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Court versus Arbitration Proceedings: Do You Know How to Tackle Business Disputes Efficiently?

Most probably, all entrepreneurs have experienced some kind of business conflict in conducting their day-to-day business. Even though some industries are more prone to dispute than others, all businesses, from the smallest family firms up to large multinational corporations have to deal with disputes. Business conflicts that go much further beyond the regular terms may even jeopardise a firm's existence per se. Therefore, there is a question of how to tackle such disputes efficiently.

As the saying goes, forewarned is forearmed. And the same applies to business disputes. Strictly speaking, even contract structuring as the starting point may affect whether proceedings will occur in the future and how their actual course will be. However, a well prepared contract may not be a sufficient preventative means. As contractual compliance by both parties is what matters. Also, the selection of the business partner with whom the deal is made is of vital importance, for instance with regard to the business partner's reputation and history. Furthermore, it is essential to put in place appropriate warrants and guarantees such as contractual fines or bank guarantees prior to contract conclusion and to take into account whether the contractual performance or the agreed guarantee can be collected and enforced from the contractual partner if necessary.

A dispute's life cycle, or how to reach seizure in five steps

1. **Contractual phase** (selection of the contractual partner, stipulation of the contractual terms, etc);
2. **Phase prior to the dispute** (compliance with statutory and contractual terms, etc);
3. **Phase prior to the start of proceedings** (dispute identification, assessment of the procedural situation, etc);
4. **Procedural phase** (course of the proceedings as such, focus on their efficiency); and
5. **Ruling execution phase** (seizure, acknowledgement on an international basis, ruling execution, etc).

In the event that all measures fail and proceedings are inevitable, special attention ought to be paid to the decision whether the dispute shall be tackled by way of court proceedings or arbitration proceedings. Both these alternatives have advantages and disadvantages. However, the actual aptness of one or another depends on the aspects of the actual case. Generally speaking, arbitration proceedings are faster. Moreover, thanks to the option to select the arbiter, the proficiency factor is secured. On the other hand, court proceedings are generally less costly and provide legal coercive means (such as witness summons).

Non-public, less costly, or fast?

Major differences between regular court proceedings and arbitration proceedings:

COURT PROCEEDINGS

- Public
- Generally slower
- No option to select the judge (ie absence of specific proficiency)
- Formal
- Lower expenses
- Coercive means (such as witness summons)
- Limited enforceability abroad (especially outside the EU)
- Legal remedies (ie better foreseeability of the ruling)
- Lower degree of confidence in national courts in international transactions

ARBITRATION PROCEEDINGS

- Non-public
- Generally fast (the option of fast-track proceedings)
- An option to select the arbiter (that possesses the relevant proficiency)
- Flexible procedural rules
- Greater expenses (in particular for international arbitration proceedings outside the Czech Republic)
- Limited number of coercive means
- Greater ruling enforceability abroad, in line with the New York Convention
- Limited options for remedying poor-quality/surprising rulings

In addition, international disputes are a special category. In resolving international disputes, arbitration proceedings are the rather more apt option, as enforceability under arbitration proceedings is covered by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is internationally valid. In assessing international disputes, foreign legal systems are the most critical factor. However, frequently, the legal systems are different from the domestic jurisdictions of the dispute parties. Another significant aspect in resolving international disputes includes genuine commercial practice. And last but not least, the equity principle may be applied in resolving international disputes, which is based on the general understanding and interpretation of justice. Moreover, similarly as in "domestic" arbitrations, the possibility of the lack of the arbiter's impartiality is a threat to international arbitrations.

Are you planning on concluding a contract with a potential business partner, but do not feel confident about his reliability? Or do you have a large number of business partners and wish to verify them all at once? Use support via the Maják software instrument by Deloitte that will help you with ongoing checks of your vendors and customers.

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The most significant changes in the field of labour migration after the amendment to the Act on the Residence of Foreigners

The amendment to the Act on the Residence of Aliens, which was signed by the President of the Czech Republic on 4th of July and was sent to be published in the Collection of the laws should come into effect in August 2019. The implementing regulations which are part of the amendment should come into effect in September 2019. Based on the EU transposition directive, the changes will enable foreign university students and researchers to stay in the Czech Republic up to nine months after completing their studies or research activities on the basis of a long-term residence for the purpose of finding a job or starting a business.

