

VK&t

NEWSLETTER NO. 7 – RECODIFICATION

Dear clients,

in this newsletter we shall provide you with the summary of fundamental changes and recommendations concerning the area of contract law and execution of contracts introduced by the new Civil Code (the „NCC“).

The new contractual law, which had been incorporated in one legal code, is based on the following fundamental principles:

Principle of Autonomous Will

According to this principle the parties may diverge from the statutory provisions to suit their needs, i.e. the statutory provisions will apply only as subsidiary.

Less Formalism

This principle brings greater freedom of choice to the contractual parties to decide what form of contract they will use, unless the law or previous agreement of the parties stipulates otherwise (see below).

Enforcement of Relative Invalidity over Absolute Invalidity

The following consequences result from the above specified principle:

- If the cause for the invalidity is only in the illegal determination of quantity, time, territorial or other extent, the court can change the extent so that it corresponds to the rightful arrangement of the rights and obligations of the parties and remedy the cause of the invalidity;

- Failure to comply with the agreed form of contract can be objected only till the commencement with the performance of the respective contract. By the performance the absence of the agreed form of contract is remedied;
- Provided the contract is not clear and understandable and its content cannot be determined by interpretation of the contract, the acts of the parties will be considered as so called apparent legal acts (*zdánlivé právní jednání*). The NCC regulates the possibility for the manifestation of will (particularly the contract offer and its acceptance) to be later clarified by the parties. In such case the defectiveness of the legal acts will not be taken into consideration and it will be considered as legally perfect from the start of the contractual negotiations.

Protection of Weaker Party

The NCC provides for protection of weaker party according to specific situation and circumstances of the contractual relation. This principle manifests itself mainly by the following:

- General ban on misus of economical standing of the entrepreneur against weaker party as weaker party is always consider the contractual party which contracts in business relations outside the scope of its own business activities (Section 433 NCC);
- Consumers protection (Section 1810 *et seq.* NCC);
- Adhesion contracts statutory provisions (Section 1798 *et seq.* NCC);
- Disproportionate abbreviation and usury statutory provisions.

See below for more details with respect to adhesion contract and consumer protection.

Pre-contractual Notification Obligation

Prior to entering into the contract the parties have statutory obligation to truthfully inform each other of all factual and legal circumstances that are significant for entering into a valid contract. Generally the parties should inform each other of all information that could cause the other party to end the contractual negotiations or threaten the performance of the contract and that are therefore of major importance of the party, which then expects to be communicated to. Failure to disclose such information may be considered as wrongful trading and give right to the damage party to seek compensation of damages.

Pre-contractual Liability

Sometimes one of the parties may pretend to commence contractual negotiations in order to get information from the other party or buy some time or for other reasons without really wanting to close the deal and enter into the contract. It may also happen that way into the contractual negotiations one of the party will terminate the negotiations without any justifiable reason and refuses to enter into the contract. This situations are addressed by the provisions of 1728 and 1729 NCC pursuant to which each party may lead freely contractual negotiations and shall not be liable for not entering into the contract, unless it was the intention of the party to do so upon the commencement of the contractual negotiations or during the contractual negotiations. If the parties advance in their contractual negotiations to the point that it appears highly likely that they will enter into the contract, the party that terminates the contractual negotiations without

justifiable reasons despite expectations of the other party that the contract will be entered into, will be considered as party acting dishonestly and will be obliged to compensate the other party damages. The amount of compensation will be limited to the amount equalling to the highest extent of loss from failure to enter into the contract in similar cases.

Note that part of the professional public believes that the possible compensation will be not only costs of the harmed party incurred in relation to the contract negotiations (such as travel and administrative costs, cost for lost time, etc.) and the loss from the failure to enter the contract in similar cases, but also the loss of profit for the actual contract that had not been entered into.

Confidentiality Duty

The parties may keep records of information disclosed to them during the course of the contractual negotiations, even if the actual contract will not be concluded. Any confidential information should be protected from their misuse or illegal disclosure. Breach of this obligation will lead to the obligation of the relevant party to return any enrichment gained as a result of such breach.

