Legal Update

January 2018

Weinhold Legal

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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

Civil Code amendment

Another part of Act No. 460/2016 Coll., which amends Act No. 89/2012 Coll., the Civil Code, and other related laws (the "amendment") entered into effect on 1 January 2018.

The most significant change brought about by the amendment is the introduction of a co-owner's pre-emptive right to transfer a share in co-owned real estate. This pre-emptive right also applies to real estate transfers without consideration, i.e. donation, but not to cases of real estate transferred to close persons. A co-owner may also surrender his pre-emptive right, which would bind his legal successor. If the real estate in question is entered in the land register, a note is entered regarding the surrender of the pre-emptive right.

By fully amending the provisions of § 1124 and § 1125 of the Civil Code, the amendment also eliminates the existing pre-emptive right to a share in a thing under co-ownership based on acquisition in the event of death or another legal fact. This pre-emptive right lasted 6 months from the inception of co-ownership. The amendment also cancels the unlimited pre-emptive right to a share in a cooperative farm under co-ownership that arose via acquisition due to death or another legal fact.

A statutory pre-emptive right of co-owners for cases of the transfer of a co-ownership share existed in Czech law when the previous Civil Code, Act No. 40/1964 Coll., came into effect. This pre-emptive right applied to transfers of shares in all things, not only real estate (as introduced by this amendment).

Recent case law

Transferability of a share in a limited liability company

(Czech Supreme Court Resolution No. 29 Cdo 5719/2016 of 19 September 2017)

The Czech Supreme Court denied the final appeal of a company seeking the reversal of a resolution of the High Court in Olomouc that had declared all the resolutions of a company General Meeting invalid.

The company in question had two members – M. K. (the "applicant") and T. S. (the "other member"). The General Meeting at which the resolutions cancelled by the Czech Supreme Court were adopted was held without the participation of the applicant, who was neither invited to nor informed of it. The other member presented himself at the General Meeting as the sole company member authorised to exercise the rights of a sole member given that the applicant's participation in the company had ceased as a result of the issuance of writs of execution against his share pursuant to the provision of § 206(01) of

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the Business Corporations Act. According to the company, the provision of § 206(1) of the Business Corporations Act must be interpreted as applicable to shares whose transferability is limited by law or a memorandum of association. The company's memorandum of association made transfer of a share to another member or a third party contingent on General Meeting consent. The company also stated in its final appeal that under the provisions of § 207 of the Business Corporations Act, every share in a company must always be transferable, at the very least to another company member.

The Czech Supreme Court did not agree with the company's aforementioned opinion and stated that the treatment of members in a memorandum of association can differ from the rules laid down in the provision of § 207(1) of the Business Corporations Act, i.e. can preclude the transfer of a share to another member. And if, at the same time, it precludes the transfer of the share to a third party (§ 208 of the Business Corporations Act), then the share in the limited liability company will be entirely non-transferable.

The Czech Supreme Court noted that only the transferability of shares certificated as ordinary shares may not in any way be limited or precluded pursuant to § 137(2) of the Business Corporations Act.

Invalidity of arrangements on acting jointly by an executive and a holder of procuration

(Czech Supreme Court Resolution No. 29 Cdo 387/2016 of 31 October 2017)

The Czech Supreme Court denied the final appeal of a company seeking the reversal of a decision of the Prague High Court, which upheld a judgment of the Prague Municipal Court that had rejected the entry of a change in the manner of acting by a statutory body of a company, which the company had proposed be entered as follows: "*At least two executives jointly, or one executive together with one holder of procuration, shall always act on behalf of the company. Should the company have only one executive, the joint acting of the executive and a holder of procuration is precluded.*"

The given question of the permissibility of acting jointly by a member of a statutory body and a holder of procuration was already addressed in High Court in Prague Resolution 14 Cmo 184/2014-RD131 of 4 August 2015, which the Civil and Commercial Division of the Supreme Court approved for publication in the Collection of Judicial Decisions and Opinions on 10 February 2016 with this recital of law: "*Acting jointly by a holder of procuration and a member of a statutory body is not a permissible manner of representing a business corporation pursuant to § 164(2) of the Civil Code and it may not be entered in the commercial register as a manner in which members of a statutory body act on behalf of a business corporation pursuant to § 25(1)(g) of the Public Registries Act.*" The decision was subsequently promulgated under number 42/2016 in the Collection of Judicial Decisions and Opinions, Civil and Commercial Section.

The Czech Supreme Court found no reason to revisit the opinion issued in the aforementioned recital of law, and went on to note that if the final appeal applicant points to findings adopted on the respective issue in the neighbouring countries of Germany and Austria, the Court will overlook these in light of the different legislation in these countries. In the case of Austria, acting jointly in this manner is expressly permitted in the Limited Liability Companies Act, and in the case of Germany, permissibility of the given representation is derived *mutatis mutandis* from the legislation on joint stock companies, where the given authorisation is explicitly established in the Joint Stock Companies Act. No such legislation exists in the Czech Republic.

The Czech Supreme Court agreed with the court of first appeal in that the representation mandate of a holder of procuration is, in contrast to the representation mandate of members of a statutory body, limited to the legal acts enumerated in § 450(1) of the Civil Code. And there is no support in the law to expand this representation mandate of a holder of procuration.

The Czech Supreme Court added that making it permissible for members of the statutory body of a legal entity to jointly act with a holder of procuration where no support for this exists in the law would necessarily mean the representation mandate of members of a statutory body can similarly be tied to acting jointly with any other representative of the legal entity (e.g. another authorised person). However, this would compromise of one of the core competencies of the statutory body, and could, to the detriment of third parties, cause confusion concerning the manner in which members of the statutory body represent a legal entity.

We hope 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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