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CZECH REPUBLIC & SLOVAKIA
NEWSLETTER

General Interest

Czech Presidential Elections of 2013

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The long awaited direct election of the Czech president is fast approaching. The recently passed legislation that allows Czech voters to decide, also provides for changes to the position's function, but the role of the president of the Czech Republic will remain largely symbolic as head of state. The parliamentary form of government in the Czech Republic differs from countries with a presidential system like the United States where an executive branch is led by a president who serves as both head of state and head of government.

Under the new law, presidential immunity will be limited to the duration of the office and the power to interrupt or stop a pending criminal proceeding will require the countersignature of the prime minister. In addition to high treason, the president could be relieved of office by the Constitutional Court for "committing a serious violation of the constitution or constitutional order."

Direct elections will take the form of a two-round system, with the first round taking place on January 11-12 or January 18-19, 2013. The exact date is yet to be set. A second round will take place fourteen days after the first one. A presidential candidate must be proposed by a group of at least twenty members of the Chamber of Deputies, ten senators, or the candidate must submit a petition with at least 50,000 signatures.

As of this writing twenty-one people have announced their candidacy for the office including the present Minister of Foreign Affairs, Karel Schwarzenberg (TOP 09), the former President of the Senate, Přemysl Sobotka (ODS) and Senator Jiří Dientsbier (ČSSD). Only two independent candidates have obtained the minimum 50,000 signatures: the former Prime Minister Jan Fischer who has, as of the time of this writing, a lead in opinion polls, and the former Prime Minister Miloš Zeman who is second in the opinion polls.

Additionally, the former presidential candidate from 2008, Jan Švejnar, who was supported by ČSSD at that time, is speculated to announce his candidacy as well.

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Czech Legal News

Giese & Partner Wins an Important Insolvency Ruling

Notification of Foreign Creditors

On July 26, 2012, the Supreme Court of the Czech Republic published a decision in which it clearly defined the term "known creditor." The period for lodging a claim of a known creditor in insolvency proceedings starts at the moment of delivery of the court notification; therefore, a clear definition of the term "known creditor" is essential to determine the deadline for lodging such a claim.

The Supreme Court defined the term "known creditor" as a creditor about whom the insolvency court or the insolvency administrator would normally have learned from documents on the status of the debtor's assets and liabilities that the debtor is obliged to submit to the insolvency court. These documents also include the accounting and correspondence with creditors.

The case before the court involved a foreign creditor seated in the European Union who was not properly identified in the debtor's accounting and who learned about the insolvency proceeding more than a year after it commenced.

The Court of first instance stated that such a creditor was not "known" to the court as a "known creditor" at the time of initiation of the insolvency proceeding and thus rejected the creditor's claim as belated on the grounds that the creditor did not have to be informed about the initiation of the insolvency proceeding and about the decision on bankruptcy.

Court of Appeals confirmed the first-instance decision and added argumentation stating that the notification can only be issued by the insolvency court if the existence of a known creditor becomes apparent during the proceeding no later than the lapse of the period for lodging of claims for Czech creditors.

The Supreme Court of the Czech Republic as the court of final appeal rejected and annulled the first instance court decision as well as the decision of the Court of Appeals. The Supreme Court dismissed the legal opinion of the lower courts as they created negative consequences for foreign creditors. The court stated that it is inconsistent with the principle of fair insolvency proceedings to base a rejection of a claim as belated due to the failure of basic obligations of the debtor.

The Supreme Court stated further, in line with the appellant's argumentation that certain provisions of EU regulations relating to multiple country insolvencies are not only to be used to overcome the inherent language barrier, but also to overcome prejudice to foreign creditors who are usually not as familiar with the procedural rules applicable to local insolvency proceedings.

The Supreme Court further supported its decision by stating that a debtor who does not keep proper records about the state of its assets and liabilities or who fails to fulfill its obligation to submit to the court a complete list of its liabilities on time and in a proper way, has no right to presume that the creditor should not be able to lodge claims in insolvency proceedings.