An extraordinary long-term work visa valid for a maximum of one year will be newly introduced to facilitate the recruitment of foreign workers for certain occupational sectors suffering from a long-term labour shortage. Acceptance of applications for this type of visa should be launched by a special government regulation in order to react flexibly to the situation on the labour market, without the possibility of extension. At present, it is not clear whether the holders of this type of visa will be allowed to apply for another type of residence in the Czech Republic if they want to remain in the territory for more than one year.

In addition, the amendment introduces the obligation to complete an adaptation-integration course (the effect was postponed to January 2021). A foreigner (if not subject to an exception from this obligation) should complete the course during the first year after entering the Czech Republic. It should be a one-day course and the expected length is eight hours.

The amendment also introduces quotas for the number of applications received at embassies of the Czech Republic abroad. This implementing regulation is expected to come into effect from September 2019 (an inter-ministerial consultation procedure is currently ongoing). Thus, the government regulation will set the maximum number of applications for long-term visas for the purpose of business and employee cards, which can be filed at individual embassies. Currently, some embassies do not allow foreigners to arrange meetings to apply for selected residence permits for September 2019 with reference to the quotas under preparation.

Another innovation is the transformation of current economic migration projects into new government economic migration programmes. Current economic migration projects and schemes will merge and three types of government economic migration programmes will be introduced. The new government economic migration programmes should be launched in September 2019.

1. Programme for key and scientific personnel
- This program replaces the Fast Track and Welcome Package for Investors.
- Newly there is a possibility of recruiting new employees; previously it was possible to use only intracompany transfers and relocations of employees.

2. Programme for highly qualified employees
- Significant territorial enlargement; previously only for highly qualified employees from Ukraine and India.

3. Programme for qualified employees
- So far the programme has been limited to Ukraine, Mongolia, the Philippines and Serbia; the programme will be extended to Belarus, Montenegro, India, Kazakhstan and Moldova.

The amendment also includes changes related to the employee card. The consent of the Ministry of the Interior with the change of employer or job position has been replaced by a notification obligation. The foreigner should report the change 30 days in advance and, if the conditions are met, both the foreigner and the employer will be notified by the Ministry of the change approval. The change of employer has been limited to the possibility of change after six months of the foreigner's residence in the territory (possibility of earlier change in specific cases) in relation to the employer for which the first employee card was issued.

Some changes will also affect EU / EEA or Swiss citizens; pursuant to the transitional provision of the amendment, certificates of temporary residence in the Czech territory issued before 1 January 2010 will expire on 31 December 2019. Certificates of temporary residence issued before the effective date of this Act (after 1 January 2010) will expire in 10 years from the date of its issuance.

We will inform you about further developments on the above topics.

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Personal Data Processing News

Personal data protection does not go unnoticed even in the summer. Great attention was attracted in particular by the British data protection authority ICO, which announced the possibility of imposing fines worth of millions of pounds on British Airways and Marriott. The European Data Protection Board also kept busy and adopted a series of important documents at its last meeting. The fate of standard contractual clauses and the Privacy Shield as a tool for transferring personal data to third countries and the US remains in the centre of attention.

British ICO as a possible pioneer of massive fines for GDPR breaches

The highest fine for a GDPR breach to date, specifically EUR 50 million, was imposed on Google by the French supervisory body CNIL. This threshold may soon be exceeded by the British supervisory body ICO, which announced its intention in early July to fine British Airways and Marriott.

Marriott hotel chain

The well-known hotel chain faces a fine of GBP 99,200,396 for an alleged leak of contact and financial data of tens of millions of customers. The leak is supposed to have taken place in 2014, when the systems of the Starwood hotel group, purchased by Marriott two years later, were attacked. This case clearly shows that the area of personal data protection is not to be underestimated in acquisition projects.

The leak was discovered in 2018, when it was also reported – in line with the new EU rules for personal data protection – to the British regulator, which had Marriott's full cooperation throughout the investigation and the identified flaws were remedied.

British Airways

The fine that could be imposed on the airline is almost twice as high as the one to be imposed on the Marriot hotel chain, specifically, it could be as high as GBP 183 million. British Airways is supposed to have committed an infringement of the GDPR by not adopting sufficient security measures and failing to prevent a hacker attack on its website and mobile application, which allegedly led to the leak of data of almost half a million customers. Through a false website, the attackers had harvested details of customer names, payment cards, email and postal addresses since June 2018.

