

Legal Update

November 2008

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The information in this newsletter is correct to the best of our knowledge and belief at the time of going to press. Specific advice should be sought, however, before investment and other decisions are made.

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We firmly believe you will find Legal Update to be a useful source of information. We're always interested in receiving your views on this bulletin, in particular regarding its content, format and frequency.

Please e-mail Iva.Belkova@weinholdlegal.com with any comments or fax them to the attention of Iva Bělková at +420 225 385 444, or let your usual contact know.

SELECTED LEGISLATION PUBLISHED IN THE COLLECTION OF LAWS

Act No. 123/2008 Coll., which changes Act No. 99/1963 Coll., The Civil Procedure Code (effective as of 1 July 2008)

Pursuant to Amendment No. 123/2008 Coll. effective from 1 July 2008, the judicial order to pay in electronic form has been incorporated into the Civil Procedure Code (CPC) alongside the existing judicial order to pay a bill.

The legislators' aim is to "facilitate" use of the institute of the judicial order to pay when it comes to what are known as *undisputed receivables*, which typically include telecommunications fees, utility charges, consumer loans etc.

One benefit of the electronic judicial order to pay is its speed. The order may now be issued within several days, and this is expected to be reduced to just several hours in future. This institute is user-friendly, as there is no need for the participant/creditor to be present in court; the electronic judicial order to pay is filed online. Moreover, it is efficient and economical. Among other advantages, the court fees are half those that are charged for a traditional written material motion to issue a judicial order to pay.

Two conditions for electronic submission are the use of an electronic form whose particulars are stipulated in Ministry of Justice Regulation No. 197/2008 Coll., and the certified electronic signature of the claimant. The filing of an electronic judicial order to pay is limited to cases of monetary performance of up to CZK 1 million. Otherwise, pursuant to a court decision the defendant is sent an electronic judicial order to pay in the same manner as a traditional order, i.e. it is personally delivered in hard-copy form.

The legislators have categorized the electronic judicial order to pay as one of the institutes that should gradually contribute to the electronization of the judiciary, a change that they promise will render the judiciary more transparent, reduce the time required to handle court cases and improve communication between the public and the judiciary.

Act No. 130/2008 Coll., which changes Act No. 455/1991 Coll., the Trades Licensing Act (effective as of 1 July 2008)

The amendment reduces the administrative burden for entrepreneurs and simplifies their dealings with trades licensing offices. As of the effective date, entrepreneurs may generate an electronic petition to enter on their computer, furnish it with the signature of their qualified certificate and send it to the trade register's central electronic registry. The competent trades licensing office (which the entrepreneur has indicated on the petition) will process the petition to enter and, where possible, execute it electronically.

Use of the electronic petition in the Unified Registration Form (JRF) format enables:

- § the creation of a petition to announce a new trade being carried on by a natural person or corporate entity;
- § the creation of a petition to announce a change;
- § the saving of a completed or partially completed petition to a disk or its uploading from a disk onto a computer;
- § the review of a petition for completeness;
- § the furnishing of a petition with an electronic signature, its dispatch to the trade register's electronic registry and the creation of a PDF file in the JRF format to print the sent petition.

The application used to generate and send the petition in JRF format is available free of charge online at www.rzp.cz. You will also find a handbook containing a detailed description of the installation and use of this new trade register service.

For entrepreneurs who do not want to acquire an electronic signature or who wish to complete a more involved petition, similar applications will be available at trades licensing office central registration points. Together with the entrepreneur, the clerk will create a petition on the computer and print it out on a JRF form; the entrepreneur will review the information and sign the form. The petition will then be sent to the trade register's electronic registry for processing (in the same manner as if it were being sent from the entrepreneur's own computer).

Act No. 383/2008 Coll., which changes Act No. 185/2001 Coll. on waste (effective as of 1 January 2009)

On 20 October 2008, an amendment of Act No. 185/2001 Col. on waste was promulgated under

number 383/2008 in the Collection of Laws. The amendment responds to the outdated and insufficient treatment of the registration and identification of persons conveying or selling waste; the law should, in future, make it more difficult, inter alia, to steal metals and sell them at collection centres.

Under the amendment, collection centre operators will have more precisely to identify the seller and the purchased waste and will also have to record the volume and type of waste that was purchased.

For machinery, works of art or religious and sacral objects, a description shall also have to be prepared to enable their subsequent identification. It will not be permitted to dispose of, disassemble or re-sell such objects for a period of 48 hours after their purchase.

The amendment further regulates the purchase of auto wrecks and introduces fees for the registration of used cars in the motor vehicle registry. Fees range from CZK 3,000 to 10,000 depending on the EURO emission standard that the respective vehicle meets.

SUMMARY OF BILLS DISCUSSED OR APPROVED BY CZECH PARLIAMENT

Bill amending Act No. 513/1991 Coll., the Commercial Code

A Commercial Code amendment currently in its first reading in the Chamber of Deputies of Czech Parliament, inter alia, abolishes the strict ban on financial assistance. In this respect, it represents the transposition of the Second Directive No. 77/91/EEC, which has the designation 2006/68/EC and whose transposition deadline was set as 15 April 2008. The amendment is also designed to revise those Commercial Code provisions whose application has long given rise to complications.

