

Legal Update

December 2018

Weinhold Legal

Contents

Legislative amendments

Amendment of the Trade Marks Act

Recent case law

Agreement on the option of resignation from a position

Absence of title to the subject of a purchase agreement

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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Legislative amendments

Amendment of the Trade Marks Act

On 5 December 2018, the Czech President signed into law a Trade Marks Act amendment, about which we wrote in the June issue of Legal Update (the "Amendment"). The Amendment will enter into force on 1 January 2019.

The purpose of the Amendment is to transpose into Czech law Directive of the European Parliament and of the Council (EU) 2015/2436, whose aim is to approximate the laws of individual Member States on trade marks.

The Amendment introduces relatively major changes into Czech trademark law. A key change is the abolition of the substantive public-law review of trade marks by the Industrial Property Office in connection with the registration of a new designation pursuant to the existing provision of § 6 of the Trade Marks Act. As a consequence of this change, the Office will no longer be able to reject the entry of

a designation because the registered designation contains elements of an older trade mark, which has already been applied for or registered by another owner. In these cases, owners of earlier registered trade marks will have to defend themselves by means of objections they can lodge against applications for similar trade marks within three months of their publication. Trade mark owners will thus have to be prudent and vigilant when it comes to the registration of new designations and they should be advised to monitor new trade mark applications.

Another major change is that while the existing domestic legislation established the need for a designation capable of graphic representation in order to register a trade mark in the trade mark register kept by the Industrial Property Office, the Amendment provides for the registration of non-traditional designations such as olfactory, taste, sound or motion designations. The condition for registering such designations is a precise and clear method of expressing the protected subject. At the same time, the obligation to have a two-dimensional graphic representation has been removed. In contrast, the conditions for registering a trade mark have become stricter in that the Industrial Property Office will not register a designation if it is comprised exclusively of features arising from the nature of a product itself (e.g. registration of a perfume scent for a perfume).

Another change is removal of the good faith requirement for the trade mark applicant. This legal treatment enables what is known as speculative application for registered trade marks, where the applicant's primary objective is to monetise a trade mark and not to differentiate its products and services from the products and services of competitors.

Recent case law

Agreement on the option of resignation from a position

(Czech Supreme Court Resolution No. 21 Cdo 1073/2017 of 15 August 2018)

According to the Supreme Court, jobs other than those set out in § 73(3) of the Labour Code can also be managerial positions for which the possibility of discharge/resignation may be arranged.

Legal Update

December 2018

In these proceedings, the Supreme Court considered the validity of notice given by an employee who had been discharged from a managerial position by his employer immediately before serving notice due to the fact that the employer had no post-discharge position commensurate with the employee's qualifications and health available for that employee.

The petitioner sought the Court's determination that the notice was invalid, *inter alia*, because the employee could not legally have been so discharged as the position he held with the defendant was not a managerial position because it failed to meet the criteria set out for a managerial position in § 73(3) of the Labour Code, pursuant to which managerial positions are positions over which direct control is exercised by a statutory body (level -1). In accordance with this provision, a managerial position is also such position over which direct control is exercised by a member of the top management who is directly subordinate to the statutory body (level -2) under the condition that another managerial employee is subordinate to the person holding such managerial position.

The petitioner succeeded in the court of first instance, which upheld his claim; however, the appellate court reversed this judgment. Upon the petitioner's appeal for an appellate review, the Supreme Court ruled to reject the claim and uphold the judgment of the appellate court.

In the view of the Supreme Court, the legal treatment set out in § 73(3) of the Labour Code is a mandatory rule and managerial positions may also be positions that fail to meet the criteria of the provision of § 73(3) of the Labour Code. In this case, the only limit on the definition of a managerial position is placed by § 11 of the Labour Code, according to which managerial employees are understood to be employees who are authorized at individual employer management levels to set and impose work tasks for subordinates, to organize, manage and control their work and to give them binding instructions for that purpose. Managerial positions at a certain employer thus may be defined, for example, by that employer's Organizational Rules.

According to the Supreme Court resolution, it is not necessary that the employee continue to hold a managerial position at the moment an agreement on the option of resignation from a managerial position is executed. Thus, it may also be executed for cases in which the employee will at some future point hold such a position.

Effect of the absence of seller title to the subject of a purchase agreement

(Czech Supreme Court Judgment No.. 29 Cdo 2601/2016 of 26 April 2018)

The Supreme Court ruled in this judgment that the absence of seller title to the subject of a purchase agreement does not render that purchase agreement invalid.

The foregoing judgment dealt with a situation where the petitioner had entered into a purchase agreement with the respondent in which the respondent undertook to transfer title to several book-entry shares and participation certificates to the petitioner. Book-entry securities are securities whose paper form was replaced by entry in the appropriate register. However, at the time the purchase agreement was executed the respondent was not the owner of the respective shares and transferred the participation certificates to a third party after executing the contentious purchase agreement. Thus, the petitioner did not become the owner of the shares and participation certificates based on the executed purchase agreement, as in the case of the transfer of title to book-entry securities, title is only transferred at the moment they are credited to his customer account kept by a participant in the central securities depository and not at the moment

the agreement enters into effect.

The petitioner requested that the court order the respondent personally to visit any entity that has entered into a contract on participation in the central securities depository with the company Central Securities Depository a.s. and submit an order to transfer the book-entry shares to the petitioner. Both the court of first instance and the appellate court rejected the claim, concluding that the contentious purchase agreement is absolutely invalid given that the seller was not and is not the owner of the respective shares and participation certificates.

However, the Supreme Court disagreed with the opinions of these courts and vacated both judgments. The Supreme Court pointed out to both lower courts that the provisions of the new Civil Code, specifically § 1760 thereof, explicitly address the case under review (in contrast to the earlier legislation). According to this provision, the fact that at the time the agreement was executed the party was not authorised to dispose of the thing to be rendered under the agreement does not in and of itself cause the agreement to be invalid. Thus, the contentious purchase agreement was always valid and the seller was obliged to provide title to the shares and participation certificates in question. The contentious purchase agreement would only be invalid if it to be were proven that the respective securities never existed. Such an agreement would be null and void for initial impossibility of performance.

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