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Mediation – An Efficient Dispute Resolution Method

Act on mediation regulating civil-law out-of-court disputes will come into force on 1 September 2012.

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The Case Law on Acquiring Real Estate from Non-Owners

Good faith alone is not enough to legitimize the purchase of real estate from a non-owner.

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Laesio Enormis Prohibition Clause in the New Civil Code

As of 1 January 2014, Czech law provides yet another instrument to protect the weaker party in contractual relations

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Amendment to the Income Tax Act

Extension of the deadline for the submission of declaration in the case of transformations and other changes.

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Mediation – An Efficient Dispute Resolution Method

Mediation is a process which allows disputing parties - whether they be legal entities or natural persons (private individuals) - to negotiate the terms on which they are willing to settle the dispute between them, drawing upon the assistance of a mediator. The mediator is an unbiased and independent person who oversees and guides the mediation process (but does not hand down any decision on the merits). In other words, mediation is another method of alternative dispute resolution (ADR) available, existing apart from common dispute resolution before courts. Compared to litigation, mediation is faster, cheaper, and more efficient, because it answers the true needs of the parties, de-escalates the atmosphere between them, helps overcome issues beyond the narrowly defined substance of the claim, and thus preserves the possibility of future cordial relations between the parties to the dispute. As a rule, the parties will be more inclined to honor a settlement agreement reached in a mediation procedure, as it was not imposed on them by an external judge or arbiter.

Czech law previously recognized mediation only in criminal-law matters; nonetheless, mediation has for several years been put to good use in this country already, as an efficient tool for resolving civil-law disputes as well. However, given the absence of a well-defined statutory framework, mediation has become the domain of expert negotiators, conflict psychologists, etc., without enjoying the benefits of a procedure recognized by law. For instance, voluntary settlement talks previously had no effect on the statute of limitation nor were they directly enforceable. Also, parties were exposed to the risk of having their mediation conducted by an inexperienced or poorly qualified mediator. The newly adopted Mediation Act (act No. 202/2012 Coll.), which will come into force on 1 September 2012, seeks to remedy these problems.

The new act stipulates formal principles for the mediation of civil-law disputes and government oversight over the same; it also ascribes important legal effects to the thus "formalized" mediation procedure. While the act does not forbid or rule out other forms of mediation outside this framework, the special benefits and guarantees are afforded only to those mediation procedures which are conducted under the Mediation Act.

We should first mention the role of the mediator. In "run-of-the-mill" mediation, anyone and everyone may assume this role if they are acceptable to the parties, without having to provide proof of their formal skills and qualifications. By contrast, mediation that is governed by law must always be overseen by a chartered mediator; a list of chartered mediators is available at the Ministry of Justice (and at the Czech Bar Association, for those mediators who are also qualified attorneys), and their work is being overseen by the latter institutions. To become a chartered mediator, one must have a clean record, be college-educated, and pass a special mediators' exam.

The Mediation Act also prescribes basic procedural rules for mediation (regarding the initiation of the mediation procedure, its course, and its conclusion). However, given the informal character of mediation, which is an essential trait of this ADR method, the lawmaker decided against prescribing excessive formal rules in this respect.

The Mediation Act creates a link between mediation and litigation by requiring the courts to instruct plaintiffs and defendants of their option to seek a resolution of their dispute in mediation. In fact, courts may also order the parties to attend a hearing with a chartered mediator so as to explore the possibilities for an out-of-court settlement. A party which refuses to attend such court-ordered mediation without good reason may be denied compensation of their costs of proceedings. The court trial itself is pending for the duration of the court-ordered mediation procedure.

The court may give its seal of approval to a settlement reached in mediation (provided that the procedure followed the Mediation Act), which provides the parties with a directly enforceable title in the event that one of them fails to honor the settlement agreement, i.e., they do not have to undergo another trial procedure to determine their rights and obligations.

Once the mediation procedure has begun, limitation periods are stayed. The parties may thus engage in

talks free from time pressure, without having to fear the forfeiture of claims due to statute-barring because they failed to file a lawsuit in time.

