Legal update

June 2021

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Amendment to Act No. 358/1992 Coll., On Notaries and Their Activities (Notarial Code)

Digitization of notary activities

On June 4, 2021, the Chamber of Deputies approved in the 3rd reading a fundamental amendment to Act No. 358/1992 Coll., On Notaries and Their Activities (Notarial Code), as amended ("**Amendments**") following the legislation contained in the previously adopted Act No. 12/2020 Coll., on the right to digital services and on the amendment of certain acts. The reason for discussing the amendment is, in addition to pragmatic reasons consists mainly in relieving business entities from an administrative burden, also the implementation of the requirements of the so-called EU digitization directive, which aims to create uniform rules for online company formation, registration of branches in public registers and saving documents and data.

The proposed Amendment has divided effectiveness, but the effectiveness of the core legislation described below is set for 1 September 2021.

A fundamental practical change brought by the Amendment is the already mentioned online establishment of companies. According to the Amendment, applicants for the establishment of companies could now carry out the entire process leading to the formation of a company, including its establishment, by videoconference instead of the necessary personal visit to the Notary office, using means of remote identification and authentication in a secure environment of the Notary Chamber of the Czech Republic. According to the draft, the identity of the applicants should be proved mainly by an electronic ID card using an NFC reader in a smartphone.

As part of this process, a notary would verify the admissibility and veracity of the data provided, such as a business name, scope of business, integrity of members of the statutory body or a legal title to use the seat in the basic registers and information systems of public administration, and then he would sign the authenticated documents with an electronic signature. Other changes to the data entered in the Commercial Register could take place in a similar way.

However, the amendment also brings other changes, such as the possibility of writing notarial records in electronic form, verifying the authenticity of electronic signatures and the resulting removal of the need for electronic conversions, the notary's explicit right to make entries in the register of beneficial owners and trusts, or the right to issue a verification clause to official documents for their use abroad (apostilles).

According to the explanatory memorandum to the Amendment, the apostille clause measure should be charged at CZK 300 (excluding VAT).

In connection with these changes, the Amendment establishes a public Register of verified signatures in electronic form, in which the public will be able to find out whether the verification clause is genuine. Along with this record, notaries would then keep a public Collection of Documents, which would contain data on notarial records. The purpose of this regulation is, in addition to simplifying the administrative burden on the business environment, also to increase the protection of entities, especially against theft of companies through the transfer of shares on the basis of forged verification clauses.

Current case law

Review of the conclusion of an arbitration agreement in enforcement proceedings

(Judgment of the Constitutional Court of the Czech Republic file No. I. ÚS 3962/18, dated April 6, 2021)

Recently, the Constitutional Court has ruled on the issue of reviewing the conclusion of an arbitration agreement in enforcement proceedings and

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its connection with a revolving loan agreement.

The complainant entered into a consumer revolving credit agreement (the "**Agreement**") on 18 March 2016, and subsequently entered into an arbitration agreement on the same day, in which it was agreed that any disputes arising from the agreement would be resolved in arbitration before one of the thirteen appointed arbitrators.

The complainant was subsequently in arrears, as the credit institution repeatedly alerted her to. As a result of the complainant's delay in repayments, the entire claim matured, however, even after being notified of this fact, the complainant did not repay the debt in any part. As a result of the complainant's conduct, the credit institution subsequently filed a lawsuit with the arbitral tribunal and informed the complainant of her right to choose an arbitrator who should decide the dispute in the matter under the terms of the arbitration agreement. The complainant did not react to this notification. In the arbitration proceedings, the claim was granted, and as the complainant failed to repay her debt, the credit institution filed an enforcement order.

The court ordered the enforcement against the complainant, but she proposed that the enforcement be stopped due to an ineligible enforcement title - a null and void arbitral award. According to her, the arbitrator did not have sufficient authority to decide the dispute, because both the arbitration contract and the contract are invalid for conflict with good manners.

The enforcement court subsequently stopped the enforcement completely.

