informal etc. then court procedures. The paper deals with the question of position of financial arbitrator among other alternative dispute resolutions, especially in relation to mediation, conciliation and arbitration. It is focusing on question, whether there can be any other more effective way of dispute resolution then financial arbitrator, as it is today.

Keywords: alternative dispute resolution, conciliation, financial arbitrator, mediation
JEL codes: K41

1. Introduction

The Europe with almost the whole world is strongly influenced by precipitate development of information technology that is nowadays becoming a part of our daily life. Usage of computers, Internet or credit cards is gradually becoming as common as usage of cars or refrigerators. However, use of the latest technologies brings along not only simplification of our activities but also new problems that require new approach to solution. This situation also breeds new attitudes and approaches towards traditional legal institute type of unfair competition (especially in connection with the electronic commerce), intellectual property (e.g. in the definition of domain names) or in dispute resolution (e.g. in relations with foreign element).

The subject of considerations in this paper are the approaches to dispute resolutions arising from the use of electronic information technology, especially dispute resolutions related to using electronic payment instruments and direct debit transactions in the European Union and the Czech Republic. The focus of speculation, therefore, is the position of the Financial Arbitrator in the Czech Republic, in particular the effectiveness of this feature and the comparison with other types of procedure of a similar type. For this purpose, it is necessary to define at least the essential features of methods of dispute resolutions.

The methods of dispute resolution between different subjects can be divided into several groups:

- trial (lawsuit), i.e. binding dispute resolution before common court of a particular state,
- arbitration, i.e. binding dispute resolution before independent subjects of private law,
- conciliation, mediation, i.e. dispute resolution before mediators or conciliators who do not own power of binding decision,
- discussion of parties, without participation of third party, that may or may not result in compromise.

As an example of secondary law accentuating out-of-court dispute resolution in terms of „the new virtual space“ can be mentioned the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society, in particular electronic commerce, in the Internal Market („Directive on electronic commerce“). In addition to procedural issues of collision nature the Directive in Article 17 includes provisions covering an out-of-court dispute settlement. Under this provision the member states are not allowed to inhibit in their legal regulations the usage of these procedures in the case of disagreement between an information society service provider and a recipient, including procedures using electronic means. The member states have also as their task to ensure adequate procedural guarantees to parties using these out-of-court dispute settlement.

Legal regulation of disputes about domain names .eu went even further. The legal basis for implementation .eu domain and its registration is governed by Regulation (EC) No 733/2002 of The European Parliament and of The Council of 22 April 2002 on the implementation of the .eu Top Level Domain. More specific legal regulation can be found in the 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 its registration. Community legal regulation, through the above-mentioned Commission Regulation (EC) No 874/2004, further regulates the rules for domain names registration and also a possible settlement of disputes related therewith. For purposes of our consideration are important the provisions on dispute resolutions about registered domain name in Articles 21 to 23 of the Regulation stated above providing the possibility of both extrajudicial and judicial settlement of disputes. The succession of firstly listed „out-of-court“ and secondly „judicial“ settlement of disputes in that provision is taken from the Regulation and it indicates which possibility is preferred, although this Regulation does not explicitly mention it. Furthermore, there is mentioned the duty of a possessor of domain name to participate in an extrajudicial settlement of dispute which was caused by a third party. In the event that the claimant chooses an extrajudicial way of a settlement of dispute, the possessor of .eu domain name is obliged to participate in this form of procedure.[1]

2. The Financial Arbitrator in the Czech Republic

How does the Financial Arbitrator fit in all of this? In conditions of the Czech Republic and other member states of the European Union, we can consider the Financial Arbitrator is another example of out-of-court dispute resolution that is established in connection with modern technologies. The domestic legal regulation of this institute is based on the requirement of the European Union to implement the Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers. In the provision of Article 10 is laid down the duty of member states to ensure the existence of appropriate and efficient procedures for handling a complaint and ensuring the redress in resolution of disputes between a customer and his institution or between an addressee and his institution, eventually using existing procedures. The above-mentioned Directive does not further specify conditions for the appropriateness and efficiency of the implemented procedures and it was up to the Member States how it will be embodied into the national systems of law.

The Czech Republic adopted, within the pre-accession harmonization of system of law, the Act No. 229/2002 Coll. on the Financial Arbiter, as amended by later regulations, which has established a new, hitherto non-existing conciliatory body which decides disputes under this Act. The Financial Arbitrator has competence over disputes arising between banks or institutions issuing electronic means of payment and clients at transferring monies, corrective accounting, direct debit or within using electronic payment instruments.

