Annual Report

2004

Financial Arbiter of the Czech Republic

Contents

Introductory Word by the Financial Arbiter

Within the meaning of S. 21(1) of the Financial Arbiter Act (No. 229/2002 Coll.), as amended, I present this Annual Report about my activities in the year 2004.

The year 2004 was the second year of my activities. Looking back to the beginning of 2004 and looking at its overall development, I have to say with satisfaction that the Financial Arbiter of the Czech Republic began to be perceived by the public as a body or a position whose purpose is to help clients of banks and other financial institutions solve their problems, which are in his competence. Provided I was not able to open proceedings, I, my Deputy or colleagues from the office were ready to at least provide advice based on our knowledge and practical experience.

What also has to be appreciated are those entities against which citizens' petitions are filed, be it banks or other transfer institutions, but also issuers of electronic payment instruments. They started to take the institute of the Financial Arbiter seriously. It is clear from growing numbers of petitions, which I discontinued due to the fact that the petitioner, i.e. a client of an institution, had informed me that his/her bank or other institution had reached an agreement with him/her and had granted him/her the required damages.

The year 2004 was also a year in which I strengthened my contacts with foreign countries, in particular active cooperation with countries that are part of FIN-NET (Cross-Border Out-of-Court Complaints Network for Financial Services), by means of which I have fulfilled the provision of S. 20 of the Financial Arbiter Act.

In autumn 2004 the Parliament of the Czech Republic passed an amendment of the Financial Arbiter Act (No. 229/2002 Coll.), which was published under No. 558/2004 Coll. This amendment contains not only organisational and technical changes as well as procedural changes, but also extends the Financial Arbiter's powers to the possibility of settling disputes ensuing from corrective settlement and disputes ensuing from collection payment. As for the procedural changes, I would like to mention the fact that thanks to the amendment of the Finance Arbiter Act proceedings before the Arbiter will be even more efficient and speedy, since the time limit for the institution to make a statement has been reduced from 30 to 15 days. All these amendments became effective as of 1 January, 2005.

In 2004 I established informal cooperation with the Czech Consumers Association, mainly in the field of protection of the consumer against the banking sector.

Besides, I was able to present my practical knowledge to university students in 2004, which I regard as highly beneficial.

In the Report that I present to you I can compare the years 2003 and 2004 not only with view to the number of petitions to open proceedings, but also the number of issued findings, imposed penalties and other monitored values.

March 2005

JUDr. Ing. Otakar Schlossberger
Financial Arbiter of the Czech Republic

Introduction

The Financial Arbiter's Annual Report 2004 informs about the second year of activities of a truly unique institute of consumer protection in the Czech Republic. The Financial Arbiter may be perceived as a special body responsible for out-of-court settlement of disputes that may arise between the providers of payment services and their clients or between the issuers and users of electronic payment instruments.

In accordance with the Financial Arbiter Act (No. 229/2002 Coll.) (hereinafter referred to as the "FA Act") the Arbiter settles disputes that have arisen as of 1 January, 2003, namely:

between entities that execute transfers of funds (hereinafter referred to as "Transfer Institutions") and their client when executing transfers of funds pursuant to special legal regulation1 in the maximum amount of EUR 50,000;

between entities that issue electronic payment instruments (hereinafter referred to as the "Issuers of Electronic Payment Instruments") and the holder of electronic payment instruments when issuing and using electronic payment instruments pursuant to special legal regulation[1].

On 1 January, 2004 the Financial Arbiter of the Czech Republic commenced the second year of his activities; the year 2004 can also be seen as a period in which the operation of the Financial Arbiter's office kept gradually improving.

The Financial Arbiter's activities are fully in compliance with the law of the Czech Republic as well as with the law of the European Union[2].

As of the date of the accession of the Czech Republic into the European Union the Financial Arbiter's powers were extended to include settlement of disputes in the field of cross-border transfers in accordance with the Payment System Act.

Cross-border transfer means a transfer of funds from one EU member state or a state that is part of the European Economic Area (i.e. EU member states together with Lichtenstein, Norway and Island) into another member state in the domestic currency of any EU member state or a state that is part of the European Economic Area (hereinafter referred to as the "EEA").

[1] Act No. 124/2002 Coll., which makes provision with respect to transfers of funds, electronic payment instruments and payment systems (the Payment System Act).

[2] E.g. Directive of the European Communities No. 97/5/EC, on cross-border credit transfers, sets forth a speedy and effective out-of-court settlement of clients' disputes with institutions executing transfers.

1. Activities of the Arbiter's Office

Within the meaning of the FA Act the first Financial Arbiter of the Czech Republic, JUDr. Ing. Otakar Schlossberger, and his Deputy, JUDr. Petr Scholz, continued the performance of their work.

JUDr. Ing. Otakar Schlossberger

JUDr. Petr Scholz

The Czech National Bank (CNB) provided material support and information technologies including premises for the performance of the Arbiter's work.

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In the course of 2004 the number of employees of the Financial Arbiter's office, employed by the CNB, rose to five. In September 2004 an employee was admitted to the position of the Financial Arbiter's Methodology Specialist. The employee who had held this position was transferred to the position of the Financial Arbiter's Main Analyst.

The Organisation Chart of the Performance of the Arbiter's Work, which is an integral part of the Organisational Guidelines issued by the Arbiter in 2003, is presented in Appendix No. 1 to this Report.

In accordance with the provision of S. 12(7) of the FA Act the Arbiter granted the new employee in the position of Methodology Specialist permanent authorisation to carry out investigation.

2. Staffing and Administrative Provision of the Performance of the Arbiter's Work

In 2004 the fulfilment of the FA Act was provided for by the Arbiter, his Deputy and five CNB employees of whom three were directly involved in investigation and settlement of disputes on the basis of filed petitions.

As has been said above, the performance of the work of the Financial Arbiter's office was provided for by five employees, of whom three are experts and two provide administrative support. The employee in the newly established position of the Financial Arbiter's Main Analyst performs in particular the following activities:

- participates in meetings and negotiations in FIN-NET attached to the EU and represents the Arbiter in this body;
- prepares source materials and proposals for the Financial Arbiter's negotiations at international level, in particular with a focus on EU structures;
- prepares the Arbiter's output materials for the highest representative bodies of the CR;
- participates in negotiations in relevant committees and commissions of the Chamber of Deputies of the CR;
- monitors, supplements and evaluates on an ongoing basis the duty of institutions to notify;
- cooperates with the Financial and Analytical Section of the MoF of the CR as concerns reporting suspicious transactions;
- carries out investigations in the proceedings before the Arbiter; prepares subject matter and expert source materials for the Arbiter's decision on the merits, on objections against the finding, on the imposition of a penalty and objections against the decision to impose a penalty;
- assesses filed petitions with regard to their admissibility and prepares source materials for their refusal;
- upon the request of petitioners provides assistance to them with the writing, filing and/or supplementing the petition to open proceedings.

In the course of 2004 the Financial Arbiter authorised in writing five other persons who are not employees of the CNB to carry out investigations in accordance with the FA Act. These persons included a judicial expert in the field of graphology, an expert in the field of the payment system, an attorney, an expert in the field of issuance and use of electronic payment instruments and a judicial expert in the field of economy, namely banking and insurance, specialised in direct debit – domestic and foreign payment cards and cheques, international payment systems, computer processing, settlement and security and protective elements in payment card systems.

From the left: Jiří Louthan, Zuzana Hornychová, Dana Klofáčová, Iveta Walterová, Marcela Soldánová

The Arbiter checked petitions filed by petitioners that were in process and the authorised persons regularly informed the Arbiter about the stage of processing of the particular opened disputes. Pursuant to the FA Act an authorised person monitored whether the duty of institutions to notify was fulfilled.

Office hours for the public set by the Arbiter, Monday to Thursday 8.30 a.m. – 3.30 p.m., Friday: 8.30 a.m. – 2.30 p.m., proved to be adequate. Approx. one third of visits in person to the Arbiter's seat took place outside the aforementioned office hours, upon prior agreement with the petitioner. The Arbiter together with all authorised persons always aimed to meet the petitioners' wishes and alter the meeting time to the petitioners' satisfaction.

3. Budget

At the beginning of 2003 the Financial Arbiter concluded an agreement with CNB representatives concerning the administrative provision of the Arbiter's work including the reimbursement of costs relating to his activities.

As for the reimbursement of costs relating to the performance of activities by the CNB, the Financial Arbiter's position is in principle dependent on CNB's attitude, since S. 1(2) of the FA Act provides for a "reasonable extent" of costs, which each party may interpret in a different way.

However, in the course of the period in question communication between the Financial Arbiter and the assigned administrator, namely the Manager of the Monetary and Payment System Section of the CNB, had very positive results.

The Arbiter states that the agreement may be seen as positive. The creation of web pages was supported and the issue of staffing of the Financial Arbiter's office was solved.
However, CNB's support concerning IT implementation, namely the creation of a supporting record programme required for monitoring procedural time limits and disputes in general including automated preparation of statistical source materials remained unsolved.

The presented overview of costs of the performance of the Financial Arbiter's work in 2004 (presented in Appendix No. 2) is tied with CNB records, it does not form a separate chapter of the state budget and thus does not have its usual structure. The CNB appointed an employee to monitor costs, who informs the Arbiter on a monthly basis about the utilisation of selected items.

It follows from the aforementioned overview of costs in 2004 that the overall costs of the performance of the work of the Arbiter's office from January to December stood at CZK 8.1 mil., of which wages, salaries and other social security costs accounted for CZK 5.4 mil., administrative activity for CZK 1.8 mil. and the operation of buildings and equipment for CZK 0.9 mil.

Compared with the previous period the overall costs rose approx. by CZK 1.9 mil., of which personnel costs accounted for CZK 1.2 mil. and administrative costs for CZK 0.9 mil. Compared with 2003, costs of the operation of buildings and equipment were reduced by a total of CZK 0.2 mil.

CNB income generated from the performance of the Arbiter's work comprised only income from imposed penalties (see below). Penalties in the amount of CZK 0.57 mil. were imposed and paid in the period in question.

4. The Arbiter's Notification Activities and the Duty of Institutions to Notify

The Arbiter carried out the duty to notify upon S. 21 of the FA Act.

In the period in question the Arbiter presented information about his activities covering the period between 1 November, 2003 and 31 March, 2004 to the 9th meeting of the Standing Commission for Banking of the Chamber of Deputies, which the Commission acknowledged.

The Financial Arbiter's web pages were updated on an ongoing basis in the course of 2004. These pages contain basic information about the Arbiter's role and powers together with conditions for opening proceedings. Besides, there is also a form for filing a petition to open proceedings before the Financial Arbiter in electronic form. The web pages also contain examples of disputes that are within the Arbiter's powers and which are not after the accession of the Czech Republic into the European Union. The pages also mention legislation relating to the Arbiter's activities as well as links related to the Arbiter's activities. Besides, information is published on the web pages about central banks in EU member states and in countries that are part of the EEA.

Information about similar institutes in EU countries and the Financial Arbiter's selected findings and decisions without the identification data of petitioners and institutions are also published on the Financial Arbiter's web pages.

On 6 April, 2004 the Financial Arbiter held his second press conference at which all major media representatives were present. The press conference was co-organised by the CNB (provision of premises including technical equipment).

During the period in question the Arbiter was asked several times by media representatives to provide information about his work or expert consultations and opinions through TV appearances and radio or press interviews. However, it has to be said again that some news published in the media without prior cooperation with the Arbiter often presented distorted information about the Arbiter's powers.

Besides, the Arbiter answered questions through on-line discussions. News and information about the Arbiter's work appeared in the press on an irregular basis, some of which were based on information provided by the Arbiter. The overview of news and information issued about the Arbiter is monitored and filed by the Arbiter's office.

The Arbiter was invited to a number of conferences and workshops organised by the CNB, the Consumer Protection Association of the CR, the Association for Banking Cards, renowned education agencies or directly institutions upon their own request. The Arbiter presented his activities several times through lectures at various conferences both home and abroad and also published articles or gave interviews to professional journals.

During the period in question the Arbiter notified bodies that perform supervision over the institutions about ascertained facts about which he learned when performing his work, namely representatives of the CNB and the Financial and Analytical Section of the Ministry of Finance of the CR. In justified cases the Financial Arbiter also notified directly the relevant institution.

The FA Act sets forth the duty of institutions, i.e. Transfer Institutions and Issuers of Electronic Payment Instruments, to notify, as of the date when they commence their activities, of their business name, as well as to identify a person authorised to communicate with the Financial Arbiter or to provide other statutory data.

A list of the institutions, updated on a regular basis, is presented on the Arbiter's web pages. The pages also contain a model form for fulfilment of the duty of institutions to notify.

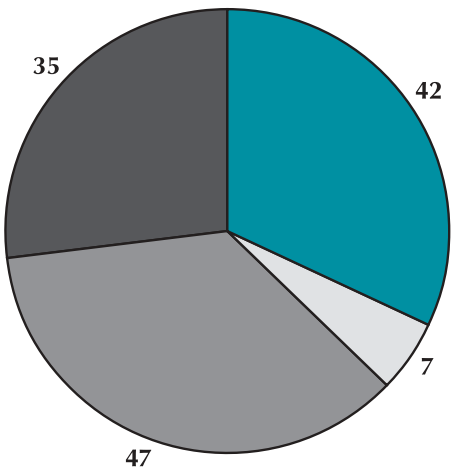


Diagram No. 1

Structure and number of institutions that operate in the CR and had the duty to notify as of 31/12/2004

- Number of institutions operating pursuant to the Banking Act
- Savings cooperatives
- Number of Issuers of Electronic Payment Instruments
- Number of institutions operating pursuant to other Acts

A total of four final and effective penalties were imposed in 2004 for failure to fulfil the duty to notify. As of 31 December, 2004 the penalties were paid in the overall amount of CZK 300,000. A diagram showing the composition of imposed penalties is presented in Section 5.1 of this Report.

The penalties were collected and recovered by the CNB upon the Arbiter's decision to impose a penalty.

When monitoring whether the duty of institutions to notify within the meaning of the FA Act is fulfilled, the Arbiter experienced the same problems in 2004 as in the previous period. In principle, the problem is such that provided an institution does not fulfil the duty to notify set forth in the FA Act and provided it is an institution established pursuant to the Commercial Code without the requirement for a licence to be granted to it by the CNB, the Financial Arbiter is unable to penalize such institution for breaking the FA Act, as he is unaware of its existence. Random sanctions are imposed only if a client of such institution files a petition with the Financial Arbiter to open proceedings against this institution and the institution is not included on the list of institutions that are within the applicability of the FA Act.

5. Material Activities

5.1. Principles of Proceedings before the Financial Arbiter

Proceedings before the Arbiter follow both the FA Act and the Code of Administrative Justice (the Administrative Procedure Act (No. 71/1967 Coll.)). In 2004 an amendment of the Administrative Procedure Act was published (Act No. 500/2004 Coll.), which will become effective as of 1 January, 2006. The principles of processing filed petitions to open proceedings before the Financial Arbiter were stabilised in the course of 2003 and thus no major changes to the adopted methodology took place in the period in question.

The Financial Arbiter's previous Annual Report 2003 sufficiently describes the principles of proceedings before the Financial Arbiter; the Annual Report 2004 therefore provides only new elements related to the described issues.

Opening of proceedings

Proceedings are usually opened on the day when the petition to open proceedings is delivered to the Arbiter's office.

There still remains the problem that petitions are sometimes incomprehensible and it is not clear what the subject matter is and what the petitioner seeks. The required appendices to the petition to open proceedings are still often confusing or are not attached at all. In that case the Arbiter opens the dispute, but at the same time asks the petitioner to provide the necessary documents. The institution is asked to make its statement only after all the necessary documents have been delivered to the Arbiter.

Compared with the previous period, petitions sent in the year 2004 often did not contain basic description of facts and the subsequent time necessary to eliminate the defects was often the reason why the duration of the overall proceedings was prolonged or why the opening of the proceedings had to be postponed.

The ratio of cases sent by post, through electronic form and delivered in person remained the same compared with 2003.

In accordance with the Act both the petitioner and the institution are notified of the opening of the proceedings in writing; besides, the institution is asked to make a statement to the filed petition. In 2004 the statutory time limit was 30 days, but the Financial Arbiter was allowed to extend this time limit in justified cases upon the institution's request.

Course of proceedings

Also in the period in question the Arbiter asked institutions to cooperate and provide further information.
Besides, several petitioners were asked to come to the Arbiter's seat to provide oral explanation.
Based on the ascertained facts the Arbiter asked the institution and in some cases the petitioner to submit other documentary evidence (e.g. to submit the original of a document or a video recording).
Voice recording was usually made at all oral proceedings, on the basis of which a report was written (report from the proceedings).

In a major part of disputes the Arbiter asked upon authorisation for an expert report to be prepared by a judicial expert in the field of graphology or by an expert in the area of issuance and use of an electronic payment instrument.

In 2004, upon the Arbiter's bad experience to date, the amendment of the FA Act was supplemented; institutions were added, which were as of 1/1/2005 obliged to cooperate with the Arbiter. These institutions are not participants in the proceedings, but their explanation may be important for the course or result of the proceedings.

Discontinuance of proceedings

The Arbiter discontinued the proceedings only upon a request to withdraw the petition submitted by the petitioner. The petitioner usually withdrew the petition due to other settlement with the institution or due to the fact that s/he had discovered who had operated with his/her funds.
In the period in question the Arbiter was not forced to discontinue the proceedings due to the petitioner's failure to cooperate.

Issuance of a finding

The Financial Arbiter makes a decision on the merits, i.e. issues a finding containing a statement, reasoning and advice on objections. Provided the finding was issued in favour of the petitioner, the statement also included a time limit within which actions leading to a financial settlement with the petitioner were to be made or damages were to be granted to the petitioner for damage incurred.
The preparation of a finding issued by the Arbiter is a very demanding activity. In accordance with the FA Act the finding contains required elements and description of all facts. Findings have to be worded and issued in a way that is clear and comprehensible in particular to the petitioner.

The Financial Arbiter stated in the reasoning of a finding on what ascertained facts the issuance of the finding relied, how he evaluated the evidence and upon what legal regulations he made his decision. When issuing the finding, the Arbiter very closely cooperated directly with an authorised CNB employee or another person authorised to settle the case.

In 2004 the Financial Arbiter issued a total of 42 findings.

The average time required for the issuance of a decision by the Arbiter was almost 100 days in 2004. Compared with 2003 no major changes took place in this respect. It has to be said that this time includes both the total time for the issuance of a finding and time for the issuance of objections as well as the statutory time limit before the finding becomes legally effective. Provided only the time required for the issuance of a finding was monitored, it would be on average 80 days.

Objections

Either the institution or the petitioner may make an objection against the finding; objections represent ordinary means of remedy against a decision made by the Financial Arbiter. This possibility was made use of in particular by institutions. Submitted objections have a suspensive effect.

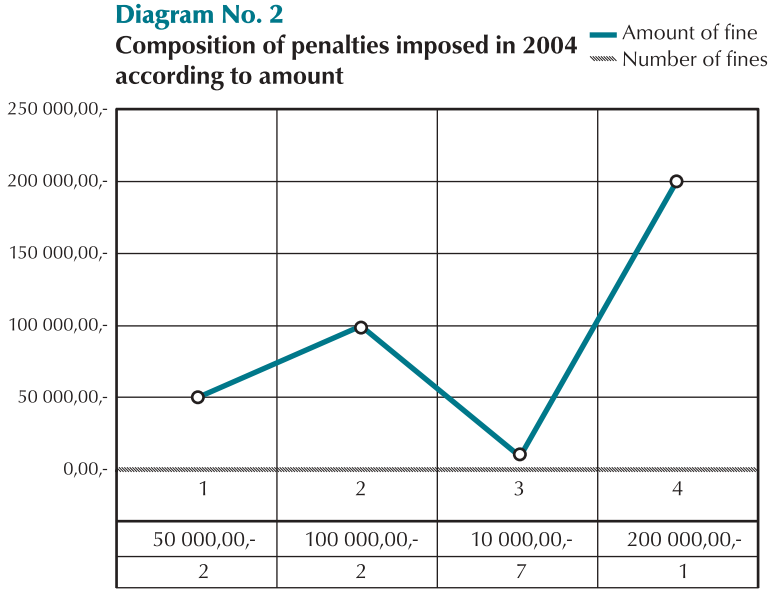
The Arbiter always reviewed the contested finding and subsequently issued a decision on objections. In the period in question the Arbiter always issued a decision on objections confirming the issued finding, as those entities contesting the finding failed to submit new evidence and/or no procedural mistakes were found.

Penalties

In 2004 the Arbiter imposed a total of 7 penalties concerning disputes in accordance with S. 23(2) of the FA Act in the aggregate amount of CZK 70,000.

The Arbiter imposed a penalty provided the institution breached a duty pursuant to special legal regulation. The amount of the penalty is set forth in the Act and it is a minimum of 10% of the disputed amount, but at least CZK 10,000.

Diagram No. 2
Composition of penalties imposed in 2004 according to amount



The Financial Arbiter imposed one penalty for breach of a duty imposed on the institution in relation to the dispute in the amount of CZK 200,000 (S. 23(1)). The Arbiter imposed this penalty on the institution with regard to the gravity of breaking the law. However, in the aforementioned case the Financial Arbiter did not impose the maximum penalty, i.e. CZK 1,000,000. Nevertheless, the institution took action against the Financial Arbiter pursuant to the Code of Administrative Practice in which it proposed that his decision on the imposition of a penalty be cancelled.
The Financial Arbiter imposed four penalties in the aggregate amount of CZK 300,000 related to a failure to fulfil the duty of an institution to notify pursuant to S. 19 of the FA Act. Diagram No. 2 presents the composition of the penalties and their amount.

5.2. General Information about Settled Cases

In the period in question, i.e. January – December 2004, the Arbiter settled 130 cases of the overall 269 sent suggestions and petitions.

Approx. 10 telephone questions were answered a day together with several questions sent by e-mail.

Approx. 15 clients visited the Arbiter's seat a month, asking for advice concerning the possibility to open proceedings before the Arbiter. Although most of the visits in person related to disputes not in the Financial Arbiter's powers, the client always received at least advice or opinion of the office experts.

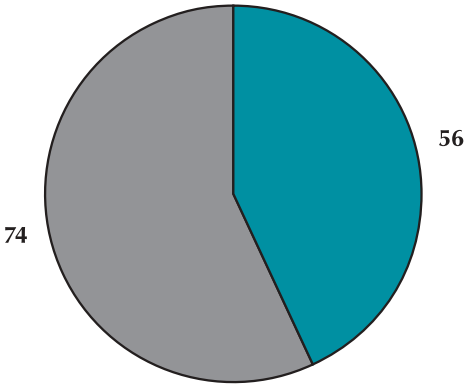


Diagram No. 3
Number of settled cases in 2004

Justified cases
Unjustified cases

It can be seen in Diagram No. 3 that out of 130 opened disputes 74 cases were justified and 56 were unjustified. Given in per cent, 57% of cases opened by the Financial Arbiter were justified and 43% of petitions were found to be unjustified.

