



### Contents

Summary of bills in Czech Parliament

Recent case law

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.

For further information, please contact your usual partner/manager or:

**Banking and Financial Services:**  
Pavel Jendrulek

**Mergers and Acquisitions:**  
Daniel Weinhold, Dušan Kmoč

**Litigation / Arbitration:**  
Milan Polák, Ondřej Havránek

**Information Technology and Intellectual Property:**  
Martin Lukáš

**Competition Law / EU Law:**  
Thilo Hoffmann, David Emr

**Labour Law:**  
Milan Polák

**Real Estate:**  
Pav Younis, Ivan Sagál

© 2010 Weinhold Legal.  
All rights reserved

### SUMMARY OF BILLS IN CZECH PARLIAMENT

#### AMENDMENT OF ACT NO. 137/2006 COLL. ON PUBLIC CONTRACTS

The Chamber of Deputies of Czech Parliament is discussing a government bill amending Act No. 137/2006 Coll. on public contracts (parliamentary bulletin 833) in its third reading (the "Amendment"). This Amendment is linked to the recent amendment of the Public Contracts Act implemented by Act No. 417/2009 Coll. and adopted before the planned Amendment as a temporary solution addressing the need for timely transposition of so-called "Remedies Directive" No. 2007/66/EC (Amendment No. 417/2009 Coll. entered into force on 1 January 2010). More extensive and complex than Amendment No. 417/2009 Coll., the content of the current Amendment includes:

- § a more detailed definition of sector contracting entities and central contracting entity (sector contracting entities would also be persons only just preparing for the first time to start performing the respective activities and which for this purpose, among others, are awarding a public contract);
- § an elaboration of the exemption from Public Contracts Act subjectivity for *in-house contract* awards in accordance with ECJ judicature (the requirement for performance of a "substantive" part of the activity for a controlling contracting entity);
- § re-introduction of the obligation to report tender prices during the opening of envelopes;
- § other changes pertaining to qualifications (e.g. the option of proving qualifications with simple document

copies, the introduction of a qualification assessment protocol, the possibility of submitting documents in the Slovak language, the obligation to prove fulfilment of basic qualification requirements for subcontractors involved in the process of proving qualification fulfilment);

- § changes to some problematic areas pertaining to simplification of the below-the-threshold procedure (in particular, publication of the call for bids, the option of requiring a surety, the possibility of exercising the option right, etc.);
- § comprehensive amending the of sections pertaining to framework agreements, the option right and design contests;
- § deletion of *quasi-concessions* or their linking to the Concession Act;
- § strengthening of the principle of economic suitability of a tender when determining evaluation criteria with an emphasis on the relationship between utility value and price;
- § shortening time-limits for providing supplementary information and reporting the results of a contract awarding procedure;
- § clarification of some issues related to sureties (in particular, return of an original surety bond to the bank).

Key proposals to amend include:

- § with respect to public contracts with a projected value exceeding CZK 500 mil. concluded for a period of longer than 5 years or for an indefinite period, it is proposed that preparation of an economic and financial assessment of the subject of the public contract be made obligatory (the contracting entity is, in such a case, obliged to solicit a Finance Ministry opinion, which shall be a condition for contract validity);



- § for vendors with the legal form of a joint stock company, only registered shares shall have been issued and a list of current shareholders shall be submitted;
- § a vendor must submit a list of employees or members of statutory bodies who have worked for the contracting entity in the past three years and held a position with decision-making authority over public contracts;
- § the contracting entity shall be obliged to disclose all information in a manner enabling remote access (internet);
- § the contracting entity shall disclose the tender price immediately after the envelopes are opened (to ensure that no manipulation has taken place in the interim);
- § in the case of a lottery, a notary must be present to certify the result in a notarial deed.

The Amendment will introduce other significant changes impacting both the contracting entity and the vendor.

### AMENDMENT OF ACT NO. 513/1991 COLL., THE COMMERCIAL CODE

The 67<sup>th</sup> meeting of the Chamber of Deputies of Czech Parliament discussed a member's bill amending Act No. 513/1991 Coll., The Commercial Code, as amended (parliamentary bulletin 990) and sent it to committees for further discussion.

The proposed legislation is a response to the spread of catalogue fraud, an unfair business practice designed to dupe contacted individuals who are misled by a "catalogue" company into entering into a sales contract.

