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## Czech Supreme Court in Line with Prevailing International Practice: Arbitration Clause Contained in an Exchange of Simple Emails Found Valid

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The 1958 New York Convention ("NY Convention" or "Convention") was adopted in the era when probably the fastest form of communication in which an arbitration agreement could have been concluded was via telegrams. The Convention requires written form for an arbitration agreement (clause) to be valid, but the electronic communication of our times had not been foreseen in its text. The Czech Supreme Court ("Court") approached this issue in a recent decision, where the arbitration clause was contained in an exchange of emails without a *qualified electronic signature* (for the definition *see*, e.g., eIDAS Regulation). The issue before the Court was not an easy one, as in its case-law regarding "domestic" matters the Court interpreted the writing requirement under the Czech Civil Code as requiring a qualified electronic signature (*see*, e.g., this decision). The Court had to decide, whether this interpretation applies also to the Convention.

### The Writing Requirement in the Convention

The Convention (Art. II/2) defines writing requirement as follows:

> The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

The UNCITRAL Working Group on Arbitration express the purpose of the writing requirement in the following words (at p. 6):

> by requiring either a signature or an exchange of documents, the form requirement ensures that the parties' assent to arbitration is expressly recorded.

Thus, the writing requirement under the Convention should primarily serve an evidentiary and information purpose. This is confirmed by the UNCITRAL Recommendation of 2006:

> [A]rticle II, paragraph 2, of the Convention […] be applied recognizing that the circumstances described therein are not exhaustive.

There was just one reported decision from the pre-Recommendation era that denied email communication as a written form,[1)] while other courts seemed to be less formalistic (see this document, at 14, notes 52-53). This is true even more for post-Recommendation practice, where, it seems, the only reported "outlier" is a Brazilian case of 2007 denying recognition to an unsigned arbitration agreement that had been exchanged via telexes.

**Facts of the Case**

As noted above, the decision handed down by the Czech Supreme Court on May 16, 2019, is the first reported Czech decision on this issue. The dispute arose out of the contract for work ("smlouva o dílo" in Czech, modelled after the Austrian "Werkvertrag") between a Czech company (the claimant) and a Spanish company (the defendant). The exact subject matter of the contract is unclear, but it was undisputed that there had been an exchange of the draft contract between the parties via emails. The contract contained an arbitration clause, which read as follows: "[A]ll disputes, which may arise and cannot be settled amicably, will be submitted to a court of arbitration and settled according to European principles laid down for this field." The arbitration clause was obviously very poorly drafted and it would require an ardent effort to figure out which court of arbitration and under which "European principles" should the arbitration be conducted. The claimant tried to avoid this clause by bringing a claim before the Czech courts.

Both the first instance court and the appellate court dismissed the action in favour of arbitration, holding that the clause is valid under the Czech law on arbitration (Act No. 216/1994 Coll., on arbitration proceedings and on enforcement of arbitration awards) and the Geneva Convention of 1961 (the "Geneva Convention"). The appellate court noted that the fact that electronic communication is not explicitly mentioned in the Geneva Convention does not mean that it is excluded, but only that it was not a usual means of communication at the time of drafting the convention.

**The Supreme Court's Opinion**

The claimant filed an extraordinary appeal ("dovolání" in Czech) to the Supreme Court, relying on the above-mentioned domestic case-law, requiring for the written form of emails that the qualified electronic signature is attached.

However, the Court distinguished the issue in question from the case-law relied upon by the claimant, stating that this is a cross-border question, so far unsettled in its case-law. The Court then went on to determine, which law is applicable to this question. It refused the application of the Czech-Spanish treaty of 1987, as it contains only a conflict-of-law rule for the validity of arbitral agreements at the enforcement stage. Then it shifted its attention to the relationship between the Geneva Convention and the NY Convention. The Court concluded that the NY Convention takes priority, as it is *lex posterior* between the Czech Republic and Spain (Spain ratified first the Geneva Convention in 1975 and in 1977 the NY Convention) and is also more "efficient" for the

resolution of the case, given its higher number of signatory states and more case-law interpreting its text. Nevertheless, given the similarity of both texts, the Court would have probably reached the same conclusion on the issue of form, no matter which of the conventions it had interpreted.

The Court had then arrived at the conclusion that the list of forms contained in the Convention was not exhaustive. It endorsed the 2006 Recommendation and it also referred to two decisions of foreign courts that were of the same view. The first one was the Indian Supreme Court case *Great Offshore Ltd. v. Iranian Offshore Engineering*. It should be noted that this decision is concerned with the exchange of faxes rather than emails, but, admittedly, the rationale is the same. The second case was "Piraeus Single_Member First-Instance Court No. 2150/2017" case, which the Court denoted as a "lower US court decision." However, the name of the court does not resemble any US court and Piraeus is a port city in Greece – as it turns out, the citation does indeed relate to a Greek court (admiralty division) decision on the issue. Mistaking a Greek decision for a US one is an unfortunate oversight at a supreme court level, but it has in principle no bearing on the rationale of the Court's reasoning. As described above, there are quite a few foreign courts' decisions endorsing the logic of the 2006 Recommendation and the Court just followed the suit. The Court found also support in its decision of December 17, 2013, stating that the written form under Article 13 of the CISG includes emails, even though this communication was not mentioned in that article (that decision was reached by the same senate of the Court).

However, the Court did not stop there, as it still faced the essential question of whether it suffices for the form to be preserved in a way so that it is only a simple (plain) email. Fortunately, the Court has proven to be less formalistic when it comes to the international arena. It emphasized that the Convention permits an exchange of telegrams, which also do not contain any (qualified) signatures. Secondly, it referred to the court decisions from other contracting states which held that no signatures are necessary when it comes to the "exchange" of documents under Art. II para 2 of the Convention.[2)] The Court also cited, in support, the E-Commerce Directive of 2000 (its Art. 17), which requires that the (EU Member States) national "legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means." The Court, at the very end of the decision, recalled also its judgment on another international treaty, Convention on the Contract for the International Carriage of Goods by Road. In that decision, the Court stated that a "written claim" under Art. 32 para 2 of the CMR includes also email communication without a qualified electronic signature – the Court arrived at that conclusion after a thorough comparative analysis of several sources and foreign courts' decisions (including the Supreme Courts of Austria, Germany and Netherlands).

## Conclusion

In essence, the Court joined many of its foreign counterparts, presenting itself as being interpretation friendly to the reality of the modern international trade. From the Czech perspective, it is a step in the right direction that the Court sought an autonomous interpretation of the Convention and that it looked towards the case law of other countries. Thus, the Court deviated from its formalistic domestic approach and extended further support for international commercial arbitration in the Czech Republic. The Court's Senate No. 23 fortunately often looks at comparative arguments and sources and is quite arbitration-friendly. To illustrate, it authored in the past an opinion under which it is possible to submit a wholly domestic commercial case to an international arbitration.

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References

**?1** Halogaland Court of Appeal, 16 August 1999, cited here, at 7 n. 20.

**?2** The Court cited the *Compagnie* decision and the NYC Guide, at 56-57.

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