Legal Update

June 2019

Weinhold Legal

Content

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 trust you will find *Legal Update* to be a useful source of information. We are always interested in your opinion about our newsletter and any comments you may have regarding its content, format and frequency.

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Bill on class actions

In accordance with the Government's Legislative Work Plan for 2019, the Ministry of Justice submitted a draft law on class actions for inter-departmental comments procedure on 14 March 2019. In particular, the Ministry promises with this draft law to streamline and economize the court hearing of class actions, while incorporating into the legal order a comprehensive and expeditious legal framework allowing joint enforcement of the same or similar claims in a single court proceeding. In Europe, this is not a novelty, as we can find such arrangements already in place in countries like Germany or Poland.

The bill mainly responds to situations in which individual entities (especially consumers) are reluctant to exercise their trivial claims, as in such cases the costs usually exceed the potential award. A class action enables individual sub-claims to be brought together in a single action, thereby allowing those entities to enforce claims that would not otherwise be enforced for the above reasons.

Class actions may be brought in respect of all private claims arising out of an unlawful activity (including both commercial and employment claims) in a single court case where a sole judge deals with the common issues and delivers a single judgment. At the same time, in collective proceedings it is possible to seek only fulfilment of an obligation that results from the law, a legal relationship or a violation of the law, or a determination of whether or not a right or legal relationship exists. However, it will not be possible to collectively conduct status or family proceedings, given the nature of such matters.

According to the bill, a collective proceeding has two stages, namely proceedings on the admissibility of the class action and proceedings on the merits of the case. In the first phase, the court decides whether it will rule on the merits of the case in a class action; in the second, the merits themselves will be dealt with. At the same time, the bill distinguishes two types of proceedings in which a collective action will be heard.

The first type of proceeding is what's known as the *opt-out* procedure, which can be conducted if the rights of individual members of a group are inexpedient due to their low value, i.e. up to CZK 10,000. At the same time, it is necessary to fulfil the condition of identifying the group in at least a rough manner and, moreover, no other mass opt-out procedure may be conducted in the same case. Individual authorized persons may opt out of this procedure.

In other cases, this is a so-called *opt-in* procedure. Authorized persons are required to register in the proceedings; only then can their claim be discussed.

Authorized persons do not become parties to collective proceedings; they must be represented either by a so-called group member, by a group administrator accredited by the Ministry of Justice (the Ministry issues 10-year accreditation) or by an interest association (e.g. dTest), whereas only these representatives are entitled to file a class action suit. Notwithstanding, group members (i.e. authorized persons) have, for example, the right to be heard in the proceedings or to consult the case file. At the same time, each party to the dispute must in principle be represented by a lawyer in the collective proceedings.

The claimant representing the members of the group is motivated by the remuneration that he or she is entitled to in the event of success in the proceedings. Should the subject of the class action be an obligation to act, such claimant is entitled to a remuneration of 20-30% of the awarded performance. In collective proceedings, the court rules on the merits of the case in a judgment against which appeal is admissible.

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In the context of class actions, a register of class actions is introduced. It will include, among other things, the fact that, in connection with a claim in collective proceedings, execution is being conducted; in such a case, depending on the type of proceedings, members of the group have the right to register or to opt out of the execution.

The bill introduces the ability of a court to impose an obligation on a subject to disclose evidence or, where appropriate, to disclose where it may be found. In the event of failure to comply with this obligation, the court may impose a fine of up to CZK 10,000,000 or 1% of net turnover for the last completed accounting period, even repeatedly.

Finally, it is worth noting that the bill has provoked a strong wave of resistance from the professional public. Several points have become subject to criticism. First, there is a criticism of the *opt-out* principle itself, which allows the court to conduct proceedings with all the injured parties, except those who have actively expressed their will not to participate in such proceedings. A person who does not even know about a class action could be a member of the group. Also subject to criticism is the defendant obligation to convey the aggregate amount of the awarded performance to court custody and that, in the absence of full payment to the members of the group within three years of the judgment becoming final, the unpaid part falls to the State.

