

February 2012

Amendment to the Act on Arbitral Proceedings and the Enforcement of Arbitral Awards: enhancing consumer protection in disputes arising from consumer contracts

On 1 April 2012 a significant amendment to Act no. 216/1994 Coll., on Arbitral Proceedings and Enforcement of Arbitral Awards as amended (after this also referred to as the "ZRŘ") provided by Act no. 19/2012 Coll. (after this also referred to as the "amendment") will come into effect.

In this legal alert we will summarize the most important changes the amendment brings to the Czech legal order.

Consumer protection is an area of law strongly regulated by the European Union and a series of directives provides partial aspects of this protection. The case law of the European Court of Justice is also well established in this area. The current version of the ZRŘ in some aspects – in the area of consumer protection – did not correspond to applicable EU regulations and in particular with the decision making practice of the European Court of Justice, which was the main reason for adopting the amendment.

As the authors of the amendment describe in the explanatory note several forms of amendment were considered, including one completely eliminating the possibility to hear disputes arising from consumer contracts (after this also referred to as "consumer disputes") in arbitral proceedings. In connection with this, for complexness it should be noted that some lower courts have concluded that hearing consumer disputes in arbitral proceedings is inadmissible because this is contradictory to applicable EU regulations and especially with the settled case law of the European Court of Justice.

Continuation

In the end the amendment retained the possibility to hear consumer disputes in arbitral proceedings, at the same time, however, it introduces specific tools to ensure greater consumer awareness of the process of negotiating the arbitration clause and its legal consequences.

Speedread:

- Enhancing consumer protection

1. Enhancing consumer protection

The ZŘŘ as amended newly establishes in particular that:

- 1.1. an arbitration agreement to resolve disputes arising from consumer contracts must be negotiated separately and not as part of the conditions which govern the main contract, under the sanction of invalidity;
- 1.2. before concluding an arbitration clause the entrepreneur is required to provide the consumer with an adequate explanation of all the consequences of the arbitration clause;
- 1.3. the arbitration clause for resolving disputes arising from consumer contracts must include true, accurate and complete information about:
 - 1.3.1. the arbitrator or about the fact that the dispute should be decided by a permanent arbitration court;
 - 1.3.2. the method of commencing the proceedings and form of leading the arbitral proceedings;
 - 1.3.3. remuneration of the arbitrator and expected types of costs that the consumer may incur in the arbitration and the rules for their awarding;
 - 1.3.4. place of the arbitral proceedings;
 - 1.3.5. method of delivery of the arbitral award to the consumer;
 - 1.3.6. the fact that the arbitral award in legal force is enforceable;

if the clause establishes the jurisdiction of a permanent arbitration court, the requirements specified under point 1.3 of this legal alert may also be met by referring to the statutes and rules of the permanent arbitration courts;

Continuation

- 1.4. the Ministry of Justice will maintain a list of the arbitrators who may be appointed by the arbitration clause to decide consumer disputes, and only persons stated in this list may be appointed to resolve such disputes;
- 1.5. when consumer disputes are decided, the arbitrator is obliged, before the commencement of the hearing, to inform the parties whether in the last three years he/she has issued or participated in the issuance of an arbitral award or whether he/she is or was the arbitrator in pending arbitral proceedings involving any of the parties to the current proceedings (the amendment also extends the general rules concerning the bias of the arbitrator);
- 1.6. in the case of consumer disputes no limits apply in using a lack of jurisdiction defense (with the exception of invalidity for the reason that an arbitration agreement was not allowed in the matter in question), based on the absence, invalidity or termination of the arbitration agreement raised by a party only as its first act done in the matter;
- 1.7. the arbitral award issued in consumer disputes must always include the reasoning and a notice of the right to file a motion for its cancellation to the court;
- 1.8. in consumer disputes the arbitrators must always follow established consumer protection regulations;
- 1.9. if there is an international element and the parties chose the decisive law, such choice may not be to the detriment of the consumer and may not involve a reduction in the level of consumer rights protection.

A new provision in section 19 paragraph 4 of the ZRŘ explicitly allows the parties to agree on the procedural rules of the arbitral proceedings (including also eg rules issued by an arbitration centre that does not have the status of a permanent arbitration court) but only on condition that these rules are attached to the arbitration agreement.

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The amendment also extended the list of reasons for the court to cancel an arbitral award in cases where the *"arbitrator or permanent arbitration court did not decide the dispute arising from a consumer contract in compliance with statutory regulations aimed at consumer protection or where it was decided obviously contrary to good morals or public order"* and further in cases in which an arbitration agreement regarding consumer disputes does not include the new statutory requirements (see point 1.3. above).