Mediation is ideally suited to resolve any kind of civil-law conflict, be it a business dispute, a dispute among neighbors, a family dispute, or an employment dispute. International statistics show that more than two thirds of mediated disputes are resolved amicably by way of a settlement agreement.

By incorporating mediation in Czech law, the lawmaker has not provided a magical panacea for all manner of troubles which arise from the very nature of disputes and conflict situations; in any case, though, it has broadened the range of available dispute resolution methods by adding a new, modern and efficient tool.

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The Case Law on Acquiring Real Estate from Non-Owners

It is not uncommon to see two parties (seller A and buyer B) enter into a real estate purchase agreement followed by a re-sale from buyer B to a third party C. Sometimes, however, it is later found that the title to the real property could never have validly passed unto C, because B never was the legitimate owner in the first place (due to nullity of the first purchase agreement).

In trying to resolve this kind of situation, we are confronted with two opposing principles: on the one hand, one intuits that the original owner A ought to enjoy protection of their ownership title (which they never forfeited, given that their agreement with B was null and void. On the other hand, a different principle demands that the good faith of the second transferee, C, be afforded equal protection.

In the end, the matter of what actually happens in cases like this, and which of the aforesaid principles enjoys priority in the Czech Law, often ends up being the subject matter of litigation. One finds that jurisprudence in this area of applied law has changed over the years, and it appears – at least as far as the Czech Constitutional Court is concerned – that the shift of views has been in favor of good faith on the part of the subsequent buyer. Previous rulings by the Constitutional Court had invariably concerned cases in which one of the parties had withdrawn from the purchase agreement (i.e., cases in which the ownership title was originally indeed acquired by the re-selling owner, but was subsequently be rescinded), but in recent times, the Constitutional Court has hold that the same conclusions also apply to cases in which the first purchase agreement has been frustrated for reasons other than a withdrawal from contract. This concept has stood counter to the prevailing jurisprudence of the general courts, however, according to which the principle of good-faith acquisition of title does not hold if the original purchase agreement has been irremediably null and void.

When the Constitutional Court handed down its ruling AZ II. ÚS 165/11 in May last year, a change of tides seemed to have occurred in the area discussed in this article: according to the Constitutional Court, the existence (or absence) of good faith on the part of C when they acquire the real property in question is of fundamental importance in determining the issue of who holds the title: if the new buyer lacked good faith, their 'ownership title' neither deserves nor enjoys protection under the law.

The Supreme Court commented on this decision by the Constitutional Court (in its own ruling AZ 30 Cdo 4280/2009) by rejecting the potential conclusion that good faith on the buyer's part in the cadastral register records may (in and by itself) be sufficient to acquire the ownership title to a to-be-transferred asset (i.e., real property). Otherwise – says the Supreme Court – an institution such as 'adverse possession' (usucapio), which ties the acquisition of a thing to the passage of a certain time period of lawful possession (i.e., specifically, ten years in the case of real property), would lose any relevance. In this respect, the Supreme Court deemed it worthwhile to state explicitly that it saw no reason to depart from its constant jurisprudence.

In its ruling I. ÚS 3391/10, the Constitutional Court more or less endorsed the Supreme Court's position according to which B cannot become the legitimate

owner if the real estate purchase agreement between A and B is absolutely null and void; in the spirit of the principle that no one may transfer rights in excess of those which they actually hold, B is in no position to transfer the ownership title to the real property to C in the given case.

In other words, it continues to be the case that one must differentiate between the acquisition of title from someone whose ownership was subsequently revoked (due to rescission / withdrawal from contract) and the intended acquisition from someone who not only is not the lawful owner but in fact never has been the owner to begin with (due to the absolute nullity of the original purchase agreement). In the latter case, the "transferee" is in the best case just someone with good-faith possession (who may potentially, eventually, acquire title through adverse possession, provided that the statutory criteria are met). This legal view is the prevailing one and as such ought to be taken into account by everyone with an interest in the matter.