We understand financial assistance to mean the provision of financial means in the form of advance payments, loans, credits or the provision of a guarantee by a company to another entity for the purpose of acquiring an ownership interest in this company, which in accordance with the currently valid and effective legislation is prohibited in the Czech Republic. As a point of fact, however, the explanatory report itself states that "financial assistance" is being provided all the time using sophisticated methods that are both onerous and costly.

The existence of financial assistance is a social given and its prohibition comes across – not only in the Czech Republic – as pointless. Operating under the philosophy that "the existence of an effective regulation is better than an ineffective prohibition,"¹ the Czech legislators have thus opted for a rational solution to restricting the permissibility of financial assistance.

The bill distinguishes between the regulation of financial assistance for a joint-stock company (proposed § 161f) and a limited liability company (proposed § 120a). In the former case, the possibility of providing financial assistance is tied to the condition that it be enabled by the company's articles or bylaws as well as to further

statutory conditions that must be cumulatively met. For a limited liability company, it is sufficient for the statutory conditions to be met, while the articles or bylaws of the company may in both cases formulate additional restrictions on financial assistance.

The statutory conditions for providing financial assistance are more strictly conceived for a joint-stock company; however, for the purposes of illustration the following may be said in principle with respect to both forms:

- § the financial assistance must be provided under standard business conditions (at arm's length);
- § the provision of financial assistance shall not lead directly to company bankruptcy;
- § the company shall not report unsettled losses;
- § company management shall draft a written report furnishing an explanation, an identification of benefits and risks, etc.; and
- § the company general meeting shall approve the provision of financial assistance.

The legislation should generally facilitate financial assistance, reduce transaction costs and, most importantly, serve to increase legal certainty for market participants. It will no longer be necessary to create the complicated and costly acquisition structures that have ultimately led to a "circumvention" of the law.

NEWLY PUBLISHED CASE LAW

The filing of a petition to enter a change in the Commercial Register by another person

In ruling No. 29 Cdo 3088/2007 dated 24 June 2008, the Supreme Court addressed the question of a change of company seat in connection with the filing of a petition to enter a change in the Commercial Register by another person having a legal interest in the matter pursuant to the provision of § 31(2) of Act No. 513/1991 Coll., the Commercial Code, as amended (the "Commercial Code").

Under Commercial Code provision § 31(1), a petition to enter or to change an entry in the Commercial Register shall be filed by a company that is a person mentioned in the provision of § 34(1)(a) of the Commercial Code immediately after the decisive fact occurs. Should this obligation not be met within 15 days of the day on which it arose, the petition to enter or to change an entry in the Commercial Register may be filed by "another person" having a legal interest in the matter.

In its ruling, the Supreme Court concluded that when a company's seat is changed or when that seat is actually located elsewhere than is entered in the Commercial Register, a decision of the general meeting of the company on the amending of the company articles or the changing of the company seat shall be deemed to constitute such decisive fact. As of this moment, then, the above mentioned deadline period will begin to run. Pursuant to the foregoing, the deadline period comprises two components:

- § a deadline period "without undue delay after a decisive fact occurs" [per § 32(3) of the Commercial Code] and

- § a deadline period "within fifteen days" [per § 31(2) of the Commercial Code].

In the case at hand, the general meeting did not decide on a change in the company's seat, thus the given time period did not begin to run and "another person" per the provision of § 31(2) of the Commercial Code was not authorised to file the petition to change the Commercial Register entry.

The Supreme Court further opined that in the given situation, the application of § 29(6) of the Commercial Code, i.e. the court's option to request that the company undertake a remedy with reference to the fact that the content of the Commercial Register entry contravenes a peremptory provision and a remedy may not be achieved in another manner, would have to enter into consideration.

However, the factual relocation of the company seat from the address entered in the Commercial Register to another address will have had to take place. In the given case, the company would then, via its general meeting, have to decide on a change in the company seat within the time period stipulated by a court on the basis of the aforementioned request. The court could decide to wind up the company with liquidation pursuant to § 29(6) of the Commercial Code should the company fail to meet the stipulated deadline.

(Supreme Court Ruling No 29 Cdo 3088/2007 dated 24 June 2008)

Relationship between the provision of § 265 of Act No. 513/1991 Coll., the Commercial Code, as amended, and § 39 of Act No. 40/1964 Coll., the Civil Code, as amended (the "Civil Code")

The Czech Supreme Court opined in a ruling of 1 July 2008 on the matter of the relationship between the provision of § 265 of the Commercial Code and § 39 of the Civil Code. The court deduced that, notwithstanding the provision of § 265 of the Commercial Code, § 39 of the Civil Code may be applied to trade relations.

The provision of § 39 of the Civil Code is regularly applied in judicial practice, even in the case of trade relations. This provision declares as (absolutely) invalid an act which in its content or objective contravenes or circumvents the law or is in breach of good morals. Thus in light of judicial practice, the provision of § 265 of the Commercial Code does not pre-empt the application of this norm.

However, it would be wrong automatically to conceive of conduct that is "in breach of fair dealing" as conduct that is in breach of good morals. In such a case, § 265 of the Commercial Code would not be separately applicable, which its longstanding interpretation contradicts. In other words, the court concluded that if certain conduct is in breach of the principles of fair dealing in the meaning of the provision of § 265 of the Commercial Code, it need not be invalid for the contravention of good morals pursuant to § 39 of the Civil Code.

(Supreme Court Ruling No. 29 Odo 1027/2006 dated 1 July 2008)

¹ Explanatory report accompanying the bill amending the Commercial Code – Parliamentary Document 498/0