The basis of catalogue fraud is the provision of a service – inclusion of the individual (generally a small businessperson or other small economic entity) in an internet catalogue or, less frequently, a print catalogue or catalogue distributed on data media, with a clear gross disproportion between the solicited fee and the value of the provided service (the costs of creating internet catalogue websites are negligible, as are the costs of print or data medium versions).

The basis of service acceptance by the contacted individual lay in the catalogue company's deliberate withholding of key information (either that a contract is involved at all or concealment of key information about the fee for the offered service) – aside from the obligatory fine-print, several references to other documents and "references to references" are employed. It is not unusual for information to have two possible interpretations; while the catalogue company provides assurances as to the "right" interpretation, once the contract is accepted by the injured party, this interpretation changes.

The current wording of § 44(1) of the Commercial Code, which defines unfair competition as "conduct in economic competition....", should, under the proposed amendment, be changed to "conduct in an economic transaction....", which expands the reach of the provisions pertaining to means of protection against unfair competitive practices to include a more generally defined entity – the customer. Under the proposed amendment, this category includes entities that are not in economic competition with one another.

The amendment inserts a new paragraph 5 into § 46 of the Commercial Code, directly aimed at a ban on unfair business practices used by catalogue companies and which should, as a result, go a long way toward limiting the operation of these entities in the Czech Republic .

### RECENT CASE LAW

This section contains summaries of newly published judicature pertaining to business law. The text of the judicial decisions is edited for publication.

#### ON THE BURDEN OF PROOF CONCERNING AUTHENTICITY OF A PROMISSORY NOTE (SIGNATURE AUTHENTICITY)

*(Czech Supreme Court Decision No. 29 Cdo 3478/2007 of 21 December 2009)*

If a defendant in a dispute over payment of a promissory note refutes the authenticity of the note, the burden of proof as to the note's authenticity (the authenticity of the signature on it) lay with the claimant who submitted the note as evidence and is bringing the suit to seek a claim

arising from the facts stated therein. Whether the given matter is to be discussed and decided (a note payment order) in a shortened or "standard" proceeding is not and cannot be material to the determination of who shall bear the burden of proof regarding the authenticity of the debtor's signature on the note.

The manner in which the thing is to be discussed is only (may only be) manifest in the fact that the court will only address the question of the authenticity of the debtor's signature on the note in the first of the mentioned cases (in consideration of the principle of the concentration of an objection proceeding), if the defendant challenges the authenticity of the note (signature authenticity) in objections filed in a timely manner.

#### ON LIABILITY OF A STATUTORY BODY MEMBER

*(Czech Supreme Court Decision No. 29 Cdo 4824/2007 of 20 October 2009)*

In the given case, the registered agent of a company entered into a contract for work with the claimant. Before the claimant's invoice for performance of the work was paid, however, bankruptcy was declared on the company's assets. The claimant therefore brought an action against the company's registered agent for damage incurred based on the unpaid invoice for performed work, citing the provisions of § 19(5) and (6) of the Commercial Code.

In its decision, the Supreme Court referred to a prior decision in which it repeatedly asserted that a statutory guarantee of (a member of) a statutory body of a company for payables of the company based on § 194(6) of the Commercial Code cannot arise without first proving fulfilment of the conditions for liability for damage caused by the company. This also applies in situations in which bankruptcy has been declared on the assets of the given company.

In the opinion of the Supreme Court, another legal institute should be applied in domestic law, i.e. (direct, delictual) liability of (members of) a statutory body to creditors for damage caused by breach of the obligation to file a petition for the adjudication of bankruptcy which, in the period to which the adjudged matter pertains, was based upon § 3(2) of Act No. 328/1991 Coll. on bankruptcy and composition, as amended, and is currently based (for an insolvency peti-



tion) on § 99 of Act No. 182/2006 Coll., The Insolvency Act, as amended.

The Supreme Court dealt with the conditions for this liability in detail in a decision published in Collection of Judicial Decisions and Opinions No. 33/2008, concluding, inter alia, that if a creditor claim arose when the statutory body of a company, or a member thereof, was late in performing the respective obligation, the full difference between what the company, as debtor, had yet to discharge and the amount the creditor finally obtained in bankruptcy for payment of this receivable constitutes damage.