The credit institution appealed against the enforcement court's resolution and the appellate court amended the district court's resolution so that enforcement did not stop. The Court of Appeal based its decision on the impossibility of reviewing the factual correctness of the enforcement decision by the enforcement court and on the principle of separability of the arbitration agreement from the main agreement.

The complainant subsequently filed a constitutional complaint against the decision of the Court of Appeal.

The complainant alleged that she considered the contract to be invalid for non-compliance with good manners, as the whole of the contractual structure was aimed only at the completely unreasonable enrichment of the secondary party. The complainant argued on the one hand with the interest rate of 152.50% p.a. and on the other with the contractual penalties, which in her view lacked the meaning and purpose for which the contractual penalties are negotiated, as the credit institution incorporated these fines into the contract not to strengthen its position, but to further enrich itself beyond the agreed remuneration for the loan provided, and in principle to keep the complainant in a debt trap.

According to the complainant, the opinion of the Constitutional Court expressed in the judgment file No. III. ÚS 4084/12 stating that the invalidity of the loan agreement causes the invalidity of the arbitration clause, shall also apply to the case where there is a separate arbitration agreement. The complainant stated that the fact that it was an arbitration agreement and not a clause was only a fulfilment of the form required by law and therefore did not affect this assessment, as the agreement and the arbitration agreement together formed one commercial construct. In addition, the arbitration agreement was signed on the same day as the proposal for the conclusion of the agreement, and thus the arbitration agreement was signed in advance.

The Constitutional Court stated that it follows from its settled decision-making practice that in enforcement proceedings it is up to the general courts to deal with defects in the enforcement title and that they are obliged to suspend enforcement in cases where enforcement would lead to obvious injustice or was in conflict with the rule of law. In examining whether the enforcement order does not suffer from fundamental defects, it is not decisive whether and how effectively the debtor defended his rights in the finding proceedings.

Furthermore, the Constitutional Court stated that its opinion expressed in the judgment file No. III. ÚS 4084/12 that the invalidity of the loan agreement causes the invalidity of the arbitration clause also applies to the case where there is a separate arbitration agreement, which can be considered as an arbitration clause in terms of content and in terms of its purpose. Therefore, if the appellate court argued on the principle of separability of the arbitration agreement from the main agreement, the complainant's assertion that the agreement and the arbitration agreement together form one commercial construct in this case must be taken into account. Just because the arbitration agreement was concluded on a separate document, it is not possible in the given case from the constitutional point of view to resign from the review of the entire contracting process, including the arbitration agreement. The approach of the Court of Appeal in the present case was a manifestation of an exaggerated legal formalism, which should not be applied in a democratic state governed by the rule of law, especially in similar cases where one party is clearly in a weaker position.

The Constitutional Court therefore concluded that the ordinary court ruling in the case had violated the complainant's rights to protection of property and to judicial protection guaranteed by Article 11 (1) and Article 36 (1) of the Charter of Fundamental Rights and Freedoms.

Labor law conduct performed by a dismissed executive

(Judgment of the Supreme Court of the Czech Republic file No. 21 Cdo 1892/2020, dated January 13, 2021)

In this judgment, the Supreme Court ruled on the validity of an employment contract concluded by the company's dismissed executive.

The court stated, inter alia: *"If the position of an executive of a limited liability company ceases to exist, the conduct of this person (even if he is no longer the executive of the company) will be binding on the company - provided that the third parties concerned have a good faith in the executive's representative authority - until this person (former executive) is deleted from the Commercial Register. However, the lack of good faith of a third party in the representative authority of such a person (former executive) representing a limited liability company leads to the fact that the legal action of this person (former executive), which was not subsequently approved by the represented in the sense of Sec. 440 (1) of the Civil Code is not binding for the limited liability company."*

Thus, in this judgment, in accordance with previously published judgments, the Supreme Court emphasized the negative side of the principle of material publicity contained in Section 8 (1) of Act No. 304/2013 Coll., On Public Registers of Legal and Natural Persons, as amended, which provides that a person does not have the right to object that the entry does not correspond to the facts against someone who is legally acting while trusting a data entered in a public register, when the entry is related to this person.