Another drawback of the proposed legislation is the power of the court to impose an obligation to make available evidence that can determine the facts of the case on whomever has it or has it under their control (including the defendant), even before the collective proceedings begin. This amendment was criticized for violating the prohibition of self-incrimination and for enabling "fishing expeditions". Furthermore, in the event of a successful class action, the group administrator would be entitled to a remuneration of 20-30% of the awarded performance. However, the outlook for profit could lead to abuse of the institute of collective redress and become a bullying tool for companies in a competitive struggle and, moreover, it contradicts the proposal for a European directive on so-called representative actions to protect consumers' collective interests (which, moreover, unlike the Czech bill on class actions, presupposes an applicability to consumer disputes only).

As a result of extensive criticism, the Ministry of Justice has decided to revise the bill by the end of June 2019 so that the law is based on the *opt-in* principle, which is more in line with the principles of European legal culture; the *opt-out* principle will only be used exceptionally for selected types of claims.

Recent case law

Excessive contractual fine

(Supreme Court Resolution No. 33 Cdo 5377/2017 of 21 March 2019)

In the above-mentioned dispute, the Supreme Court dealt with a situation where the pledgee concluded a loan agreement with a pledgor of CZK 80,000 with fixed interest of CZK 40,000 and a contractual penalty of CZK 400 for each day of delay; the debt was secured by a lien on land owned by the pledgor.

The Court of First Instance ordered the judicial sale of the pledge in order to satisfy the claim totalling CZK 212,000. However, according to the Court of Appeal, the agreed amount of the contractual fine was in contradiction with good morals; the Court therefore reduced its amount to CZK 80 per day, and partially rejected the proposal to order the sale of the lien.

The Supreme Court, in accordance with established case law, ruled that a contractual penalty arrangement cannot be regarded as manifestly contravening good morals owing solely to the unreasonableness of its amount; instead, the court will reduce the excessive fine. However, if the contractual fine has been negotiated in circumstances that contravene good morals, then such conduct is considered to be void without the possibility of reducing the contractual penalty.

Assignment of work during a dispute over the invalidity of a notice of dismissal

(Supreme Court Judgment No. 21 Cdo 862/2018 of 16 January 2019)

In this dispute, the employee received notice of dismissal from the employer for redundancy. After a period of several months during which a lawsuit concerning the invalidity of the dismissal notice was conducted, the employee received another notice of dismissal for serious breach of duty, which was that after being called on to work several months after delivery of the first dismissal notice, the employee ignored the request, thereby breaching a work obligation.

The Court of First Instance found that while the first notice was indeed invalid for being served during the protection period, it dismissed the second invalidity claim, arguing that the employee had in fact breached his obligations by failing to heed the call to work. The Court of Appeal upheld the judgment. On appeal, the employee argued that the employer had not required him to work during his notice period and that his work was not necessary because his job had been eliminated.

According to the Supreme Court, an employer who serves an invalid notice of dismissal for redundancy to an employee who insists that the employer continue to employ him is obliged to continue to assign work to the employee without having any impact on the grounds for the dismissal.

Exemption from the obligation to protest a General Meeting resolution

(Czech Supreme Court Resolution No. 27 Cdo 3885/2017 of 27 March 2019)

In this ruling, the Supreme Court opined on the interpretation of the provision of § 424(1) of the Business Corporations Act, which establishes an exemption from the obligation to protest against invocation of the nullity of a General Meeting resolution for a shareholder who did not attend the General Meeting.

It may be inferred from the wording of the provision that a shareholder who was not present at a General Meeting automatically has a better position than a shareholder who attended the General Meeting, as the invocation of the nullity of the General Meeting resolution by the present shareholder is conditional on a protest being raised. However, the Supreme Court stated that this provision should be interpreted in accordance with its purpose, and the exception to the protest obligation applies only to such shareholder who has not attended the General Meeting for serious or excusable reasons.