In the last consequence, then, one may only advise buyers of real estate to review the titles of acquisition (not only of the most recent owner!) with utmost diligence. Only the promulgation of the new Civil Code (in force from 1.1.2014), that will provide buyers of real estate with additional security, as it expressly affords protection to good-faith acquisitions.

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Laesio Enormis Prohibition Clause in The New Civil Code

The New Czech Civil Code contains a novel instrument designed to protect the weaker party: the civil-law institution of laesio enormis (in English also sometimes referred to as lesion beyond moiety; §§ 1793–1795) which applies in those cases in which there exists a gross mismatch between the performances which the parties agreed to render to each other on the basis of contract. Laesio enormis gives that party which feels it has not received fair value the right to demand rescission of the contract (and restoration of the original state of affairs) or, as the case may be, compensation in the amount of the customary price. The new rule reflects the equivalence principle, according to which performance and counter-performance must not be grossly disproportionate but should meet the criteria of fairness.

This raises the question of what exactly makes performances "grossly disproportionate". According to the classic concept of laesio enormis, this is the case if the price is less than half the customary price (or if the price charged for a given performance exceeds the customary price by more than half, without good reason). The New Civil Code, however, provides no such specific threshold, so as to avoid the possibility of unfair outcomes in individual cases. This means that the issue of what constitutes gross disproportion will have to be resolved depending on the specific circumstances, on a case-by-case basis. One may assume, though, that approximate thresholds and rules of interpretation will eventually be provided by case law.

The right of the injured party to demand rescission of contract or compensation to close the gap between the performance rendered and the customary price expires after one year has passed from the date of execution of the underlying contract.

It should be noted, however, that laesio enormis cannot be invoked invariably and under all circumstances. In particular, it does not cover situations in which the mismatch between the mutual performances is due to circumstances of which the other party was not aware, and did not have to be aware. This is presumably the case where goods are purchased whose price subsequently skyrockets due to e.g. a natural catastrophe. The laesio enormis clause also does not apply to auctions, or to cases in which the risk of loss and the prospect of gain is a defining feature of the contractual obligation (such as in the trading of investment instruments). Yet another exemption are cases in which the parties had to be aware of the gross disproportion between their mutual performances or even intended them to be disproportionate - one example being what is known as "mixed donation", in which the curtailed party wishes to make some part of its performance for consideration

and another not for consideration. Finally, the right to rescission of the contract or compensatory performance does not apply if the curtailed party expressly waived their rights from laesio enormis and represents that it has special interest in purchasing the performance at the exceptionally high price, or otherwise indicates its consent with the disproportionate price.

The above-described provision seeks to strengthen the protection of the weaker party in the interest of safeguarding fair prices. However, it is quite conceivable that the prohibition of laesio enormis may be abused in order to frustrate an existing contract for self-serving purposes. In addition, there are other issues in connection with the legal framework for laesio enormis not discussed in this article (such as the manner in which claims invoking laesio enormis should be made and enforced); one must therefore expect this concept to become the subject matter of numerous judicial disputes.

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Amendment to the Income Tax Act

On 12 July 2012, act No. 192/2012 Coll. amending the Investment Incentives Act came into force, which also affects and modifies related laws, among them the Income Tax Act.

The first group of changes to the Income Tax Act is taking into account changes made in the Investment Incentives Act: in connection with the new definition of eligible (i.e., tax-deductible) expenses, an income tax relief may be claimed not only for the costs of investments, but also for labor costs in connection with newly created jobs. With a view to the fact that the economy has been slowing down, the term during which this tax relief may be claimed has moreover been extended, from five to newly ten consecutive assessment periods (of twelve months each). The government hopes that the change will make this particular form of investment incentive more attractive also for capital-intensive projects that take longer to break even.

