Tax & Legal Newsletter
Spring 2015

Contents

Contact us

British Chamber of Commerce in Hungary

Eiffel Palace, 6th floor
1055 Budapest
Bajcsy-Zsilinszky út 78.
T +36 1 302-5200
E bcch@bcch.com
www.bcch.com

CMS Cameron McKenna LLP Hungarian Office

1053 Budapest
Károlyi utca 12.
T +36 1 483-4800
F +36 1 483-4801
www.cms-cmck.com

Partos & Noblet
in co-operation with Hogan Lovells International LLP

1051 Budapest
Vörösmarty tér 7/8
T +36 1 505 4480
F +36 1 505 4485
www.hoganlovells.com

New rules for mobile subscriber contracts

New detailed rules on subscriber contracts for electronic communications services (ECS) have been issued by the National Media and Infocommunications Authority.

The new rules are being phased in in two parts service providers will have to introduce new general terms and conditions of service by 1 September and December 2015 respectively.
The new rules contain changes from the current regulations published three years ago and are mainly intended to help consumers or, at least, to address issues arising in recent court proceedings involving service providers.

Special rules for business customers

In Hungary, subscriber contracts are more heavily regulated than in other EU countries, with around 50 pages of specific ECS regulation. Service providers are currently able to exclude most (but not all) rules unilaterally in their general terms and conditions for non-consumer (business) customers. However, under the new rules, they will only be able to exclude such rules by individual agreement with business customers, and subject to further restrictions benefiting small enterprises[1]. SMEs are also entitled to use any of the contracts available to consumers.

Changing fixed-term contracts

Perhaps the most burdensome change for service providers in the new regulations is the loss of the right to make unilateral changes to any provisions in fixed-term contracts, unless the change is to the benefit of the subscriber or is required by law or court ruling. This means that, once the regulations come into force, they can no longer to be updated to reflect technological or other changes (e.g. in administrative or background processes). This will particularly impact consumer contracts, as most are for a fixed two-year term (e.g. in return for a reduced tariff).

Transparency in net-neutrality and special offers

Service providers will now be required to give details of publish a special table giving details of internet (including mobile internet) access services.

This must now include details not only of internet speed (already required) but also of any restrictions on the use of the internet service (e.g. file/video-sharing, VoIP, chat, online TV or other applications) and any surcharges for extra data traffic.

Service providers will also be required to put all their special public offers in a separate annex of their general terms and conditions.

New termination right for mobile and satellite services

There is a new right for subscribers to terminate their contract within the first 14 days if it turns out that the service received at the (contractually) designated 'location of use' does not meet the quality promised.

Dóra Petrányi
Partner, Head of TMC
CMS Cameron McKenna LLP

Péter Homoki
Senior associate, TMC
CMS Cameron McKenna LLP

[1] a 'small enterprise' is defined in the EU Commission Recommendation 96/280/EC.), and any SMEs may opt to use any of the offerings made to consumers (at the same conditions as consumers).

Real estate aspects of the new Civil Code

As of 15 March 2014, some important changes were introduced as part of the new Civil Code for real estate, although overall property law has remained relatively stable compared to the extent of reforms taking place in other areas of law.

Superstructures and land use rights

The new Civil Code allows more flexibility for separate registration of buildings and the land on which they are erected; this is now allowed at any time, rather than (as before) only before construction of the building. The decision to separate the registrations may now be taken any time by the land owner. This has several advantages, the most important of which is the increased scope for multifunctional development where buildings with different functions can be alienated to different investors separately from each other and the land.

Where the land and building are owned separately, the building owner is entitled by law to use the land to the extent required for normal use of the building. The land and building owners may enter into an agreement to regulate their rights and obligations regarding use of the land which is to be submitted to the land registry. The land use agreement properly filed with the land register will be binding to all future owners of the land and building as well.

