June 2012

LEGAL UPDATE

WEINHOLD LEGAL

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BILLS UNDER DISCUSSION

CIVIL PROCEDURE CODE AMENDMENT

The Czech Government approved a Civil Procedure Code amendment that could enter into effect as early as next year. The amendment addresses the Supreme Court's growing workload and reflects a Czech Constitutional Court decision repealing the provision of § 237(1)(c) of the Civil Procedure Code (enabling a petition for an appellate review to be lodged, if the court of final appeal concludes that the merits in law of a contested judgment are of fundamental importance). The new provisions should strengthen the Supreme Court's role as the body standardizing case law and speed up the electronic issuance of judicial orders to pay.

New concept of appellate review

The amendment introduces a new concept of appellate review based on the following principles:

- a simpler decision-making agenda in judicial proceedings will be enjoined to a sole judge;
- a new concept of appellate review admissibility has been proposed – the Supreme Court alone will rule on the admissibility of an appeal and the statutory reasons for admissibility (e.g. disparity in the rulings of the first and second instance courts) will be eliminated;
- the deadline for lodging a petition for an appellate review should be reduced to 1 month from delivery of the appellate court's decision to the party to the proceedings;
- the reasons of appellate review will be limited to one: erroneous determination of law in the case;
- the Supreme Court will be able to issue a ruling changing an appeal (or first-instance) court decision if facts arise from the file;
- the Supreme Court will have a 12-month time limit to rule on the admissibility of an appellate review;
- the amendment includes a new definition of appellate review admissibility ;
- the Senate will have to decide unanimously on the inadmissibility of an appellate review.

Computerization of the judiciary

The amendment also strengthens judiciary computerization in civil proceedings, explicitly addressing the option of video conferencing to offer evidence in civil proceedings and introducing the option of electronically filing a protest against a judicial order to pay.

BILL ON THE INCREASED TRANSPARENCY OF JOINT STOCK COMPANIES

On 30 May 2012, the Government approved a bill on the increased transparency of joint stock companies, which is expected to take effect on 1 January 2014.

The bill is designed to regulate certificated bearer shares. The new wording attempts to limit, without explicitly banning, anonymous bearer shares. The bill intends to maintain these shares, but on condition of registration with a central depositary (book-entry) or, in the case of certificated shares, lodgment in a bank (immobilization). A joint stock company wishing to keep bearer shares would have to choose one of the respective options. Whether shares are book-entered or immobilized, their owner identification will include a central depositary or bank, and the transfer of title to book entry or immobilized shares will be tied to a change in the entry of the share owner at the central depositary or bank.

RECENT CASE LAW

RETROACTIVE APPLICATION OF CASE LAW IN DISPUTES CONCERNING THE VALIDITY OF ARBITRATION CLAUSES

(Regional Court in Brno Resolution No. 44 Co 246/2010 of 27 September 2011)

A Brno Regional Court resolution resolved a dispute over the validity of an arbitration clause agreed in reference to arbitration rules issued by an entity other than a permanent arbitration court. Czech courts have revisited the matter of the validity of an arbitration clause agreed as above in many judicial decisions. However, opinion in this matter was highly fragmented, especially in recent years, until the Grand Chamber of the Supreme Court issued Unifying Resolution No. 31 Cdo 1945/2010 of 11 May 2011 definitively ruling that arbitration clauses agreed in this way are invalid pursuant to § 39 of the Civil Code for their legal noncompliance.

The number of arbitration clauses agreed annually means this unifying resolution will impact a great many high-value legal relationships. Parties to such relationships thus find themselves in an area of legal uncertainty, even where arbitration clauses were agreed at a time when their validity was not in doubt. For this and other reasons, the resolution has become subject to much expert discussion and extensive media attention, the primary focus of criticism being its potential unconstitutionality owing to violation of the principle of legal certainty and the predictability of judicial decisions.

The Brno Regional Court does not challenge the Supreme Court's conclusions, but has stated that the decision should be respected in future judicial practice (which is currently highly fragmented) due to its standardization, in which case the clause in question must in itself be regarded as invalid. The court does, however, note the circumstances under which an appellate review of absolute invalidity would be at odds with good morals. The court considers a legal situation in which the parties negotiated an arbitration clause at a time when its erroneousness was not obvious, and there was no established or comprehensive case law to address the question of the validity of an arbitration clause in consideration of the manner of arbitrator appointment pursuant to § 7 of the arbitration rules, to constitute such circumstances. The court deems just such a situation to be one in which both parties to litigation accepted an arbitration clause executed in this manner, had no doubts concerning its validity and, indeed, proceeded on its basis.

The court has stressed in this connection that Prague High Court Decision No. 12 Cmo 496/2008 of 28 May 2009 is the first key decision challenging the possibility of appointing an arbitrator with reference to arbitration rules issued by an entity other than a permanent arbitration court. Until that decision, however, decision-making practice held the view that arbitration clauses agreed as above are not invalid. Nor was judicial practice unified in the period between the issuance of the Prague High Court decision and the Supreme Court's unifying ruling.

It is clear from the foregoing that the fragmentation of case law in the matter of the validity of arbitration agreements, a matter often addressed in judicial practice, made a unifying opinion both unavoidable and necessary. On the other hand, the automatic application of these conclusions could in a great many cases constitute a violation of the principle of legal certainty and the predictability of judicial practice. The Brno Regional Court resolution respects these principles while not challenging the conclusions contained in the Supreme Court's unifying resolution.