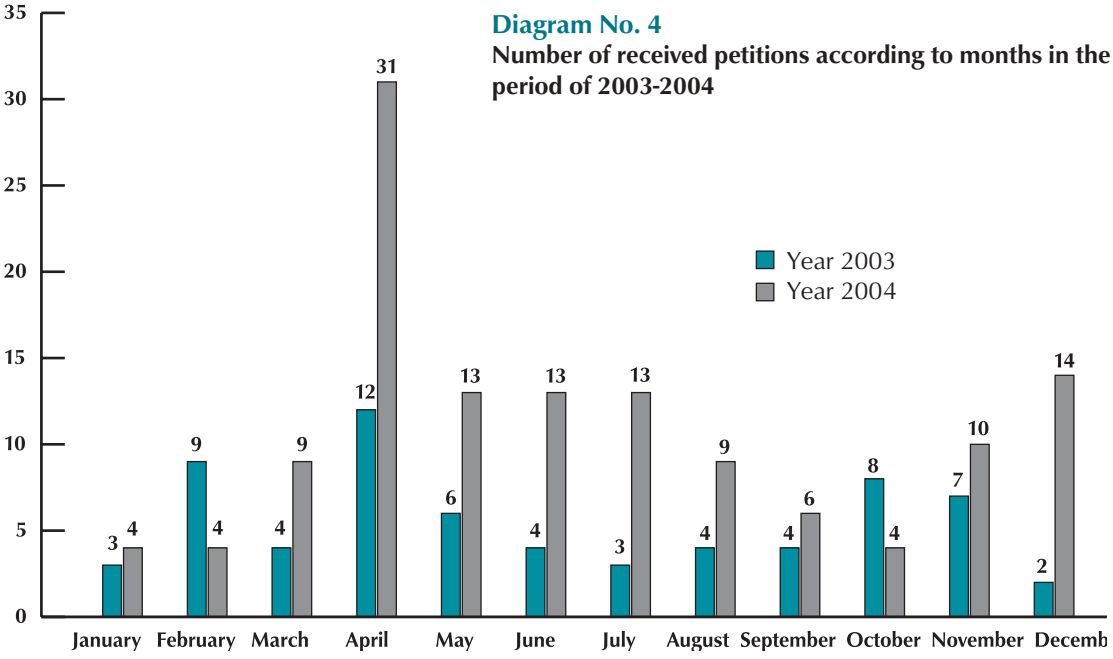


Diagram No. 4
Number of received petitions according to months in the period of 2003-2004

A clear trend can be seen in the diagram, namely that the largest number of petitions is received in the course of the second quarter of the year and the smallest number in the period after Christmas and the New Year. The increase in filed petitions may also be explained by the fact that the Financial Arbiter held press conferences both in 2003 and in 2004, about which the public was subsequently informed through the media.

Only several petitions were sent through legal representatives and attorneys, however also in 2004 these petitions contained legal defects. Again, petitions were filed that concerned issues outside the Arbiter's powers.

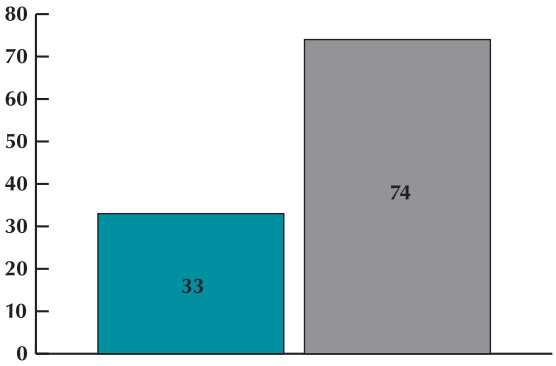


Diagram No. 5

Comparison of the number of justified cases in 2003-2004

Year 2003
Year 2004

The y-o-y growth in the number of justified cases (the 2004/2003 index) is more than twofold. All justified disputes concerned institutions operating in the CR pursuant to the Banking Act[3].

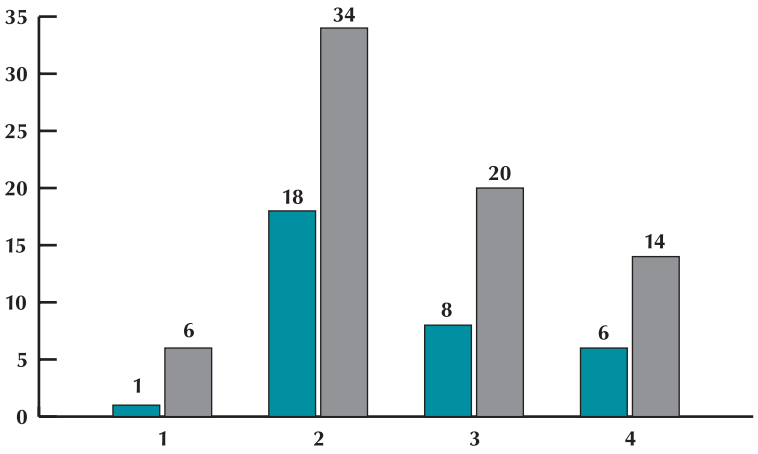


Diagram No. 6

Comparison of the number of justified cases according quarters in the period of 2003-2004

Year 2003
Year 2004

Diagram No. 6 shows a quarterly comparison of received justified cases in 2003-2004, which illustrates the conclusion stated at Diagram No. 4. In both compared years the highest increase in filed petitions to open proceedings occurred in the second quarter of the year.

The following diagram shows in what fields and with what frequency petitioners filed their petitions to open proceedings. The problems involved mostly the use of an electronic payment instrument in a cash machine (ATM) (i.e. use of a payment card in a cash machine for money withdrawal), use of this instrument at a trader when purchasing goods or services and problems related to making transfers pursuant to special legal regulation. Other defects related to the use of an electronic payment instrument concerned e.g. the quality of this instrument, use of the Internet, etc.

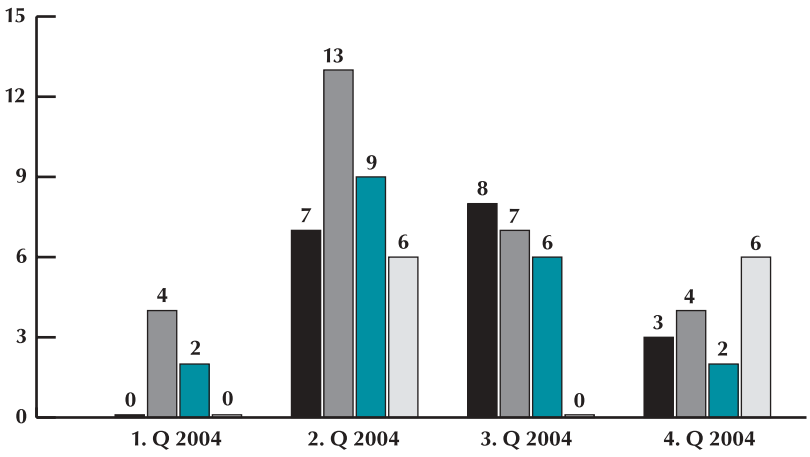


Diagram No. 7

Number of settled justified cases in 2004 according to the field of dispute

Transfers of funds
Use of an electronic payment instrument in a cash machine
Use of an electronic payment instrument at a trader
Other problems related to an electronic payment instrument

[3] Banking Act (No. 21/1992 Coll.)

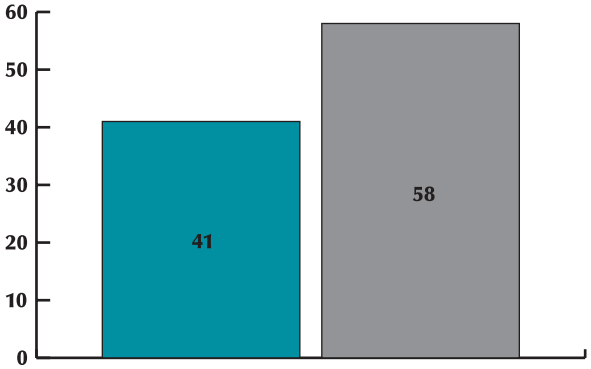


Diagram No. 8

Comparison of the number of unjustified cases in 2003-2004

- Year 2003
- Year 2004

Based on Diagram No. 8 it may be said that the number of unjustified petitions in 2004 was higher by 40% compared with 2003. However, the per cent increase in unjustified cases was not as dynamic as the increase in the number of justified cases (see Diagram No. 5).

Diagram No. 9 below provides a quarterly comparison of received unjustified cases in 2003-2004.

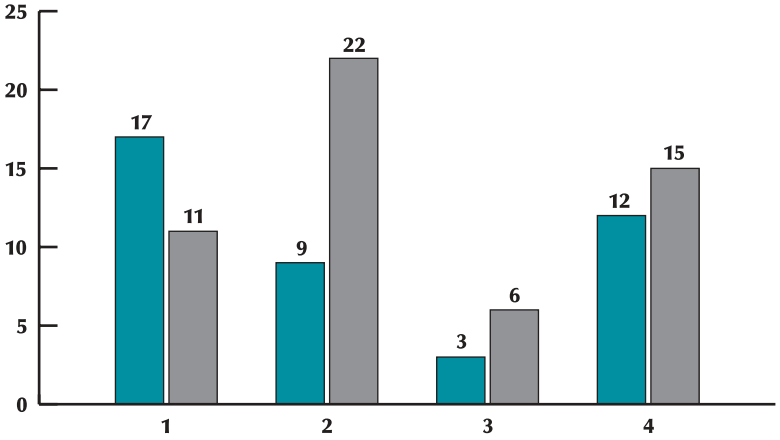


Diagram No. 9

Comparison of the number of unjustified cases according quarters in the period of 2003-2004

- Year 2003
- Year 2004

The Arbiter also monitors the structure of institutions, which the petitioner's petition to open proceedings concerned. A concise overview of these institutions is presented in the following diagram.

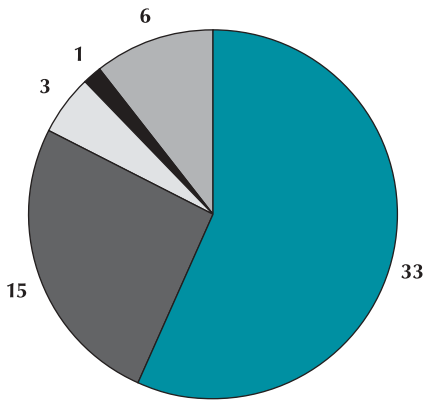


Diagram No. 10

Overview of institutions – unjustified cases in 2004

- Banks (33)
- Loan and building societies (15)
- Insurance companies (3)
- Savings cooperatives (1)
- Other institutions (6)

Out of the total number of 74 justified and opened disputes 18 disputes were discontinued on the basis of the petitioner's request to withdraw the petition. Out of that number 16 disputes were discontinued upon a settlement between the institution and the petitioner, in one case the petitioner himself/herself discovered the unauthorised person and in one case the petitioner acknowledged that s/he had made a mistake.

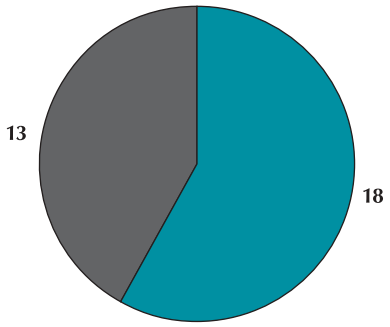


Diagram No. 11

Comparison of the number of withdrawn petitions in 2003-2004

- Number in 2003
- Number in 2004

It is clear from the presented figures that the existence of the Financial Arbiter plays a preventive role, which is reflected in the fact that the institution indemnifies the client even before the Financial Arbiter issues a decision on the merits in the form of a finding.

Provided the Arbiter issues a finding sentencing the institution, the institution shall pay the penalty and/or other proven damage incurred by the petitioner.

According to statements made by some institutions it may be said that they value a good relationship with the client (petitioner), goodwill of the institution and last but not least they do not wish to be subject to a penalty.

However, based on a two-year experience the Arbiter has to say that there are also institutions that are not interested in a friendly settlement of a dispute with their client. On the contrary, even though the Arbiter clearly proves that the institution has breached its duties, provides a due reasoning and states it in the finding, the institution seeks in court that funds be returned by its client (petitioner) and demands that court fees be reimbursed to it.

The FA Act allows for the possibility of settling a dispute, about which the Arbiter has made a decision, subsequently in court. After the court delivers its judgment, the Financial Arbiter's finding loses its validity and effect. This fulfils the lawfulness principle that is contained in the whole legal system of the Czech Republic. However, what needs to be born in mind is the way an institution seeks its funds to be returned and also the fact that the institution demands that its client pay the court fees, which may often be far higher than the actual disputed amount. This may be seen as a form of pressure on the petitioner so that s/he does not file petitions with the Financial Arbiter, as the case can eventually get to court and the petitioner's complaint may "cost him/her dear". Such behaviour of institutions towards a client may be seen as very unethical.

With the growing number of heard cases the number of issued findings that became legally effective in 2004 rose as well. The ratio reflects the number of issued findings.

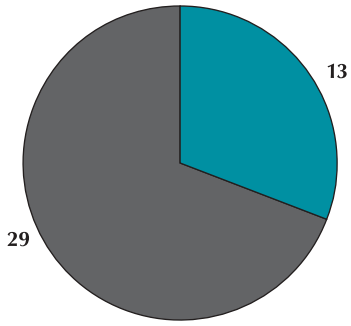


Diagram No. 12
Comparison of the number of issued findings legally effective in 2004

- Findings issued in favour of the institution
- Findings issued in favour of the petitioner

Together with the increased number of issued findings the number of objections against the Arbiter's findings rose as well in the period in question. The following diagram shows that in 2003 only two objections were filed, which represents 15% of findings issued in the year; however in 2004 the number of objections accounted for 58% of the total of 29 issued findings. This shows that almost one in two findings was appealed against by means of an ordinary means of remedy.

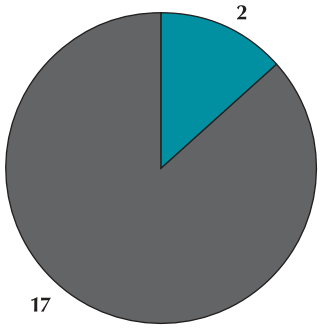


Diagram No. 13
Comparison of the number of objections against issued findings in 2003-2004

- Number in 2003
- Number in 2004

5.3. Description of Selected Heard Cases

In accordance with S. 21(1) of the FA Act the Arbiter provides a description of selected heard disputes that are within his powers.

In this context the Arbiter has stated the number of issued findings that became legally effective in 2004. From what is given below it is clear that over two thirds of all findings are issued in favour of the institution and only one third of findings is issued in favour of the petitioner.

The description of selected heard cases has been broken down to:

A. transfers of funds pursuant to S. 1(1)(a) of the FA Act;
B. electronic payment instruments pursuant to S. 1(1)(b) of the FA Act.

A. Transfers of Funds

Payment order to transfer funds incorrectly filled in by the petitioner

A petitioner sought that the institution pay damages for loss incurred due to a non-executed transfer in the amount of CZK 80,000, which resulted in a failure to award state contribution in the amount of CZK 4,500 for building saving and interest in the amount of 5% p.a. on the transferred amount. The reasoning of the petition was such that on 13/8/2003 the petitioner transferred the amount of CZK 80,000 from his time deposit account No. 1111111111/1111 to a building savings account No. 3333333333/2222. On that day the petitioner visited the institution's office in person, where a person in charge checked whether the transfer was possible and wrote down on a piece of paper the account number, as the petitioner did not have it on him. Subsequently the person in charge confirmed the receipt of the transfer order and gave a copy to the petitioner. Later (in January 2004) the petitioner learned that the order had been sent for processing to a centre processing the institution's documents. Owing to the fact that the petitioner is sent his account statement once every three months, he did not find out the transfer had not been executed, and he later forgot to check. Only in 2004 when the petitioner again visited the institution to make a transfer did he learn that the transfer had not been made on 13/8/2003, since a wrong payer's account number had been given. Due to this the petitioner incurred damage in the amount of CZK 4,500 for non-awarded state contribution to his building savings account and also damage for non-awarded 5% interest on the transferred amount of CZK 80,000. The petitioner later learned that a transfer from a time deposit account could not be made at a counter, but only in an office where the institution's employee makes a check through the terminal and executes the transfer immediately. The petitioner objects that if the same procedure had been followed on 13/8/2003, the wrong payer's account number would have been discovered while the petitioner was still in the office with the institution's employee. The petitioner's objection was not accepted by the institution and only the manager of the institution's branch in V. verbally acknowledged that the institution had made a mistake and promised to make good as part of claim proceedings. The petitioner also stated that both the institution and the loan and building society failed to make good.

In its statement the institution was convinced that it bore no responsibility for damage incurred by the petitioner. The institution stated that on 13/8/2003 the petitioner submitted in its branch in V. a payment order to be debited from account No. 2222222222/1111 and credited to account No. 3333333333/2222 in the amount of CZK 80,000. In accordance with the institution's internal guidelines this payment order was sent for processing into a processing centre in Prague. However, employees of the Prague processing centre were unable to verify the correctness of the signature, as time deposit No. 2222222222/1111 had been closed at that time and the petitioner's signature specimen to this account had no longer been available. The payment order submitted by the petitioner was returned on the following business day to the institution's branch. However, employees of the institution's branch were unable to contact the petitioner in any way and notify him of the incorrectly filled in payment order, because the rightful holder of time deposit account No. 2222222222/1111 that had been closed could not be ascertained. It also became obvious from the institution's statement that the petitioner could have found out that the required transfer of CZK 80,000 had not been made in his account statement to account No. 1111111111/1111, i.e. account that should presumably have been stated on the payment order submitted to the institution.

During the evidencing the Financial Arbiter found out that the payment order had been issued, i.e. written in hand by the petitioner, to be debited from account No. 2222222222/1111, and not from account No. 1111111111/1111, as stated by the petitioner, and that the payment order had been signed by the petitioner, meaning that the petitioner had agreed with data given on the payment order. The institution's employee only corrected the bank code to 1111, because the petitioner had given the already non-existent code 9999, and added the abbreviation of "TV" (time deposit). The institution followed the petitioner's instructions, but did not make the payment, as the payer's account number had been wrong. Besides, the petitioner could have found out from account statement to account No. 1111111111/1111 from September 2003 that the

payment order as of 13/8/2003 had not been executed. The Financial Arbiter holds the opinion that the petitioner has made a mistake and the institution can therefore not be held liable for damage incurred as a result of not executing a transfer in the amount of CZK 80,000 also with view to the fact that the institution is not obliged to notify the petitioner of not having made a transfer.

The work of the Financial Arbiter does not replace the work of common courts. The Financial Arbiter has powers to decide disputes set forth in S. 1 of the FA Act. In this case, on the basis of evidencing that had been performed, the Financial Arbiter reached a conclusion that the institution had not breached any provision of Act No. 124/2002 Coll., which makes provision with respect to transfers of funds, electronic payment instruments and payment systems (the Payment System Act). The Financial Arbiter does not have any other powers apart from those stipulated in the aforementioned S. 1 of the FA Act and can therefore not investigate potential breaches of other regulations or rights than those listed in the provision; otherwise the Financial Arbiter's powers would be exceeded. If, regardless of what has been stated, the petitioner is still convinced that the institution has caused damage to him, he may seek his right in civil procedure.
The Financial Arbiter therefore dismissed the aforementioned petition.

The petitioner filed objections against the finding within the statutory time limit. In the objections he states that he does not understand why the petition concerning the non-awarded state contribution in the amount of CZK 4,500 had been dismissed on grounds that financial institution Q had not made a mistake, as he has two letters as of 15/3/2004 and 8/4/2004 sent by the institution to the loan and building society, in which the institution accepts its fault.

Based on the filed objections, the Financial Arbiter assessed the whole contested finding, but did not accept the petitioner's objections, as he discovered that the institution had written both letters in order to help the petitioner, in spite of his apparent mistake, when claiming the non-awarded state contribution. The institution therefore contacted the loan and building society, requested that it award state contribution for 2003 retrospectively and in good faith and with view to easier processing of its request it stated that it had made the mistake. The institution had assumed that if the request for awarding state contribution for 2003 retrospectively had stated that the petitioner had made the mistake, the loan and building society would have refused to respond to the request at all. None the less, these attempts were not successful. The Financial Arbiter has to say that the institution's letters may under no circumstances be regarded as evidence that the institution had made a mistake, since he is aware of the reasons why the institution had written these letters.
The Financial Arbiter therefore confirmed his finding.

Transfer of funds at the institution's trading point

Case A
In her petition as of 27/5/2004 a petitioner represented by the Czech Bar Association (hereinafter referred to as the "AK") in P. sought that the institution pay the aggregate amount of CZK 180,000 including interest on late payment to the petitioner's account No. 123456789/1111.
The reasoning of the petition was such that on 3/11/2003 the petitioner withdrew cash at the institution's branch in the amount of CZK 20,000. However, after she received the account statement she found out that a mistake had occurred and that funds worth CZK 200,000 had been withdrawn from the account in an unauthorised way.
On 8/1/2004 the petitioner visited the institution's branch where she was given a receipt as of 3/11/2003 for the amount of CZK 200,000 and she immediately made a claim in writing concerning the transaction. The petitioner does not deny that the signature on the receipt is identical to her signature specimen deposited with the institution. The aforementioned transaction was monitored by the institution's internal camera system. However, the institution refused to show the video recording to the petitioner saying that it was designated only for the bank's internal needs. The petitioner also stated in her petition that she propose that evidencing be performed – i.e. the video recording be watched, which would prove her statement.

In its statement the institution told the Financial Arbiter that the cashier at the cash desk where the withdrawal had been made had not recorded any difference in Czech currency, which the institution may prove. Besides, the institution stated that according to the records the amount was paid in CZK 5,000 banknotes. The petitioner's statement however denies this fact, as the petitioner said that the total amount paid had been only CZK 20,000 in CZK 1,000 banknotes. The institution therefore evidenced the course of the withdrawal by the video recording.

During the evidencing the Financial Arbiter asked the institution to make an oral explanation from which a report was written. Among others, it was said in the protocol that for the purposes of comparison the institution submitted originals of banknotes having the face value of CZK 1,000 and CZK 5,000. The rear side of the banknotes was used for the assessment, the banknote with the face value of CZK 1,000 showing a flying bird with spread wings and that with the face value of CZK 5,000 showing the Hradčany panorama.
The video recording of the withdrawal of funds by the petitioner on 3/11/2003 was shown using the institution's technology, which made it possible to make cuts of the recording as required by the Financial Arbiter and zoom in

the recording to a distance from which it was absolutely clear that the petitioner had received banknotes showing the Hradčany panorama, i.e. banknotes having the face value of CZK 5,000. Besides, it was obvious from the recording that the petitioner had received banknotes, the number of which she counted in person for 36 seconds, which corresponds to counting 40 banknotes, and subsequently left the cash desk.
The Financial Arbiter subsequently ordered that the petitioner (or rather AK in P.) provide an oral explanation from which a report was also written. For the purposes of comparison the Financial Arbiter also presented to the petitioner and her legal representative originals of banknotes having the face value of CZK 1,000 and CZK 5,000.
Among others, it was stated in the report that the participants saw a part of the video recording and that the legal representative said that he had seen a banknote in the petitioner's hand, which he said was a banknote having the face value of CZK 5,000.
Based on the provided oral explanation, the petitioner withdrew her petition on 19/7/2004.
Hence, on 21/7/2004 the Financial Arbiter decided that proceedings be discontinued in accordance with the FA Act.