New land registry rules

New land registry rules were introduced into the new Civil Code (by Act CXLI of 1997 on Real Estate Registration) limiting the right to bring an action to cancel registered rights due to an invalid or incorrect registration to the period ending six month after the date of receiving the real estate register's resolution on the invalid registration.

This protection is only applicable to a registered rights holder who acquired the right in good faith, for consideration, relying on the accurateness of the land registry, from a predecessor whose registration proved to be void, but not to the right holder who acquired title on the basis of void registration himself. The protection was previously available after three years from the effective date of the entry based on void documents. Where the real estate register's resolution has not been delivered, the three years deadline for cancellation action stayed in place.

Lease agreements

Another important change under the new Civil Code affects transfers of leased property to a new owner, making both new and former owner jointly and severally liable to the tenants for the landlord's obligations under the lease agreement.
As previously, the landlord's rights and obligations under the lease agreement do not change when the leased property is transferred to a new owner after a lease agreement has been concluded.

Another change is that all securities (such as security deposit and bank guarantee) under the lease agreement will cease to exist upon transfer to the new landlord.

It is expected that law firms representing landlords will try to insert clauses into new lease agreements to exclude the joint and several liability of former and new landlord and to ensure that the securities provided by lease agreements survive any transfer and can still be executed by the new landlord.

Lapse of warranty claims

The new Civil Code allow warranty claims to be made (as a general rule) within one year from the date of performance, (for consumer contracts) within two years and (for real estate agreements) five years. Where someone has an excusable reason, for not being able enforce their warranty claim within the relevant time limit (like the defect being hidden), the claim will remain enforceable for one year after the excusable reason ceases to apply.

The new Civil Code removes the preclusive (objective) deadlines for statutory warranty claims contained in the old Civil Code resulting a potentially unlimited warranty liability for hidden defect of buildings. In addition to warranty, stricter compulsory guarantee obligations are still effective under separate legislation for residential buildings and certain special superstructures.

Other important changes to property law

On 1 May 2014, Act CXXII of 2013 on the transfer of agricultural lands came fully into force, introducing stricter rules than previously on the acquisition of agricultural lands and also introducing a formal approval procedure by the competent real estate register for transfers of agricultural land and for the establishment of use rights related to agricultural land.
The new Government Decree No. 251/2014 has also introduced important changes to the acquisition of real estate (other than agricultural and forestry land) by non-EU citizens.

dr. Gábor Czike
Partner, Head of Real Estate
CMS Cameron McKenna LLP

Oil and Gas Concessions in Hungary

2015 Bid Round

The third and latest invitation to tender for concessions was finally announced by the Hungarian Ministry of National Development on 16 April 2015 and is due to close on 23 and 24 September 2015 **(2015 Bid Round)**.

What's on offer?

The 2015 Bid Round is the largest to date in terms of blocks being offered as it has made available a total of 10 blocks, comprising:

- 1 block for brown coal (Dubicsány i. — szén mining site)
- 9 blocks for oil & gas exploration and production (Mogyoród, Püspökladány, Nagykáta, Ócsa, Sellye, Dány, Northern area of Battonya-pusztaföldvár, Berettyóújfalu and Lakócsa).

How do things look?

At a recent meeting held in Budapest, Zoltan Horvath – the Head of Department of Energy Security in the Ministry of National Development - gave a short presentation about the previous bid round as well as an overview of the 2015 Bid Round, during which he indicated that the government had listened to the feedback provided by industry participants and had made some changes. However, these were relatively modest.

The availability of relevant exploration & production (E&P) data is said to have been addressed by new provisions in the mining act, but it remains to be seen if its practical application will lead to such data being made available as required. Certain market participants are sceptical, but it would be nice to see them being proven wrong.

There has also been a re-organisation of the district mining authorities, with their merging into the government apparatus. Nobody is yet certain how the new structure will work in practice, i.e. will it be more streamlined or less so and will the relevant expertise and experience of mining captains remain as accessible, but the idea is to try to ensure a more cohesive approach is taken.

