The Czech civil code: From effectiveness to amendment in 17 months?

1. Recodification of the Czech civil law

With effect from 1 January 2014, the entire Czech civil law has been re-enacted by Act No. 89/2012 Coll., the civil code (the “Civil Code”), along with Act No. 90/2012 Coll., the business corporation act (the “Business Corporation Act”), and other legislation.

A long time in the making, the new Civil Code replaced the old civil code from 1964 along with the commercial code from 1991 (which, unlike the Business Corporation Act, also contained special provisions on contract law) and a large amount of other legislation. The old civil code had been amended by more than 60 acts, the commercial code by more than 70 acts. Thanks to these patches and with the help of court decisions and jurisprudence, the old civil law managed to adapt to dramatically different social circumstances. Nevertheless, there still had been a call for a new modern code.

2. Emerging issues and work on an amendment

In the course of practice under the Civil Code, several issues and uncertainties have already emerged and others are still being discovered; some of them were identified even before the Civil Code became effective.

In order to address some of such issues, the Ministry of Justice created an expert group which publishes opinions on the interpretation of the contentious provisions of the new civil law. However, these opinions are not binding and cannot eliminate the possibility that courts or other authorities could take different approaches on matters. The expert group has published 31 opinions so far.

In summer 2014, the Czech Ministry of Justice started to work on a proposal for an amendment of the Civil Code. This amendment was supposed to affect about 300 sections (or about 10%) of the Civil Code. The first part of the amendment (out of four intended parts) was made publicly accessible in August 2014. Even though it was titled "acute", instead of merely addressing the most acute issues and correcting apparent legislative errors, the draft amendment proposed conceptual amendments to what was then (and continues to be) the very recent and comprehensive act. In the form in which it was proposed, the amendment would even have affected the definition of civil law in section 1 of the Civil Code.

As a result, the amendment has encountered wide criticism from legal practitioners, academics and several institutions, including the Czech Bar Association. The general opinion is that conceptual amendments would require wide discussion and deep analysis of the practice. Many observers argue that a hasty amendment might introduce new issues rather than solving all of the present ones.

3. The “small” (technical) amendment

The Ministry of Justice therefore split the work into two projects: the “big” (conceptual) amendment and the “small” or “urgent” (technical) amendment. While the former is scheduled to be prepared in the course of 2016, the latter was published in November 2014 and under its Art. VIII should become effective on 1 June 2015 (i.e. 17 months from the effectiveness of the Civil Code), provided that it will be enacted.
The small amendment only deals with a few issues. Three of them could be significant from a business perspective: the requirement of form for powers of attorney, the registration of trusts, and the return of pre-emptive right to co-owner interest. Other issues include consent for autopsy, limitation of a legal capacity, and the possibility of repeated placement of a child into a facility for children in need of immediate assistance.

3.1 Form of powers of attorney

Under the current wording of the Civil Code (section 441, paragraph 2 of the Civil Code), a power of attorney requires a written form unless it is limited only to a specific act. Furthermore, it requires the same (special) form as the legal act in question. Under this rule, e.g. the power of attorney to enter into an agreement on a pledge of enterprise requires the form of a notarial deed, since an agreement on a pledge of enterprise requires the form of a notarial deed.

However, it became a subject of discussion whether a power of attorney in the form of a notarial deed is required for participation in a general meeting (or other body of a company) or for making decisions on behalf of a company's sole shareholder.

This question was addressed by the expert group's (non-binding) opinion No 12, which argues against such a requirement. There seems to be general consensus that such a requirement would be too burdensome and impractical. However, since the Business Corporation Act requires certification of the decision in the form of a notarial deed for some decisions of the general meeting and of the sole shareholder of a company, there is no legal certainty that the relevant court, notary public or other public authority will follow this interpretation in each case. In fact, some Czech notaries have taken a strict approach and required the form of a Czech notarial deed for powers of attorney to represent the sole shareholder acting in the capacity of the general meeting in cases when the resolution of the general meeting must be certified in the form of a notarial deed.

The matter was ultimately addressed on 27 November 2014 by the Czech Supreme Court, which decided that where the legal act in question requires the form of a notarial deed, it is sufficient to grant the power of attorney in written form with a notarised signature. The Supreme Court therefore upheld the practical solution even if the wording of the Civil Code enables a different approach.

The "small" amendment seeks clarification of the issue as it proposes a new rule under which in cases where the legal act requires the form of a notarial deed, it is sufficient to grant a power of attorney in written form with a notarised signature, if: a) it concerns matters of business corporations; or b) the principal is an entrepreneur or a business corporation (in Czech "podnikatel") and the matter is in the course of business; or c) the agent is an attorney at law.

3.2 Register of trusts

The Ministry of Justice proposes the creation of a register of trusts (similar to the commercial register). Trusts would be created by a registration into such register (with the exception of a trust established by a disposition mortis causa, which is created upon the death of the decedent).

A beneficiary of a trust would also be registered, with the exception of a trust established for a publicly beneficial purpose. Until such registration, the beneficiary would not be entitled to benefit from the trust.

3.3 Return of the pre-emptive right to co-owner interest

It is furthermore provided that co-owners should have pre-emptive right in case of transfer of a co-owner interest. This as a general rule was abandoned by the Civil Code and maintained only for cases where the co-ownership has been created by a
fact that made it impossible for the co-owners to affect their rights and duties from the beginning (e.g. on the basis of a testament).

3.4 Response to the "small" amendment

The nature of many of the amendments is viewed as rather conceptual and not technical; as such, they would require further discussion. At the moment, there seems to be consensus only on the matter of the possibility of repeated placement of a child in a facility for children in need of immediate assistance (a topic which has garnered much media exposure), as well as regarding the limitation of legal capacity, autopsies, and on the requirement of form for power of attorney. Nevertheless, the mentioned decision of the Supreme Court has presumably eliminated the last mentioned matter, which could have been considered as the most "urgent" issue from a business perspective.

Under the pressure of criticism, the "small" amendment might therefore be reduced to an even smaller one, reworked substantially, or even not accepted at all.

4. Conclusion

After the long process of recodification, the process of first assessments and amendments to the Civil Code has now commenced. Not only the big amendment to the Civil Code, but also the small one, which should simply have focused on correcting clear mistakes and issues associated with the still recent Civil Code, are raising criticism. It remains to be seen whether the amendments to the Civil Code will be passed – and if they are, with what content.

The Czech Supreme Court’s recent decision might fuel the opinion that many issues relating to the Civil Code may well be solved by court decisions and jurisprudence and that amendments should be adopted only after thorough consideration and follow only after longer periods of practice.