

**JOINT SESSION OF THE "CORPORATE LAW PRACTICE GROUP" AND
THE "LITIGATION, ADR, & CONTRACTS PRACTICE GROUP"**

**Friday 14 October 2016
9:00 – 13:00**

**Czech Chamber of Commerce
Na Florenci 15, Prague**

09:00 Welcome

Ladislav Zvolsky, AK Zvolsky (Czechia), **Joachim Asendorf**, v. Einem & Partner (Germany), Chair of Corporate Group, and **Thierry Clerc**, IFL Avocats (France), Chair of Litigation, ADR & Contracts Group
Overview of the program for the day.

Who is who around the table?

40 lawyers from 16 countries, including 3 Czech inhouse lawyers from VEOLIA, PPF BANKA, and CB&I.

09:30 New Czech Law on Groups of Companies

by **JUDr. Petr Cech, Ph.D, LL.M. (Köln)**, Charles University in Prague, Faculty of Law, Czech lawyer specialized in commercial and corporate law.

The new Czech law is inspired by the French concept of Rozenblum (1985).

3 possible levels of group intervention:

- Influence (art. 71: “*anyone who uses his influence in a business corporation to influence in a decisive and significant manner the behavior of the business corporation to the damage of the same shall compensate such damage unless he proves that he could have in good faith and reasonably assumed in his influencing action to be acting on an informed basis and in a justifiable interest of the influenced entity*”)
- Control (art.74: “a controlling entity can directly or indirectly exercise influence on a business corporation”)
- Group declaration (art. 79: “the existence of a concern shall be published by its members without undue delay on their websites...”).

Right of parent to give instructions to the subsidiary, even detrimental to the latter if in group’s interest (art. 81)

Withdrawal right of minority shareholders if there is a significant aggravation of the position of the members of a controlled entity.

10:00 German perspective (Groups of companies in German law)

by Joachim Asendorf, v. Einem & Partner (Germany)

I. Two kinds of companies:

1. AG („Aktiengesellschaft“)

(= German corporation according to German stock corporation act /AktG)

Executive board manages the company under their own responsibility; shareholders are not entitled to give instructions.

2. GmbH

(= limited liability company according to German GmbHG)

managing directors have to follow instructions of the shareholders unless they are unlawful.

II. Two kinds of concepts

1. Contract based group

- Right of instruction
- Duty to offset losses
- Protection of outside shareholders
 - Guaranteed dividend or
 - Compensation (upon withdrawal from the company)

2. De facto group

where dependent undertaking is an AG

- Prohibition of disadvantageous transactions caused by the dominant undertaking
- Executive measures must be in the interest of the dependent undertaking;
Otherwise: duty of compensation

where dependent undertaking is a GmbH

- Disadvantageous instructions are generally possible
- Managing director of the dependent GmbH is bound by lawful instructions of the shareholders

III. Two case studies

1. Holz Müller (1982) [BGHZ 83,122]

- Where the rights of shareholders are seriously affected, the shareholders might have unwritten competencies
- The spin-off of the most valuable assets is such a case in point

2. Bremer Vulkan (2001) [17.09.2001 - II ZR 178/99]

- The protection of a dependent GmbH is limited to

interventions of the sole shareholder that affect the assets required to maintain the nominal capital

interventions that lead to destruction of the economic basis
(Existenzvernichtung)

- Due to a central cash management contract, Bremer Vulkan was obliged to inform the daughter company about the liquidity issue
- Because of omitting information and endangering the existence of the daughter company, the board members of Bremer Vulkan were held liable and found guilty for breach of trust (Untreue, sec 266 German Criminal Code, StGB)”

11:30 Arbitration in Corporate and M&A Matters

by **JUDr. Martin MAISNER, Ph.D., MCI Arb**, arbitrator, partner in Rowan Legal (Czechia)

Report on Czech arbitration act 1984.

Your target is time.

4 months for an arbitration case: common in Czech Republic.

Other advantages of arbitration:

- Arbitrators are business people Vs judges, who are not.
- Confidentiality
- Witnesses are not important because they are not always reliable
- Choose your rules, language
- Enforceability
- NY Convention
- Arbitration benchmarking:
 - o ICC : good but costly
 - o Vienna: quick and efficient
 - o LCIA (UK): quick and efficient
 - o Hong Long: good cost and quality.

12:00 Discussion and case study (Experience in international arbitration cases)

by member of the Litigation, ADR and Contracts Group: **Valerie CREVECOEUR** (IFL Avocats – France):

A report on a case between a French commercial agent and a Spanish principal.

The contract includes an arbitration clause and the French agent sued the Spanish company before the French courts instead of the arbitration tribunal in Barcelona.

French law has regulation for international arbitration (2001).

It has been a long fight before the State courts to make the arbitration clause valid, especially to recognize that an arbitration clause shall survive termination of the contract.

Proceedings before the arbitration tribunal in Barcelona:

They have a specialist chamber in agency and distribution, a model arbitration clause, description of the arbitrators, of the proceedings, introductory request, condition to be appointed as arbitrator, contradiction, equality, procedural brevity.

Arbitration costs as an example for a case amounting to €100,000: registration fees and administration right of €11,500.

Cost allocation to the claimant: €5,900.

Cost allocation to the respondent: €5,500.

This is for 1 arbitrator; for 3 of them, this is approx. twice the above amount.

2 other examples of arbitration cases were developed regarding the arrest of a ship belonging to the State of Argentina before the court of Ghana and then the arbitration court of Hamburg.

Finally, some information was given about the biggest arbitration case recently dealt with, i.e. the YUKOS case against the Russian State, where the latter was sentenced to pay \$50 billion.

An interesting case, where lots of points were raised, i.e. applicable law, energy charter treaty, quantification of damages.

The award was rendered on 15 July 2014 by the arbitration tribunal in The Hague.

Then the state court in The Hague cancelled the award.

The case is still pending before the Dutch courts.

List of attendees attached.