The government's view seems to be that the previous round had been a success, perhaps judging on the basis that all the winning bidders eventually signed their respective concession contracts, and they appeared to be positive for the current round.
A consensus view of industry players seems to be that the general bid parameters remain challenging, taking into account the relative lack of recent commercial discoveries, the continuing depressed oil price and the applicable fiscal terms.

That is not to say that operators are not willing to participate, as may be concluded form the "success" of the last round, but when more detailed consideration is undertaken of the committed work programs (i.e. what activities they will actually perform and the ensuing results), then it may be that a different picture emerges, particularly against a background where old fields may be exploitable with the benefit of new technologies, but only if the economics are right.

Will the 2015 Bid Round be a success?

While we will have to wait until October or November to learn the outcome of the 2015 Bid Round, we believe that it may become apparent sooner if there is sufficient interest, and this is likely to be determined in part by the timely availability of E&P data to help bidders.

Against this background, global trends indicate that there is no near term likelihood of a meaningful increase in oil prices, notwithstanding its recent strengthening. Many commentators foresee a continued depressed oil price in the near term, but nobody is really sure if the price is going up or down, and more importantly how steep the curve will be in either direction!

Whilst there are operators with capex budgets to accommodate their proposed exploration activities, there are an increasing number of smaller players who are fast running out of cash, with very scarce opportunities for them to tap the markets for funds.

Based on experience to date, we expect to see a continued interest in the Hungarian market by some of the participants already present, but it remains to be seen if they will be as active in bidding across all of the available blocks, as well as if new entrants are tempted to participate. Talk amongst previous winning bidders indicates that they are each submitting similar bid terms, with no overbidding on any particular one block, which indicates a similar appetite to risk and economic modelling.

We anticipate existing concession holders may soon start looking to consolidate some of their existing positions, and in the not too distant future, we would expect them to start looking to rebalance their portfolios and seeking risk-sharing partners, with a consequential pick in acquisition & disposal (A&D) activities.

It is clear that the other constituents in the oil industry, namely oil service contractors, are having a hard time, with limited opportunities available for work, and downward price pressure being applied by operators.

Not only financial terms are being challenged, but the legal terms and conditions being imposed are generally favouring operators – a sure indicator that the market is soft. One only has to be aware of some of the recent headlines surrounding some of the major service contractors, who are letting tens of thousands of people off their books, as well as the dramatic fall in rig counts, to appreciate the significance of downturn.

Over and above general market conditions, the ongoing energy geo-political issues remain a concern, albeit with less media coverage at present (summer is coming!). Nevertheless, nothing has really changed, except that Ukraine has recently ceased imports from the EU (Hungary and Slovakia) and turned back to Russia due to the falling oil price and hence cheaper gas (as the price is linked to oil).

Talk about Turkstream replacing South Stream, Greece as a hub or entry point into EU (although it still has some other pressing issues to resolve) and Bulgaria also looking to get involved, all add up to continuing uncertainty as to what will change and when, or even if it will change in any meaningful way, given that the infrastructure projects required to provide alternative supplies will take a considerable amount of money and time to complete.

Notwithstanding these challenges, our view is that whilst operators remain cautious in their exposure to new exploration activities, there are those who believe there is still sufficient potential for them to find commercial production opportunities in Hungary, which will have a positive impact on the 2015 Bid Round. To coin an industry phrase: *jó szerencsét.*

Steven Conybeare
Conybeare Solicitors, London & Budapest

Wrongful trading under Hungarian law

Hungarian law generally requires from executive officers of a company to operate and manage the company with due care as expected from persons in such positions. Nevertheless, there is a very special situation, when such requirement is changed: in the event of threatening insolvency, Hungarian insolvency law requires that the focus is shifted primarily to the interest of the creditors. The rules on these special requirements are called the wrongful trading rules, which we will address briefly below.