### ON A DECLARATORY ACTION PURSUANT TO § 183K(1) OF THE COMMERCIAL CODE (JUDICIAL PROTECTION OF PARTICIPATION SECURITIES)

*(Czech Supreme Court Decision No. 29 Cdo 4712/2007 of 16 December 2009)*

Through the filing of a petition pursuant to § 183k(1) of the Commercial Code, as amended, a petitioner has the right to seek a determination of the amount of reasonable counter-performance provided to shareholders pursuant to § 183m(1) of the Commercial Code, as amended, without having to prove [in the meaning of § 8(c) of the Civil Procedure Code] an exigent legal interest in the requested determination.

On the basis of such a petition, the court shall decide by determining a specific amount of counter-performance for one participation security of a joint stock company whose General Meeting adopted a decision pursuant to § 183i of the Commercial Code.

A disadvantage of the declaratory action must also be noted, however, i.e. that even if the petitioner is successful in the proceeding, the court decision includes no mechanism for its execution. If the main shareholder fails voluntarily to effect counter-performance in the determined amount or voluntarily to effect payment of the difference between the paid amount of counter-performance and the amount ensuing from the court's legal determination of the reasonable counter-performance amount, the petitioner will have once again to turn to the court and file a petition for a new first instance trial seeking a judgment against the main shareholder for

payment of the determined counter-performance or the difference between the counter-performance that was paid and that which was determined.

The Supreme Court concludes that nothing prevents the petitioner from seeking payment of the counter-performance in the amount stated in the petition, or supplementary payment of the difference specified in the petition between the amount of the counter-performance paid by the main shareholder and the amount it considers as reasonable, by filing a petition filed pursuant to § 183k(1) of the Commercial Code. If the court decides on the main shareholder's obligation to effect payment of reasonable counter-performance before the existing owners of participation securities incur the right to payment [§ 183m(2) of the Commercial Code], it must set a time-limit for performance that does not elapse before the petitioner incurs the right to payment of the counter-performance.

### ON PROCEEDINGS ON A PETITION PURSUANT TO § 183K(1) OF THE COMMERCIAL CODE

*(Czech Supreme Court Decision No. 29 Cdo 4712/2007 of 16 December 2009)*

Pursuant to the provision of § 83(2)(d) of the Civil Procedure Code, the opening of proceedings against a main shareholder in matters concerning a review of counter-performance for the purchase of participation securities pursuant to § 183k of the Commercial Code precludes the opening of court proceedings against the main shareholder concerning petitions of other shareholders of the same company seeking the same review. Thus if another shareholder files a petition for a determination of the reasonable amount of counter-performance in a required amount or supplementary payment of counter-performance up to a required amount after a review proceeding has been opened against a main shareholder concerning the amount of counter-performance (and before the proceeding is legally concluded), this later petition shall be considered a joinder of the first proceeding.

When deciding on a petition to open proceedings pursuant to §183k, the court is not bound by how the petitioner formulated its idea of the amount of reasonable counter-performance

for one share in its "statement of claim". Thus, in its decision, the court may determine a reasonable counter-performance per share in an amount that is higher or, on the contrary, an amount that is lower (without rejecting the remaining "amount"). The petition for a determination of a reasonable amount of counter-performance will be open to discussion (the court may decide on it in a manner anticipated by law), even if the petitioner limits its request to a determination of a reasonable amount of counter-performance without formulating its idea of the amount of reasonable counter-performance per share in its statement of claim.

Within a single proceeding, the claims of two or more petitioners, of which a part seeks entitlements arising from the provision of § 183k of the Commercial Code via a petition for the performance of an obligation (for payment of the respective amount) and a part "only" via a petition for a determination of a reasonable amount of counter-performance, are deemed equal (from the perspective of the court's obligation to rule on them). A reason for partial rejection of a petition to open proceedings due to concurrent cumulation (in the statement of claim) of a declaratory finding with a finding on performance of an obligation would not arise (in respect of the declaratory finding), even if this cumulation were to relate to the person of one and the same petitioner.

Where a petition for payment of reasonable counter-performance and a petition for a determination of a reasonable amount of counter-performance (of one or more petitioners) is applied at the same time (pursuant to the provision of § 183k of the Commercial Code) as a result of concurrent cumulation, the findings in which the court decides on such petitions may only enter into legal force contemporaneously.