The Supreme Court nevertheless limited the term "known creditor" as well. A creditor will not be considered "known" if, until the end of lapse period for admission of claims, nothing has become apparent about such creditor in the insolvency proceeding or from properly kept accounting by the debtor, or from any other lists of the debtor's assets and liabilities with which the insolvency administrator had time to become familiar. In this case, if the creditor becomes apparent after the lapse of admission of claims for Czech creditors it will be "known;" however, no new period for bringing a claim will commence and the creditor will effectively be barred from obtaining any consideration from the assets.

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Supreme Court's Decision on Non-Compete Clauses

On March 28, 2012 the Czech Supreme Court ruled in a case where an employer and employee had agreed on a non-compete clause. It was expressly agreed in the clause that the employer could withdraw from the provision. Prior to termination of employment, the employer withdrew from the non-compete clause.

In a significant decision, the court ruled in favor of the employee and found that not only must the possibility to withdraw from the clause be the part of the contract, but the *reasons for withdrawing* have to be agreed in advance as well. The court did not state which reasons would be acceptable to include.

The validity of the non-compete clause itself was not challenged in court and therefore the employer was required to compensate the employee for the duration of the non-compete clause, even though the employer had no specific interest in having the employee observe the clause.

Certain mandatory compensation for up to one year is required under non-compete clauses. From January 1, 2012, the minimum compensation for a non-compete clause is 50% of the employee's average earnings. Non-compete clauses agreed prior to that date required compensation equal to 100% of the employee's average earnings.

The decision raises important questions about how and when to conclude non-compete clauses. It is recommended to include possible reasons for withdrawal; however, there are still concerns about what reasons would be found acceptable in court. Employers will also need to weigh the benefits and risks regarding the timing of signing the clause. The employer may want to protect sensitive business information and conclude the provision at the beginning of the trial period for the employee; however, both the employer and employee can unilaterally terminate the relationship with immediate effect during the trial period. In this case the employer would be obliged to pay the mandatory compensation, regardless of whether he entrusts the employee with sensitive information. Alternatively, the employer and employee may agree to postpone concluding the non-compete clause until later during the trial phase or after the trial phase of employment, but then the employer would be restricted in the information its shares and, as a practical matter, may not be able to evaluate the performance of the employee.

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Transfers between Related Companies:

Purpose of the Legal Regulation Wins over Formalism

A recent decision of the Supreme Court of the Czech Republic has fundamentally changed the standard interpretation of Section 196a (3) of the Commercial Code.

The purpose of the provision is to provide protection to companies when transferring or acquiring assets for a consideration with the minimum value of one-tenth of the company's registered capital. Section 196a(3) applies when the other contracting party is considered a related entity, including, among others, the founder, the shareholder or an entity acting in concert with such entity and/or any other entity listed in 196a (1). In such case the value of the transferred assets must be specified on the basis of a court appointed expert evaluation. The rule does not, however, apply to transfers within the ordinary course of business.

Prior to this decision, if the parties failed to obtain a court appointed expert evaluation determining the transfer price which was executed

prior to the execution of the relevant contract, the court would consider the contract invalid. Even if the transfer price was the same as the market price, the court still found the contract invalid if the formal steps involving the expert evaluation were not taken.

Under the recent decision, a sales or transfer contract which falls under the regime of 196a (3) cannot be found invalid for breach of the Section, if it is executed for a transfer price that corresponds to the market price at the given time and place, even if that price is not determined by a court appointed expert evaluation.

The Supreme Court reasoned that the purpose of 196a (3) is *"to assure that transfer of property will be made at market value"* and *"to eliminate any negative consequences of conflicts of interests."* Following this decision, the rule of absolute nullity should now be applied only if damage has been caused to the company in question.

The decision has been widely been welcomed as practical and supportive of the intention of the Commercial Code.