Concept of threatening insolvency

Threatening insolvency occurs when the director or shadow director knew or should have reasonably foreseen that the company would be unable to cover its debts when they fall due. In practice, 'threatening insolvency' is seen by Hungarian courts as rather a cash-flow test than a balance sheet test, which means that a threatening insolvency may occur in case the illiquidity of the company is reasonably foreseeable irrespective of a potential positive balance sheet.

Directors and shadow directors

The obligation to act in the interest of the creditors once a threatening insolvency situation occurs is applicable to all directors of the company who occupied such position in the preceding three years prior to the commencement of the liquidation. In addition, such obligation is also applicable to so-called "shadow directors". Who are these people? While the concept of director is obviously clearly determined under Hungarian law, no such definition is provided for the concept of 'shadow director'. In light of limited Hungarian (and more extended foreign) court practice, a "shadow director" is a person, other than the executive officers of a company, who has power to significantly influence the decision-making of a company. The court practice also generally requires (especially in common law countries) that in order for a "shadow director" to emerge

- the influence shall be permanent,
- the influence shall not necessarily cover the whole operation of the company,
- the liability only occur if the company in fact acts in line with the instructions of the shadow director,
- the shadow director may not necessarily stay in the „shadow" (ie this may apply to a shareholder of a company having dominant influence or an executive employee, or even a private investor who, based on an investment agreement, is entitled to exercise control over the management of a company)

Liability and claims

Non-compliance with the obligation to operate the company in the best interest of the creditors may result in the personal liability of a director or a shadow director, however, consequences may be applied only if the liquidation of the company is finally ordered by the court and the wrongful trading behaviour proved to be resulted in the decrease of the company's assets.

Wrongful trading claims can be asserted in a two-step proceeding. During the liquidation proceeding the creditors may file a declaratory action for establishing that the directors breached their obligation. Once the liquidation procedure is concluded the creditors with unsatisfied claims may file an action requiring the directors to satisfy their claims.

What directors could do?

There is no statutory guidance as to what a director should precisely do to avoid wrongful trading behaviour. However, there are certain actions that may reduce risk associated with a threatening insolvency situation. These are, for e.g.:

- due monitoring and introduction of well-established and documented decision making mechanism
- using external advisors
- insurance could make the risk more calculable
- applying for bankruptcy protection if the illiquidity seems inevitable

Mariann Erdei
Senior Associate
Oppenheim

Recent changes regarding arbitration

Within the legal framework for the Paks II nuclear power plant development, the Hungarian Parliament has annulled the general restriction on arbitration in the case of Hungarian national assets, which had been heavily criticised by legal practitioners and professional organisations since its introduction at the beginning of 2012.

Background

In accordance with the Fundamental Law of Hungary, requirements in relation to the protection of national assets and their prudent management are set out in Act CXCVI of 2011 on National Assets ("Act on National Assets"), which entered into force on 1 January 2012.

The Act on National Assets required that in the case of contracts relating to national assets located in the territory of Hungary, Hungarian law would be the mandatory governing law, Hungarian had to be the governing language and the Hungarian ordinary courts would have jurisdiction in relation to disputes. The same provision explicitly excluded the jurisdiction of arbitration courts for such matters. In accordance with the Act on National Assets, Act LXXI of 1994 on Arbitration ("Act on Arbitration") was amended accordingly to include the above restriction in connection with national assets.

The above restriction was heavily criticised by legal practitioners and professional organisations and the related legislation was challenged in front of the Constitutional Court of Hungary, which, in its decision no. 14/2013 (VI.17.) AB, rejected the motion effectively bringing the ongoing debate to an end.

Reform

On 11 March 2015, an omnibus act was published in the Hungarian Gazette which amended numerous acts in connection with the Paks II Nuclear Power Plant Development ("Paks II Act"). With effect from 19 March 2015, the Paks II Act amended the Act on National Assets with respect to the above restriction in relation to the jurisdiction of arbitration courts in relation to national assets. While the amendments do not change the requirements in respect of governing law, language and the jurisdiction of the Hungarian courts for civil law contracts with the subject of national assets located in the territory of Hungary, however, the Paks II Act provides that the restriction shall not affect the parties' right to submit their dispute to arbitration in Hungary.