The second group of changes to the Income Tax Act consists of an extension of the statutory term for filing the income tax return in those special cases which are enumerated in Sec. 38m of the Income Tax Act, i.e., in particular, in the case of corporate transformations (such as mergers, de-mergers, or spin-offs): instead of one month, a period of three months from the cut-off date has newly been stipulated. For instance, in the case of a merger / transfer of assets to the shareholder / de-merger of a company or co-operative, the tax return must be filed by the end of the third month after the month in which the following occurs:

(i) the date of the decision by the general meeting / by the shareholders / by the meeting of members of the co-operative on the merger / transfer of assets to the shareholder / de-merger, if the reference date precedes (or falls on) the date of that decision (and unless the reference date of the (de-)merger or transfer of assets is the first day of the calendar year or fiscal year); or

(ii) the day immediately preceding the reference date of the merger / transfer of assets to the shareholder / de-merger of the company or co-operative, if the reference date occurs only after the day on which the decision on the (de-)merger or transfer of assets was made by the general meeting / shareholders / meeting of members of the co-operative, unless the reference date of the (de-)merger or transfer of assets is the first day of the calendar year or fiscal year.

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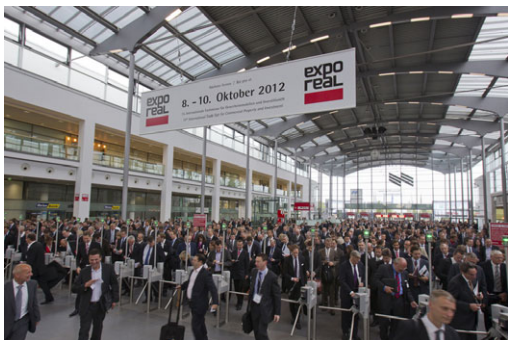
- Entrepreneurs whose business is established in one EU member state but who have purchased goods or services in another EU member state must request their **refund for VAT** paid in the calendar year 2011 (as a part of the price for the said goods or services) by 30 September 2012. Such tax usually concerns the expenses made for business trips: fuel, toll fees, accommodation, but also e.g. entrance fees to trade fairs and exhibitions. Since 1 January 2010, the beneficiary of such a refund must file the pertinent request in electronic form, using the tax portal administered by that member state in which the taxperson is registered.
- The Senate has returned an amendment to the **Code of Civil Procedure** (and related laws) to the Chamber of Deputies with comments. This amendment (parliamentary press No. 537) seeks to make the system for debt enforcement more efficient; it will now have to be heard and voted upon again by the lower chamber of Czech Parliament. For the most part, the amendment is set to come into force as at 1 January 2013.
- Its fate is shared by an amendment to the **Building Code** (parliamentary press No. 573), which has also been returned to the Chamber of Deputies by the Senate along with proposals for modifications. The amendment is rather ambitious in scope; among other things, it enlarges the category of buildings for which no zoning decision or building permit is required and prescribes rules to define the role of authorized building inspectors. It is envisioned that this amendment will become law as of 1 January 2013.
- The Senate returned to the House of Deputies revised proposals of the amendment of the **Act on the Protection of Competition** (parliamentary press No. 621). Its main objective is to introduce a leniency program into Czech competition law; it also includes a settlement procedure for mitigating the penalties imposed on actively repentant offenders outside cartels. The authors of the bill would like it to come into force as of the first day of the second calendar month following its promulgation.
- The Senate returned to the House of Deputies revised proposals of the amendment of the **Insolvency Act** (parliamentary press No. 604) aimed against frivolous motions for insolvency (filed to harass competitors). It is to come into force as of 1.1.2013.
- Based on act No. 111/2009 Coll., the so-called "**Basic Registers**" were established on 1 July 2012. These include: (i) the register of residents ("ROB") which contains data on Czech citizens, foreigners with a residency permit, and foreign owners of real property in the Czech Republic; (ii) the register of entities ("ROS") which contains data on legal entities, self-employed natural persons, and bodies of public administration; (iii), the register of rights and responsibilities ("RPP") which contains data on the scope of duties and competencies of government authorities and the rights and responsibilities of persons; and (iv) the register for territorial identification, addresses, and real property ("RUIAN") which contains basic territorial data such as the sovereign territory of the Czech Republic and its subdivision into regions, municipalities, parts of towns and villages, land plots, and roads and ways. For additional information, please be referred to the website www.szrcr.cz.
- The request for entries into the **Commercial Register** may newly be made by filing what is known as "intelligent forms", which make it easier to fill in the required information. More can be found at the following website, which also offers a link for downloading the form: https://or.justice.cz/ias/ui/podani.

