Legal update

October 2020

Weinhold Legal

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The information contained in this bulletin is presented to the best of our knowledge and belief at the time of going to press. However, specific information related to the topics listed in this bulletin should be consulted before any investment decisions are made.

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News in legislation

Civil Code Amendment concerning consumer protection

On 2 September 2020, the government submitted a bill amending Act No. 89/2012 Coll., Civil Code, as amended ("**Amendment**") to the Chamber of Deputies, prepared by the Ministry of Justice for the purpose of transposing two new European Directives in the field of consumer law concerning the purchase of goods and the provision of digital content and digital services, and in order to correct the shortcomings identified in the transposition of European Directives in the Civil Code.

The Amendment, being discussed by the Chamber of Deputies under No. 944, aims to tighten the conditions for concluding contract over the phone. The amendment provides that oral consent expressed by a customer during a phone call will be insufficient for the conclusion of a contract, which will be concluded only after the entrepreneur submits a text offer to the consumer after the call and the consumer confirms the same. The enactment of this new rule is justified by the frequent abuse of this method of distance contracting which exploits the element of surprise, particularly in respect of elderly consumers and other vulnerable consumers.

A further change envisages the extension of the length of the so-called inverted burden of proof from six months to one year, which will advantage the consumer from an evidentiary point of view. Should a defect in a consumer good become apparent within one year from the day it was taken over by the consumer (or making the digital content available), it is sufficient for the consumer to point out the defect and the burden shall be on the seller to provide evidence to the contrary.

The Amendment further, inter alia, corrects certain shortcomings in the the transposition of several directives and thus bring the legal regulation of contracts concluded with consumers and late payment in commercial transaction in line with EU law requirements.

A large part of the Amendment is to take effect as of 1 July, 2021 in line with the EU deadline. The remaining part of the Amendment is to become effective on 1 January, 2022.

New case law

Sublease of an apartment in which the tenant does not live permanently

(Judgment of the Supreme Court File No. 26 Cdo 3623/2019 of 9 June 2020)

The tenants demanded a review of ease termination of an apartment by the landlord on the grounds that they had sublet the leased apartment to third parties without his consent and thus violated the rule defined in Section 2274 of Act No. 89/2012 Coll., Civil Code, as amended ("**Civil Code**"). The tenants claimed that the landlord's consent was not required, given that one of the original tenants continued to use the apartment, or its part.

The District Court in Benešov upheld the lawsuit, but on appeal by the landlord, the Regional Court in Prague reversed the judgment by dismissing the lawsuit. According to the Court of Appeal, one of the tenants did not use the apartment to a sufficient extent that would allow the tenant to ensure sufficient control over the apartment's condition at the time of sublease and to ensure quick communication with the landlord in case of resolving various situations. The tenants therefore needed the landlord's consent in order to sublet the apartment. As they did not have this consent, the landlord's 's termination was justified.

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The tenants appeal against the judgment of the appellate court was dismissed by the Supreme Court as unfounded.

In its decision, the Supreme Court stated that the decisive factor in concluding whether the tenants could have sublet part of the apartment without the landlord's consent is whether the tenants (or one of them) lived permanently in the apartment. Occasional visits cannot be considered permanent living, nor can situations where the tenant uses the apartment only for occasional overnight stays or short-term stays and whose housing needs are satisfied elsewhere (and the apartment is in fact inhabited exclusively by the subtenant). To support this, reference may also be made to the judgment of the Constitutional Court of 12 March 2001, File No. II. ÚS 544/2000, in which the Constitutional Court stated that the current need for housing is not

> *"only in overnight stays, but in whole complex of ensuring the needs of man in his material and mental level".*

It is without legal significance to indicate permanent residence at the address of the apartment in question, as this is only for record-keeping purposes.

According to the decision of the Supreme Court, the fulfilment of the conditions of Section 2274 Civil Code is therefore bound only to the finding that the tenant lives permanently in the apartment. If the courts find that the tenant does not live in the apartment permanently (and the "permanence" is not affected by temporary circumstances), they do not further determine whether there are serious reasons why the tenant does not live in the apartment permanently. It is not the tenant's obligation to use the leased apartment, but if he wants to sublet the apartment in such a case, he can do so only with the consent of the landlord.

Wage conditions of agency employees

(Judgment of the Supreme Administrative Court File No. 2 Ads 335/2018 of 29 May 2020)

In this dispute, the Regional Labour Inspectorate fined company AMBOSELI, s. r. o. ("Plaintiff") for allegedly violating the obligation stipulated in Section 309 (5) of Act No. 262/2006 Coll., Labour Code, as amended ("Labour Code"), by failing to ensure that the wage conditions of some its employees, who were temporarily assigned to work in Humpolec as agency workers, were not worse than those of the Plaintiff's comparable employees. This decision was confirmed by an appellate body, the State Labour Inspection Authority ("Defendant"), which only reduced the amount of the fine imposed.

The Plaintiff filed an administrative action against the decision of the Defendant which the Regional Court in České Budějovice upheld and annulled the contested decision.

The Defendant filed a cassation complaint against the judgment of the Regional Court in České Budějovice. However, the Supreme Administrative Court rejected the cassation complaint as unfounded.

The Supreme Administrative Court, as well as the Court of First Instance, concluded that both the Defendant and the first instance administrative authority erred in failing to examine a "key witness". That witness, working as a senior worker, was, according to the Plaintiff, *"a person familiar with the conditions of employment of the agency and regular staff"* and was therefore able to provide essential information for the purposes of the proceedings. However, the administrative authorities did not examine this witness on the ground that the statements of other witnesses who worked in the lower position of manipulators were sufficient to prove the Plaintiff's liability for the violation of Section 309 (5) Labour Code. The Supreme Administrative Court therefore agreed with the opinion of the Regional Court in České Budějovice that the justification for the non-conducted examination is not sufficient and is therefore unreviewable.

According to the Supreme Administrative Court, the "key witness" will need to be examined in further proceedings. The Supreme Administrative Court has ruled that the following decisive facts should be considered in accordance with the following rules:

"First of all, it is necessary to compare the objective differences in remuneration between regular and agency employees working in similar positions (for this, the documents seem to have already been provided during the proceedings).

Furthermore, it is necessary to focus on whether there were no differences between the group of regular and the group of agency employees in similar position, which justified the wage differentiation. Differences of this type can be, for example, proficiency in machine operation, level of orientation, performance, reliability, level of connection with and loyalty to the user, but also experience and ability to adequately face non-standard situations. A legitimate difference can also be a kind of "seniority" or "juniority" of employees. From a managerial and economic point of view, it may be advantageous for employers (or users by agency employees) to employ such employees that identify themselves with the employer and can be assumed in the future that their services can be relied on.

"Comparability" within the meaning of Section 309 (5) Labour Code between agency and regular employees does not mean that they must be remunerated similarly in similar job positions; it means that if they are paid differently in similar positions, there must be economically rational and generally understandable reasons for it, consisting of differences in the contribution of this or that category of workers to their employers (or users in the case of agency employees). It can be understood that agency employees who rotate after a few months may usually (i.e. not necessarily in each case, but often) receive lower remuneration in the same job positions than regular employees, as, taking into account various legitimate differences, regular employees may be more beneficial or less risky to employers than agency employees (due to higher performance, orientation, reliability, loyalty, etc.)."

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