### ON THE DETERMINATION OF THE AMOUNT OF COMPENSATION OF A PROCURATOR AND REIMBURSEMENT OF EXPENSES

*(Czech Supreme Court Decision No. 23 Cdo 2713/2009 of 25 November 2009)*

Under business law, procurator is a power of attorney providing the procurator with the statutory power to represent a business entity. However, it does not



constitute a legal authorisation. Inasmuch as it only constitutes authorisation for representation, it is separated from the internal relationship to the business entity. This internal relationship may be based on any type of contract. Thus, there is no such thing as the “occupation of procurator” or procuration as a pre-determined in-house company function.

As the procurator represents the business entity in the conducting of its business activity, the activity is not usually performed without consideration, though this is theoretically possible. Nonetheless, the compensation must be agreed between the procurator and the business entity and such agreement must be proven in any subsequent litigation.

If the relationship underlying the granting of procuration is not based on a certain type of contract (the selection of contract type being fully at the discretion of the contracting parties), then the subsidiary application of a contract of any type regulating the procuration of a given matter shall be permitted.

As the statutory definition of procuration scope stipulates that a procurator is authorised to perform all legal acts arising in the course of enterprise operation, that it entails matters connected with the business dealings of the represented party, the Supreme Court favours subsidiary application of the mandate contract under which the mandatary undertakes to arrange certain business matters of the mandant by performing legal acts in the name of the mandant or by performing other activities. That the mandant is obliged to pay the mandatary a consideration for arranging such matters is another fact that ensues from this conclusion.

The procurator is therefore entitled to a consideration from the business entity for arranging business matters based on an agreement between them.

Where no consideration has been contractually agreed, the business entity is obliged to pay the mandatary a consideration that would be usual – at the time the contract was executed – for activity similar to the activity the procurator performed when arranging the matters [§ 571(1) of the Commercial Code]. Consequently, the entitlement to the consideration may not be tied to the mere fact of the granted procuration; rather, it is necessary to assess whether the procurator actually arranged business matters connected with the operation of the represented party’s enterprise and in what scope.

The position of statutory body may not be applied *mutatis mutandis* to the position of procurator.

### ON THE LEGAL EFFECTS OF RESERVATION OF A PROPRIETARY RIGHT

*(Czech Supreme Court Decision No. 29 Cdo 1028/2007 of 30 July 2009)*

Reservation of a proprietary right (*pac-tum reservati domini*) is a collateral contractual arrangement ancillary to contracts based on good consideration under which the moment of the transfer of a proprietary right is not tied to the time to which the legal regulations generally connect it, but to a deferred later time, i.e. until full payment of the fee for the transferred object or the provision of agreed counter-performance.

As a result, the acquirer merely acquires detention of the object of performance upon its take-over, while acquisition of the proprietary right is suspended until a later time by agreement of the parties. Hence, for the duration of the reservation of the proprietary right in favour of the transferor, the acquirer may not freely dispose of the thing and the

thing shall in relation to the acquirer be deemed the thing of another that has only been entrusted to the acquirer. This constitutes an agreement on the determination of a time of acquisition of a proprietary right (a covenant on transfer *certo tempore*).

If the buyer breaches its obligation to pay the agreed purchase price in a due and timely manner, the seller must choose whether to withdraw from the purchase contract (where no other agreement has been made between the parties, the seller shall act according to the provision of § 517 of the Civil Code) and request the return of the thing to which it applied the reservation of proprietary right or whether to continue in the contractual relationship with the buyer and seek payment of the purchase price.

As the exercising of one of these rights precludes the exercising of the other, there is no question that the seller may only choose one of them, and may not exercise both subjective rights at the same time. Nevertheless, a seller that has already requested payment of the purchase price is permitted to change its choice, abandoning its exercising of the subjective right to payment and withdrawing from the purchase contract, and then exercising its right to delivery of the thing.

The choice may not be changed in the opposite order, as the buyer’s obligation to effect purchase price payment expires when contract withdrawal takes effect. Reservation of a proprietary right may also be agreed for types of things designated as generic (generic determination of things shall mean their sufficient differentiation from other things of the same type for as long as the reservation is valid and effective, e.g. separated by deposit or storage, special marking etc.).

© 2010 Weinhold Legal.