Case B
In his petition as of 27/9/2004 a petitioner sought that the institution pay the amount of CZK 1,250 and CZK 9,071 and write an apology letter.
The reasoning of the petition was such that on 10/9/2003 the petitioner gave two payment orders to the institution through a payment collection box, of which one in the amount of CZK 2,011 was to be credited to a medical insurance company and another one in the amount of CZK 25,695 was to be credited to insurance company A.
The petitioner subsequently went abroad for a year thinking that the institution had duly executed both transfers. However, having returned to the CR, the petitioner was contacted by the medical insurance company on grounds that he had not paid mandatory medical insurance. Since the amount was small, the petitioner paid it again and at the same time filed a claim with the institution for not having made the transfer. The institution apologised to the petitioner that it had indeed not executed the submitted payment order and said it believed that the petitioner would be satisfied with its services again in the future.
Furthermore, the petitioner was informed by a branch of insurance company A. that since the first premium had not been paid his policy had been terminated. As of the date when the petitioner filed the petition to open proceedings with the Financial Arbiter, he owed insurance company A. the amount of CZK 9,285. The petitioner also filed a claim with the institution for not having executed the payment order, but was not satisfied with its explanation, as in this case the amount was large. The institution told the petitioner that it had never received the transfer order to be credited to insurance company A.

In its statement the institution told the Financial Arbiter among others that the petitioner had submitted the payment orders at another branch and not his home branch in Š. and hence proceeded at variance with the Terms and Conditions and that he had not met the time limit for filing a claim.
The institution also stated that in its opinion it had not breached its duties ensuing from its contract with the petitioner. However, since the institution is aware of its good relationship with the client to date, it proposes that agreement on a friendly settlement of the dispute be concluded with the client.
Subsequently, on 8/11/2004, the petitioner withdrew his petition.
Hence, on 15/11/2004 the Financial Arbiter decided that proceedings be discontinued in accordance with the FA Act.

B. Electronic Payment Instruments

Failure of a cash machine to give part of cash

Case A
A petitioner sought that institution Q1 return funds in the amount of CZK 16,500 withdrawn from the petitioner's account No. 0123456789/1111. The reasoning of the petition was such that on 18/9/2003 at 8.33 a.m. the petitioner wished to withdraw cash in the amount of CZK 2,000 from a cash machine of institution Q2 in P. (terminal S1AT1234) by payment card No. 1234 1234 1234 1234 issued by Q1. The cash machine gave seven banknotes having the face value of CZK 500 to the petitioner, i.e. a total of CZK 3,500, but a receipt was issued for the withdrawal of cash in the amount of CZK 20,000. The amount of CZK 20,000 was subsequently included in the petitioner's drawdown of credit maintained by institution Q1. The petitioner filed a claim concerning the disputed transaction on 19/9/2003 in Q2. Q1 subsequently dismissed his claim.

In its statement institution Q1 said that the transaction in the amount of CZK 20,000 had been included in a monthly credit card statement as of 29/9/2003. On 1/10/2003 the petitioner made a claim by phone and on 3/11/2003, following several requests from the institution, he sent his claim in writing, as required. On that day the institution in conjunction with Q2 opened claim proceedings and notified the petitioner thereof in his monthly statement as of 30/11/2003. On 23/12/2003 the institution received a statement from Q2 with the results of its investigation, which said that in the cash machine where the transaction had been executed no surplus had been discovered and that the petitioner had received the required cash and had executed the transaction. The petitioner was informed that his claim had been unjustified in his monthly statement as of 30/12/2003.

On 6/1/2004 the petitioner again claimed the transaction by phone and the institution again sent him a form to open claim proceedings. On 14/1/2004 the institution again informed the client that his claim had been dismissed and a copy of a letter containing Q2's statement concerning the executed transaction, which was part of the claim proceedings, was sent to the client.
During the evidencing the Financial Arbiter discovered that the petitioner had told an employee of Q2 about the withdrawal from the cash machine immediately after the withdrawal, the employee whose office was in a house right above the cash machine had phoned Q2 and had told the petitioner that he visit the institution's branch and claim everything there. As the petitioner was going to P. for a performance, he visited Q2 in P. on the following day and filled in a claim report there. On the previous day, i.e. 18/9/2003, he phoned the line of institution Q1 and claimed the transaction by phone; the claim was accepted. Several days later the petitioner was contacted by the employee of Q2, who had filled in the claim with him, and she told him she had been reprimanded for having negotiated with him and that the whole issue had to be settled between Q2 and Q1 first. In the meantime the petitioner spoke several times with the Q1 line. Only via this line a claim form was sent to the Q1 branch, which the petitioner filled in together with the institution's employee.

During the evidencing the Financial Arbiter asked institution Q2, which operates the cash machine in question, to provide other documents and a statement concerning the executed transaction. It became obvious from this statement that on 2/12/2003 institution Q1 turned to it with a claim concerning the petitioner's transaction. Institution Q2 checked the transaction and sent the authorisation log and TLF (Transaction Log File) to institution Q1. Furthermore, institution Q2 had a record about the refilling of the cash machine, which did not discover any surplus at the given time. Based on this fact the claim made by institution Q1 was dismissed.
In its statement institution Q2 also responded to the petitioner's claim that he had required a withdrawal in the amount of CZK 2,000, but that the cash machine had given CZK 3,500 and that CZK 20,000 had been debited from his account. According to the statement made by institution Q2 it is not possible for the cash machine to give a larger amount than the amount that had been entered when selecting the amount. It is clear from the authorisation log from company M. that the amount of CZK 20,000 was authorised, i.e. it must have been entered, which could only be done by the payment card holder, i.e. the petitioner. It cannot be ruled out that the petitioner made a mistake when entering the amount of CZK 2,000 and through "OTHER AMOUNT" unintentionally required the amount of CZK 20,000.

During the evidencing the Financial Arbiter discovered that institution Q2 could support its statement concerning the problem-free transaction and production of cash in the amount of CZK 20,000 by a transaction record, namely the authorisation log, i.e. a record about the performed authorisation as well as records about the refilling of the cash machine without a surplus occurring. However, institution Q2 does not have a record from the cash machine evidencing the course of the transaction, in particular the production of cash in the amount of CZK 20,000.

An expert report prepared upon the Financial Arbiter's requirement by expert Z. has shown that provided the amount of CZK 20,000 is given in banknotes having the face value of CZK 500, a total of 40 banknotes have to be given out. Cash machine producers state that this number of banknotes is the maximum number that can get through the cash machine feeder. When using banknotes in a cassette, which were already in circulation, a technical defect may have occurred. The occurrence of a technical defect during the transaction is evidenced by a statement made by company M., according to which an error occurred during the following transaction, which happens when cash from a previous transaction has not been taken. The remaining banknotes in the amount of CZK 16,500 were not put into the cash machine "waste cassette", but presumably stayed in the feeder until another cash withdrawal took place.
The judicial expert stated that cash in the amount of CZK 16,500 had not been given due to a technical defect of the cash machine.
Based on the conclusion of the expert report the Financial Arbiter decided to extend the participants in the proceedings by institution Q2 and asked it to provide a statement including all relevant documentation.

In its statement concerning the dispute institution Q2 states that it still holds the opinion that the transaction in its cash machine in the amount of CZK 20,000 had been duly authorised and that with regard to a zero surplus in the cash machine it could not admit the petitioner's claim. Institution Q2 also responds to some facts stated by the judicial expert in his expert report. It does not agree with the fact that it had not made any steps upon the petitioner's notification, because on the very day between 11.36 and 11.50 a.m. the status of the cash machine had been checked, money had been refilled and no surplus had been discovered. Institution Q2 also states that if it had received the claim from institution Q1 within 30 days from the transaction, it would have been able to find the record from the cash machine, since the filing time of old records in institution Q2 is 30 days.

Based on discovered facts, assessment of evidence and upon application of S. 420a of Act No. 40/1964 Coll., as amended, the Financial Arbiter arrived at a conclusion that institution Q2 was liable for damage caused to the petitioner by a defect of the equipment (the cash machine), which the institution operates, and shall therefore pay to the petitioner the cash that had not been given by the cash machine. The Financial Arbiter reached the aforementioned conclusion owing to the fact that institution Q2 owns the cash machine in question, which it operates, and failed to evidence during the course of the proceedings before the Financial Arbiter that damage to the petitioner had been caused by an unavoidable event,

which had not stemmed from the operation of the cash machine or from the petitioner's action. The Arbiter decided that institution Q2 was bound to pay damages to the petitioner in the amount of CZK 16,500 plus a 2% annual interest on late payment commencing on 19/9/2003 until payment, within 15 days after this finding becomes legally effective.

Case B
A petitioner sought that the institution return funds in the amount of CZK 6,500 withdrawn from the petitioner's account No. 0123456789/1111. The reasoning of the petition was such that on 8/4/2004 at 12.30 p.m. the petitioner wanted to make a withdrawal from the institution's cash machine in Street U. from his account maintained by the institution in the amount of CZK 6,600, which he had on his account, by payment card No. 1234 1234 1234 1234. This amount was not given to him, but the cash machine offered him the amount of CZK 6,500, which the petitioner confirmed. However, not even this amount was given to the petitioner with the reasoning that the transaction could not be executed and the petitioner was asked to take the payment card. However, after the petitioner confirmed that he wanted a transaction receipt, the receipt was not produced. The petitioner took the card and again inserted it into the cash machine to make the withdrawal, but this time he was asked by the cash machine to take the payment card immediately. The petitioner subsequently went to the institution's branch in Street U. to make a withdrawal at a counter and also inform the institution about the aforementioned facts. The petitioner was told at the institution's counter that the transaction had been performed successfully and that the amount of CZK 6,500 had been debited from his account. Having obtained this information, the petitioner filled in a claim report concerning operations made through the institution's payment card. After more than two months (on 14/6/2004) the petitioner received the institution's statement, which dismissed his claim.

In its statement the institution regards the claim as unjustified, since documentation related to the claimed transactions shows that the transaction was performed successfully, i.e. the cash machine gave the required amount and during a check of cash no surplus was discovered in the cash machine related to the claimed transaction. The transaction was performed with the petitioner's payment card present and with the correct Personal Identification Number (PIN) entered. This is evidenced by a cash machine record as of 8/4/2004, which accurately records in real time what operations a cash machine performs. It is clear from this record that the claimed transaction does not show an error; neither is there an error in transactions immediately preceding the petitioner's transactions nor in those immediately following it.

It also became obvious from the institution's statement that the authorisation record concerning the transaction did not show an error and evidenced the performed withdrawal of CZK 6,500. In the period between 7/4/2004 and 9/4/2004 no cash difference was discovered in cash machine U., where the transaction claimed by the petitioner had been made, and that the physical and accounting state of the cash machine showed no fault.

In the course of the evidencing the Financial Arbiter stated during the petitioner's oral explanation that from a camera video recording, which had monitored the petitioner's withdrawal from the cash machine on 8/4/2004, it was unclear whether the petitioner had taken the cash or not.
The Financial Arbiter also discovered that when the petitioner made the disputed transaction, he followed the procedure he had stated in his petition to open proceedings.
Based on the evidencing the Financial Arbiter arrived at a conclusion that the petitioner had failed to prove his statements and that the institution had not breached the provision of Act No. 124/2002 Coll. The Arbiter therefore dismissed the petition.

Funds withdrawn from a cash machine through a payment card

Case A
In her petition as of 1/4/2004 a petitioner sought that the institution pay the aggregate amount of CZK 17,000 withdrawn from the petitioner's account No. 123456789/1111.

The reasoning of the petition was such that based on a quarterly account statement covering the period of 01/04/2003 to 30/06/2003 the petitioner had discovered that funds had been withdrawn in an unauthorised way through her VISA payment card No. 1234 1234 1234 1234 issued by the institution to the petitioner's account. The funds were withdrawn from cash machines in Prague on 25/6/2003 in the amount of CZK 2,000, in the amount of CZK 4,000, in the amount of CZK 4,000, in the amount of CZK 3,000, and on 26/6/2003 in the amount of CZK 4,000. The petitioner stated in her petition that she had always had the payment card on her and on 25/6/2003 and on 26/6/2003 had been staying outside P., namely in S. On 8/7/2003 the petitioner immediately claimed with the institution all unauthorised transactions executed by her non-stolen payment card and on the same day submitted the payment card to the institution.
The institution dismissed the claim on 26/8/2003, saying that the claim proceedings had been completed and the claim had been found unjustified, since all transactions had been made with the card present and using the PIN, which only the payment card holder should have known. The petitioner again claimed these transactions with the institution, asking it to send documentation related to the disputed transactions. However, even the second statement made by the institution concerning all the disputed transactions dismissed the claim, saying that the institution resumed the claim proceedings and

deemed the claim unjustified on grounds that the withdrawals had been authorised by entering the PIN code. The petitioner again claimed the transactions and asked for further information related to the withdrawals. The institution's third statement the petitioner obtained also dismissed the claim, saying that the payment card had been present at all the transactions, the PIN code had been entered and the cash machine had produced the required cash. The institution stated that the claims concerning these transactions had been handled in accordance with international rules of the Visa International Association and that it might be presumed that the transactions had not been performed by an unauthorised person.
In its statement the institution told the Financial Arbiter that the card claim proceedings followed valid international rules set forth by associations, in this case VISA International, which are binding to all parties, as well as rights and duties set forth in the Card Terms and Conditions. Furthermore, the institution told the Financial Arbiter that all the disputed transactions had been duly investigated in the claim proceedings and that the petitioner's claim had been deemed unauthorised.
During the evidencing the Financial Arbiter found out that the institution had duly investigated the claim and had deemed it unauthorised based on documentation (cash machine records) and that the institution had received the cash machine records from other institutions (Q1 and Q2), which owned the cash machines where the disputed transaction had been made. The institution stated that it was clear from these records that the payment card had been present at all the transactions, the PIN code had been entered, the cash machine had given the required cash and no surplus had been discovered in the cash machines. Besides, it became obvious from the institution's statement that all disputed transactions made by the VISA card on 25/6/2003 and 26/6/2003 had been performed before this card was blocked and that it clearly followed from point 42 of the Card Terms and Conditions that the account holder's liability for transactions made by a lost, stolen or misused card ended at 12.00 p.m. on the day the institution was notified of the event by phone, with the exception of transactions where the PIN code had been used. The institution also told the Financial Arbiter that through the petitioner's legal representative, AK in Č.B., the petitioner had been send a qualified answer on 25/2/2004 concerning the claim related to the disputed transactions.
In the course of the evidencing the Financial Arbiter entrusted Ing. M. Z. with the preparation of an expert report so as to assess in general whether it was possible to obtain unauthorised access to the Personal Identification Number (PIN) from the magnetic record on the payment card. The Financial Arbiter in line with the expert state that the PIN is a unique means of identification of the card holder when making transactions with the help of electronic payment instruments. The Financial Arbiter also makes a general statement that after completed personalisation of the payment card a legible form of the PIN to a particular card exists solely in the envelope sent to the card holder. On the magnetic strip of the payment card different digits are recorded, derived from the PIN by a single-direction mathematical operation, which does not make it possible to generate the original PIN from these digits. The expert in the field furthermore stated that the rules and procedures governing the generation of the PIN and its protection against discovery by unauthorised persons, as well as internationally approved algorithms for PIN ciphering during transfers were set forth in internationally valid standards. The expert in the field therefore reached the conclusion that the possibility of obtaining the PIN from the record on the magnetic card strip might be unequivocally rejected.

Based on the evidencing the Financial Arbiter arrived at a conclusion that the petition was unjustified in particular due to the fact that the petitioner had failed to prove her statements contained in her petition and that the card had not been used contrary to the law and contract concluded with the institution. During the evidencing breach of S. 18(b) of Act No. 124/2002 Coll. by the institution was not proven. To support his statement, the Financial Arbiter states that it is clear from the statement made by an expert in the field that provided a card is misused with the PIN code, the PIN can only be revealed owing to the holder's carelessness.
The Financial Arbiter therefore made a decision in which he dismissed the petitioner's claim to return funds in the aggregate amount of CZK 17,000.
The petitioner represented by AK in Č.B. filed her objections against this finding within the statutory time limit.

In her objections the petitioner states that she does not agree with the Financial Arbiter's conclusion that the petition is unjustified in particular due to the fact that the petitioner has failed to prove her statements contained in her petition and that the card has not been used contrary to the law and contract concluded with the institution. Besides, she does not agree with the conclusion made by the expert in the field, Ing. M. Z., that the possibility of obtaining the PIN from the magnetic card strip may be unequivocally rejected. Besides, the Financial Arbiter did not look at the sequence of the individual withdrawals on 25/6/2003. In her opinion the system must have failed in the cash machines in question. The petitioner is one hundred per cent sure that her payment card could not have been used in the transactions, as she had it on her at the time of the withdrawals and stayed outside P. The petitioner also stated that the institution's employee should have informed her that she should report the whole matter to the Police of the CR, which is allowed to demand camera recordings from the particular cash machines.

The Financial Arbiter states that the petitioner's power of attorney sent to AK in Č.B. together with the objections has no informative value, since sufficient identification of the mandator is missing and the purpose of the power of attorney is not clearly defined, in particular it is not clear against what finding made by the Financial Arbiter objections are to be filed. Nevertheless, the Financial Arbiter showed good will in accepting the power of attorney and dealing with the objections.
The petitioner failed to provide any new evidence in her objections and did not state new facts that would make the Financial Arbiter change the challenged finding. Notably, the petitioner failed to submit evidence that she had been in S. on 25/6/2003 and had had the payment card on her and that she had not breached the contractual provision with the

institution by having lent the payment card to an acquaintance and told him/her the PIN.
The Financial Arbiter had a new expert report prepared by a judicial expert, Ing. T., in the field of economy, namely banking and insurance, specialised in direct debit – domestic and foreign payment cards and cheques, international payment systems, computer processing, settlement and security and protective elements in payment card systems. The judicial expert stated that the data recorded on the magnetic strip were obtained through a selection of digits smaller than 9 based on the result of a coding process of an open PIN with the help of two keys in the course of multiple passage through a DES algorithm (Decrypt-Encrypt-Standard). The judicial expert also stated that there was no algorithm that would be able to discover the PIN associated with a card on the magnetic strip upon knowledge of the PVV (PIN Verification Value, i.e. reference data). Besides, he states that in order to prevent a targeted attack aimed at obtaining the PIN there is a limit according to which a card holder has only three attempts to enter the PIN code within 24 hours and if s/he fails, the card is blocked.
The Financial Arbiter states in line with the judicial expert that the probability that a randomly entered PIN code is the same as the code corresponding to the reference PVV recorded on the magnetic strip is 0.0001.

In particular, the petitioner failed to produce evidence that on 25/6/2003 she had had the payment card on her and had not lent it to an acquaintance and that she had been in S. or that her card had been stolen and subsequently returned to her. The Financial Arbiter also states that if she had had the payment card on her all the time, as she claims, she should have filed an indictment for an unknown offender immediately after she had found out that the payment card had been misused by an unauthorised holder. Besides, the Financial Arbiter states that provided the Police of the CR found the offender, the petitioner - if she filed an indictment - would have the right the exercise her claim towards the offender either in criminal or in civil proceedings.
The Financial Arbiter did not look at the sequence of withdrawals on 25/6/2003, since that investigation would have been irrelevant for the issuance of a finding. The Financial Arbiter only dealt with transactions made by the payment card and did not look at the reasons why the card holder had used it several times in various cash machines during one day.

In order to expand legal knowledge of the petitioner and her legal representative the Financial Arbiter states that he makes decisions on disputes in accordance with the FA Act, in the field of transfers of funds and issuance and use of electronic payment instruments. It follows from what has been said above that the Financial Arbiter does not have such powers the petitioner demands of him. The Financial Arbiter therefore states that the petitioner seek damages with the institution, if she thinks that the cash machine system failed. The petitioner has sufficient possibilities of using other legal instruments to prove her innocence or rather her truth.
The Financial Arbiter thus confirmed his finding.

Case B
In his petition as of 15/6/2004 a petitioner sought that the institution pay the overall amount of CZK 4,000, which had been withdrawn from his account through credit card No. 1234 1234 1234 1234.
The reasoning of the petition was such that since September 2002 the petitioner had not received his account statements and only on the basis of his claim did he receive an extraordinary statement from which he had discovered that cash had been withdrawn repeatedly from his account through a cash machine by an unauthorised person between 2002 and 2003.
The petitioner also stated in his petition that he had used the card only on the day when he had received it for purchase and since then he had used a standing payment order to repay his credit. Besides, the petitioner said that he had submitted the card to a branch of institution Q1.

The institution sent a statement to the petitioner on 2/6/2004 in which it dismissed the claim, saying that on 28 May, 2004 the petitioner was sent an extraordinary statement recording movements on his account over the whole repayment period, i.e. between 24/11/2001 and 27/5/2004. According to a statement made by the head of the branch of institution Q1 in O., this institution had never accepted credit cards from clients. Provided a customer wished to return a credit card at a trading point, s/he would always be referred to the institution's Customer Services. The institution also stated that in accordance with valid Business Terms and Conditions provided a customer disagrees with a performed or settled operation involving the use of a card, s/he is obliged to make a claim without delay, i.e. within 60 days from the settling of this transaction on the customer's account at the latest. Due to the fact that the last transaction made through the credit card took place on 19/9/2003, the executed transactions may no longer be claimed.

A second statement made by the institution on 9/6/2004 concerning all disputed transactions also dismissed the claim, saying that the institution clearly specified the dates on which statements had been sent between 8/12/2001 and 3/6/2004.
Besides, the institution specified the names of the trading points and cash machines of the institution, from which cash had been withdrawn by the credit card from 26/4/2002. Among others, the institution stated that on 3/1/2003 a withdrawal was made in the amount of CZK 1,000 from a cash machine in Ž.; on 23/6/2003 a withdrawal in the amount of CZK 2,000 was made from a cash machine in O., Street J. B.; and on 19/9/2003 a withdrawal was made in the amount of CZK 1,000 from the same cash machine.
The institution also stated that in accordance with the Business Terms and Conditions the customer shall be liable to the

institution for all use of the card, in particular for requests for the provision of funds presented by third parties until the institution is notified of a loss, theft, destruction of the card or until the card is blocked. The credit card is protected by a Personal Identification Number (PIN) and the client is obliged to protect the PIN against misuse, in particular, s/he must not tell the PIN code, or make it accessible to, third parties. On 9/6/2004 the credit card was blocked for further withdrawals.
In its statement the institution told the Financial Arbiter that the aforementioned card had been used for cash withdrawals from the institution's cash machines and that the PIN had been used, having been entered correctly at first attempt. The institution also stated that employees of a trading centre of institution Q1 in O. had never accepted a credit card from a client, since clients were always referred to the institution's Customer Services.
Besides, the institution stated that between 20/12/2002 and 9/5/2004 the petitioner contacted the institution's Customer Services neither by phone, nor in writing, from which the institution had assumed that the petitioner had never requested the termination of the credit card and agreement.

