

Legal Update

September 2018

Weinhold Legal

Contents

Bills under discussion

Insurance and Reinsurance Distribution Act

Recent case law

Invalidity of a statutory representative and a corporate agent acting jointly on behalf of a company

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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Bills under discussion

Insurance and Reinsurance Distribution Act

On 16 August 2018, an act was promulgated in Section 87 of the Collection of Laws under number 170/2018 Coll. It enters into effect on the first day of the fourth calendar month following the month of its promulgation (i.e. 1 December 2018).

The act responds to EU Directive No. 2016/97 on the distribution of insurance, also known as the IDD - Insurance Distribution Directive (the "Directive") - and is designed to replace the existing Czech Act on Insurance Intermediaries and Independent Loss Adjustors (the "AIIA"). It is a response, as well, to certain problems specific to the Czech market, with legislators either applying tighter restrictions as compared to the Directive or addressing areas not treated in the Directive (e.g. damage suffered by clients in arranging life insurance, ineffective oversight or time constraints on business authorisation validity for insurance mediation).

The act will not apply to the mere provision of general information on insurance or reinsurance or similar information on insurers, reinsurers or insurance intermediaries on the condition that the aim of providing such information is not to help negotiate or amend an insurance or reinsurance policy or indemnification. In accordance with the explanatory memorandum, this means the occasional provision of information as part of other activity (e.g. attorneys, tax advisors, etc.) will not fall within the act's jurisdiction. Nor will the act apply to loss adjustment. In contrast, mediating the possibility of becoming insured ("fleet insurance" most often offered by used car dealerships, automobile rental agencies, banks as a part of payment card insurance, etc.) is not excluded from the act's ambit.

When the Insurance and Reinsurance Distribution Act enters into force, the number of insurance intermediary categories will drop to 4 (independent intermediaries, tied agents, insurance intermediaries whose principal professional activity is not insurance mediation, and foreign intermediaries). The Czech National Bank (CNB) will be responsible for registering intermediaries and granting authorization to perform intermediary work. Such authorization shall remain valid until the end of the calendar year following the year in which the independent intermediary is entered in the register. The CNB will, on request, extend the authorization by another 12 months against payment of an administrative fee.

The mechanisms for imposing penalties in the newly adopted act constitute one of the most significant remedies of shortcomings found in the AIIA, which had virtually no penalty provisions that could be effectively used to penalise breaches of the obligation to act with due diligence via two of the toughest punishments - cancellation of registration or a monetary fine. The Czech National Bank is the main body overseeing the performance of activities under this act.

The act establishes several constitutive elements of offenses in the area of the distribution of insurance and reinsurance that will be examined by the CNB. Subsequent penalties could reach tens of millions of crowns.

Legal Update

September 2018

The act also envisages CNB implementing regulations stipulating the professional qualifications for distributing insurance and reinsurance and the particulars of applications and notifications effected under this act.

Recent case law

Invalidity of a statutory representative and corporate agent acting jointly on behalf of a company

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

A limited liability company submitted a petition dated 19 February 2014 seeking to enter a statutory representative (duties effective from 13 February 2014) and information on the company's subordination to Act No. 90/2012 Coll. on business companies and cooperatives (the Business Corporations Act) - the "BCA" - as a sole act using the procedure set out in § 777(5) of the BCA, and also to enter a change in the manner in which the statutory body acts in the commercial register, in the following wording: "It is always the case that at least two statutory representatives jointly, or one statutory representative together with one corporate agent, shall act on behalf of a company. If a company has only one statutory representative, the statutory representative and corporate agent may not act jointly on its behalf."

In a resolution dated 25 February 2014, the Municipal Court in Prague (the "registry court") granted the first two items of the petition and rejected the section concerning entry of a change in the manner of representation by the statutory body. Citing § 194(1) of the BCA and § 450(1) of Act No. 89/2012 Coll., the Civil Code (henceforth the "CC"), the registry court concluded that the proposed manner of representation by the statutory body is impermissible as "it would mean the corporate agent ranks at an equal level as the statutory representative, i.e. is also a statutory body of the company". The Memorandum of Association provision addressing the proposed manner of representation is at variance with the law and invalid pursuant to § 580(1) of the CC as "the meaning and purpose of the law clearly differentiates between the statutory representative as a statutory body and the corporate agent as a type of contract-based representative".

In a resolution dated 4 August 2015, the High Court in Prague (the "appeals court") upheld the court of first instance decision that was the subject of the company's appeal. Citing § 164, § 450, § 451, § 452 and § 453 of the CC and § 44(5) and § 47 of the BCA, the appeals court agreed with the registry court's finding that the legislative treatment of the manner of representation by members of a statutory body on behalf of a legal entity does not provide for the arbitrary combining of representation by members of statutory bodies with representation by contractual or legal representatives of the legal entity. The relevant sections of the company's Memorandum of Association are invalid under § 588, first sentence, of the CC; therefore, this part of the petition could not be granted. "The overlapping of representation by a member of the statutory body with representation by a corporate agent is further prevented," according to the appeals court, "by the

representation limits placed on the corporate agent, as established in § 450 of the CC, where procuration is conceived as a special type of contract-based representation in the extent of legal acts that arise during the operation of a primary business or branch (with the exceptions set out in § 450[1], second sentence, of the CC), while the executive authorization of the statutory body is unlimited pursuant to § 164(1) of the CC". In the appeals court's view, the company's argument that the restrictions on procuration pursuant to § 450(1) of the CC do not apply to a corporate agent acting together with a statutory representative has no basis in the respective legislation.

The company contended that the challenged decision is contingent on resolving a question of substantive law, i.e. whether and in what scope joint representation by a statutory representative and a corporate agent of a limited liability company is possible pursuant to legislation valid as of 1 January 2014, and applied for an appellate review of the appeals court's decision. The company proposes that the Supreme Court amend the challenged decision and grant the petition in full, i.e. inclusive of its section regarding entry of the manner of company representation.

In this proceeding, the Supreme Court relied on Civil and Commercial Code of the Supreme Court Decision No. 42/2016 of the Collection of Judgments and Opinions, civil and commercial section, dated 10 February 2016, which upheld High Court in Prague Resolution No. 14 Cmo 184/2014-RD131 of 4 August 2015, according to which joint representation by a corporate agent and a member of a statutory body is an impermissible manner of business corporation representation pursuant to § 164(2) of the CC and may not be entered in the commercial register as the manner in which members of a statutory body act on behalf of a business corporation.

A provision on joint representation by a statutory representative and a corporate agent as a manner of representing a company by the members of its statutory body contravenes the law (§ 1[2], § 164[2] of the CC) and is a clear violation of a right pertaining to the standing of persons and, by extension, to the public order. There is no doubt that the meaning and purpose of the legal standards protecting the public order require that legal acts violating the public order be invalid. The Supreme Court thus concurs with the lower instance court and finds that the given provision of the applicant's Memorandum of Association is invalid and that the court shall take this invalidity into account in accordance with § 588 of the CC even without a petition.

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We firmly believe 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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