

REVOLUTION IN CIVIL LAW 2014: PART 4 WHAT WILL CHANGE IN CONTRACT LAW?



The New Civil Code ("**NCC**") will introduce many fundamental changes to contract law, devoting more than a thousand provisions to the subject. In general the legal regulations will become less formalised, characterised by greater contractual flexibility, reflecting for example the principle of autonomous will (a crucial principle of the NCC), and enforcement of relative invalidity over absolute invalidity. From 1 January 2014 contractual relations and relations between entrepreneurs will be essentially governed by the NCC, superseding the fragmentation of current contract law. In the following overview we present a list of the most important conceptual and tangible changes in the general parts of contract law and certain related areas.

1. Powers of Attorney

- 1.1 Firstly it is important to note the **change in legislation regarding contractual representation. If legal proceedings require a certain form, any power of attorney is must be granted in the same form.** This implies that **if an authorised agent is to represent acts requiring, for instance, the form of a notarial deed, the power of attorney must also take the form of a notarial deed.**
- 1.2 Legislators apparently did not think through the practical consequences of such a requirement. In particular for foreign entities (such as foreign shareholders in Czech companies) which can lead not only to increased costs, but also to practical difficulties in granting powers of attorney as of 2014 for negotiations in the Czech Republic, which thus far have been relatively uncomplicated.
- 1.3 For this reason we recommend **granting powers of attorney for legal proceedings that require the form of a notarial deed** (in particular certain corporate affairs, general meetings, etc.) **right away**, i.e. no later than **December 31, 2013** (under the current system with signatures certified to the greatest extent possible).
- 1.4 It is now also **possible to agree on the reasons for revoking a power of attorney** (this does not apply for particularly serious reasons for such revocation); **representation by a legal entity** may also be practical. In such a case the principal is represented by the statutory body of the legal entity (if, for example, each director acts independently, then by each individual director) or another person determined by the statutory body, as the case may be.

2. Option of Contracts Diverging from the Wording of the Law

- 2.1 **The provisions of contract law essentially will be non-mandatory**, meaning that in the vast majority of cases the parties will be able to diverge from statutory wording. Relationships where there is an interest in protecting the weaker party (e.g. a minor) or contracts with consumers are exceptions to this principle.

3. Invalidity of Contractual Negotiations

- 3.1 **Contractual negotiations will have to be perceived as valid rather than as invalid.** Contractual negotiations will be invalid only if the invalidity affects the entitled party (i.e. relative invalidity), whereas **they will be absolutely invalid only in exceptional cases**, such as obvious conflict with good morals, contradiction of the law, clear breach of public order, or pledges for performance that from the onset are impossible.

- 3.2 This last principle is manifested in several other new features in connection with the remedy of several defects. **If the reason 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.** The court also shall consider whether the party would have acceded to the contractual negotiations had it recognised the invalidity in time.

- 3.3 If the contract is indefinite and intelligible and its contents cannot be determined even following exposition, only ostensible contractual negotiations shall be relevant, which shall not be taken into consideration. The ambiguity will have to be attributed to the detriment of whoever first used the term. **The NCC now regulates the possibility for the manifestation of will (e.g. offer to enter into a contract or its acceptance) to be subsequently clarified. In such a case its defectiveness will not be taken into consideration and it will be taken into account as though it was there from the start of the contractual negotiations.**

- 3.4 **The NCC also permits the remedy of defects in the form of an agreement as long as it is not concluded in a form agreed between the parties or stipulated by law**, which would lead to its relative invalidity. **It can be objected that the contract is invalid only if the contract was not performed.**

4. Principle of Informality

- 4.1 **Free choice between written and oral forms of contracts**

With the exceptions stipulated by contract **or by law** (written form shall remain for example when establishing, transferring or cancelling rights to real property) , **especially in obligatory law**, gives broader space for the exercise of the free will

of the parties. If the parties decide to enter into a written contract, although the law does not require the given type of contract to be in writing, the contents can be changed orally as long as this is not excluded by agreement of the parties.

4.2 Business Confirmation Letter

Under the NCC, **after entering into an oral contract the parties can subsequently confirm the contents of the contract in writing**, which has a special significance primarily in relations between entrepreneurs (an analogous practice in Germany is the so-called 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**.