Current Events at bnt Prague

SAVE THE DATE: For the fourth time already, bnt | attorneys-at-law invites you cordially to the EXPO REAL

The International Trade Fair for Commercial Property and Investment takes place in Munich from 8 October to 10 October 2012. Please come to Hall C1 – booth No. 031 – to visit the stand of bnt!



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Following a dear tradition, Munich will again be hosting the International Trade Fair for Commercial Property and Investment, one of the largest B2B trade fairs of its kind. Almost 1,600 exhibitors from all corners of the world present their real estate portfolio on altogether 64,000 square meters of exhibition space within the halls of the München Messe fairground. The list of participants reads like a cross-section of the industry and is testimony to the great variety of the field: project developers and managers, investors, financial advisors, consultants, architects, planners, construction companies, and representatives of municipalities and regions. The three-day event, which takes place in the wake of the Oktoberfest, is enriched by a variety of individually programmed conferences, forums, and panel discussions on the latest trends and innovations in real estate, investments, and financial markets. Visitors with a valid ticket to the trade fair have free entry to all these accompanying events. For more information, please visit the organizers' website: www.exporeal.com.

Throughout the trade fair, the stand of bnt | attorneys-at-law will be staffed by partners and lawyers from the various offices within the bnt network in order to accommodate visitors' wishes and requests. Aside from expert advice, those who alight at our stand will also be treated to two very special industry surveys: the ATLASES FOR INVESTORS evaluate the legal environment across Central and Eastern Europe and provide a nifty, intuitive comparison between the individual countries in which bnt maintains a presence. Our unique survey from 2011/2012 allowed us to create region-wide guides to the areas of real estate and real-estate financing. These publications are available in an English and a German version.

Would you like to arrange for a personal meeting with a specific lawyer of bnt | attorneys-at-law? Just drop us a line, at eliska.fucikova@bnt.eu.

We are looking forward to meeting you in person, on the floor of the communication platform that is this year's EXPO REAL!

Announcing our symposium on the recodification of Czech private law – only two months left until the event

Following years of arduous efforts by the Ministry of Justice, the Czech lawmaker, and the legal community, the new Civil Code is finally taking concrete shape. In tandem with the new Act on Corporations and on Private International Law, it provides a modern legislatory framework for our times within which private-law relations play out. The principal virtues of the new Czech private law include the greater stress which will now be put on personality rights and the principle of freedom of choice, and the uniform design of the law of obligations.

bnt | attorneys-at-law and the Institute for International Research have cooperated to organize a symposium for you, „**The Recodification of Law**", which will take place on **6–7 November 2012** at the Park Inn Hotel in Prague. Join us to find out, among other things, how the legal standing of private individuals (natural persons) and legal entities has changed or what the new concept of corporate holdings entails. Would you like to find out in advance about the fundamental changes with which joint-stock companies will be confronted, and how limited liability companies will be affected by the new law? What are the differences between the monist and dualist model of corporate governance? Don't wait until you are caught off-guard by the surprises which the changes of terminology in contract law hold in store for you, but prepare even now for future amendments in this field! Make room in your planner and make use of the opportunity to meet the architects of new Czech private law in the flesh and exchange thoughts and ideas with them.

You also do not want to miss our workshop „**Incorporation and governance of companies under the new Civil Code**", scheduled for 8 November 2012, in which you'll learn all the essentials regarding the business operations of limited liability companies and joint-stock companies pursuant to the new civil law.

While you are at it, maybe pencil in the dates for these subsequent expert seminars as well:
Joint-Stock Companies after the Recodification: 4–5 December 2012
Contractual Law after the Recodification: 11–12 December 2012

We are looking forward to meeting you in person! For additional information, please visit http://www.konference.cz/akce/detail-2597-Rekodifikace-prava/.

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