As opposed to the old law, the new statutory protection is given to all information of confidential nature regardless of the fact if such information had been marked as such by the party it belongs to. Question which information will be considered as confidential, will be subject to judicature. It is therefore recommended to mark any disclosed information during the contractual negotiations as confidential.

Contract Interpretation

The parties may have different interpretation of the contract or other legal acts (defect claim, testament). Any legal acts as well as any contract shall be interpreted according to the intentions of the acting party, if these have been known or should have been known to the other party. The interpretation should also reflect any custom practice of the parties, as well as any pre or post contractual negotiations or correspondence of the parties. Custom practice applicable to the relevant area or type of business will also apply unless these are omitted by the contractual provisions or the law, i.e. unless the parties agree otherwise, the generally applicable custom practice will prevail over non-mandatory statutory provisions. The parties shall take this into consideration during their contract negotiations.

Pursuant to Section 1725 NCC the contract is deemed to be executed when the parties agree upon its content. However, the contract may be deemed as executed also when the parties do not have agreement about all aspects of their contractual relation, provided it can be reasonably expected that they would have executed the contract without the agreement about such aspects of their contractual relations. The above rule will not apply in contracts when one of the parties will clearly stipulate during the contract negotiations that execution of the contract is subject to agreement of the parties about individual terms (such as price, place and date of delivery). Therefore it is recommended to stipulate which provisions/terms of the contract the party sees as crucial for the contract and communicate these to the other party.

In practice the contracts are being executed in different manners. Generally speaking we have a contract offer send to one party and its acceptance by the other party. The contract offer should include mandatory provisions of the contract. Next to the mandatory provisions, the contract offer may also include number of different contract terms and conditions which are important to the party making the offer. The contract offer should be precise enough so the other party will be able to accept it by simple consent. If the party making the contract offer will not stipulate the term during which it will be valid and binding, the contract offer send by email or mail will be considered as valid and binding for a period corresponding to the nature and complexity of the contract. Upon the receipt of the acceptance, the contract is deemed to be executed. Silence or inactivity are not considered as contract offer acceptance. Reply to contract offer which includes reservations, additional provisions, limitations or other changes, is in principle considered as rejection of the

offer and new contractual offer (contra proposal). Newly, the supplement or deviation that does not significantly change the terms and conditions of the offer is considered as supplement or deviation that does not significantly change the terms and conditions of the offer acceptance, as long as the offeror does not reject this acceptance without unnecessary delay. Any deviations/amendments of the offer regarding price, quality or volume of goods, place and time of delivery, liability, jurisdiction, will be in most cases considered as significant. The above rule of acceptance can be disapplied in the offer or by any other means. Even late acceptance of offer can have the effect of timely acceptance provided the offer will notify the other party that he considers the acceptance as timely or if he observes the offer (provides for the relevant performance).

If the parties intent to send out the contract offer as non-binding and revocable, it is recommended to expressly state that is such offer.

Offer to deliver goods or services for certain price communicated to customer by advertisement, catalogue or goods display is deemed to be offer subject to availability unless the offeror provides otherwise.

The parties may also agree on different way of contract execution, for example by framework agreement on the basis of which individual purchase contracts or other types of contracts are being executed.

In business practice it is common to lead oral negotiation about the terms of the contract. After such negotiations, one of the parties may send to the other party confirmation letter/email, in which it will summarise the agreed contract terms as it is convinced they have been agreed (business confirmation letter). The NCC stipulates that if one of the parties conducts business in this manner based on the conviction that its confirmation faithfully retains the contents of the contract, the contract with the contents expressed in the confirmation shall be valid, even if it constituted and demonstrated an insignificant deviation from the actually agreed contents of the contract. Nevertheless, the other party has the right to reject these deviations.

Novelty introduced by NCC is the above described rule that a contract may be executed even if the confirmation of an offer includes deviations or amendments, as long these do not change the original terms of the contract offer significantly and such amended offer is not rejected by the addressee without any undue delay. Therefore in practice it is recommended to react to any reply to an offer without any undue delay and notify the other party about acceptance/rejection of any modified terms.