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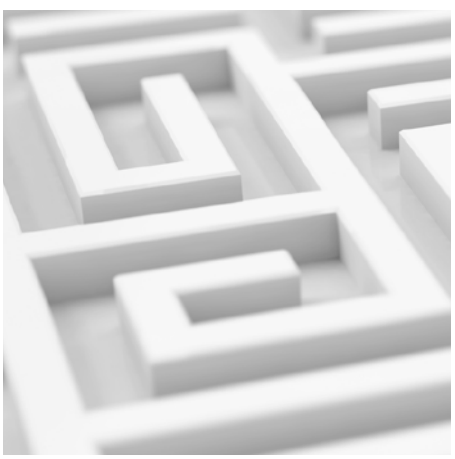

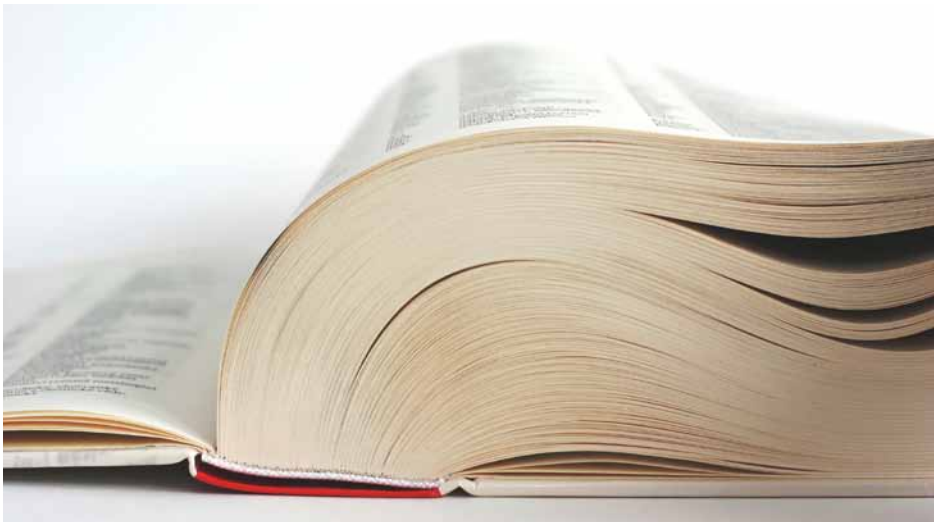

Mediation in the Czech Republic

A new Act on Mediation came into force on September 1, 2012. The statutory regulation of mediation, as an alternative method for solving civil disputes outside the scope of the ordinary court proceedings, had been absent from the Czech legal system. Mediation was regulated only in criminal law.

As opposed to a trial or administrative hearing, the process is completely in the hands of the parties to the dispute and the final agreement is considered a declaration of the parties' will and responsibility. Mediation is expected to be much quicker and more informal than a trial or arbitration. Moreover, information regarding the dispute is shared only among the parties and the mediator. The mediator does not act as a judge or negotiator, but leads the parties to assess all aspects and consequences of their dispute and to find a satisfactory solution.

Mediation may be particularly well suited to situations where the parties are interested in finding a quick resolution to their problem, where an effective and financially non-demanding proceeding is being sought, in highly confidential matters and in cases where future cooperation between parties is expected, regardless of the existing dispute. In other jurisdictions, joint shareholders, co-owners of property and partners of projects have often found mediation to be a better alternative than pursuing their claims in protracted court proceedings. Moreover, mediation may be used in cases where the parties cannot anticipate a court decision.

According to the Act on Mediation, mediators are to be registered on a list administered by the Ministry of Justice. A mediator must be a person of good character, have a college education and have passed a mediator exam given by the Ministry of Justice. If attorneys would like to be listed as mediators, they must pass an exam administered by the Czech Bar Association. For mediation in family issues, a separate special exam is necessary.

Importantly, only mediation undertaken pursuant to the Act on Mediation will result in suspension of the time limits that are normally in force for bringing an action. Moreover, there are simplified rules for delivery of documents including a fictional delivery as well as protections for secrecy of details of the mediation.

Mediation, in the best sense, can increase a sense of privacy, give more control of the process to the parties and decrease stress among the participants. It is also anticipated that the strain on courts may be lowered as well.