It also became clear from the institution's statement that the institution informed its clients about account movements through statements that were generated and sent once a month by post to a contact address provided by the client. In the course of the credit agreement duration the client had never made a claim about not having received account statements and no statement had been returned to the sender as undeliverable, so the institution regarded the statements as delivered.

The institution also told the Financial Arbiter that clients were sent a credit card by registered post and the PIN code to this card was sent by post. The credit card was produced and the PIN was generated, made and sent to the client by company M. Hence, the institution never had the credit card at its disposal at any moment of the agreement duration.

According to the institution's statement, in accordance with the Business Terms and Conditions (Article 3.8) the client is obliged to make an objection or a claim without delay, within 60 days from the settlement of an operation on the customer's account at the latest; however, the petitioner's claim was filed after this time limit had passed. A credit card is protected by the PIN and the client is obliged to protect it in accordance with the Business Terms and Conditions against misuse, in particular s/he must not tell the PIN code, or make it accessible to, third parties. If follows from what has been said above that if somebody had made the aforementioned cash withdrawals from the institution's cash machines, s/he must have known the PIN, because the PIN code had been entered correctly at first attempt.
On the aforementioned grounds the institution therefore regards the petitioner's claim as unjustified.

In its supplementary explanation the institution told the Financial Arbiter that in its statement as of 9/6/2004 it had incorrectly stated that on 3/1/2003 a withdrawal had been made in the amount of CZK 1,000 from a cash machine in Ž. The institution provided an explanation to the Financial Arbiter, saying that the cash machine in question had been located in B. until 3/4/2003 and its number had subsequently been used for a new cash machine located in Ž. The institution apologised for having provided incorrect information.

The Financial Arbiter considered and evaluated the evidence, each piece of evidence separately and all pieces of evidence in relation to one another. When performing this, the Financial Arbiter followed the principle of free evaluation of evidence.
The Financial Arbiter entrusted a judicial expert in the field of economy, namely banking and insurance, specialised in direct debit – domestic and foreign payment cards and cheques, international payment systems, computer processing, settlement and security and protective elements in payment cards systems, with the preparation of an expert report. The judicial expert stated that the data recorded on the magnetic strip were obtained through a selection of digits smaller than 9 based on the result of a coding process of an open PIN with the help of two keys in the course of multiple passage through a DES algorithm (Decrypt-Encrypt-Standard). The judicial expert also stated that there was no algorithm that would be able to discover the PIN associated with a card on the magnetic strip upon knowledge of the PVV (PIN Verification Value, i.e. reference data). Besides, he states that in order to prevent a targeted attack aimed at obtaining the PIN there is a limit according to which a card holder has only three attempts to enter the PIN code within 24 hours and if s/he fails, the card is blocked.
The Financial Arbiter states in line with the judicial expert that the probability that a randomly entered PIN code is the same as the code corresponding to the reference PVV recorded on the magnetic strip is 0.0001.

The Financial Arbiter arrived at a conclusion that the petition was unjustified in particular due to the fact that the petitioner had failed to prove his statements contained in his petition and that it had not been proven that the institution had breached its legal obligation ensuing from the contractual relationship concluded with the petitioner.
It follows from the application of the Payment System Act that provided an electronic payment instrument was used with the PIN and was physically present, the holder of this electronic payment instrument does not have the right to demand that the issuer return funds withdrawn on the basis of such use of the electronic payment instrument.
To support his statement, the Financial Arbiter states that it is clear from a statement made by an expert in the field that provided a card is misused with the PIN code, the PIN can only be revealed owing to the holder's carelessness.
The Financial Arbiter therefore made a decision in which he dismissed the petitioner's claim for the return of funds in the aggregate amount of CZK 4,000.

Case C

In his petition as of 25/3/2004 a petitioner claimed that the institution pay the aggregate amount of CZK 46,400 withdrawn from the petitioner's account No. 123456789/1111.

The reasoning of the petition was such that on 6/2/2004 very early in the morning a burglary took place, during which a handbag containing among others payment card No. 1234 1234 1234 1234 issued by the institution to the petitioner's account was stolen from the petitioner's partner, Ms. M. Z. Subsequently, on the same day Ms. M. Z. reported the theft of the handbag, which had contained the payment card and other personal belongings, to the Police of the CR. Besides, at 7.13 a.m. on 6/2/2004 Ms. M. Z. reported the theft of the payment card to the institution by phone, asking it to block it, and in the afternoon she on the same day she visited the institution in person and signed a report on loss/theft of a payment card. On 17/2/2004 the petitioner immediately claimed with the institution the performance of unauthorised transactions made by the stolen payment card in the amount of CZK 20,000.00 and again CZK 20,000.00, then CZK 2,000.00, CZK 4,000.00 and CZK 400.00.

The institution's statement as of 18/3/2004 sent to the petitioner dismissed the claim, saying that the claim proceedings had been completed and that the claim had been deemed unjustified, since the transactions had been executed with the card present and using the PIN, which only the payment card holder had been supposed to know.

In its statement the institution told the Financial Arbiter that the claim had been duly examined and subsequently deemed unjustified based on documentation (cash machine records). The institution received the cash machine records from institution Q1, which owns the cash machine where all disputed transactions had been made. The institution states that it was clear from these records that the payment card had been present at all transactions, the PIN had been entered and the required cash had been given by the cash machine and no surplus had been discovered in the cash machine. It also became obvious from the institution's statement that all disputed transactions made by the card on 6/2/2004 had been executed between 4.06 a.m. and 4.10 a.m., i.e. before this card had been blocked, and that it was absolutely clear from the Card Terms and Conditions that the account holder's liability for transactions made by a lost, stolen or misused card ended at 12.00 p.m. on the day when the institution was notified of the event by phone.

During the evidencing the Financial Arbiter entrusted an expert, Ing. M. Z., with the preparation of an expert report so as to assess in general whether it was possible to obtain unauthorised access to the Personal Identification Number (PIN) from the magnetic record on the payment card. The Financial Arbiter in line with the expert state that the PIN is a unique means of identification of the card holder when making transactions with the help of electronic payment instruments. The Financial Arbiter also makes a general statement that after completed personalisation of the payment card a legible form of the PIN to a particular card exists solely in the envelope sent to the card holder. On the magnetic strip of the payment card different digits are recorded, derived from the PIN by a single-direction mathematical operation, which does not make it possible to generate the original PIN from these digits. The expert in the field furthermore stated that the rules and procedures governing the generation of the PIN and its protection against discovery by unauthorised persons, as well as internationally approved algorithms for PIN ciphering during transfers were set forth in internationally valid standards. The expert in the field therefore reached the conclusion that the possibility of obtaining the PIN from the record on the magnetic card strip might be unequivocally rejected.

Based on the evidencing the Financial Arbiter arrived at a conclusion that the petition was unjustified in particular due to the fact that the petitioner had failed to prove his statements contained in his petition and that it had not been proved that the institution had breached the provision of S. 18(b) of Act No. 124/2002 Coll.

To support his statement, the Financial Arbiter states that it is clear from a statement made by an expert in the field that provided a card is misused with the PIN code, the PIN can only be revealed owing to the holder's carelessness (the PIN has been written down and kept together with the electronic payment instrument).

The Financial Arbiter therefore made a decision in which he dismissed the petitioner's claim for the return of withdrawn funds in the aggregate amount of CZK 46,400.

The petitioner filed objections against the aforementioned finding within the statutory time limit, in which he asked that the whole case be reconsidered and the issued finding be changed. The petitioner objects in particular the following:

The person disposing of the card cannot prove her innocence, but she did all she possibly could to cooperate with the Police of the CR and the institution.

The bank has stated two differing times in the report for the Police of the CR and for the Financial Arbiter of the CR.

The bank has not provided more detailed information about the operation of the cash machine of institution Q1 (a total of 7 payment cards had been stolen, of which only one issued by the institution had been misused by the offender(s), while the six remaining cards issued to accounts of institution Q2 had been left untouched).

The card holder has been the institution's client for 14 years and during that period of time his company has made financial transactions worth hundreds of millions of Czech crowns. The explanation the institution provided about the case does not solve the client's problem, who has given his money to the bank and has lost it not due to his own fault. In particular the bank's handling of the case has been quite shocking. The fact that the bank usually invites the client once a year for refreshments and shakes his hands does not mean anything at all.

Based on the client's filed objections, the Financial Arbiter assessed the challenged finding to its full extent; he evaluated each piece of evidence separately and all pieces of evidence in relation to one another and he did not identify himself with the petitioner's views for the following reasons.

As regards objection No. 1
The issuance of the Financial Arbiter's finding relies on neither on how the indictment is tackled nor on the result of police investigation, since in the Financial Arbiter's opinion the institution has not breached its obligations. This opinion held by the Financial Arbiter is supported by a new expert report the Financial Arbiter commissioned. The expert report was prepared by a judicial expert in the field of economy, namely banking and insurance, specialised in direct debit – domestic and foreign payment cards and cheques, international payment systems, computer processing, settlement and security and protective elements in payment cards systems. The judicial expert stated that the data recorded on the magnetic strip were obtained through a selection of digits smaller than 9 based on the result of a coding process of an open PIN with the help of two keys in the course of multiple passage through a DES algorithm (Decrypt-Encrypt-Standard). The judicial expert also stated that there was no algorithm that would be able to discover the PIN associated with a card on the magnetic strip upon knowledge of the PVV (PIN Verification Value, i.e. reference data). Besides, he states that in order to prevent a targeted attack aimed at obtaining the PIN there is a limit according to which a card holder has only three attempts to enter the PIN code within 24 hours and if s/he fails, the card is blocked. The Financial Arbiter states in line with the judicial expert that the probability that a randomly entered PIN code is the same as the code corresponding to the reference PVV recorded on the magnetic strip is 0.0001. The Financial Arbiter also states that provided the Police of the CR found the offender, the petitioner would have the right to exercise his claim towards the offender in civil proceedings.

As regards objections Nos. 1, 2, 3 and 4
The petitioner failed to provide any new evidence in his objections and did not state new facts that would make the Financial Arbiter change the finding.

Before the Financial Arbiter issued this decision, he obtained all source materials required for its issuance, established duly and fully the facts, performed all investigations necessary to assess the case and when making the decision about the objections filed by the petitioner, the Financial Arbiter did not discover any new facts that would justify the finding issued on 14 April, 2004, registration No. 7/2004, to be changed.
The Financial Arbiter therefore confirmed his finding.

Misuse of a stolen payment card at the institution's trading point

Case A
In her petition as of 3/5/2004 a petitioner sought that the institution return funds in the amount of CZK 27,000 withdrawn from the petitioner's account No. 123456789/1111. The reasoning of the petition was such that on 18/3/2004 the petitioner had her purse stolen, containing ID cards and payment card No. 1234 1234 1234 1234. The petitioner notified both the institution and the Police of the CR of this fact. The petitioner blocked the payment card too late, since the amount of CZK 1,000 had already been withdrawn from a cash machine of institution in U. O. and several minutes later the amount of CZK 27,000 at a counter in U. O., although the petitioner has a weekly limit of CZK 5,000, which the petitioner exhausted on the previous day, i.e. on 17/3/2004, and even though the petitioner does not have a current account, this limit was withdrawn once again. There was thus an overdraft on the petitioner's account in the amount of CZK 4,217 and the institution now demands that this amount be paid together with extra CZK 200. The petitioner also states that the offenders who made the withdrawal in the amount of CZK 27,000 used the PIN (Personal Identification Number), which the petitioner had not written down anywhere. The offenders had originally demanded CZK 30,000, but that amount was not available, and after the institution's employee informed them of the balance, they withdrew the aforementioned amount. The petitioner does not understand how the weekly limit could be exhausted once more without the signature specimen that she provided when she received the payment card; furthermore, she does not understand why the limit and the signature specimen exist if she cannot rely on them. Nevertheless, the institution dismissed the petitioner's claim.
In its statement the institution regards the petitioner's claim as unjustified. The reasoning of the institution's statement was such that on 11/2/2003 the petitioner had had her account No. 123456789/1111 opened, to which card No. 1234 1234 1234 1234 had been produced. By her signature the petitioner expressed her agreement with the Account Terms and Conditions and Card Terms and Conditions. The weekly withdrawal limit for a chip application (for withdrawals at a counter) was set at CZK 5,000 and the weekly limit for a magnetic application withdrawal was set at CZK 1,000. The petitioner received the payment card and the PIN in order and the PIN code was not revealed. On 18/3/2004 at 2.35 p.m. the payment card was blocked on grounds of theft.

It also became clear from the institution's statement that the payment card had been used on 18/3/2004 between 10.51 and 10.53 a.m. a total of seven times in a cash machine, i.e. with the magnetic strip. At second attempt, the card holder withdrew the amount of CZK 1,000; the first attempt to withdraw CZK 15,000 and five other attempts at a withdrawal were unsuccessful

with regard to the weekly limit. It was not recorded that incorrect PIN had been entered. On 18/3/2004 at 11.00 the payment card was submitted at a counter in U. O. with a requirement to withdraw the amount of CZK 30,000. This withdrawal was not authorised with view to the existing disposable amount on the account. Another requirement to withdraw CZK 27,000 was met, since as of 18/3/2004 at approx. 11.01 a.m. the disposable balance of funds on the petitioner's account was CZK 28,007.70.
In its statement the institution also stated that a withdrawal of cash exceeding the limit by a chip application is made possible by the provision of point 13 of the Card Terms and Conditions, i.e. withdrawal of disposable funds above the set limit of the chip part. In such case the trading point employee is always bound to check whether there are sufficient funds on the client's account by asking at the bank's central office. In no case does the bank's central office tell the trading point employee the account balance – it only confirms or dismisses the performance of a withdrawal.
It also became clear from the institution's statement that the petitioner's account was overdraft due to the fact that all cash withdrawals made by the payment card had been settled, i.e. withdrawal on 17/3/2004 in the amount of CZK 5,000, which the petitioner executed in person, then the withdrawal of CZK 27,000 on 18/3/2004 and the withdrawal of CZK 1,000 from a cash machine on the same day, i.e. 18/3/2004.

Evidence submitted by the institution shows that pursuant to the provision of point 31 of the Card Terms and Conditions the account holder shall be liable for damage caused by the revelation of the PIN code. It also became obvious that the transaction had been confirmed by entering the valid PIN. The person who stole the payment card from the petitioner and used it in an unauthorised way to withdraw funds from the petitioner's account must have known the valid PIN to that card.

The Financial Arbiter found out from the institution's explanation that when funds are withdrawn at trading points through a card the client's identity is not checked when cash is given to him/her, since in the institution's opinion entering the correct PIN is sufficiently evidential and adequate. In that case the card replaces the standard ID card. The Financial Arbiter noted that in principle the limit for access to the balance of funds on the client's account was not a safety (protective) limit, as anybody could reach the overall account balance after entering the correct PIN. The institution does not further identify the person at the institution's trading point, because the institution has decided not to make the check when paying cash in compliance with statutory limits (CZK 100,000, CZK 500,000).

Based on the evidencing the Financial Arbiter arrived at a conclusion that the petition was unjustified in particular due to the fact that the petitioner had failed to prove her statements contained in her petition and that the card had not been used contrary to the Payment System Act.
The Financial Arbiter therefore dismissed the petition.

The petitioner filed objections against the finding within the statutory time limit.
In her objections the petitioner states that she disagrees with the recovery of the debt amount of CZK 4,217 by the institution. This is the overdraft amount due to which the petitioner had unpermitted overdraft. As of today the amount is CZK 6,004. The petitioner also states that in the Terms and Conditions she had been given it was not stated, as she had been told by an employee working at the institution's Claims Centre, that a transfer of funds took 24 hours. Besides, the petitioner thinks that the recovery of funds by the institution is unjustified, as the petitioner has not provided a written consent to an overdraft.

Based on the filed objections, the Financial Arbiter assessed the challenged finding to its whole extent and did not identify himself with the petitioner's objections, since he had found out that in point 50(c) of the Account Terms and Conditions the institution provides for the possibility of settling transactions without the client's consent. The petitioner agreed to these conditions on 7/2/2003 when she submitted an application to open an account. Besides, the institution does not have in its records the petitioner's enquiry about the duration of the transfer of funds, neither in written correspondence, nor in records about phone calls directed to the Claims Centre.
The Financial Arbiter therefore confirmed his finding.

Case B
In his petition as of 1/5/2004 a petitioner sought that the institution return funds in the aggregate amount of CZK 22,932.28 (the equivalent of GBP 493) withdrawn from the petitioner's account No. 123456789/1111. The reasoning of the petition was such that on 25/11/2003 in V. B. the petitioner had his VISA payment card No. 1234 1234 1234 1234 stolen, which had been issued to the above account maintained by the institution. On the same day the petitioner blocked the payment card, within approx. one hour after the theft.
As soon as the petitioner found out that the amount of CZK 22,932.28 had been debited from his account, he filed a claim with the institution for unauthorised use of his payment card. However, he was informed by the institution that the card had been blocked after the payment had taken place.

Further reasoning provided by the petitioner was that he had been aware of the fact that the institution had made a copy of the payment card including the holder's signature specimen and he therefore decided to claim the signature on the receipt. The institution's employee told the petitioner that the signature did indeed not agree with the signature specimen

and promised to file a claim with VISA. After approx. 40 days the petitioner received information that VISA could not return the amount in question before it received the stolen payment card. The petitioner comments that he cannot imagine a thief paying with a card and then going to hand the card over.

The institution's statement sent to the petitioner dismissed the claim saying that according to the records the transaction had been made on 25/11/2003 at 1.29 p.m. and the card had been blocked on 25/11/2003 at 2.30 p.m. The payment was therefore made before the card was blocked and the transaction was duly authorised. The sales receipts contain all the prerequisites. It also follows from the institution's statement that according to the Business Terms and Conditions governing the issuance and use of VISA cards the client's liability for transactions made with a particular card ends at midnight on the day when the card is blocked; the institution hence regarded the claim as settled. The institution stated that it would be able to continue the claim proceedings provided it had at its disposal a copy of the stolen payment card and provided the signature on the sales receipt showed significant differences from the signature on the rear side of the payment card.
This information provided by the institution left the petitioner in a situation in which he did not know how to proceed further and he therefore filed a petition to open proceedings with the Financial Arbiter concerning the disputed transaction in the amount of CZK 22,932.28.

In its statement the institution among others told the Financial Arbiter that the petitioner had concluded a contract with the institution on the issuance and use of a card, which had become effective on 6/9/2002 and on the basis of which the institution had issued to the petitioner the aforementioned payment card, whose use followed the institution's valid General Business Terms and Conditions and Business Terms and Conditions for the Issuance and Use of Cards to an account maintained by the institution. The institution highlighted that the disputed transaction had been performed before the card had been blocked, in which case the institution was justified in thinking that such transaction could be authorised and so it authorised the transaction.

Besides, the institution stated that on 5/12/2003 it had asked the processing bank (the trader's bank) to provide a copy of the sales receipt, which it received on 26/12/2003. It gave the copy of the sales receipt to the petitioner's branch, saying that it was not possible to continue the claim proceedings on grounds of signature disagreement, as the institution did not have a copy of the stolen payment card at its disposal. This condition is set forth by the VISA International Association. According to VIOR rules, Volume I, which are valid worldwide, the issuer bank is allowed to claim signature disagreement on a sales receipt and on a card only provided the card has been stolen or lost and subsequently withheld (e.g. by a trader or a cash machine). Only in such case is it possible to prove that the trading partner has significantly breached the conditions (i.e. failed to compare signatures on the sales receipt with the signature on the payment card, which was present at this trader when the disputed transaction was performed).

It also became clear from the institution's statement that the petitioner had not found this statement sufficient and had demanded that the claim proceedings continue, saying that on 13/1/2004 he had sent a claim to the processing bank to its seat in V. B. in spite of non-compliance with conditions set forth in rules provided by card associations. The processing bank failed to reply to the institution within the set time limit not even after it had been urged to do so for a second time on 27/2/2004, which the institution interpreted that the processing bank had not admitted the claim.

For the purposes of clarity the institution among others provided the rules according to which VISA proceeded.
According to binding VISA Payment Acceptance Rules – VIOR I, section 5.1, a trader is bound to check the signature to find out whether the holder is rightful. Provided s/he thinks the signatures differ, s/he may ask for an ID card. If the ID card is not provided, the trader has a right to refuse to accept the transaction or has a right to contact its bank and withhold the card provided s/he is told to do so by the authorisation centre. It cannot therefore be said that a trader shall check the signature and that s/he shall not accept a transaction provided the signatures disagree and that s/he shall withhold the card immediately – the trader uses signature only to check whether the holder is rightful rather than to authorise the transaction. From the institution's viewpoint the transactions were executed in a standard and correct way, there were sufficient funds on the petitioner's account, the card was not blocked and thus there was no reason not to authorise the transaction. The institution among others stated that in the case of signature disagreement and hence breach of VISA rules governing the acceptance of cards by trading partners compliance may be applied (arbitration proceedings directly in VISA Association, not only among banks), but in this case certain rules also have to be met – the card has been stolen or lost, blocked and subsequently withheld by a cash machine or a trader following an order from the authorisation centre. The reason why this condition has been included is to prevent misuse of cards by holders who may intentionally alter their signatures and subsequently claim their disagreement.
Besides, the institution stated that it had at its disposal a photocopy of the rear side of the petitioner's payment card, but that it might not be used for the purposes of claim proceedings among banks according to VIOR rules as cited above (the payment card has to be physically withheld). The institution makes a photocopy of the rear side of the payment card solely for its own needs and with regard to the fact that a stolen payment card is not found or withheld in most cases. In specific cases the institution may provide the photocopy of the rear side of the payment card to its contractual trading partner to evidence a statement made by the payment card holder that the has not made a certain transaction. This does not mean that all transactions claimed this way are settled in favour of the payment card holder, as other related circumstances of a particular case always have to be assessed.