[1] Further to the questions of alternative dispute resolution about domain names, look at e.g. GONGOL, T. Out-of-court dispute resolution policy in EU electronic commerce. In FIKUSZ 2008 Business Sciences - Symposium for Young Researchers: Proceedings. Budapest: Keleti Károly Faculty of Economics Budapéest Tech, 2008. pp. 41-54. ISBN 978-963-7154-78-2.

It has passed nearly 10 years from the establishment of the Financial Arbitrator and it is long enough to answer the question whether there was chosen an appropriate instrument for mentioned types of dispute resolutions. Let us summarize the basic attributes of proceedings conducted by the Financial Arbitrator.

First of all we can say that it is type of out-of-court dispute resolution. Contrary to most of other out-of-court dispute resolution is a person of the Financial Arbitrator subject of public law. It is a body elected by the Chamber of Deputies in a public vote on the term of 5 years. The proposals for election are entitled to submit both financial institutions or their professional association and Consumer Defence Association. That can be seen as a fundamental difference from the usual out-of-court methods of settlement of private-law disputes in which the third party in proceedings (arbitrator, conciliator, mediator, etc.) is a person of private law and the „choice" of this subject is mainly in the disposition of parties of the dispute.

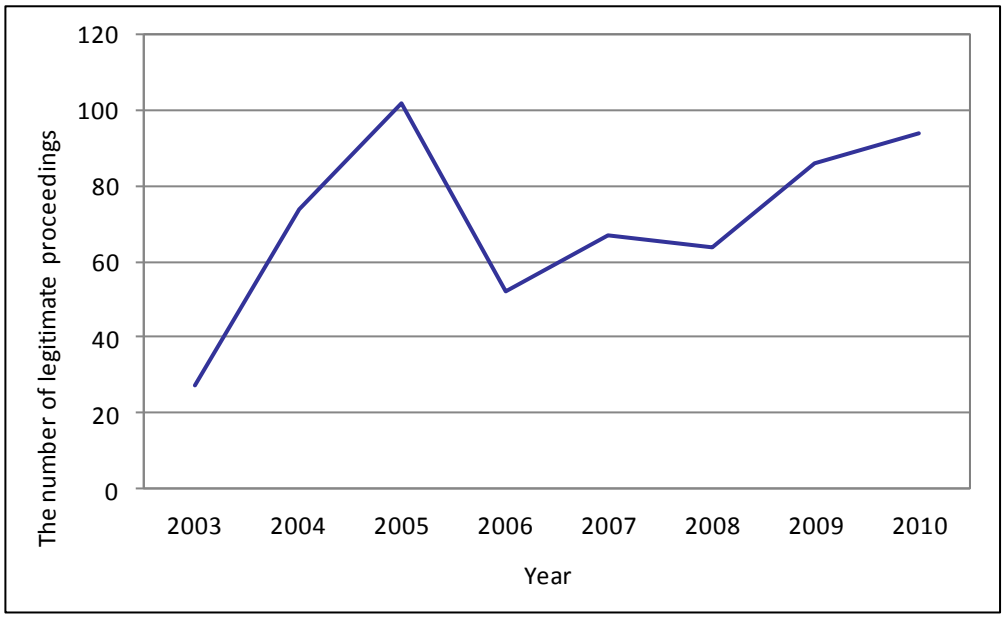
The course of proceedings before the Financial Arbitrator is regulated by the Act on the Financial Arbitrator which defines both procedures and time limits, eventually the requirements for act, etc. Subsidiary can be used the Administrative Procedure Rules in this proceeding. Even in this regard there can be seen the difference against typical extrajudicial dispute resolutions that are regulated either solely non-mandatory (typically arbitration) or not at all (ADR). In any case, in these types of out-of-court dispute resolution is given a great possibility to parties to dispose the entire proceedings.

A proceeding before the Financial Arbitrator ends by making an award, unless it is stopped. The Financial Arbitrator has period of 30 days for making an award from the date of initiation of proceedings, in especially complex cases period of 60 days (but he is not bounded by this time limit and may appropriately extend it). The objections against an award may be entered within 15 days of the date of delivery of the award in writing. The objections are considered by the Financial Arbitrator and he can either uphold or set aside an award and in time limits that are the same as in making an award. The average duration of proceedings before the Financial Arbitrator is c. 100 days, which is quite a lot in comparison with other options, as will be referred below.