4.3 Factual Acceptance of Contracts

The NCC also changes some of the rules for the creation of a pledge and facilitates the acceptance of offers to enter into silent agreements. **Although silence or inaction will continue not to be accepted by and in itself, the person for whom the contract offer is intended can accept it along with a supplement or deviation that does not significantly change the terms and conditions of the offer, as long as the offeror does not reject this acceptance without unnecessary delay** (this can be done in advance already in the offer). The NCC also **facilitates so-called factual acceptance of contracts**. If it follows from the contents of the offer, the practice of the contracting parties or usual conduct, **the recipient of the offer does not have to notify the offeror of its consent to the offer, but shall express consent by observing the offer**, for example by providing or accepting performance. Furthermore, it shall apply that late acceptance of the offer shall have the effect of timely acceptance, as long as the offeror starts to act in accordance with the offer.

4.4 Electronic Negotiations Considered Written Form

Written form of negotiations will be maintained even in negotiations carried out by **electronic means** or other technology so long as the contents are recorded and the people involved in the negotiations are identified. **The electronic archive of contractual negotiations will have an information value if entries are made systematically and regularly and it is protected against intervention**.

5. Pre-contract obligation

5.1 The NCC expressly introduces a **pre-contract notification obligation**, which

consists of the obligation of the parties to truthfully inform each other of all factual and legal circumstances that are significant for entering into a valid contract. **Otherwise they will be obliged to pay the other party resulting damages.**

- 5.2 Another novelty is **fault in conclusion of a contract (*culpa in contrahendo*)**, on the basis of which **a right to compensation of damages arises to the damaged party as a result of the termination of negotiations upon entering into a contract, without there being a justified reason for this termination. The prerequisite** for the emergence of this right **will be** the fact that one of the parties has advanced so far in the contractual negotiations **that it appears highly likely that it will enter into the contract.** The amount of compensation will be limited to the amount equalling the highest extent of loss from failure to enter into the contract in similar cases, whereas it will not be necessary to prove loss from failure to enter into the contract in the given case. Unlike current judicature, **it will also be possible to declare the right for compensation of lost profit in addition to the right to compensation of costs.** For public contracts it will be necessary to check whether the terms and conditions contain a proviso that the contract does not have to be concluded.
- 5.3 **Illegal misuse or disclosure of information about the other party acquired during the contractual negotiations shall lead to the obligation to pay the gained enrichment to the other party** or to the obligation to compensate damages caused to this party as a result.
6. **Balance in Rights and Obligations of Contractual Parties, or *rebus sic stantibus* pursuant to the NCC**
- 6.1 **The NCC enforces adjustment of change of circumstances**, which until now were contained within the agreement on a future contract **for all types of contracts. If there is a significant change of circumstances leading to gross imbalance of rights and obligations of the contracting parties**, the affected party will be able to demand from the other party **renewal of contractual negotiations for the purpose of the change.** The above will apply under the condition that the affected party could not reasonably expect or influence the change and the change occurred only after the conclusion of the contract, or the affected party learned of the change only after the conclusion of the contract. It must be noted that the **exercise of the right will not create the entitlement to divest performance.** The right shall not arise to the affected party if it accepts the dangerous change of circumstances. **If the parties do not agree, the court will be able to change the contract at the proposal of either party by restoring the balance** between the parties **or by cancelling it**, assuming of course that the affected party exercised the right to renew negotiations in an adequate period, meaning that it must have discovered the circumstances (according to legal assumptions the period is two months).

- 6.2 **The establishment of balance in the rights and obligations of the parties to a contract is also provided by the institute of disproportionate shortening. If the performance of one of the parties is in gross disproportion to what is provided by the other party, the shortened party will be able to request the termination of the contract and the return of everything to the original state.** This conclusion shall not apply if the other party supplements that which was shortened for the affected party (taking into account the price usual in the period and place where the contract was signed) or the disproportion will be determined on the basis of facts about which the other party did not know and did not have to know. **Rights from disproportionate shortening can be exercised within one year from the conclusion of the contract**, whereas the NCC sets exceptions when the shortened party does not have any entitlement (in particular if it is an entrepreneur and entered into the contract as part of its business activities).
- 6.3 A related institute is abusive disproportionality, which the NCC expressly introduces in Section 1796. Abusive disproportionality **is the abuse of need, inexperience, simple-mindedness, agitation or carelessness of the other party, during which someone promises that he or another shall provide performance whose asset value is in gross disproportion to the mutual performance.** Such a contract shall be relatively invalid, although abusive disproportionality (usury) remains a criminal offense under the conditions set forth in the Criminal Code.
7. **Unification of General Period of Limitation**
- The period of limitation will in principle be three years (including for relationships between entrepreneurs). Already running periods of limitation shall be governed pursuant to the law in effect prior to 1 January 2014.

bpv BRAUN PARTNERS

Palác Myslbek

Ovocný trh 8

CZ-110 00 Praha 1

Tel.: (+420) 224 490 000

Fax: (+420) 224 490 033

www.bpv-bp.cominfo@bpv-bp.com

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