The institution also stated that the petitioner had breached contractual provisions, whose breach had caused damage to the petitioner, for which he had to bear responsibility. The institution rejected having breached obligations towards the petitioner upon whose breach damage had been incurred by the petitioner and, it therefore proposed that the Financial Arbiter dismiss the petition as unjustified.
During the evidencing the Financial Arbiter found out that the payment card had been used at one trading point – B. G., L., on 25/11/2003 at 12.28 p.m. and that the amount of the transaction had been GBP 493 (CZK 22,932.28).
During the evidencing the Financial Arbiter asked the institution to lend him the original of the sales receipt in order to check the authenticity of signatures on this receipt. The institution informed the Financial Arbiter that according to international rules of the VISA Association the processing bank, i.e. the trader's bank, was bound to provide the originals of sales receipts solely for litigations and it was only in the Financial Arbiter's powers to require the originals of sales receipts directly from the trader's bank. The institution therefore submitted only a copy of the sales receipt including correspondence between the processing bank and the trader, from which it became clear that even though the bank asked that the original of the sales receipt be provided, the trader provided only a copy. The Financial Arbiter states that two different signatures can clearly be seen in the presented photocopy.

From an expert report prepared upon the Financial Arbiter's requirement by PhDr. M. N., the Financial Arbiter found out that the disputed signatures on the receipt for the amount of GBP 493 were almost certainly not the petitioner's authentic signatures.

It became clear from an expert report prepared upon the Financial Arbiter's requirement by Ing. M. Z. that the institution had proceeded in accordance with rules of the VISA Association and with the Business Terms and Conditions for the Issuance and Use of Cards issued to an account maintained by the institution. Among others, Ing. M. Z. states that in order for a signature disagreement claim to be successful, the signatures have to be significantly different, which has to be ascertainable in the operation conditions of the trading point, i.e. not only by an expert graphological finding. However, in this case there are visible differences between the signatures on the sales receipt and the signature on the copy of the rear side of the card made by the institution when issuing the card. There are two signatures on the sales receipt, which may have meant that the trader did indeed note the difference in signatures and in accordance with the rules asked the buyer to sign himself again. Since the actual signature specimen on the card was not available, it was not possible to proceed with the claim pursuant to VISA rules.

During the evidencing the Financial Arbiter found out that according to Article V point 2 of the Terms and Conditions the holder was bound to take all possible steps to prevent the loss or theft and misuse of a card by unauthorised persons and check on an ongoing basis whether s/he still had the card. Besides, pursuant to Article IV point 6 of the Terms and Conditions the petitioner (holder) shall be liable for all transactions made by a lost or stolen card from the moment the card is lost/stolen until one calendar day, in which the card is blocked, passes. In this context the Financial Arbiter is of the opinion that the provision of Article V point 2 of the Terms and Conditions is virtually not accomplishable and contains unclear wordings such as "check on an ongoing basis", which may lead to vagueness of a legal act within the meaning of the relevant provisions of the Civil Code. The Financial Arbiter thinks that it is contrary to principles of fair trading relations and both the Civil Code and Commercial Code to transfer the responsibility for the loss of a card to the client, which the institution has done in point 6 of Article IV of the Terms and Conditions, as in most cases the client is unable to prevent the loss of a card. On these grounds the Financial Arbiter finds this contractual provision against good morals according to the provision of S. 39 et seq. of the Civil Code among others also due to the fact that the institution failed to accept recommendations made by the Czech National Bank provided in Article VIII point 1 of Model Business Terms Conditions for the Issuance and Use of Electronic Payment Instruments, according to which the payment card holder is liable for financial loss incurred due to loss or theft of a payment card until the moment the event is notified and up to the maximum amount of CZK 4,500.

During the evidencing the Financial Arbiter also discovered that the Introductory Provision of the Business Terms and Conditions for the Issuance and Use of Cards issued to an account maintained by the institution did not vary from Article V point 6(a) of the Model Business Terms and Conditions for the Issuance and Use of Electronic Payment Instruments. This point stipulates that in the event of a dispute with the holder the issuer is bound to evidence that the disputed operation has been correctly recorded and settled.
Besides, pursuant to Article II point 3 of the Business Terms and Conditions for the Issuance and Use of Cards issued to an account maintained by the institution the business premises (in this case the trader) issue a sales receipt, which the holder (in this case the petitioner) shall sign in accordance with the signature specimen on the card strip. Provided the transaction does not comply with these conditions, the business premises may refuse to make it or may ask the card holder to show his/her ID card. Article III point 1 of the Terms and Conditions also states that the bank debits from/credits to the account all items related to the card use, and pursuant to Article IV point 1 of the Terms and Conditions the holder may ask for the examination of a transaction with which s/he disagrees, as well as a mistake or other discrepancy in maintaining the account at the particular trading point.
Based on ascertained facts, evidence assessment and upon application of S. 331 and S. 375 of Act No. 513/1991 Coll., as amended, the Financial Arbiter arrived at a conclusion that the institution was liable for damage incurred by the petitioner and was therefore bound to return to the petitioner funds withdrawn in an unauthorised way. The Financial Arbiter reached this

conclusion because the institution, in order to meet its obligation ensuing from an obligation concluded with the petitioner on 6/9/2002 (contract on the issuance and use of the institution's card), had to use a third party, i.e. the trader's bank (also member of the VISA Card Association), which had the same liability towards the institution as the institution towards the petitioner (S. 331 and S. 375 of the Commercial Code). Since a trader of this third party made a transaction with a payment card presented by an unauthorised holder, the trader hence breached the contractual relationship concluded between the third party and itself and also breached the contractual relationship between the institution and the third party, i.e. the trader's bank. In accordance with legislation, this fact fulfils the provisions of S. 331 and S. 375 of the Commercial Code. It is absolutely clear from the above provisions that if a person uses a third person to meet its obligation and this person breaches its obligation, it shall be liable for the performance of the third person as if it had been its own performance.
Besides, in its Business Terms and Conditions the institution did not exclude the provision of Article V point 6(a) of the Model Business Terms and Conditions for the Issuance and Use of Electronic Payment Instruments, which stipulates that in the event of a dispute with a holder the issuer is bound to evidence that the disputed operation has been correctly recorded and settled; the institution therefore failed to bear its burden of proof. Based on what has been said above, the Financial Arbiter arrived at a conclusion that the institution was liable and obliged to return to the petitioner funds that had been withdrawn in an unauthorised way.

Within the meaning of S. 1(1)(b) and S. 3 of Act No. 229/2002 Coll. the Financial Arbiter therefore decided that the institution was bound to return to the petitioner withdrawn funds in the amount of CZK 22,932.28 plus a 2% interest on late payment p.a. commencing on 27/11/2003 until payment, within 15 days after the finding becomes legally effective.

The institution filed objections against the finding within the statutory time limit and proposed that the finding be changed and the claim filed by the petitioner be dismissed as unjustified.

In its objections, Part II, the institution holds the opinion that the provisions of S. 331 and S. 375 of the Commercial Code cannot be applied to this case with regard to the fact that those cases when individual banks take part in effecting or settling a transaction made through a payment card have to be assessed as cases that are governed among participants by contractual provisions, which reflect among others international rules that are standard for all participants in card trade worldwide. The institution also states that in its contractual provision with the petitioner there is no obligation to check the agreement of signatures on the sales receipt and the signature strip on the payment card and it cannot therefore entrust a third party with the performance of this obligation.

In its objections, Part III, the institution among other proves that it shall be liable for transactions provided the card holder does not breach his/her obligations. The institution also states that if a card is used, the main identification is related to the card or its holder and the signature plays a minor role in the whole identification process compared with smooth payments, since the signature is fully accessible on the rear side of the card and that is why the protection of a card by its holder is stressed.

Last but not least the institution states in Part III of its objections the possibilities of claims pursuant to VISA binding rules (VIOR I, section 5.1) and reaches the conclusion that it is not true that a trader shall check the signature and that provided signature disagreement occurs s/he shall not accept a transaction and must immediately withhold the card, because the trader uses the signature only to check whether the holder is rightful rather than to authorise the transaction. The institution also analyses the impossibility to continue the claim proceedings with view to VISA rules (VIOR II, section 3.4.A.1.c; 7.12. A.1.c), since not all conditions set forth in the rules have been met.

In the final section of its objections, Part IV, the institution states that it does not understand the Financial Arbiter's statement that it failed to bear the burden of proof, since in its Business Terms and Conditions it did not exclude the provision of Article V point 6(a) of the Model Business Terms and Conditions for the Issuance and Use of Electronic Payment Instruments, which stipulates that in the event of a dispute with a holder the issuer shall evidence that the disputed operation has been correctly recorded and settled. Besides, the institution does not understand why the failure to transfer the provision of Article VIII point 1 of the Model Business Terms and Conditions for the Issuance and Use of Electronic Payment Instruments into its contractual provisions is in the Financial Arbiter's opinion against good morals.
The Financial Arbiter says the following to the institution's objections:

The Financial Arbiter cannot identify himself with the institution's opinion presented in its objections against Article II in particular due to the fact that according to Article III point 1 of the Business Terms and Conditions for the Issuance and Use of Cards issued to an account maintained by the institution (hereinafter referred to as the "Conditions") the institution debits from/credits to an account all items ensuing from the use of the card, i.e. use of the card at any trader. Contracts concluded among traders and their banks concerning the acceptance of payment cards stipulate that traders are also bound to accept other payment cards issued by a different institution from the one with which they have concluded the contractual relationship.
The obligation to check signature agreement on the sales receipt and the signature strip on the payment card is not enshrined in the contractual provisions between the institution and the petitioner, but the contract presupposes the performance of

this check in Article II point 3 of the Conditions in principle as a precondition to performing or settling transactions by stating the procedure followed by a trader. Without this transactions could not be settled within the card association, and hence pursuant to S. 331 and S. 375 of the Commercial Code breach of the aforementioned obligations by the trader also establishes the obligation of the institution to pay damages, as the Financial Arbiter stated in the reasoning of his finding issued under registration No. 49/2004, filing No. 1081/2004.
According to the institution the petitioner has breached his obligations by not having prevented the theft of his payment card. The Financial Arbiter states that the Conditions do not govern the mode of protection of the issued payment card, not even by an exemplary list, but make its holder liable for its loss or theft. Article V point 2 of the Conditions is limited only to a statement that the holder shall take all possible steps to prevent the loss or theft and misuse of a card by unauthorised persons. In the Financial Arbiter's opinion it is not possible to transfer a special type of absolute liability (provided for by the Civil Code) for the loss of a card to the client, who is in most cases unable to prevent the loss of the card. This is an issue for completely different proceedings and not proceedings before the Financial Arbiter.

As the institution surely knows, statutory provisions take precedence over contractual provisions, which must not be contrary to the law and must not get round the law or be against good morals. The Financial Arbiter identifies himself with the provision of S. 39 et seq. of the Commercial Code, which governs the invalidity of a legal act if it is against good morals and he therefore regards the provision of point 6 of Article IV of the Conditions as a provision that is against good morals and the provision of point 2 of Article V of the Conditions as a provision that is not accomplishable. The Financial Arbiter thinks that both these provisions should be deemed invalid, as by means of these provisions the institution rids itself of its liability.

The Financial Arbiter is always willing to take into account contractual provisions provided they are relevant and provided they do not in principle misuse the position of the institution at the cost of legal protection of the card holder, i.e. the institution's client. Besides, the institution is bound to behave in such a way so as to minimise damage or rather to prevent damage (S. 415 of the Civil Code (Act No. 40/1964 Coll.)). In the Financial Arbiter's opinion it is surely possible that the institution improve its control system concerning obligations that are to prevent the loss or minimise the possibility of theft or loss of payment cards, e.g. by settling only transactions made with entering the PIN code, issuing payment cards provided with the card holder's photo, etc. However, by trying to transfer all obligations in the Conditions to the client (the card holder), the institution in the Financial Arbiter's opinion has breached also the general provisions of the Civil Code pertaining to prevention of potential damage, and thus puts the client at a disadvantage in particular when evidencing at court.

As for another objection made by the institution concerning the fact that the signature has lesser weight when using a card compared with a signature on a payment order and that its only purpose is that a trader can check whether the card holder is rightful, the Financial Arbiter states that the signature is one of the identification elements of a payment card holder in accordance with S. 15(l)(a) of Act No. 124/2002 Coll. If a trader does not sufficiently check the signature, the safety of card use is reduced and an unauthorised card holder may thus easily withdraw funds from an account to which the card has been issued.

Besides, the Financial Arbiter cannot identify himself with the institution's opinion stated in its objections concerning correct recording and settling of transactions mainly due to the fact that the institution forgot the trader who accepted the payments for goods. The Financial Arbiter states that the institution failed to prove the contrary, i.e. that the trader did not breach its obligations, although the transactions appeared so at first sight.

To conclude, the Financial Arbiter points out the provision of S. 16 of Act No. 124/2002 Coll., pursuant to which the Czech National Bank has issued the Model Business Terms and Conditions containing mutual rights and obligations of issuers and holders of electronic payment instruments in order to protect the holders of electronic payment instruments. The institution's failure to assume the protective provision of these Conditions into its Business Terms and Conditions, according to which the holder shall be liable for financial loss incurred due to loss or theft of a payment card until notification and up to CZK 4,500, has worsened the position of payment card holders, which the Financial Arbiter regards as a contractual provision against good morals. The institution's statement presented in the objections, namely that all liability cannot be "taken from" the holder in the case of stolen cards when it is shown that the card holder has not made a particular transaction at a trader is also against good morals. It is absolutely clear from this statement made by the institution that in no case is the institution willing to create equal conditions for its clients and that at all cost and even to the detriment of clients the institution aims at maintaining its dominant position, which in effect leads to clients' negative perception of the operation of institutions.
Before the Financial Arbiter issued this decision, he obtained all source materials required for its issuance, duly and fully established the facts, performed all investigations necessary to assess the case and when making the decision about the objections filed by the institution, the Financial Arbiter did not discover any new facts why the finding issued on 29 October, 2004, registration No. 49/2004, filing No. 1081/2004, should be changed.
The Financial Arbiter therefore confirmed his finding.

Case C

In his petition to open proceedings before the Financial Arbiter a petitioner sought that the institution return funds withdrawn from his account by a payment card.

On the basis of requested evidence the Financial Arbiter found out that the petitioner's damage had occurred after the institution's payment card (hereinafter referred to as the "PC") had been stolen from the petitioner's wife who also disposed of the petitioner's account. An unknown offender made withdrawals with the card from the institution's cash machine on the same day in the amounts of A1, A2 and A3. Further funds in the amounts of B1, B2, B3 and B4 were withdrawn in person from the petitioner's account with the help of the stolen PC on the same day at the institution's branches. With regard to technical processing of the cash machine withdrawals the petitioner's account was thus overdraft by amount C. Based on the overdraft C the institution charged the petitioner fees in the amount of D. In his petition the petitioner states that the PIN (Personal Identification Number) was not written down on the stolen items.

The petitioner's wife discovered the theft of the payment card on the very day and without delay phoned the institution to block the card, which the institution did immediately in all systems. When deactivating the PC the institution did not make any mistake. On the same day the petitioner's wife filed an indictment with the Police of the CR for unknown offender. After the statutory time limit passed, the Police adjourned the case, as facts could not be ascertained that would justify criminal proceedings to be opened.

In its statement the institution dismissed the petitioner's claim, saying that all withdrawals had been made before the blocking of the stolen PC and that the withdrawals had been authorised by entering the correct PIN.

When the PC was issued the petitioner asked the institution to set weekly withdrawal limits for the chip application and magnetic application in the amount of E. According to the petitioner's requirement the institution set this limit.

As for the history of transactions, the institution told the Financial Arbiter that according to records made by the authorisation centre the C/M application, i.e. the PC magnetic strip, was used sixteen times altogether on that day in cash machines of two institutions, X and Y, of which three times were successful. The PC holder always authorised the PC by entering the correct PIN and gradually withdrew cash in the amount of the weekly limit E.

The petitioner objected that had the offenders known the PIN, they would surely not have made 16 attempts at money withdrawal, but the Financial Arbiter found out that the history of the 16 attempts at money withdrawals from the cash machine was as follows:

- 6 enquiries about account balance;
- 6 unsuccessful attempts at cash withdrawal owing to the PC weekly limit in the amount of E;
- 3 successful withdrawals;
- 1 unsuccessful attempt to charge a mobile phone, as the PC weekly limit in the amount of E had already been exhausted.

In all 16 cases the PC holder always authorised the PC by entering the correct PIN. The institution recorded no instance of entering incorrect PIN.

The investigation also discovered that the stolen PC was a hybrid payment card provided with both a magnetic strip and a chip. The magnetic strip is used for payments in shops and cash machine withdrawals and the chip is used for client service at the institution's trading points.

Two limits are set for such PC: one for standard card services through the magnetic application – in the petitioner's case the limit was set in the amount of E per week, and another one for the client's access to funds on the account through the chip application. The second limit differs from the first one, as it is set after the PIN code is entered and it equals the account balance. Through the chip application a withdrawal can be made at the institution's branch up to the minimum account balance.

According to the institution's statement and submitted evidence it is clear that in this particular case the weekly withdrawal limit in the amount of E was set upon the petitioner's request for both applications, the magnetic one and the chip one. The institution's terms and conditions governing PCs made it possible to make cash withdrawals exceeding the weekly limit E of the chip application. The petitioner was aware of this possibility of overdrafting cash above the set limit E, as he had used it himself with his PC, where the weekly limit for the chip application had been lower than the amount of E, and through the chip application he withdrew an amount exceeding the limit of E. However, this fact was not significant for the Financial Arbiter's decision-making.

The institution's Business Terms and Conditions set forth the PC holder's obligations. It is among others stipulated that the PC holder is not allowed to write down the PIN in an easily legible way on the PC or other document that is kept together with the PC. The PC holder is also bound to store the PC in a safe place and protect it against loss, theft, misuse by unauthorised persons, etc.

It is clear from evidence submitted by the institution that the transactions, i.e. withdrawals of funds with the PC belonging to the petitioner's wife, were made and authorised after the valid PIN had been entered, the central computer ordered that money

be paid only after the authorisation. The person who used the PC to withdraw funds from the account must have known the valid safety code, i.e. the PIN, to this card. The transactions challenged by the petitioner were made with the knowledge of the PIN and at a time when the PC was not yet blocked. No strange behaviour was noted in any of the cash machines and no surplus was discovered. The institution did not evaluate the claimed transactions as the cases of skimming, i.e. card copy. From evidence and requested expert report prepared by an expert in the field of economy, namely banking and insurance, specialised in direct debit, the Financial Arbiter discovered that the probability that a person correctly determines the PIN number combination at first attempt was virtually zero. In all challenged cases the PIN was entered at first attempt.

S. 15(1)(a) and S. 18 of the Payment System Act stipulate that provided an electronic payment instrument was used with PIN identification and the electronic payment instrument was physically present, the holder of the electronic payment instrument does not have the right to demand that the issuer return funds withdrawn through such use of the electronic payment instrument.

At a meeting that took place at the Financial Arbiter's office it was discovered from statements made by the institution's representatives, from which a report was prepared, that provided funds are withdrawn at the institution's trading points through a PC the client's identity is not checked when cash is given to him/her, since in the institution's opinion entering the correct PIN is sufficiently evidential and adequate. In this case the card replaces the standard ID card. The Financial Arbiter noted that in principle the limit for access to the balance of funds on the client's account was not a safety (protective) limit, as anybody could reach the overall account balance after entering the correct PIN. The institution does not further identify a person at the trading point when paying cash.

In this context the Financial Arbiter identified himself with the petitioner's opinion that it was misguiding that when he had ordered the PC the institution had accepted his proposal for setting the maximum required amount for the chip application in the weekly limit of E and the weekly limit for the magnetic application also in the amount of E. These limits were written on the confirmation of the PC receipt by the petitioner's wife.

With regard to ascertained facts, evidence assessment and upon application of S. 710(2) of the Commercial Code (Act No. 513/1991 Coll.), as amended, the Financial Arbiter did not identify himself with the institution's arguments that the petitioner had been aware of the possibility of cash withdrawal exceeding the weekly limit and should therefore be liable for the damage incurred. This provision sets forth that funds on an account may be disposed of only by persons stated on the signature specimen provided by the account holder to the institution, other persons may do so only under conditions set forth in the account maintenance contract.

The Financial Arbiter reached the aforementioned conclusions in particular with regard to the fact that the institution had stated that the PC in question replaced the standard ID card for the purposes of cash withdrawal. The institution failed to prove that it had duly informed the petitioner and the PC holder about protection of funds given to the institution and failed to say that provided withdrawals through a payment cheque exceed the limit set on the PC the person's identity is always checked, but in the case of a cash withdrawal through the PC chip application the person's identity is not checked. In this case it is enough to enter the PIN. Although the institution's conditions governing account maintenance state that the account holder or person having disposal of the account prove his/her identity by an ID card or a passport, identity (or authorisation to dispose of an account) may also be proven by entering the correct PIN when using the PC; however, the Financial Arbiter thinks that the institution's control mechanism has been poorly set, mainly with view to the provision of S. 710(2) of the Commercial Code. Contrary to this provision the institution made it possible for an unauthorised PC holder to dispose of the petitioner's funds.

The institution also breached the PC Business Terms and Conditions, which among others stipulate that a PC must not be used for transactions that would be contrary to legislation valid where the transaction is performed. The Financial Arbiter highlights the provision of S. 2 of Act No. 61/1996 Coll., which makes provision with respect to certain measures against the legalisation of yields from criminal activity, as amended. According to this statutory provision the paying entity (e.g. a bank, postal licence holder) always identifies the participants when entering into a commercial relationship, e.g. money withdrawal), in particular if the transaction is suspicious (e.g. such cases when the number of turnovers on an account within a day or following days does not correspond to the client's standard monetary operations – S. 1a(6)(d) of Act No. 61/1996 Coll., etc.). This was the case at the institution's branch where on the day in question several withdrawals took place in the course of a couple of minutes worth several thousands of CZK. If S. 2 of Act No. 61/1996 Coll. had been complied with, i.e. the obligation of identifying a participant in a transaction had been met, the identity of the PC holder would have been discovered. When evaluating the evidence, the Financial Arbiter arrived at a conclusion that the institution had breached the aforementioned statutory obligation and contractual relationship concluded with the petitioner.

The petitioner or rather his wife breached the contractual relationship concluded with the institution as well. The person who had used the PC in an unauthorised way and had withdrawn funds from the petitioner's account through the stolen PC must have known the PIN. The authorised PC holder must have breached the contractual provisions in a way that had made it

possible for the unauthorised person to gain access to the PIN, which led to subsequent occurrence of damage. However, without the knowledge of the PIN the occurrence of damage under the given circumstances would not have been possible. Based on the aforementioned evidence the Financial Arbiter reached a conclusion that the institution was liable for part of the damage incurred by the petitioner and was therefore liable to return to him withdrawn funds in the amount of B1, B2, B3, B4 and D. The petition to return the amount of A1, A2 and A3 was dismissed.

Case D
In her petition to open proceedings before the Financial Arbiter of the CR a petitioner sought that the institution pay damage the petitioner had incurred after funds had been withdrawn from her account through a payment card (hereinafter referred to as the "PC") from a cash machine of institution A and institution B. The petitioner claimed that she had not made the disputed transactions with her PC. In order to prove that the petitioner's statement was true, the petitioner's legal representative presented an Affirmation to the Financial Arbiter in which the petitioner stated that she had been on holidays abroad in the period in question. The petitioner annexed to the Affirmation a photocopy of her passport from which it was obvious when and where she had crossed state borders. In the Affirmation she also stated that she had had the institution's PC on her all the time and it could therefore not have been disposed of. The PC was not international and could be used only on the territory of the CR. In its statement the institution among others stated that the petitioner claimed a withdrawal that had taken place at a time when she had still been in the CR, namely on the day of her departure from the CR.