In regard of relation to judicial proceedings, it is important that making an award does not constitute res iudicata, and therefore the party of proceedings before the Financial Arbitrator is not inhibited from bringing an action to the competent common court in the same case. There we can see a substantial difference to an award made by the Financial Arbitrator which constitutes res iudicata. The annual reports of the Financial Arbitrator shows that in many same cases (however, concrete data of the number are missing) was brought an action, especially by discontent financial institutions. The fact that there can be brought an action to the court weakens the position of the Financial Arbitrator and classifies him closer to the conciliation type of arbitration then to arbitration proceedings itself (note: the term arbitrator evokes rather a form of arbitration proceedings). In regard of the binding effect of an award, the regulation of proceedings and its result is handled alike in disputes on the .eu domain names. The decisions issued in ADR proceedings that can be described as quasi-arbitral is binding and enforceable, unless there is brought an action to the common court in the same case. However, there should be noted that this occurs rarely in practice of .eu domain disputes.

As one of the important attributes of extrajudicial methods of dispute resolution are above-mentioned also lesser costs. If we look at the financial expenses on operating the office of the Financial Arbitrator we find out that the expenses increased almost twofold from 2003 to 2010. To consider this method of dispute resolution as efficient we should expect a rapid increase of decision-making activities. However, this did not happen during mentioned period, as evident from these graphs.

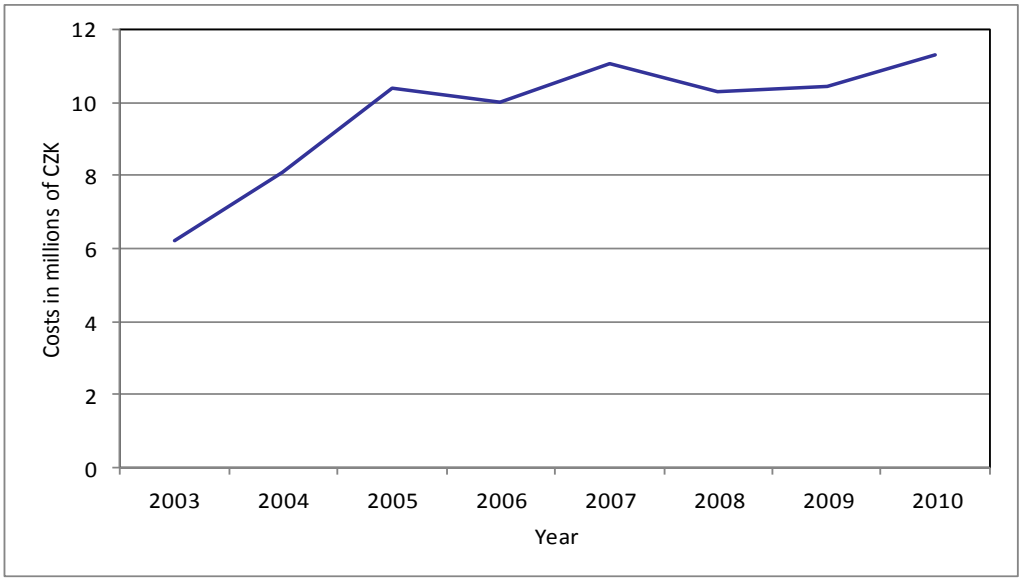
Figure 1: The progress of the number of legitimate proceedings in the years 2003-2010



Source: The Annual Reports of the Financial Arbitrator.

As you can see from the previous graph, the number of legitimate proceedings, i.e. those that fall within the competence of the Financial Arbitrator, shows no significant progressive tendency. In 2003 there were 23 of legitimate proceedings, in 2010 there were 94 proceedings. So far, the most legitimate proceedings were resolute in 2005, namely 102. The following graph describes the growing tendency of costs in the years 2003-2010.

Figure 2: The costs on operating the office of the Financial Arbitrator in the years 2003-2010.



Source: The Annual Reports of the Financial Arbitrator.

While in 2003 was spent on operating the office of the Financial Arbitrator c. CZK 6.2 millions, in 2010 it was reached almost twofold of this value, the costs amounted CZK 11.3 millions. The graph describes, except the years 2006 and 2008, the growing tendency. The costs of the Financial Arbitrator office are paid from the budget of the CNB.

We can find out through a simple calculation (the ratio of the costs of proceedings against the number of legitimate proceedings) that the average cost of one legitimate dispute was in 2010 c. CZK 120 thousands. Let us compare this figure to the average financial amount of requirements in initiated proceedings which amounts c. CZK 127 thousands in the same year. The cost of one initiated dispute is almost as high as the average demanded amount in the dispute. The year of 2007 was an exception because the cost of one initiated dispute was almost fivefold, compared to the average amount of the demand.