TRANSFER OF ASSETS BETWEEN RELATED PARTIES

The Czech Supreme Court has recently handed down two important decisions concerning § 196a(3) of the Commercial Code. This provision applies to related-party transfers of property for consideration with a value of at least one tenth the respective company's capital stock and stipulates conditions whose nonadherence is sanctioned by transfer invalidity. The first, generally valid condition is a determination of the value of the transferred property based on an expert opinion. The second condition, applicable only to acquisitions of property within the first three years of company incorporation, requires general meeting approval of the respective transfer. Both decisions somewhat ameliorate the strict earlier interpretation of this provision, which led to the absolute invalidity of a transfer for nonadherence to the foregoing conditions.

Expert opinion for general meeting approval of a transfer

(Czech Supreme Court Resolution No. 29 Cdo 253/2010 of 28 March 2012)

In this resolution, the Supreme Court addressed the question of whether a general meeting approving a transfer of property subject to § 196a of the Commercial Code requires an expert opinion.

The Supreme Court once again stressed that the purpose of § 196a(3) of the Commercial Code is to protect companies and by extension their shareholders. The condition of an expert opinion serves to ensure the fairness of the price of transferred property. The company is also protected by the fact that in the initial phase (first three years) of its existence, the general meeting must approve such a transfer.

In the court's opinion, no general meeting obligation to opine not only on a transfer itself, but also on the price for which such transfer is effected, can be inferred. The expert opinion serves to ensure a fair price and the law enjoins the decision on whether or not a transfer shall be effected to the general meeting alone. The law does not stipulate on which facts the general meeting shall base its decision. It is up to the general meeting whether an expert opinion will be solicited or the decision will be made without such price information. According to the Supreme Court, it is also permissible to make approval contingent on a certain price not being exceeded.

The Supreme Court thus concludes that the requirement that shareholders at a general meeting approving a transaction subject to the provision of § 196a(3) of the Commercial Code have on hand an expert opinion determining the value of the transferred property can be established, for example, in company bylaws, though no such obligation arises from the actual legal provision.

Validity of a transfer without an expert opinion when negotiating market price

(Czech Supreme Court Resolution No. 31 Cdo 3986/2009 of 8 February 2012)

In this decision, the Grand Chamber of the Civil and Commercial Division of the Supreme Court deviated slightly from earlier judicial decision-making practice. According to settled case law, any transfer of property subject to § 196a of the Commercial Code effected without an expert opinion was absolutely invalid for conflict with the law. Moreover, this invalidity could not be reversed by the later preparation of an expert opinion.

However, in this decision the Supreme Court argued the purpose of the given provision, i.e. ensuring companies and their shareholders are protected by preserving company basic capital. The price of transferred property should thus not be left exclusively at the will of the parties. If the price of transferred property is usual for the given place and time, or if a price even more favorable for the company is determined, then the company suffers no damage. Nor is there any grounds, therefore, to sanction such a transfer with invalidity. In other words, the mere absence of an expert opinion does not in and of itself create grounds to void a transfer of property, if the agreed price is not less favorable for the company than the market price.

SHAREHOLDER RIGHT TO EXPLANATIONS AT A GENERAL MEETING

(Czech Supreme Court Resolution No. 29 Cdo 1592/2011 of 13 March 2012)

In its decision, the Supreme Court addressed Board of Directors obligations regarding the right of shareholders to receive explanations at a general meeting and situations in which a joint stock company fails to meet the 30-day deadline for providing financial statements to shareholders.

Pursuant to § 180(1) of the Commercial Code, shareholders have the "right to solicit and receive explanations of matters pertaining to the company, if such explanations are necessary to assess a subject of general meeting discussion".

In the case at hand, the court looked at whether a company is in compliance with this provision if it refuses to answer a majority of questions immediately at a general meeting, instead responding in writing ex post in a letter sent to a specific shareholder.

The Supreme Court concluded that if a shareholder only solicits explanations necessary to assess a subject of general meeting discussion at the general meeting, the Board of Directors is required immediately to provide the required explanations at the general meeting. Indeed, a Board of Directors familiar with the general meeting agenda must anticipate such requests as well as its duty to prepare answers to potential questions or ensure the presence of persons with the information required to answer such questions. Each individual question raised at a general meeting must be assessed for whether it constitutes such a question. If so, the Board of Directors may not tell the shareholder to wait for an ex post response.

BREACH OF DUE DILIGENCE WHEN TRANSFERRING A COMPANY REGISTERED OFFICE WITHOUT AMENDING THE COMPANY ARTICLES

(Czech Supreme Court Resolution No. 29 Cdo 745/2011 of 11 April 2012)

In its decision, the Supreme Court looked at whether a company executive acted with due diligence when he found cheaper and better non-residential premises in which to conduct his company's business, while also transferring the company's registered address to another address without amending the company memorandum of association as regards the company registered office.

In accordance with the concept of a factual (actual) registered office, § 19c(2) of the Civil Code stipulates that the registered office of a corporate entity, which is identified in its incorporation document and entered in the respective public registry, must correspond to its actual registered office, i.e. the place where the corporate entity's administration is conducted and where the public may transact with it (for example, a headquarters or base of administrative operations). A distinction must be drawn between the terms "registered office" and "address". An address is not a registered office, but an indication of where the corporate entity is located (municipality or street, building number, post code). The address that a corporate entity gives as its registered office must be the same as the actual registered office. The address must be disclosed so that a person may be contacted (for corporate entities entered in public registries, disclosure in such a registry is sufficient).

For a corporate entity entered in the commercial register or another public registry, its founding document need not state the address of the registered office, just the municipality in which the registered office is located. However, the registry entry must provide the full address of the registered office. If the company has the full address of the registered office in its memorandum of association, it must amend the memorandum of association when changing its registered office.

The court concluded that a company executive who has moved the company registered office to other premises without making the corresponding change in the memorandum of association has clearly breached the statutory obligation that the registered office of the company entered in the commercial register be its actual registered office, thus exposing the company to the threat of being wound up by a court for breaching the duty to act with due diligence.