From the submitted evidence the Financial Arbiter found out that funds had been withdrawn from the petitioner's account on different days and in different amounts by the PC through the institution's cash machines and at all cash withdrawals the PIN (Personal Identification Number) had been entered correctly at first attempt.

Although affirmation is not direct evidence and its content cannot serve as evidence (affirmation does not have the value of proven fact, but only affirmed fact), the Financial Arbiter's investigation discovered that there was major difference between the official record in the passport and the petitioner's Affirmation. In the period in question the petitioner returned to the CR for one day and subsequently went abroad again.

The contract concluded between the institution and the petitioner stipulates that the account holder, i.e. the petitioner, shall be liable for damage incurred for incompliance with provisions set forth in the Terms and Conditions or in relation to the loss, theft and misuse of the PC. The institution's Business Terms and Conditions set forth among other obligations that the PC holder shall not write down his/her PIN in an easily legible way in particular not on the PC or other document together with the PC. Besides, the holder shall take all steps to prevent the theft of the PC or its loss and misuse by unauthorised persons, in particular the holder shall keep the PIN secret. The card holder (or the client as the account holder) shall be liable for all transactions, costs or damage incurred as a result of the revelation, even unintentional, of the PIN to another person.

It is clear from evidence submitted by the institution that the transactions, i.e. withdrawals of funds through the petitioner's PC, were made and authorised after the correct PIN had been entered, the central computer ordered that the money be paid only after the authorisation. The person who used the PC to withdraw funds from the petitioner's account must have known the valid security code (the PIN) to this card. The transactions challenged by the petitioner were made with the knowledge of the PIN and at a time when the PC was yet blocked. No strange behaviour was noted in any of the cash machines and no surplus was discovered. None of the institutions operating the cash machines in question (institution A and institution B) evaluated the claimed transactions as the cases of skimming, i.e. card copy.

In this context the institution made a suggestion based on its experience when solving similar cases that in this case the payment card may have been misused by a family member. However, when the Financial Arbiter evaluated the evidence he did not take the institution's assumption into account.
The petitioner filed an indictment with the Police of the CR for unknown offender. After the statutory time limit passed, the Police adjourned the case, as facts could not be ascertained that would justify criminal proceedings to be opened.

From evidence and requested expert report prepared by an expert in the field of economy, namely banking and insurance, specialised in direct debit, the Financial Arbiter discovered that the probability that a person correctly determines the PIN number combination at first attempt was virtually zero. In all challenged cases the PIN was entered at first attempt.

S. 15(1)(a) and S. 18 of the Payment System Act stipulate that provided an electronic payment instrument has been used with PIN identification and the electronic payment instrument has been physically present, the holder of the electronic payment instrument shall have no right to demand that the issuer return funds withdrawn through such use of the electronic payment instrument.

The Financial Arbiter arrived at a conclusion that the institution had not breached legal obligations ensuing from the contractual relationship concluded with the petitioner. At the time when funds were withdrawn from the petitioner's

account though her PC, the person who used the PC in an unauthorised way must have had access to this PC and must have known PIN. The petitioner breached the contractual provisions in a way that made it possible for the unauthorised person to gain access to the PIN and that had led to subsequent occurrence of damage. However, without the knowledge of the PIN the occurrence of damage under the given circumstances would not have been possible.
Since there was no causal link between the occurrence of damage and the action of the institution and since the fault of the institution was not proven, the Financial Arbiter dismissed the petition.

Funds withdrawn through a PC at the institution's trading point

In her petition as of 7/6/2004 a petitioner sought that the institution pay the aggregate amount of CZK 195,000 withdrawn from the petitioner's account No. 123456789/1111.
The reasoning of the petition was such that on 13/5/2003 the petitioner had her card No. 1234 1234 1234 1234, which had been issued by the institution to the above account, stolen; the PIN (Personal Identification Number) was written down on the card. Immediately after the theft the petitioner blocked the card by phone and subsequently on the same day at 4.00 p.m. with the help of the branch head of institution Q2 in B. phoned the institution, where she was informed that no withdrawal of funds had been made with the card. The petitioner also stated that she had requested a card statement from which she had learnt that funds had been withdrawn with the card on the same day, i.e. 13/5/2003, and the account had been overdraft. All withdrawals had been made by an unauthorised holder and the amounts had been as follows: branch of institution Q2 in Č. – CZK 10,000 at 1.32 p.m., withdrawal within the limit; branch of institution Q2 in Č. – CZK 15,000 at 1.34 p.m.; branch of institution Q2 in M. – CZK 20,000 at 1.49 p.m.; branch of institution Q2 in D. – CZK 30,000 at 1.55 p.m.; branch of institution Q2 in R. – CZK 30,000 at 2.05 p.m.; branch of institution Q2 in Q2 V. – CZK 30,000 at 2.19 p.m.; branch of institution Q2 in B. – CZK 40,000 at 2.35 p.m.; branch of institution Q2 in M. P. – CZK 20,000 at 2.51 p.m.; branch of institution Q2 in U. O. – CZK 40,000 at 3.03 p.m.; branch of institution Q2 in U. O. – CZK 40,000 at 3.05 p.m.; branch of institution Q2 in H. – CZK 19,000 at 3.23 p.m.
In her petition the petitioner also stated that she had immediately reported the theft of the card to the Police of the CR in H. and the institution's employee in P.

The institution's statement as of 8/9/2003 sent to the petitioner partly dismissed the claim, saying that according to records about the transactions maintained by the institution all cash withdrawals made with the card had always been authorised by entering the correct PIN and under such circumstances the institution was therefore unable to accept the claim concerning transactions authorised in such a way. The institution also stated that it had weighed all other circumstances pertaining to the card withdrawals and decided to partly compensate the proven damage incurred by the petitioner. Hence, on 4/9/2003 the institution transferred the amount of CZK 99,000 to the aforementioned account for withdrawals made following the notification of the card theft by phone. The withdrawals were the following: branch of institution Q2 in U. O. - CZK 40,000 at 3.03 p.m.; branch of institution Q2 in U. O. - CZK 40,000 at 3.05 p.m.; branch of institution Q2 in H. - CZK 19,000 at 3.23 p.m.

The petitioner subsequently claimed with the institution the remaining withdrawals made by an unauthorised holder, saying that witnesses had evidenced that the withdrawals made with the stolen card had been made by a male whose identity was yet unknown and that the card non-transferability declared by the institution was against rules governing cash withdrawals from her account.

The second statement made by the institution on 29/12/2003 concerning the disputed transactions dismissed the claim, saying that the institution had informed the petitioner that the purpose of card non-transferability stated in the Account or Card Terms and Conditions was to serve to make the holder not to reveal the PIN to the card or signature on the card to a third person. The institution also states that in its opinion the aforementioned conditions stipulate that the institution check the authorisation to card disposal by entering the correct PIN and that the check of entering the correct PIN replaces identification, which the institution performed. The institution among others explained to the petitioner how the weekly limits worked and how cash withdrawals at a branch of institution Q2 could be made, saying that a withdrawal up to the weekly limit was made without prior verification by the trading point employee and the prerequisite was to submit the card and verify the transaction by entering the correct PIN, whereas in the case of a withdrawal above the weekly limit the trading point employee was bound to check by phone whether there were sufficient funds on the account. The prerequisite is again to submit the card and verify the transaction by entering the correct PIN.

Upon the Financial Arbiter's request, the petitioner supplemented the petition to open proceedings with the Card Terms and Conditions valid as of 1/4/2003 and the institution's statement as of 2/6/2004. In it the institution among others told the petitioner that when making transactions with a card at the institution's trading points, cash machines and shops authorisation to dispose of the card was checked by entering the PIN. In accordance with the Card Terms and Conditions the card holder is bound to store the card at a safe place and protect it against loss, theft and misuse by unauthorised persons. The card holder is not allowed to write down the PIN on the card or another document or to tell it to other persons. Besides, the revelation of the PIN has to be prevented when entering it on the keyboard. In the event of a loss or theft of a card the holder shall notify the bank thereof without delay. When the card is blocked on grounds of loss or

theft, the C/M application is blocked without delay and all cash payments above the card limit within 45 minutes. The card blocking is effective for all card disposals that may change the account balance always on the following business day at the latest provided the phone notification is done by 3.00 p.m. If the event is notified after 3.00 p.m. the blocking shall take place on the day following the second business day after notification. The account holder's liability for transactions made by the card magnetic application ends at 12.00 p.m. on the day when the bank is notified of the event by phone.
In its statement the institution also said that according to available data the phone request for the issued card to be blocked had been received on 13/5/2003 at 2.14 p.m., the card blocking concerning withdrawals up to the weekly limit had become effective on 14/5/2003 and concerning withdrawals by magnetic application on 13/5/2003 at 12.00 p.m. Blocking related to withdrawals above the weekly card limit became effective 45 minutes after the telephone notification – i.e. on 13/5/2003 at 2.59 p.m.

In its statement the institution told the Financial Arbiter that the payment card had been produced to the petitioner's account as part of providing all accounts with payment instruments; the petitioner received the card on 5/6/2000 at a branch of institution Q2 in B. By entering the correct PIN, which had been sent to the contact address by registered post, the petitioner activated the card. The petitioner confirmed the receipt of the card also by her signature on the card receipt confirmation and was at the same time acquainted with weekly withdrawal limits – CZK 10,000 for the chip application, CZK 500 for electronic purse and CZK 5,000 for C/M. The institution also stated that the client had not filed any claims about the letter containing the PIN, from which the institution had assumed that the petitioner had received an undamaged and complete letter and that the PIN had therefore not been revealed and that a check of the history of the above account had verified that the card had been used on an ongoing basis to make withdrawals at a branch of institution Q2 as well as for shop payments. A transaction preceding the aforementioned withdrawal sequences was recorded on 14/12/2002 in the amount of CZK 1,825 at trader P. If the PIN had been revealed at that time to a stranger, as the institution stated, e.g. by noticing the entered combination of numbers, in the institution's viewpoint such person would have had to spend approx. 3 months looking for an opportunity of stealing the card.

Besides, the institution told the Financial Arbiter that the contact branch of the institution had received the phone demand that the card be blocked on grounds of theft on 13/5/2003 and on the basis of the notification the card had been deactivated in the bank's systems at 2.14 p.m.

It became obvious from another statement provided by the institution that according to records made by the authorisation centre the card C/M application had been used a total of five times on 13/5/2003 between 1.21 p.m. and 1.23 p.m. in a cash machine belonging to institution Q1 in Č. According to the institution's statement the card holder withdrew at first attempt the amount of CZK 1,000 and at second attempt the amount of CZK 4,000. The subsequent three attempts were unsuccessful with regard to the weekly C/M limit. The institution did not record entering of a wrong PIN code by the card holder.
Besides, the institution stated that on the same day between 1.32 p.m. and 3.23 p.m. the card had been presented eleven times at branches of institution Q2 and through the card the aforementioned cash payments had been made.
In its statement to the Financial Arbiter the institution among others stated that the whole issue had been investigated in close cooperation with the Police of the CR in H. and that on 8/9/2003 the institution had closed the case, about which the petitioner had been informed in writing. Although all withdrawals through the card (from a cash machine and at a branch of institution Q2) had been authorised by entering the correct PIN, it was decided in the claim proceedings that the client be compensated withdrawals in the amount of CZK 99,000, which the person who had made the withdrawals performed after the notification by phone had become effective, i.e. in the period when the bank, having failed to comply with point 62a of the Account Terms and Conditions, made these withdrawals possible.

The institution also stated that the petitioner had been informed about the possibility of cash withdrawal exceeding the limit by the chip application when she received the card and was given the Card User Manual and that the petitioner e.g. on 1/8/2002 made a withdrawal exceeding the limit in the amount of CZK 20,000 at a branch of institution Q2 in B. and had not challenged that withdrawal. The institution also stated that when a withdrawal exceeding the limit takes place at the institution's trading point, the trading point employee is always obliged to check whether there are sufficient funds on the client's account. The trading point employee, as the institution stated, never tells the person making the withdrawal the available account balance – s/he only confirms or refuses the withdrawal.

In its statement the institution also told the Financial Arbiter that the account holder had the possibility to refuse withdrawals of funds from his/her account exceeding the limit by blocking withdrawals above the card limit. In this case higher amounts may be withdrawn by means of a payment cheque that is sent by registered post to the contact address to the account. When a withdrawal is made by a payment cheque, the holder's identity is always checked. However, according to the institution's statement the petitioner chose a cheaper way of cash withdrawal from her account, as in accordance with the institution's Tariff valid a card withdrawal costs CZK 5 compared with a payment cheque withdrawal costing CZK 6.
Owing to the fact that all disputed withdrawals had been authorised by the card holder by entering the correct PIN, without which a card transaction is not possible according to the institution's statement, the institution regards the aforementioned transactions as duly settled.

The Financial Arbiter evaluated the evidence, each piece of evidence separately and all pieces of evidence in relation to one another. When performing this, the Financial Arbiter followed the principle of free evaluation of evidence.
In accordance with the provision of S. 12(3) of the FA Act the Financial Arbiter obtained a copy of part of the file from the Police of the CR in H., from which it among others followed that an unknown offender had stolen a card to the petitioner's above account between 10.00 a.m. and 1.45 p.m. on 13/5/2003 from a building of company P. in B. Investigation carried out by the Police of the CR in H. discovered that at a branch of institution Q2 in Č. a withdrawal had been made without an ID card and that the employee had not known who had made the withdrawal and could not describe the person. Phone investigation on 22/5/2003 discovered the following: branch of institution Q2 in Č. – the employee did not say anything to the case; branch of institution Q2 in M. – the employee stated that a young man in his 30s, 180 cm tall, with light brown hair, slightly overweight and with a round face, had made the cash withdrawal; branch of institution Q2 in D. – the employee described the man as in his 30s, with short dark hair, who had been very nervous during the cash withdrawal and had a tendency to look back, he had wanted to withdraw CZK 20,000 at first and then CZK 30,000; branch of institution Q2 in R. – the employee described the man as in his 30s, approx. 180 cm tall with short dark hair; branch V. – the employee stated only that the man was young and slim with short black hair; branch of institution Q2 in B. – the employee stated that the man was in his 30s and had dark hair; branch of institution Q2 in M. P. – the employee did not say anything; branch of institution Q2 in U. O. – none of the employees were available; branch of institution Q2 in H. – the individual employee was not present.
It is clear from the file that an employee of company P. in B. and another person that rents a garage in B. saw on 13/5/2003 at around 1.00 p.m. two strangers in the area who arrived there by a dark car. The manager of company P. spoke with an unknown young man approx. 180 cm tall, with short hair combed upwards and with a thin face, on 23/5/2003 between 3.00 and 3.30 in the building and asked him who he was looking for. The unknown man replied that he was looking for toilettes. Then another young man went up the stairs, he had straight hair combed to the side, greyish round face and stout figure. These two young men had a green car parked in front of the gate to the company area. Since the description of the persons present in company P. on 23/5/2003 are very similar to the description of the persons who had made the cash withdrawal by the stolen card at the branches of institution Q2, the Local Police Department in H. demanded that the District Directorate of the Police of the CR in B. examine the finding.

On 2/7/2004 the institution made an explanation at the Financial Arbiter's office concerning the use of the payment card, registration No. 50/2004. Since the Financial Arbiter also deals with other disputes concerning cards, it is stated in the report written from the explanation that the Financial Arbiter will take the oral explanation into account when settling this dispute as well. It is stated in the report that after the Financial Arbiter asked whether the identity of a client receiving cash at a cash withdrawal was checked, the institution's representative replied that it was not, since in the institution's opinion the PIN was sufficiently evidential and adequate. In this case the card replaces the standard ID card. The Financial Arbiter noted that in principle the limit for access to the balance of funds on the client's account was not a safety (protective) limit, as anybody could reach the overall account balance after entering the correct PIN. The institution does not further identify the person at the institution's trading point, because the institution has decided not to make the check not when paying cash in compliance with statutory limits (CZK 100,000, CZK 500,000).

Based on other submitted evidence the Financial Arbiter also found out that the following guidelines governing cash withdrawals through a card were valid for the trading point employees at the time in question:

a) branch of institution – Handbook;
b) branch of institution Q2 – Rules prepared by the institution and issued by institution Q2.

It became clear from the institution's statement that all withdrawals except for withdrawals from a cash machine of institution Q1 had been made at branches of institution Q2. The Financial Arbiter has discovered that the part of the Rules concerning cash withdrawals by a card stipulate that a holder may submit a request to make a withdrawal from an account to which the card has been issued either in writing or verbally. Upon the holder's request the employee takes the card and types into the system the transaction code of the required transaction. S/he places the card into the sensor, types in the transaction data and upon the system's call asks the holder to enter the PIN code on the client's keyboard. If the transaction is performed without any error, the employee returns the card to the holder and issues a receipt automatically printed by the system and at the same time gives the particular amount to the holder.
The Rules among others state that provided the amount of any transaction exceeds CZK 500,000, an employee is bound to fill in an ID sheet according to the holder's ID card before s/he makes the transaction in the system in accordance with Act No. 61/1996 Coll. Provided the card holder refuses to go through the identification procedure, the employee shall not make the required transaction. In case the name given on the card disagrees with data stated on the ID card when making a cash withdrawal or a payment order, the employee shall refuse such transaction.
The description of cash withdrawal exceeding the limit, i.e. withdrawal of an amount higher than the weekly card limit, is also stated in one part of the Rules; in this case an employee makes two transactions. First s/he makes a verification in the bank. Provided the bank agrees with the payment, s/he makes a transaction referred to as withdrawal exceeding the limit and subsequently issues a receipt to the client.
During the evidencing the Financial Arbiter found out that point 3 of the Card Terms and Conditions valid as of 1/4/2003

stipulated that the account holder should always be fully liable for breach of the Terms and Conditions by an authorised person disposing of the card (the card holder), to whom a card has been issued upon his/her request. Point 21 states that a payment card must not be used for transactions that are contrary to legislation valid where the transaction is performed. Point 32 of the Card Terms and Conditions stipulates that provided card blocking is requested on grounds of loss/theft, all cash withdrawals by the chip application above the card limit shall be blocked within 45 minutes. Point 36 states that the account holder shall be liable for damage caused by the revelation of the PIN. Provided the PIN has been used in transactions made with a lost or stolen card, the account holder shall reimburse the institution for potential damage incurred.
It also follows from the submitted evidence, namely the Part I of the Card User Manual issued by the institution that the card fully replaces a standard ID card. Part II stipulates that the surface of the card includes the holder's name, the card number and the chip application includes e.g. the card holder's birth code, the card holder's account number and his/her relationship to the account (whether s/he is the account holder or person disposing of the account). Part III states that if cash is withdrawn from the card limit at branches or branches of institution Q2, the card holder's limit is not limited and s/he may ask for withdrawal above the limit. The bank monitors the holder's account balance and may block the holder's card or prevent its further use. Part VI of the Card User Manual stipulates that the weekly limit for a new card is decided by the bank and only the account holder may request that it be changed.

Based on ascertained facts, evidence assessment and upon application of S. 710(2) of the Commercial Code (Act No. 513/1991 Coll.), as amended, the Financial Arbiter arrived at a conclusion that the institution was liable for damage incurred by the petitioner and was therefore liable to return to the petitioner funds withdrawn in an unauthorised way.
The Financial Arbiter reached this conclusion based on the fact that the institution had stated that a card replaced the standard ID card for the purposes of cash withdrawal. The institution failed to prove that it had duly informed the petitioner about the protection of funds she had given to the bank and had failed to say that by blocking withdrawals exceeding the remaining card limit the card holder's identity is always checked at subsequent withdrawals of amounts by a payment cheque, but in the case of a card withdrawal exceeding the limit the holder's identity is not checked and it is enough to enter the PIN (with the exception of transactions exceeding CZK 500,000). Point 14 of the Account Terms and Conditions stipulates that the account holder or person disposing of the account shall prove his/her identity by an ID card. Identity or authorisation to dispose of an account may also be proven by entering the correct PIN when using the card. The Financial Arbiter holds the opinion that the institution has a poorly set control mechanism, in particular with regard to the provision of S. 710 of the Commercial Code (Act No. 513/1991 Coll.), as amended, which sets forth that funds on an account may be disposed of only by persons stated on the signature specimen provided by the account holder to the institution, other persons may do so only under conditions set forth in the account maintenance contract. Since the institution made it possible for an unauthorised payment card holder to dispose of the funds, it breached the provision of this Act, as contrary to this provision the card makes it possible to dispose of funds only by the entering of the PIN.

Besides, the institution breached point 21 of the Card Terms and Conditions (a payment card shall not be used for transactions that may be contrary to legislation valid where the transaction is performed), because it broke both S. 1 and S. 2 of Act No. 61/1996 Coll., as amended. Pursuant to S. 2(3)(a), a financial institution shall always identify participants in a transaction provided a transaction is suspicious. For the purposes of this Act, a financial institution means banks and among others legal entities mediating cash and direct debit transfers of funds. For the purposes of this Act, a transaction is any act that leads to money movements or to transfer of property or that directly gives rise to them. In accordance with S. 2(6) a financial institution shall not effect a transaction provided it is suspicious. In particular according to S. 1(5)(d) a suspicious transaction is mainly the number of turnovers on an account within a day or in the following days, which does not correspond to standard monetary operations performed by a client. The institution breached the provision of this Act by not having identified the participant in the transaction when the second and subsequent withdrawals of funds were taking place within one day, only several minutes apart, at various places not far from one another. The withdrawals did not absolutely correspond to standard monetary operations of the petitioner – e.g. withdrawal at a branch in U. O. – CZK 40,000 at 3.03 p.m. and again a branch in U. O. – CZK 40,000 at 3.05 p.m. To clarify, the Financial Arbiter states that the first withdrawal took place at 1.32 p.m. and until 3.23 p.m. a total of 10 withdrawals were made whose average amount stood at CZK 28,400.

In the Financial Arbiter's opinion a suspicious transaction also occurs when a male presents a card with a female name written on it or vice versa.
The Financial Arbiter reached the conclusion that the institution was liable for damage incurred by the petitioner also due to the fact that if an employee of institution Q2 asked the holder to present the card when withdrawing cash, s/he was bound to effect the transaction only provided it was not contrary to the law. Since the employees of institution Q2 took the card with the petitioner's name written on it from an unknown male offender and without noticing this absolutely clear difference (completely contrary to the Card Terms and Conditions) asked the unknown offender to enter the PIN, the institution allowed an unauthorised person to dispose of funds on the petitioner's account. Besides, the institution breached the provision of this Act owing to the fact that an employee of institution D. let the completely atypical behaviour of the card holder unnoticed. The behaviour of the unknown offender observed by the employee of a branch of institution Q2 undoubtedly shows signs of a suspicious transaction.