The Paks II Act also introduces a general exception from these restrictions in the case where international conventions allow for arbitration. Such general exception applies with retroactive effect, i.e. before the entering into force of the Paks II Act (hence covering the Russian-Hungarian Intergovernmental Treaty which deals with the Paks II nuclear power plant development). The Act on Arbitration has been amended accordingly.

Conclusions

Unfortunately, the new regime does leave room for interpretation. The reference to the parties' right to arbitration in Hungary under the Act on National Assets and the Act on Arbitration is not entirely clear. It cannot be ruled out that the legislator intended to maintain the restriction with the wording, and the sole new element of the reform is the introduction of the general exceptions in the case of international conventions, as pointed out by the representatives of the legislator and reflected by the official reasoning of the Paks II Act, which is otherwise silent on the amended wording in relation to the parties' right to agree on arbitration in Hungary. In this regard, it would be useful for the market if some official guidance is issued on this as this matter is unlikely to be clarified through practice in the future.

Dr. László Partos
Partner
Partos & Noblet in cooperation with Hogan Lovells International LLP

dr. Tamás Halmos
Associate
Partos & Noblet in cooperation with Hogan Lovells International LLP

Update on law restricting Sunday shopping

Act CII of 2014 in relation to the restriction of opening hours of stores, in particular on Sundays, (the "Act") has been in effect since 15 March 2015. Following the entry into effect of the Act, a number of amendments have been passed in relation to the Act and to related laws including as follows.

a) An amendment to Act CLXIV of 2005 on Trading was adopted by Parliament setting out that any store pursuing both retail and wholesale trading at the same location and at the same time, shall be deemed as a store pursuing retail trading for the purposes of the Act, and thus, falls under the general restriction under the Act. In addition, any store operating at a petrol station but not selling petrol shall be deemed as a store pursuing retail trading for the purposes of the Act and thus, falls under the general restriction under the Act. Such amendment affects several petrol station operators, since it is common practice that petrol stations have independent store operators not selling petrol. The above amendments are effective from 27 March 2015.

b) An amendment to the Act was adopted by Parliament on 28 April 2015, according to which world heritage areas no longer qualify as exceptions from the general restriction, and therefore, stores located in world heritage areas fall under the general restriction as well. Such areas include, for example, the area of Tokaj and the downtown area of Budapest. The amendment sets out that the Act does not apply to vending machines, and has also extended the generally permitted opening hours of stores so that stores can now open from 4:30 am rather than 6am. The amendment is effective from 9 May 2015.

The above is a clear indication that the Act remains subject to continuous changes on the basis of market reactions and experience following the entry into effect of the Act and further changes can still be expected.

Christopher Noblet
Partner
Partos & Noblet in cooperation with Hogan Lovells International LLP

dr Dóra Szilas
Associate
Partos & Noblet in cooperation with Hogan Lovells International LLP

The Electronic Road Freight Control System has been launched

Hungary's new Electronic Road Freight Control System ('EKAER') went live in early March. Upon its implementation, it became clear that the legislators had recognised and acknowledged some of the issues and suggestions raised by market operators, leading to a substantial revision of the relevant draft decree before its promulgation. The wording of the new decree, as entered into force, was made stricter and/or more precise concerning certain transactions, to eliminate loopholes that would allow circumventing the system. In addition, a number of rules facilitating easier administration will be introduced in stages.

The EKAER creates additional burdens for businesses in terms of correctly applying the decree's provisions to specific transactions, and even more so in regard to requesting EKAER numbers. For complex chain transactions, determining which entity should be regarded as the party arranging the transport or whether the transport is deemed to be interrupted for VAT purposes by a specific logistics activity will always be a question.