Slovak Legal News

New Regulatory Regime for Slovak Energy
Another change in Slovakia's Pension System

New Regulatory Regime for Slovak Energy

From September 1, 2012, electricity and gas markets will be subject to a new regulatory regime. A new Act of Regulation of Network Industries was adopted subsequent to the EU's so-called "third energy packet." It introduced significant changes that affect the position and scope of powers of the Regulatory Office for Network Industries (Úrad pre reguláciu sieťových odvetví) towards the energy sector market. The Act of Regulation changes are also intended to liberalize the market and strengthen customer rights

In general, the Regulatory Office should become more independent from the government and other state offices. It will have greater authority to authorize plans of network developments or evaluating "the good standing" of network operators to protect customer rights. Moreover, it will have increased authority to issue binding regulatory policy for market participants.

The Regulatory Office is also empowered to decide disputes between consumers and operators or between operators themselves instead of regular courts, provided that both parties consent to this type of conflict resolution.

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Another Change in Slovakia's Pension System

The Slovak pension system has faced another change despite strong opposition from the pension saving companies, independent NGOs and approximately eighty thousand people who signed a protest petition. The governing social democratic party which has a comfortable majority in parliament adopted an amendment to the Act on Social Insurance that came into force this month. The changes to the pension system are intended to help trim the budget deficit.

The Slovak pension system consists of three pillars. The first is under the control of the state and the third is a voluntary pillar. These two were not affected by the amendment to the same extent as the second pillar which is based on the employee's contributions, i.e. those of the private pension savers. Under the amendment, the amount paid into the second private pension pillar will drop from its current 9% to 4%. These funds are channelled to private asset managers.

In addition, the second pillar will be "opened" for a period of five months for savers to enter or leave it. If individuals consider that their second pillar pension would be affected negatively, they can decide to leave the second pillar and contribute the entire 18 percent contribution to the state's first pillar. On the other hand, young people who for any reason did not enter into the second pillar can now use that period and conclude an agreement on pension saving with any of the six pension saving companies.

The cut in contributions to private funds takes effect as the government attempts to ensure that the 2012 deficit target of 4.6 percent of GDP is achieved. The changes also limit annual increases in pensions and as of 2017 the retirement age of 62 years will be increased automatically to reflect rising life expectancy.

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Giese & Partner News

New Lawyer and Junior Lawyers

New Lawyer

Mgr. Lenka Velvarská, LL.M.

Ms. Velvarská is a new attorney at law at Giese & Partner. Before joining our firm, she had worked for more than three years for a Prague office of a leading German law firm and subsequently for a Prague based Czech law firm. During this time, Lenka gained experience particularly in real estate, corporate law and employment law. She graduated from the School of Law at Masaryk University in Brno (Mgr.) in 2003 after completing a one-year study program at the University of Constance in Germany in 2002. Lenka also successfully completed a one-year post-graduate study program at the University of Constance in Germany (LL.M.) in 2007.

She speaks Czech (native language), English and German.

New Training Lawyers

Mgr. et Bc. Pavla Polívková

Ms. Polívková has worked as a training lawyer at a large Prague firm for two years. She specializes in corporate law, establishment and liquidation of the business companies, civil law and real estate law. She graduated from the School of Law at Palacky University in Olomouc (Mgr.) in 2009 after completing a year study program at the Universidad Autónoma de Madrid in 2007-2008. She also graduated from the Political Sciences and European Studies at Palacky University in Olomouc (Bc.) in 2006.

She speaks Czech (native language), English and Spanish.

Mgr. Michaela Řezníková

Ms. Řezníková specializes in corporate law and M&A transactions and restructurings. She also has experience with liquidation of business companies and legal due diligence. She graduated from Masaryk University Law School in Brno (Mgr.) in 2008 after completing a year study program at the Universidad de La Coruña (Spain) in 2005-2006. She has also recently completed a Masters Program (LL.M. in Cross-Cultural Business Practice) at Université de Fribourg/Universität Freiburg, Switzerland (2011-2012).

She speaks Czech (native language), English, Spanish and German.

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