3. Other extrajudicial dispute resolution

In regard of mentioned above, it is appropriate to ask whether the Czech Republic selected actually effective fulfilment of the European Union Directives, when there was a wide range of other possible out-of-court methods of dispute resolution. And it is necessary to add that these possibilities were used in other EU countries. There are many models how to resolute a given range of disputes. Generally, it is possible to distinguish them into three groups:

1. arbitration of mediation or conciliation type without binding resolution,
2. arbitration with a final and enforceable arbitration award,
3. quasi-arbitral proceedings with an enforceable award, however, exceptionable in judicial remedy.

Arbitration of mediation type is applied in France where there are many of such mediators and banks are obliged to inform their clients through the bank statements of the possibility to settle the disputes before them. The costs associated with the mediators activities are paid by banks. The parties, of course, are not inhibited from bringing the given dispute to the court for resolution. The great advantage of this method of dispute resolution is speed. The average duration of proceedings before the mediator in France is 19 days and only for comparison, in Czech Republic the average duration of proceedings before the Financial Arbitrator is 100 days.

Arbitration of conciliation type is applied for example in Spain, where acts special body counting c. 30 employees. The result of the conciliation is not binding recommendation issued within 60 days. Similarly, the decision made by consultant office for consumers on banking market in Finland is also not legally binding but voluntarily adhered by bank institutions.

Disputes between consumers and financial institutions can also be settled through arbitration. The advantage of this method of resolution is in the form of a decision of the arbitral award which is final and enforceable. In the case of Czech legal regulation, it constitutes an obstacle of res iudicata, so there is no possibility of bringing an action to the court in the same thing. The form of arbitration in cases of system of payments between consumers and banks was chosen in Slovakia. For this purpose, there was established the Arbitration Court of the Slovak Banking Association, where operate twenty of arbitrators. It should be noted that the Slovak Republic, in addition of arbitration, has in 2008 introduced a voluntary arbitration before the Ombudsman.

The third model was described as quasi-arbitral proceeding, namely for the reason that albeit it leads to binding resolution, however, only to the moment when there is brought an action to the court in the same case. Such proceeding is currently applied in the Czech Republic as well as in Germany, Austria or Ireland. The duration of such proceedings is for example in the Czech Republic about 3 months, in Germany 3-6 months. The fact that the result of proceeding is an award actionable in trial devalues this method of dispute resolution at the arbitration level. In consideration of the arbitration, it loses more points in comparing the average duration of proceedings. The quasi-arbitral model is applied in the European Union also in another material competence, namely in above-mentioned .eu

domain names. In these cases, it is an out-of-court proceeding between two entities, one of which is probably speculator who is not bringing an action to court in case of losing because he is aware of his speculative behaviour and knows that he would fail. However, banks often feel aggrieved by the decision of the Financial Arbitrator and they bring an action to the court.

CONCLUSION

The author of this article assumes that the Czech Republic did not select the most appropriate method of dispute resolution arising from some relations between financial institutions and their clients. It is relevant to consider the question of what method of dispute resolution should be selected to be sufficiently efficient. It seems appropriate to the author to decide between two models, namely the mediation with the strongest weapon in speed, and the arbitration with advantage of finality and enforceability of an arbitration award. The current model, the so-called quasi-arbitral proceedings drops behind both speed and finality of the decision and it does not use the advantages of both these types of proceedings. There can be add the fact of the average cost of one proceeding that is almost five times greater than the amount of demand in the given dispute.

For inspiration, the direction of further development of extrajudicial dispute resolution between financial institutions and their clients can use the existing experience of current and often very good functional models. For regulation of out-of-court dispute resolution in the Czech Republic it is possible to use the experience in instituting the out-of-court consumer dispute resolutions (entrepreneur vs. consumer) within the joint project of the Ministry of Industry and Trade and the Czech Chamber of Commerce and apply them in different areas of life. In this case, it will take some time before making the evaluation because the system has been established only recently. If the Czech Republic decides to go in the arbitration way, it will be necessary to ensure the acceptance of arbitration by the side of financial institutions. Thereat can be used the experience with so-called mandatory offer of arbitration as it is for example in .cz domain names dispute resolutions. In this case, banks would be obliged to embody in contracts also an obligation to submit to the arbitration in the event when clients would like to. In the matter of the costs of such proceedings, there can be find an inspiration in legal regulation of other states such as Germany, Finland, France, Italy, Denmark and Ireland, where the operating costs of decision-making authorities are paid by contributions of financial institutions.

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