In proceedings to cancel an arbitral award the courts will now also assess the arbitral awards issued in consumer disputes on their merits, as well as on their compliance with good morals and public order.

According to the amendment the courts will be newly obliged – on the condition that an arbitral award was issued in a consumer dispute and a motion for its cancellation was submitted by the consumer (regardless of the reason such motion was submitted) – to examine, from official duty, whether there is no reason to cancel the arbitral award as referred to in section 31 letter a) through d) or h) of the ZRŘ as amended (this is eg a reason newly established by the amendment consisting of the fact that the arbitral award does not meet the new statutory requirements – see point 1.3. above).

The ZRŘ as amended also retains the period to submit a motion for the court to cancel an arbitral award within three months after delivery, even in relation to consumers. The importance of preserving this period is to some extent weakened by extending the reasons to submit a motion to stop the enforcement proceedings that have already been started (see below).

If a consumer submits a motion to cancel an arbitral award, in the scope of the proceedings on cancelling an arbitral award the courts are newly obliged to examine (also without consumer request) whether there is any reason to postpone enforcement of the arbitral award in the matter in question (ie whether there is the threat of serious harm arising from its immediate enforcement or it is possible to consider the submitted motion to cancel an arbitral award justified).

Continuation

According to the amendment, in the case of a consumer dispute the provision stating that the court will dismiss the motion to cancel the arbitral award (based on the invalidity of the arbitration agreement, cancellation of the arbitration agreement or on the fact that the matter was decided by an unauthorized arbitrator or an arbitrator lacking the capacity to act as an arbitrator) if that party seeking the cancellation did not apply such reason (although he/she might) in the arbitral proceedings before taking action in the merits no more applies.

The current wording of section 35 paragraph 1 of the ZŘŘ establishes the reasons which authorize the parties to the arbitral proceedings to submit a motion to stop the enforcement proceedings of an arbitral award that have already been started (even if such party did not submit a motion for the court to cancel the arbitral award). In consumer disputes the amendment adds two new reasons for this (see the provision 35 paragraph 1 letter b) of the ZŘŘ). In provision 35 paragraph 1 of the ZŘŘ as amended it is further established that a motion to stop the enforcement proceedings of an arbitral award may be submitted regardless of the period to submit a motion to cancel the arbitral award by the court (ie regardless of the three month period after delivery of the arbitral award – see above).

Speedread:

- Stricter qualification requirements for arbitrators

2. Stricter qualification requirements for arbitrators

As a further requirement to perform the function of arbitrator the amendment introduces the requirement of integrity. The requirement of integrity is applied to all arbitrators, not just to those appointed by an arbitration clause to decide consumer disputes.

The Ministry of Justice will maintain a list of arbitrators which may be appointed by an arbitration clause to decide consumer disputes. One of the requirements for inclusion in this list is (in addition to integrity and legal capacity) also a university education in law. The ZŘŘ also regulates further requirements for registration in the above list of arbitrators, as well as the reasons for deletion from the list.

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- Clarifying permanent arbitration court's regulations

3. Clarifying permanent arbitration court's regulations

As the authors of the amendment describe in the explanatory note the provision of section 13 paragraph 1 of the ZŘŘ has been amended ("*permanent arbitration courts may be established only by other statute or only in case their establishment is expressly allowed by another statute*")

Continuation

so the issue of permanent arbitration courts should be clarified now, while the current wording of this provision enabled various interpretations of this provision (eg the interpretation that a permanent arbitration court may be any subject established according to the ZRŘ – including the so called arbitration centers).

The ZRŘ as amended also prohibits using a designation which gives a false impression that it is a permanent arbitration court pursuant to the ZRŘ.

4. Conclusion

The transitional provisions of Act no. 19/2012 Coll., by which the amendment was provided, in particular state that arbitral proceedings started before this statute came into effect (ie before 1 April 2012), including consumer disputes, should be finished pursuant to the current statute.

Similarly, the validity of the arbitration agreement should be considered pursuant to the ZRŘ effective at the time of concluding the arbitration agreement.

For arbitrators appointed by an arbitration clause in consumer disputes there is a transitional period of six months from the effectiveness of Act no. 19/2012 Coll., during which they do not have to meet the condition to enter the list of arbitrators maintained by the Ministry of Justice (see above).



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