Novelty are also possible legal effects of business confirmation letters and we also recommend to react to these as soon as practicable, especially if the terms of the letter do not correspond to the agreed terms.

As specified above, parties are allowed to choose preferred form for their legal actions, unless prior agreement or law binds them to comply with certain form. This means that it is possible in general to execute contracts in oral form and also other legal actions (such as making warranty claims) can be executed orally. Contracts, for which the law does not stipulate written form may be amended orally even if executed in written form. However if a contract stipulates that it can be amended or modified only in written form, the parties are obliged to comply with the required form, otherwise such acts will be deemed as invalid.

The parties may also agree orally on provisions addressing contractual penalty, assignment of receivables, assumption of warranty or debt, remission of debts, etc. It is therefore recommended to maintain necessary level of caution and care in information disclosed and communicated to other party.

Oral contract can be also problematic in terms of proving its content in case of a dispute.

Opinion as to whether a simple email can be seen as written form of contract is not generally accepted; the main reason is the argument that such email is usually missing the specification of the contracting parties and signatures.

The NCC stipulates mandatory written form for the following types of legal acts:

- clausular written form—§ 1758 NCC, i.e. if one party stipulates its intention to execute the contract in written form, it is presumed that it does not wish to be bind by oral agreement,
- general power of attorney or power of attorney for acts which require mandatory written form (§ 441 (2) NCC),
- shifting or settlement provisions, if original obligation had been agreed in written form (§ 1906 NCC),
- declaration of guarantor (§ 2018 NCC),
- commercial agency contracts (§ 2483 (2) NCC).

Part of the content of the contract may be made by reference to general terms and conditions, provided these have been communicated to the parties in contract offer or are known to them. In consumer contracts, the general terms and conditions have to always be attached to the contract offer or a declaration of the consumer that he had been acquainted with the general terms and conditions must be obtained. In case of contracts among entrepreneurs, the general terms and conditions may be incorporated to the contract by way of reference to general terms and conditions of specific professional organization.

Any contractual deviations from the general terms and conditions shall take precedent. It must be, however, noted that other statutory principles will also apply, in particular statutory provision concerning the protection of weaker party (consumer) (§ 1810 *et seq.* NCC).

Generally speaking the NCC stipulates that any provisions of general terms and conditions which cannot be reasonably expected by the other party are deemed as legally ineffective, unless the party expressed its consent with such provisions. Such provisions may concern provision limiting or excluding liability of one contractual party. When examining the admissibility of these provisions, you must review not just content of the provisions, but also the method how these have been communicated to the other party (for example size of letter fond, placement in the actual text of the contract, etc.).

NCC newly allows the parties, in case of contracts executed with higher number of persons and when the contract performance is long-term and repetitive, to agree in the contract on the possibility to unilaterally change the general terms and conditions, if it is obvious upon the execution of the contract that these will need to be amended at later date. The condition for the applicability of such provision is that the other party will be able to reject the proposed changes and withdraw from the contract (so called ultimate amendment of contract).

Reason for change of general terms and conditions cannot be any circumstances which should have been presumed by the party that is using its own general terms and conditions upon the time of the execution of the contract; the above shall also apply to any change in personal or economic status of the parties—unless the parties agree otherwise.

Adhesion contracts are contracts which content is not result of mutual negotiations of the parties, but is set by one of the parties, while the other party may only accept or reject the contract as such—i.e. one of the contracting parties may not influence in any way the terms of the contract. Such contract is usually in the form of contract form.