In this context, the Financial Arbiter regards the breach of the aforementioned point 36 of the Card Terms and Conditions by the petitioner as fully irrelevant.
The Financial Arbiter arrived at the conclusion also due to the fact that in order for the institution to meet its obligation, which followed from the obligation concluded with the petitioner on 5/6/2000 (the card receipt confirmation), the institution had to use a third party, i.e. institution Q2, in accordance with the provision of S. 331 of the Commercial Code. It has to be pointed out that the Financial Arbiter did not look at the contents of the contractual document upon which trading points of institution Q2 accept cards to effect transactions at branches of institution Q2. It became absolutely clear from the institution's statement that cash withdrawals through a card were governed by Rules prepared by the institution and published by institution Q2. In the Financial Arbiter's opinion the institution is therefore liable for the fault made by institution Q2, whose actions breached provisions of Act No. 513/1991 Coll. and Act No. 61/1996 Coll.
On these grounds the Financial Arbiter deems the institution liable and obliged to return to the petitioner funds withdrawn in an unauthorised way.

The Financial Arbiter also states that if the institution or the third party had acted in accordance with valid Czech legal regulations, funds would not have been withdrawn through the petitioner's card by an unknown male offender. The Financial Arbiter therefore does not apply the Payment System Act on this dispute, which stipulates that if an electronic payment instrument is used with the PIN and the instrument is at the same time physically present, the holder of such electronic payment instrument shall have no right to demand that the issuer return funds withdrawn by using such electronic payment instrument.

The Financial Arbiter also states that the institution made a mistake when dealing with the petitioner's claim and that it had absolutely contrary to point 32 of the Card Terms and Conditions refused to return to the petitioner funds withdrawn through the stolen card after the card blocking. The institution stated that the card had been deactivated in the bank's systems on 13/5/2003 at 2.14 p.m. From this statement the Financial Arbiter infers that from that time it was not possible to dispose of funds on the account through the card. In spite of this the institution refused to return to the petitioner funds withdrawn in an unauthorised way in the amount of CZK 90,000. The withdrawals were the following: branch in V. - CZK 30,000 at 2.19 p.m.; branch in B. - CZK 40,000 at 2.35 p.m.; branch in M. P. - CZK 20,000 at 2.51 p.m. The institution completely misinterpreted the point concerning the card blocking about which it had told to the petitioner in its statement as of 2/6/2003 that the blocking of withdrawals exceeding the weekly card limit had become effective 45 minutes after the notification by phone - i.e. on 13/5/2003 at 2.59 p.m.

To expand legal knowledge of the institution the Financial Arbiter states that in its Card Terms and Conditions the institution undertakes to block a card within 45 minutes following notification, from which it follows that after the institution blocks the card it is not possible to make cash withdrawals exceeding the card limit, and not after 45 minutes, as the institution wrongly stated.
Within the meaning of S. 1(1)(b) and S. 3 of Act No. 229/2002 Coll. the Financial Arbiter decided that the institution was obliged to return to the petitioner withdrawn funds in the amount of CZK 10,000 with a 2.5% interest on late payment p.a. commencing on 16/5/2003 and in the amount of CZK 185,000 with a 2.5% interest on late payment p.a. commencing on 20/5/2003 until payment, within 15 days after this finding becomes legally effective.
The institution filed objections against this finding within the statutory time limit.
The institution proposes that the finding be changed and the petitioner's petition be dismissed or that the petition not be admitted, since the case is not in the Financial Arbiter's powers.
The institution divided its objections into a total of seven points in which – by applying some provisions of the Card Terms and Conditions (hereinafter referred to as the "Conditions") – it tried to prove that the Financial Arbiter's conclusions were incorrect or that he had made a mistake when evaluating the provisions of the Conditions; furthermore the institution pointed out that S. 710 of Act No. 513/1991 Coll. had been applied incorrectly and last but not least argued that the Financial Arbiter did not have the powers to settle the case. Having evaluated the objections, the Financial Arbiter has taken the following standpoint.

As regards the institution's objection No. 1 as of 17/8/2004
In this part the institution refers to point 16 of the Conditions concerning the setting of a card for its use at trading points with the possibility of withdrawal exceeding the limit. It is also stated in this point that the card holder is given the same PIN for the chip application limit and the C/M limit. The institution renews the chip application limit and the C/M limit once a week, always at the first use in a calendar week. Other information concerns an account (which the petitioner does not hold) or electronic purse. Point 23 quoted by the institution mentions the possibility of making withdrawals exceeding the weekly chip application limit in the trading point opening hours and impossibility of making a withdrawal provided phone appliances do not work or natural disasters or catastrophes occur. The institution also quotes point 42 of the Account Terms and Conditions, which stipulates that cash payments from an account up to the minimum balance are made through a card or a payment cheque; when a card is used, only the PIN is entered and when a payment cheque is used, the holder's identity is always checked by using the ID card.
The Financial Arbiter states that these points do not provide any other procedures for the use of a card for a withdrawal exceeding the limit and reference is not given to point 42 of the Account Terms and Conditions. Part of the Conditions entitled "General" (points 1 to 7) stipulates (in point 1) that legal relationships related to the issuance and use of a card follow the legislation of the Czech Republic; point 2 includes only a reference to the Model Business Terms and Conditions for the Issuance and Use of Electronic Payment Instruments issued by the Czech National Bank and point 3 refers to the

account holder's obligation to acquaint himself/herself in detail with the Conditions.
The Financial Arbiter regards the failure to state the procedure for using a card quoted in point 42 of the Account Terms and Conditions in the Conditions and its inclusion only in the aforementioned point 42 of the Account Terms and Conditions as misleading also with regard to the long time that passed between the petitioner's application to open an account and her approval with the Account Terms and Conditions on 4/2/1999 on the one hand and the receipt of the card by the petitioner on 5/6/2000 on the other hand.
Among others, the Financial Arbiter has to remind the institution of its statement quoted by the Financial Arbiter in the challenged finding that the institution produced the payment card to the petitioner's account as part of providing all accounts with payment instruments and not upon the petitioner's free choice.
The institution's statement included in its objections that information about the possibility of cash withdrawals is given directly in the Card Terms and Conditions is not true with view to what has been said above.
The Financial Arbiter therefore still holds the opinion that the institution failed to duly inform the petitioner about the protection of funds given to the bank and failed to inform her that when withdrawals exceeding the card limit are blocked, higher amounts of cash may be withdrawn through a payment cheque, in which case the holder's identity is always checked, unlike the use of a card, in which case only entering the correct PIN is sufficient.

The Financial Arbiter also has to state that the institution among others breached point 23 of the Conditions, where it states that the institution settles cash withdrawals and deposits on the third business day after the transaction has been made at a trading point. Withdrawals made by the unauthorised card holder were made on Tuesday 13/5/2003. The third business day following this day was Friday 16/5/2003, but the institution settled the 10 withdrawals as late as on Monday 19/5/2003. The withdrawals were the following: branch of institution Q2 in Č. – CZK 15,000 at 1.34 p.m.; branch of institution Q2 in M. – CZK 20,000 at 1.49 p.m.; branch of institution Q2 in D. – CZK 30,000 at 1.55 p.m.; branch of institution Q2 in R. – CZK 30,000 at 2.05 p.m.; branch of institution Q2 in V. – CZK 30,000 at 2.19 p.m.; branch of institution Q2 in B. – CZK 40,000 at 2.35 p.m.; branch of institution Q2 in M. P. – CZK 20,000 at 2.51 p.m.; branch of institution Q2 in U. O. – CZK 40,000 at 3.03 p.m.; branch of institution Q2 in U. O. – CZK 40,000 at 3.05 p.m.; branch of institution Q2 in H. – CZK 19,000 at 3.23 p.m.

As concerns the institution's objections 2, 4 and 5 as of 17/8/2004 the Financial Arbiter states that in his opinion the institution's objections given under point 2 are related to its objections given under points 4 and 5. The Financial Arbiter states that it follows from point 11 of the Conditions that the future card holder is asked to take a card from the institution by having been sent the PIN. It is therefore clear from this point that a payment card holder is an individual, whose name and surname are written on the card and whose signature is on the rear side of the card, to whom the payment card has been issued for use. It follows from Part II of the Card User Manual issued by the institution that also the card number and validity are written on the card.
In the Financial Arbiter's opinion such card may be accepted at a trading point only from a person whose name and surname are written on the card and whose signature is on the rear side of the card, i.e. in this case from the petitioner. The Financial Arbiter holds the opinion that the institution shall always check this authorisation to present the card.
Besides, point 12 of the Conditions stipulates that after the holder receives the card the institution is authorised to debit all payments and cash withdrawals made with the card from the account to which the card has been issued. The account holder shall pay the institution all damage incurred by the institution in relation to incorrect use of card issued to his/her account.
The Financial Arbiter reached the conclusion that by its actions the institution itself had caused the card to be used incorrectly, as it had on all occasions failed to check or rather identify the person who had presented the card and had furthermore asked this person to enter the PIN, which is in direct contradiction with point 12 of the Conditions.

In its objection given under point 4 the institution among others stated that in no case could it agree with the Arbiter's opinion who regarded the breach of point 36 of the Conditions by the petitioner as irrelevant. To this objection the Financial Arbiter states that for the purposes of assessment of the institution's liability for damage incurred by the petitioner it is not important whether the card holder was or was not asked to enter the PIN, as there are other circumstances, in particular different gender of the person who presented the card from the gender (name) stated on the card, which are stronger pieces of evidence than the fact that after one breach another breach occurred, this time due to the institution's fault. Only for information the Financial Arbiter states that he did not deal with transactions made at a cash machine of institution Q1 on 13/5/2003 at 1.21 p.m. (withdrawal of CZK 1,000) and 1.22 p.m. (withdrawal of CZK 4,000). The Financial Arbiter does not question the petitioner's liability for the cash machine withdrawals where the revealed PIN was used. The Financial Arbiter only looked at transactions made by an unauthorised card holder after employees of institution Q2 asked him to enter the PIN, which has to be taken into account when "evaluating" the Financial Arbiter's finding. If the institution had complied with all provisions of the Conditions and had in particular checked the card holder, damage would not have occurred.

In objection stated under point 5 the institution disagrees with the Financial Arbiter's opinion that it had not acted in compliance with valid Czech legislation, it said that it had not breached any statutory provision; at the same time the institution transfers liability for incurred damage to the petitioner. To this objection the Financial Arbiter states that primary breach of legislation and obligations occurred at the trading points.
When assessing the authorisation to make card operations the Financial Arbiter among others drew on the provision of

S. 710(1) of the Commercial Code, as amended. The provision of this paragraph stipulates that under S. 40(3) and (4) of the Civil Code (Act No. 40/1964 Coll.), as amended, an order to make a transfer of funds may be given also by electronic payment instruments, which make it possible to record the contents of a legal act and determine the person who has performed this legal act in accordance with the Payment System Act (Act No. 124/2002 Coll.).
It therefore follows from what has been said above that the institution performed orders to transfer funds that had been given by an unauthorised person without having determined the person who had performed this legal act, by which it broke the legal regulations of the Czech Republic.
In its objection given under point 3 the institution regards its breach of point 21 of the Conditions as questionable, because according to the institution's statement the card was international and this point highlights to clients the possibility of different legislative regulations when making card payments abroad. However, the Financial Arbiter has to say that if the institution had meant to highlight to card holders that there might be different legislative regulations when making card payments abroad, it should have stated so in the Conditions. It is not absolutely clear from the quotation of the point that card use abroad is meant.
As the Financial Arbiter has already stated, the institution's statement is misleading also due to the fact that point 1 of the Conditions ("General") stipulates that legal relationships concerning the issuance and use of a card follow valid legislation of the Czech Republic and there is no reference to point 21, which according to the institution's statement diverts from this wording.
Besides, the institution stated in its objection that it had not breached the Money Laundering Act (No. 21/1996 Coll.). The Financial Arbiter dealt with this objection, although Act No. 21/1996 Coll. is in fact a Regulation of the Ministry of the Interior, which implements the Fire Protection Act. The institution had presumably meant Act No. 61/1996 Coll., as amended, which makes provision with respect to certain measures against legalisation of yields from criminal activity, as amended (the "Money Laundering Act"). The institution made reference to S. 1a(5)(d) of the Money Laundering Act, saying that funds had been deposited on the account gradually in the course of several years in fairly small amounts including wages, and the institution had therefore not regarded these deposits as yields from criminal activity and in line with the aim of the Money Laundering Act had not had a reason to regard the withdrawals of these funds from the account as suspicious; besides, the amounts were such that not even their aggregate had reached CZK 500,000.
Beyond the scope of the dispute, the Financial Arbiter also dealt with this objection filed by the institution, although the institution had made a wrong reference to the provision of the above Act. Nevertheless, the Financial Arbiter has to say that in the challenged finding he had made reference to the breach of S. 1(5)(d) of the Act and not the provision of S. 1a(5)(d) of the Act.
The Financial Arbiter states that the provision of S. 1(5)(d) of the Money Laundering Act stipulates that a suspicious transaction is in particular the number of turnovers on an account within a day or in the following days, which does not correspond to the client's standard monetary operations. Having applied this provision on the case, the Financial Arbiter reached the conclusion that the institution had a poorly set control mechanism (which checked this in accordance with the provisions cited above) and that this control mechanism had failed or that the institution did not have this control mechanism at all, by which it broke the aforementioned Act. The Financial Arbiter obtained copies from the petitioner's account statements for the period of April, May and June up to December 2002; January 2003 and July to December 2003 and January to July 2004. From this evidence the Financial Arbiter discovered that until the day in question, 13/5/2003, the petitioner had never made a withdrawal exceeding the limit with the exception of a withdrawal on 5/8/2002, which had already been mentioned by the Financial Arbiter. Besides, the Financial Arbiter found out that the petitioner made a total of two operations on the account within a day only on 11/4/2002.
Based on the evidencing the Financial Arbiter arrived at a conclusion that the institution should have regarded the second withdrawal and subsequent withdrawals made by an unauthorised person on 13/5/2003 as yields from criminal activity (S. 1(5)(d) of the Money Laundering Act).

The Financial Arbiter considers another part of the institution's objections stated under point 3 as irrelevant (cash payment to a person of a different gender who knows the PIN, which the institution cannot regard as a suspicious transaction, in particular when taking place in relatively small amounts, as the gender difference cannot be spotted in the case of cash machines; besides, gender may sometimes not be determined on the basis of a particular name). As the Financial Arbiter mentioned several times, the institution breached the provision of S. 710(1) of the Commercial Code, as amended, in that it had made orders to transfer funds without having determined who had performed the legal act. If the institution had proceeded in accordance with this Act, the PIN would never have been entered by the unauthorised holder.

When the Financial Arbiter made a decision about another part of the institution's objection, namely that the PIN may have been told to another person intentionally on various grounds, e.g. illness, etc., he has to point out that by this statement the institution itself admits that holders of electronic payment instruments break the law, which is also contrary to the legislation of the Czech Republic. The institution admits that it gives other persons than those stated in the account maintenance contract the authorisation to dispose of funds on the account.
The Financial Arbiter thinks that the objection filed by the institution is in contradiction with declared rights of authorised use of a card only by the petitioner, as the Financial Arbiter mentioned, as well as in contradiction with e.g. the Conditions, point 4, which stipulates that a card shall be issued to the account holder or to a person with the right to dispose of the account and shall be non-transferable, and point 25, which states that the card may only be presented by its holder.

In point 3 of the objections the institution also states that when amounts up to CZK 100,000 are withdrawn, no legal regulation or contract sets forth the obligation to the institution to check the identity of the card holder in such cases, and that the card holder may only be the person whose name is written on the card. Even this objection filed by the institution is in direct contradiction with the legislation of the Czech Republic.
Also in this case the Financial Arbiter has to stress to the institution yet again that the obligation to check the identity of a card holder stems from the provision of S. 710(1) of the Commercial Code and provision of the Money Laundering Act, as had already been stated above.
The last part of the institution's objection, namely that without more detailed data the cash withdrawal at a branch of institution Q2 in D. cannot be regarded as a suspicious transaction and that the employee of institution Q2 obviously realised the apparently odd behaviour of the client after she had been informed by the Police of the CR, again shows that the institution's aforementioned control mechanism had failed.
In the Financial Arbiter's opinion even this objection stated by the institution is contrary to the Money Laundering Act, which in provision of S. 9 lists among others the institution's obligation to implement a system of internal principles, procedures and control measures to prevent the legalisation of yields.
As for the institution's objection presented under point 6, the Financial Arbiter states that also in this case the institution is trying to transfer liability for damage incurred by the petitioner; that owing to its own technical problem the card had been deactivated at 3.49 p.m. Only after the institution had assessed the claim, the aggregate amount of CZK 99,000 had been returned to the petitioner, i.e. transactions made after 45 minutes following the record in the bank's filing database, i.e. by the deactivation order at 2.14:14 p.m., i.e. from 2.59 p.m. the institution had decided to assume liability for the failure to make card transactions made after this time. It is not the petitioner's fault, but the institution's fault that the transactions (that first and foremost should not have been made at all) had been made and had been considered unauthorised from 2.59 p.m. If the institution's technical equipment had operated without fault, the card may have been deactivated immediately, i.e. from 2.15 p.m.

As for the institution's objection presented under point 7 the Financial Arbiter states that he decides disputes in accordance with the FA Act, in the field of transfers of funds and in the field of issuance and use of electronic payment instruments pursuant to the Payment System Act. The provision of S. 3(2) of the Payment System Act stipulates that a transfer can be made in particular by debiting from the beneficiary's account or a cash deposit made by the payer and by crediting to the beneficiary's account or a cash payment to the beneficiary. The Act also stipulates that the payer and beneficiary may be the same person. It is therefore clear that the aforementioned dispute is in the Financial Arbiter's powers.

Owing to the fact that the institution failed to provide any new facts or evidence in its objections that would make the Financial Arbiter change the challenged finding, the Financial Arbiter had to confirm his finding issued on 3/8/2004 under registration No. 64/2004, filing No. 770/2004.

Misuse of a stolen payment card involving a signature at a domestic trader

A petitioner sought that the institution return funds in the aggregate amount of CZK 7,920 withdrawn from the petitioner's account No. 123456789/1111. The reasoning of the petition was such that on 2/5/2003 in the evening he was going on holidays into the United Kingdom. In the airport transit area his handbag was stolen in which he had his payment card Eurocard/MasterCard No. 1234 1234 1234 1234. On the same day at 9.50 p.m. the petitioner boarded the plane and left. He discovered his loss on the following day in the morning in the United Kingdom from where he phoned the institution in Prague, where he was told that there had yet been no account movements. On 4/5/2003 the petitioner discovered that there had been some movements on the account and that is why the petitioner's mother blocked the payment card. All payments made by the stolen payment card took place within 24 hours from the theft in the airport transit area. The petitioner has all four receipts from traders with an absolutely different signature from the petitioner's; the petitioner thinks that the payment card must have been stolen by someone at the security frame before he boarded the plane. The receipts are for the amounts of CZK 640, CZK 830, CZK 3,000 and CZK 3,450. The institution dismissed the claim as unjustified.

In its statement the institution regards the petitioner's claim as unjustified, as the disputed transactions have been made in accordance with conditions set forth in the General Business Terms and Conditions of Q1. The institution also states that the card was blocked as late as on 5/5/2003 at 9.27 a.m. upon a phone request made by the petitioner's mother. In the institution's opinion the comparison of copies of the card payments presented by the petitioner, which contain the buyer's signature, with the petitioner's signature on the claim report show that the signatures differ; despite this the traders accepted the aforementioned four payments and thus failed to show sufficient caution; they are therefore liable for the incurred damage and bound to pay the damage. This applies in particular to a trader in shop M3, where the payment was made at fourth attempt and where three unsuccessful attempts took place in the course of four minutes, which were dismissed for lack of money.

It also became obvious from the institution's statement that all claimed transactions had been made before the petitioner had reported loss of his payment card. According to the General Business Terms and Conditions of Q1 valid in May 2003 the institution is liable for transactions made from the end of the day following a day in which a client requests that the card

be blocked. Hence, the petitioner is liable for all aforementioned transactions.
During the evidencing the Financial Arbiter discovered that the claimed transaction in the amount of CZK 3,450 had been made at trader S1 at trading point M1. Company S1 is a contractual partner of institution Q2 with which it has a contract on accepting MasterCard payment cards. Traders Manual forms an inseparable part of this contract (Appendix No. 2). It follows from point 2.2 of this Manual that the trader's employee presents filled-in sales receipt to the card holder to sign it and checks whether the signature of the sales receipt and card agree. Provided the signature on the sales receipt does not agree with the signature on the card, the transaction cannot be made. The trader's employee destroys the sales receipt in front of the eyes of the card holder and asks the card holder to present his/her ID card.

During the evidencing the Financial Arbiter also discovered that the three remaining claimed transactions were made at trading points of company S2 at trading points M2 in the amount of CZK 830 and CZK 640 and at M3 in the amount of CZK 3,000. Company S2 is a contractual partner of institution Q3 with which it has a contract on accepting payment cards, among others also Eurocard/MasterCard payment cards. According to Article II of this contract the trader effects payments made through payment cards in accordance with valid Guidelines for Making Payment Card Transactions, which form an inseparable part of this contract. It follows from Part I of point 3 of these Guidelines that the trader is bound to check the client's signature on the receipt with the signature specimen on the card. Provided the signature on the sales receipt does not agree with the signature on the card, the transaction must not be made, not even provided is authorised and the authorisation centre permits that the transaction be made. If the trader has doubts, s/he may ask the card holder for identification by means of an ID card.

On the basis of an expert report prepared upon the Financial Arbiter's request by expert Z. the Financial Arbiter found out that the disputed signatures on the sales receipts for the amounts of CZK 3,450 and CZK 830 as of 2/5/2003 and for the amounts of CZK 3,000 and CZK 640 as of 3/5/2003 were not the petitioner's rightful signatures.

Besides, the Financial Arbiter discovered during the evidencing that the Eurocard/MasterCard payment card No. 1234 1234 1234 1234 had been issued on the basis of Appendix No. 1 to the account agreement as of 6/12/2000. According to Article 230 of the General Business Terms and Conditions of Q1, which form part of the account contract, a payment card issued by the institution makes it possible among others to make direct debit payments for goods and services at those entities that accept the card.