In many cases, solving these complex questions actually requires interpreting specific provisions of the VAT Act, rather than those of the EKAER decree. The primary legislative aim of the decree is, obviously, combatting VAT fraud. Nevertheless, it also affects taxpayers acting in good faith who, lacking full awareness of every provision of the VAT Act, commit unintentional errors and thereby expose themselves to a potential tax penalty for unpaid VAT. With the introduction of the EKAER, many taxpayers are now reviewing their transactions to ensure compliance with the relevant decree, which may also entail changing the VAT treatment of the transactions concerned.

The most significant administrative aspect of the new system is the process of requesting EKAER numbers, which requires a lot of data for any transaction. For a few transactions, the process represents a manageable burden. For large volumes, however, hiring new staff or automating the process is inevitable. The latter option represents a one-time expense, after which the number of transactions subject to EKAER reporting can increase without limitation, since it makes no difference for an automated solution whether individual EKAER numbers are requested for one hundred or one thousand transactions. The situation, however, is different if requesting EKAER numbers manually, which involves a high risk of making clerical errors as well as internal processes becoming unpredictable due to staff fluctuation.

There are a number of applications already on the market offering a partially or fully automated solution for requesting EKAER numbers. PwC has developed a fully-automated real-time application that is capable of requesting and archiving up to several hundred EKAER numbers at a time. In our view, the main question now is not the level of automating EKAER-related administrative tasks, but the extent to which businesses use the opportunity to definitively address certain issues brought to light by the need to comply with the EKAER rules.

Gábor Farkas
Manager, PwC Hungary
Tax and Legal Services

Flexibility in managing the minimum capital requirement

The new Civil Code (Act V of 2013) requires all limited liability companies to have a minimum registered capital of HUF 3,000,000. For companies founded with the previous minimum of HUF 500,000 applicable to the period from 1 September 2007 to 14 March 2014, the change implies an obligatory capital increase to the new minimum amount until 15 March 2016 at the latest.

The increase is likely to create challenges to both smaller entities because of shortage of funds and larger ones due to the administrative burden involved in executing corporate changes. However, it can be handled in several ways and provides companies with opportunities to review their capital structures, remedy negative equity positions or achieve thin capitalisation optimisation.

The capital increase can of course be managed by a simple cash payment. Thanks to the Act's dispositive rules, capital payments can be made in several instalments with no prescribed deadline. Nevertheless, setting a payment deadline in the articles of association is encouraged. More importantly, a dividend allocation is not allowed when unpaid registered capital exists.

The Act also offers the option to make the increase through a contribution in-kind, either in the form of fixed assets - for which a value certification is needed, or made up of intercompany loans from the parent or other intragroup companies.

Multinational companies whose activity is financed by intragroup loans may find it financially efficient to convert part of these loans to equity. Keeping in mind the usual length of internal approvals for treasury transactions at such companies, this option could definitely be a more acceptable solution to meet the minimum requirements. Loans received from the parent company are always agreed and confirmed by both parties, and with this the founder's receivable when contributed to a company that is, and is expected, to be a going concern for the foreseeable future, qualifies as a contributable asset from both legal and taxation perspectives.

Conversion still requires consideration especially in cases where the loan is not from the founder(s) but from other intragroup companies and where the loan's currency is different from the bookkeeping currency.

In the first case, thought should be given to the route by which the loan can be allocated to the parent in order to make it suitable for contribution, or, where this is not possible, whether it makes sense to involve the owner of the loan receivable in the company structure. Difference in currencies can be resolved by a before-capital-increase conversion of the loan to the bookkeeping currency, so the company can ensure that the capital increase can happen in the required currency and in the exact amount.

The number of possibilities for managing capital increase is broad, as is the number of potential issues that might arise. We highly recommend companies involve their accountants, lawyers and tax advisors in this process in order to reach an optimal result.

Ágnes Bartha
TMF Group