As the adhesion contract can lead to imbalance in the rights and obligations of the parties, the NCC regulates the issue in specific provisions § 1799 and § 1800; these rules cannot be disapplied or modified by the parties, unless both parties are in the position of entrepreneurs. The rules are as follows:

- if a contract provision refers to terms that are outside the main body of the contract (such as general terms and conditions), such provision will be valid only if the weaker party had fully acknowledged the meaning of such provision or if it can be proven that the party must have known the meaning of such provision. The above is judged against the intellect of average person,
- if a contract provision (in or outside the main body of the contact) can be read only with great difficulties or is drafted in a language that is not understandable to the intellect of average person, such provision will be considered valid only in cases when it will not cause any harm to the weaker party or if it can be proven that the content of such provision had been well explained to the weaker party. This rule applies mostly to text, which is written with small fond or in colour which is difficult to read,

- if a contract provision (in or outside the main body of the contract) is not understandable to the intellect of average person,
- if a contract provision (in or outside the main body of the contract) is especially disadvantageous without any justifiable reason. Such as provisions when the contract diverts from generally applicable terms and conditions applied in similar contracts.

NCC has rules for execution of contracts between entrepreneurs (Section 420 and 421) and consumer (Section 419) and their content and mandatory provisions. The new law extends the original statutory regulations and provides for broader scope of rights of the consumer.

The entrepreneurs have wide duty of notification (Section 1811 NCC), which must be observed prior to contract execution or prior to binding offer.

Section 1814 NCC lists, by way of example, forbidden contractual provisions which may lead to gross imbalance of rights and obligations with the consumer being the protected party, such as limitation or exclusion of rights of the consumer with respect to warranty or compensation of damages, unilateral withdrawal right of the entrepreneur, rights of the entrepreneur to unilaterally change contractual terms and conditions, right of the entrepreneur to increase contract price without the right of the consumer to withdraw from the contract, etc. If such provisions (or any similar provisions) will be included in the contract, such contractual provisions will not have any legal effect unless used by the consumer himself (Section 1815).

Section 1818 expressly states the right of the consumer to withdraw from the contract without any given reason in the statutory provided period. The withdrawal will be effective if sent to the entrepreneur within the statutory given period; this is exemption from the generally applicable rule under Section 570 NCC that any manifestation of will can cause legal effect when delivered/received by the addressed party.

Sections 1820–1867 NCC regulate:

- contracts executed by means of distant communication (so called distant contracts) and
- contracts executed outside the place of general business,

The above contract have as the primary mean of protection of the consumer the right of the consumer to withdraw from the contract within 14 days statutory period without any given reason. Section 1837 NCC furthermore includes taxative list of specific performances for which the above specified withdrawal right cannot be applied—such as fast selling goods or good with protective packaging, etc. If the consumer withdraws from the contract, the entrepreneur shall return to the consumer the whole price, including delivery costs. The entrepreneur shall also return to the consumer costs incurred in relation to the return of the goods, unless the consumer had been notified prior to the execution of the contract that such costs will be borne by him.

Sections 1822 and 1844 NCC lay down the principle by which the information notified prior to the execution of contract are binding, i.e. the actual contract must include this information and must be compliant with the information notified.

Statutory protection of the consumer may be further find in Sections 1838 and 1851, which regulate unordered performances. Pursuant to the above said statutory provisions, the consumer is not obliged to return any such unordered goods or services or notify the entrepreneur in any way. The consumer is considered as authorised abator and may act as an legitimate owner.

Advance performance (*závdavek*) is a legal institute that had been omitted from the Czech legal system more than 50 years ago. The advance performance must be differentiated from any deposit, security payments or gratuity. Advance performance may be monetary or in-kind performance handed over to the other party prior to the execution of the contract (similar to deposit) or during the execution of the contract. The advance performance has the following role:

- a) serves as an evidence for execution of the contract (if done orally),
- b) serves as a security—the advance performance can be kept by the other party if the party that provided the advance performance failed to fulfil its contractual obligations,
- c) serves as a penalty—if the party that accepted the advance performance fails to fulfil its obligations under the contract, the other party may:
 - (i) demand the return of the advance performance together with once the multiple of what had been provided;
 - (ii) demand the performance of the contract;
 - (iii) demand compensation of damages.

We believe that the above summary will allow you better orientation in the new law. We are available for all your requests for any additional information.

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