Based on ascertained facts, evidence assessment and upon application of S. 331 and S. 375 of Act No. 513/1991 Coll., as amended, the Financial Arbiter arrived at a conclusion that the institution was liable for damage incurred by the petitioner and was therefore liable to return to the petitioner funds withdrawn in an unauthorised way. The Financial Arbiter reached this conclusion due to the fact that the institution, in order to meet its obligation ensuing from contractual relationship concluded with the petitioner on 1/8/2001 (Appendix No. 1 to the account contract as of 6/12/2000), was forced to use a third party, i.e. traders' banks (members of the same MasterCard International Association), who were liable to the institution in the same way the institution was liable to the petitioner (S. 331 and S. 375 of the Commercial Code). Since traders of the third party effected transactions made by a payment card presented by its unauthorised holder, they breached the obligation between the third party and them and at the same time breached the obligation between the institution and the third party, i.e. traders' banks. This clearly fulfils the provisions of S. 331 and S. 375 of the Commercial Code. The quoted provisions clearly stipulate that if a person uses a third person to meet its obligation and this person breaches its obligation, it shall be liable for the performance of the third person as if it had been its own performance. On these grounds the Financial Arbiter deems the institution liable to return to the petitioner funds withdrawn in an unauthorised way.

The Financial Arbiter decided that institution Q1 was bound to return to the petitioner withdrawn funds in the amount of CZK 1,470 with 3% interest on late payment p.a. commencing on 7/5/2003 until payment and in the amount of CZK 6,450 with 3% interest on late payment p.a. commencing on 8/5/2003 until payment, within 15 days after this finding becomes legally effective.

6. Selected Information from the Arbiter's Work

6.1. Proceedings before the Arbiter

When performing his work, the Arbiter often experienced that if other institutions were to be involved in obtaining evidence, they often refused to cooperate with the Arbiter, making reference to the FA Act or other legislation (e.g. the Banking Act[4]). The Arbiter therefore had to obtain the required data by turning to other participants (traders, the Police) with reference to the Code of Administrative Justice. However, in some cases the addressed participant failed to cooperate with the Arbiter regardless of the possibility of a penalty being imposed. Pursuant to the Code of Administrative Justice the penalty is only CZK 200, which is a negligible amount for these participants.
The Arbiter had already pointed out these facts hindering thorough and timely settlement of disputes in the 2003 Report.

In recent months numerous clients turned to the Financial Arbiter's office, whose petitions were not in the Financial Arbiter's powers. In most cases these disputes concerned transfers and use of electronic payment instruments outside the territory of the CR and also the issue of newly charged fees for "records pertaining to advantageous interest" by loan and building societies.

Besides, consultants working for civic consulting companies (members of the Civic Consultants Association) turned to the Arbiter for expert consultation. Having found out that the employees of the consulting companies have little knowledge in the field of the payment system, the Arbiter proposed that he perform a joint presentation about the Arbiter for all members of this Association in January 2005.

6.2. Issues Not in the Arbiter's Powers

Also in 2004 clients filed petitions to open proceedings with the Arbiter, which were not in his powers:

The fields were in particular the following:

- terms and conditions of maintaining current accounts;
- cases concerning Union Banka occurring after 21/2/2003;
- termination of contracts on savings for building purposes;
- provision of the beneficiary's identification data by the beneficiary's bank in the case of unjust enrichment;
- disproportionate interest on monetary loans from non-banking entities;
- provision of credit by banks;
- disposal of deposited funds in the case of a declaration of bankruptcy over the account holder or issuance of a decision on compulsory debiting from the obliged person's account;
- transfers outside the territory of the EU and EEA;
- all cases that had occurred before the FA Act came into effect;
- issue of private pension schemes;

A concise overview of institutions at which unjustified claims were directed in 2004 is presented in diagram No. 10 in chapter 5.2.

[4] **Act No. 21/1992 Coll.**

7. The Arbiter's International Cooperation

Experience from France

In February 2004 the Arbiter met in Paris with the ombudsman of Société Générale (SG), Ms. Christiane Scrivener, and the ombudsman of Federation Bancaire Francaise, Mr. Benoit Jolivet, in order to exchange experience and obtain information about the activities of ombudsmen in France.
Since 2003 it has been enshrined in legislation that the SG ombudsman is an independent person who tackles disputes solely of the clients of the SG group (a total of 9 banks). Ms. Scrivener's experience has shown that it is better not to decide the case provided she lacks certain competence in a dispute with a client; besides, claims need to be settled quickly and it is very desirable to often inform clients about the existence of the ombudsman.
Her decisions are not binding and serve only as a recommendation; investigation including the issuance of a decision takes 19 days on average.

The ombudsman of Federation Bancaire Francaise, who is an independent person, provided information about the how consumer protection worked in France. Besides him, there are another 19 ombudsmen working for individual banks or groups of banks. There is a statutory requirement that each bank shall inform its client on account statements that the client's dispute with the bank is dealt with by the ombudsman and also states his/her name and contact address on the account statement.

Experience from FIN-NET

Besides, the Arbiter took part in an international conference of financial ombudsmen and bodies responsible for out-of-court-settlement of disputes that took place in central London on 18 and 19 March 2004, which also included an ordinary FIN-NET meeting.
The Arbiter's participation in this conference made it possible to establish new relationships within FIN-NET and exchange experience from the individual members of this group.

FIN-NET means Cross-border Out-of-Court Complaints Network for Financial Services. It associates member institutions in charge of out-of-court settlement of disputes in the field of finance in order to help consumers with their problems that arise with regard to foreign entities, e.g. banks, insurance companies, loan and building societies and investment companies. FIN-NET members include the following European Union member states: Belgium, Denmark, Finland, France, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Greece, Germany, Spain, Sweden and the United Kingdom. Besides, members include European Economic Area countries, namely Iceland and Norway.

FIN-NET mainly has three main goals:

1. make sure that consumers have easy access to out-of court settlement of disputes through the provision of detailed information about disputed cross-border cases;
2. ensure efficient exchange of information among European institutions for the settlement of disputes so that cross-border complains are processed in the fastest way, effectively and professionally;
3. ensure joint minimum standards for court-of-court settlement of disputes in various European Economic Area countries.

FIN-NET members mainly aim to improve out-of-court settlement of disputes within the European Union. In order to achieve this, FIN-NET members have entered into an agreement that sets forth the framework of cross-border cooperation and principles of out-of-court settlement of disputes. This agreement also contains a statement of objections, according to which the individual institutions of FIN-NET members want to comply with quality standards pursuant to Recommendation 98/257/EC as of 30/3/1998 (hereinafter referred to as the "Recommendation").

The Recommendation sets forth seven principles for the institutions responsible for out-of-court settlement of disputes in the field of consumer rights:

- ❍ principle of independence of institutions for dispute settlement, which guarantees the impartiality of actions;
- ❍ principle of transparency of the procedure, i.e. all required information has been obtained and the result is assessed in an objective way;
- ❍ adversarial principle, which allows all the parties concerned to present their viewpoints and to hear the arguments and facts put forward by the other party;
- ❍ principle of effectiveness of the procedure, which makes it possible to use the advantages of alternative dispute resolution, i.e.:

- access to the procedure without being obliged to use a legal representative;
- the procedure is free of charges or of moderate costs;
- speedy settlement;
- the competent institution is given an active role, thus enabling it to take into consideration any factors conducive to a settlement of the dispute;

❍ principle of legality, i.e. a decision made by the institution does not deprive the consumer of the protection afforded by mandatory provisions of the consumer protection law;
❍ principle of liberty;
❍ principle of representation by a third party.

FIN-NET draws on cooperation among national bodies responsible for out-of-court settlement of disputes and establishes a fully operative network for alternative dispute resolution in the European Union. The principle of its activities is such that in the case of a dispute in the field of finance between a consumer and service provider with a seat abroad FIN-NET makes it possible for the consumer to turn to the relevant out-of-court body to settle the dispute in the country where the consumer has his/her domicile. There the consumer receives the necessary information about the FIN-NET network of institutions responsible for out-of-court settlement of disputes as well as address in the country where the service provider has its seat. Provided the consumer decides to file a complaint with an institution responsible for the settlement of disputes abroad, his/her complaint shall be given to the relevant institution abroad. When settling the dispute, the institution shall proceed in accordance with the Recommendation. If it is more beneficial for the consumer to turn to the relevant institution abroad directly, the consumer shall be notified thereof.

Persons authorised by the Arbiter took part in the meeting of FIN-NET members in Brussels on 15 October, 2004.

The participation in the meeting made it possible to draw on the March meeting of FIN-NET and extend cooperation as well as to strengthen ties with the individual arbiters in those EU member states where this institute was established.
The agenda included a number of points that are closely related o the Arbiter's activities and that are important for the performance of his work (e.g. preparation of new EU directives, comments on them or about other legally binding EU documents) or that assess the performance and compare the number and contents of settled cases in the Arbiter's powers (e.g. statistics, overviews, etc.) in comparison with other EU countries. It is also very beneficial that it is possible to exchange practical experience from settling individual cases of the same type (this is supported by official and unofficial discussions about settled cases, jurisdiction and powers, etc.).

The purpose of the whole FIN-NET platform is not only to exchange experience and discuss possible settlements, but also to provide a real basis for settling cross-border disputes, methods of their settlement and communication among the individual countries in the course of the settlement of a dispute.

It is very necessary for the Arbiter's activities in the future to establish business relationships and acquaint himself with the individual financial ombudsmen and representatives of bodies responsible for out-of-court settlement of disputes and find communication partners for the purposes of settlement of disputes that are in joint powers or sphere of interest (cross-border disputes, etc.).

It is also necessary to acquire materials under preparation or amend existing EU legislation and opinion about them, their timeframe, etc. and to have sufficient comparative materials about the numbers and types of settled disputes (statistics) carried out by all EU member states, which have an institute in charge of out-of-court settlement of disputes, i.e. an arbiter or ombudsman.

Experience from Belgium

In June 2004 the Arbiter's Deputy went to Brussels in order to obtain practical and material knowledge and information about the operation of EC institutions and the Belgian banking ombudsman, Mr. Paul Caeyers.
The Financial Arbiter's Deputy informed the Belgian ombudsman about the establishment of the institute of the Financial Arbiter and his activities and gave him the FA Act and the Payment System Act.
The Belgian ombudsman presented his report of activities in 2002 in French and a detailed report about settled cases in the second half of 2002 in French and Flemish. These materials are not translated into English.
It was said during the meeting that in Belgium there was an ombudsman for insurance companies and an ombudsman for banks. Their activities are fully separated, but they have some issues in common, e.g. the insurance of banks.
The banking ombudsman was established by the Banking Association in 1990 by legislation from the same year protecting small savers and investors. Until 2003, supervision over financial institutions was divided in Belgium, but since 1/1/2004 it has been unified. The ombudsman's office has 4 employees and 3 assistants. They report to the Banking Association, which also finances them. They are appointed into office by a committee of managers for indefinite period of time. All have had practice in banking.

All complaints have to be filed in writing, they are accepted neither in person nor by phone. There were approx. 2,200 complaints in 2003. As of 1/6/2004 there were approx. 1,000 complaints. The filing of a petition to open proceedings is similar to the process in the CR, but there is no limit. However, the Belgian banking ombudsman cannot settle disputes of legal entities. In the case of cross-border payments there is a limit of EUR 12,500. In the case of cross-border payments the ombudsman also settles disputes of legal entities (minimum number of complaints). It is presumed that in 2006 the limit will be adjusted to EUR 50,000. There are no charges related to the proceedings before the ombudsman, but it is presumed that certain charges will be introduced in the future.
The banking ombudsman in Belgium is a private institution that will after agreement with the Minister of Economy in future presumably associate itself with a consumer protection organisation. This organisation will then delegate other employees.
The possibility of involving Belgian partners into the PHARE programme in the Financial Arbiter's office in the CR was also consulted. At the time when the meeting was taking place, the Belgian ombudsman had already received the Arbiter's letter offering to involve the Belgian party in this project. Mr. Caeyers was interested in the project and did not rule out involvement.

Experience from Slovakia

In May 2004 the Financial Arbiter's Deputy went to Bratislava to establish cooperation in the Slovak Republic with a similar institute to the Financial Arbiter in the CR.

In the Slovak Republic there is an institute similar to the Financial Arbiter in the Czech Republic, namely the Permanent Arbitration Court, which is an organisational component of the Banking Association. There are altogether 10 professional arbitration courts in Slovakia, however only one, the Permanent Arbitration Court, is for the field of banking. The Permanent Arbitration Court was established by the Banking Association. The legal form of the Permanent Arbitration Court stems from the Payment System Act (No. 510/2002 Coll. of the SR). According to set rules, when a client concludes a contract with a bank, the bank in Slovakia has to present to the client a draft arbitration contract for potential dispute settlement. Provided the client does not agree with the draft arbitration contract, s/he may refuse it and in such case a court will decide the client's potential dispute with the bank. Provided the client agrees, a separate paragraph is included in the contract, namely the arbitration clause.
The Permanent Arbitration Court comprises two chambers. The first chamber was established upon statute and has been in existence since mid-2003 and the second chamber was established on 1/1/2004. The first chamber is non-commercial and there are no charges related to the proceedings before it. Banks contribute to its operation with the amount of SK 200,000 p.a. At the time of the meeting 24 commercial banks contributed to the operation of the first chamber plus the Slovak National Bank and the State Treasury, which are also involved in the payment system.
The second chamber is open and commercial and has to earn money for its operation (a petition to open proceedings before it may be filed by anyone, it may also decide non-banking disputes provided both parties to the dispute agree with it). Fees for the proceedings have been set at 50% of the court fees.
A judge at the Permanent Arbitration Court may only be an individual, candidates are assessed by the Permanent Arbitration Court Board. The nominated member is entered in a List of Arbitrators. The Permanent Arbitration Court is independent and may establish branches.
When a petition to open proceedings is filed, the Court Secretary presents the List of Arbitrators to the dispute participants and they choose the arbitrators who will decide the dispute. In order to prevent the same arbitrators from deciding disputes, there is a descending selection system in place.
The first chamber always makes decisions in a senate comprising three members. Provided the dispute participants cannot agree on arbitrators, one arbitrator is selected by the petitioner, one by the defendant and these two selected arbitrators select the third arbitrator. A total of 19 arbitrators have so far been nominated in the first chamber, of whom 3 are attorneys and 16 are bank employees. It is relatively difficult to obtain a qualified arbitrator, since s/he has to hold this office besides his/her regular job and the remuneration for this activity stands at SK 1,000 per case, regardless of how long it is being settled.
In the case of proceedings before the second chamber the dispute participants agree how many arbitrators will decide their dispute – whether 3, 5 or 7. A total of 7 arbitrators have so far been nominated in the second chamber.
The parties to the dispute may also propose other persons to settle the dispute than those entered in the List of Arbitrators, but such person has to be approved by the President of the Board, when approved, s/he is allowed to decide ad hoc. Such person has to meet the requirements for arbitrators.
A petition to open proceedings may also be filed in electronic form, but in that case it has to be confirmed in writing within three days. The decision-making of the Permanent Arbitration Court follows special Arbitration Act (No. 244/2002 Coll.), and also the Code of Civil Procedure.
In 2003 the Permanent Arbitration Court did not hear any case. At the time when the meeting took place, the second chamber was settling only six disputes and none had yet been settled. The disputes were mostly in the field of provision of (consumer) credit, failure to repay it and overdrafting its limit, drawdown of funds through a payment card and failure to pay the debt. Such cases would in general be settled at court by means of compulsory debiting.
At a time when the visit took place a survey was taking place in Slovakia concerning the filing of clients' complaints with banks regarding the payment system (it was estimated there were thousands of such cases).

8. Proposed Legislative Changes

The Arbiter's experience from performing his work and information obtained from equivalent bodies in EU member states has shown a need to amend some valid legislation.

8.1 Approved Changes

❍ **Amendment of Act No. 61/1996 Coll., which makes provision with respect to certain measures against the legalisation of yields from criminal activity**

The Financial Arbiter initiated the supplementing of amendment of Act No. 61/1996 Coll., which makes provision with respect to certain measures against the legalisation of yields from criminal activity. The proposed change related to the breach of the bank secret and possibility of providing the Arbiter with information even if the institution was bound by the duty not to disclose. The amendment was adopted by Act No. 284/2004 Coll.

❍ **Amendment of the FA Act (No. 229/2002 Coll.)**

In 2004 the Parliament of the CR negotiated an amendment of the FA Act. The proposed amendment of this Act was adopted by Act No. 558/2004 Coll., which became effective as of 1/1/2005.

❍ **Other proposed changes**

In the period in question the Arbiter was also asked by the CNB to comment a draft regulation related to the payment system. Regulation No. 62/2004 Coll., which makes provision with respect to payment systems among banks, settling bank accounts and technical procedures in the event of corrective settlement, was issued in the Collection of Laws, Part 20, year 2004.

8.2 Proposed Changes

❍ **Amendment of the Payment System Act (No. 124/2002 Coll.)**

The Arbiter still attempts at extending and improving consumer protection in the CR. In 2004 he took part in negotiations with CNB representatives for the purpose of proposing some changes of the Payment System Act. In particular, the issues concern the fact that the Arbiter does not have powers in disputes related to transfers of funds to tax offices and customs offices pursuant to the Tax and Charges Administration Act[5] or payment of social security premium and payment of state medical insurance premium[6]. From the payer's point of view it is absolutely irrelevant what the purpose of payment is and to what type of state institution funds are to be transferred[7].

[5] **Act No. 337/1992 Coll.**
[6] **Act No. 592/1992 Coll.**
[7] **Act No. 589/1992 Coll.**

Conclusion

This Report contains pieces of knowledge from the Arbiter's activities in 2004, i.e. the second year of his term of office.

It needs to be said that the existence of the Arbiter was perceived far more intensely by the general and professional public than in the previous period, but certain lack of knowledge concerning the Arbiter's powers still remained. The Arbiter therefore closely cooperated with the media to expand knowledge about the possibility of out-of-court settlement of disputes through the Financial Arbiter.

The Financial Arbiter was addressed by the Czech Consumers Association and in August 2004 he signed a Memorandum of Cooperation. The actual cooperation included also the implementation of a campaign entitled "You may sign, but you have to read". As part of this campaign the Arbiter's role was among others highlighted and explained. In December 2004 the Arbiter participated in a seminar on "Consumers' Contracts", which took place in the Chamber of Deputies of the Parliament of the CR under the auspices of the Economic Committee of the Chamber of Deputies of the Parliament of the CR and the Subcommittee for Trade, Consumer Protection and Market Protection.

Besides, the Arbiter accepted a proposal made by the EU and in the second half of 2004 as part of the PHARE programme got involved into a campaign, which involved lecturing at seminars about the Financial Arbiter's work in the CR in conjunction with other payment system experts from EU member states.

As part of further assistance and getting closer to the public on the basis of obtained knowledge over the two years of office, the Financial Arbiter decided to publish on his web pages some experience from his activities. This information will concern in particular some non-standard procedures taken by institutions when dealing with their clients' claims.

Prague, 21 March, 2005

JUDr. Ing. Otakar Schlossberger

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No. 1 - Organisation Chart
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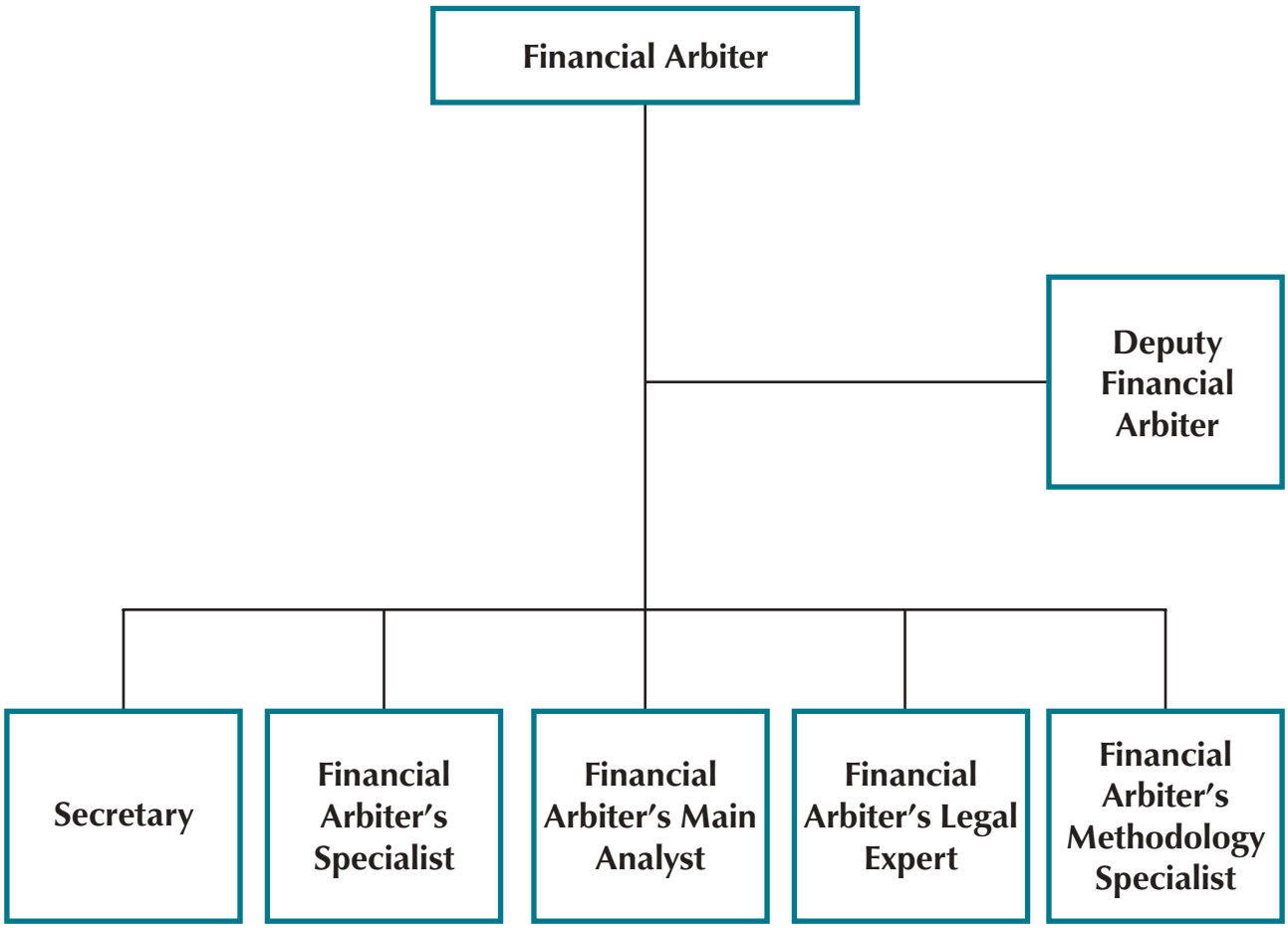
APPENDIX NO. 1

Organisation Chart of the Performance of the Arbiter's Work in 2004



APPENDIX NO. 2

Overview of the Utilisation of Funds in the Year 2004

Item name	Amount in CZK 000 000
Overall costs in the year 2004	**8.1**
Of which:	
Personnel costs - Wages and salaries - Education costs	**5.4** 5.1 0.3
Administrative activity - e.g. advisory and consultancy services - translation services - services related to utilisation of residential and non-residential premises - telecommunications services - travel expenses	**1.8** 0.7 0.1 0.1 0.2 0.7
Operation of buildings and equipment - Rent - property depreciation	**0.9** 0.7 0.2

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