The airline reported the incident in September of last year and similarly to Marriott, it provided full cooperation during the investigation and took remedial action. Like Marriott, British Airways has an opportunity to make representations to the ICO as to the proposed findings and sanction. Data protection authorities in the EU whose residents have been affected by the leak will also have the same right.

The fine amount is not final in either of these cases. Both companies have allegedly committed a similar infringement of the GDPR, i.e. A data leak as a result of insufficient security. While both fines may seem very high, the question remains whether the British ICO would not have proposed an even higher amount if the companies had not reported the leak immediately or had not fully cooperated during the investigation. In the case of British Airways, the proposed fine corresponds to 1.5% of its annual turnover, while the maximum fine for a GDPR breach may amount up to 4% of the company's global turnover.

Transfers of personal data outside the EU at risk? Developments surrounding the Privacy Shield and standard contractual clauses

The primary tool for transferring personal data to the United States of America, namely the resolution of the European Commission known as the "Privacy Shield" is subject to scrutiny of the Court of Justice of the EU, together with so-called standard contractual clauses, which are the most common instrument for transferring personal data to third countries.

Austrian lawyer Maximilian Schrems, who was behind the invalidation of the previous instrument for transferring data to the United States of America ("Safe Harbour"), filed a complaint with the Irish data protection authority stating that personal data protection in the US was insufficient since the transferred data were accessible to US authorities. The preliminary questions referred to the Court of Justice of the EU are available on the eur-lex website.

The ruling of the Court of Justice of the EU can be expected in the first half of 2020. Until that time, the United States is trying to address certain complains of EU bodies regarding the level of personal data protection in the US. As an example, we can mention the recent appointment of an ombudsman whom EU citizens may contact regarding the processing of personal data by US authorities. Following the confirmation by the US Senate in late June 2019, this role will be held by Keith Krach.

Standard contractual clauses, whose timely review was promised by Czech EU Commissioner Eva Jourová in her June speech on the first anniversary of the effective date of the GDPR, also do not remain unnoticed. The current version of standard contractual clauses still refers to the previous data protection directive.

The potential invalidation of the Privacy Shield or standard contractual clauses would have extensive consequences, as there would be no legal framework for transferring personal data not just to the US but also to most non-EU countries. An alternative could consist in the use of so-called binding

corporate rules, which are, however, used rather rarely (primarily due to their limited flexibility, since they have to be approved by the competent data protection authority) and they are suitable primarily for cross-border transfers of personal data within multinational corporations. Prospectively, codes of conduct or data protection certificates could represent a suitable method of transferring data. Since they are new GDPR institutes, their use has not caught on so far as the procedures of their set-up have not yet been fully finalised.

DPIA: further developments regarding the methodology of its preparation

In February 2019, the Czech Data Protection Office issued the first part of the long-awaited methodology, which answers the question of data controllers whether they need to prepare a Data Protection Impact Assessment (DPIA) for a specific case.

The second part of the methodology, which lists exceptions from the obligation to perform a DPIA, has yet to be issued. However, a draft already exists and has been submitted to the European Data Protection Board (EDPB), which issued an opinion on it on 10 July 2019. However, the opinion does not contain the full list of the proposed exceptions. Nevertheless, its wording indicates that the Czech office proposed exempting at least the following processing events from the obligation of preparing the DPIA, but it has to amend or exclude the relevant parts according to the EDPB:

- Processing in the area of HR, social security and health insurance (according to the EDPB, the exception is admissible only under the condition that it is a legally required processing and not on a large scale);
- Processing in relation to business activities (according to the EDPB, the exception is admissible only under the condition that the processing concerns non-sensitive data of customers and the processing is not on a large scale);
- Processing for the purposes of direct marketing (according to the EDPB, the exception is admissible only under the condition that the processing does not concern sensitive data and data of vulnerable groups of persons); and
- Footage of a camera installed on a vehicle (the EDPB is against this exception).

The European Data Protection Board issued guidelines on camera systems

At its July plenary meeting, the European Data Protection Board (EDPB) adopted draft guidelines on processing of personal data through video devices. The draft is intended for public consultation.

On almost 30 pages, the EDPB analyses several legal aspects, with the most interesting ones being:

- When the processing by camera systems is not subject to the GDPR and when it is;
- How to correctly inform natural persons about the use of camera systems;
- What are the specifics with respect to the request for exercising the rights of the data subjects; and
- A significant part addresses questions regarding the combination of camera systems with biometrical analysis.

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