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NEW CZECH CIVIL CODE

INTRODUCTION

In the past two decades, Central and Eastern European countries have experienced a rapid political, economic and social transformation. After the fall of communism in the Central Europe, transition countries were exposed to number of enormous political, legal and economic challenges. The process of establishing a market economy in a constitutional democracy has been a unique historical experience, with a different path for each transition country. Due to political and social changes the transition countries attempted to bring entire their legal systems closer to standards in the Western Europe.

The political development in the region of the Visegrad Group countries after the commencement of the communist period brought significant interventions in the traditional concepts of private law. During the communist period, all countries of the Visegrad Group adopted Civil Codes that corresponded with the circumstances of the said era and met the requirements of the regime. After the fall of communism, it was more than obvious that the Civil Codes of countries of the Visegrad Group, with their numerous amendments, were not meeting the needs and conditions of a modern society, nor the needs of the European and international integration. Therefore, all countries of Visegrad Group have chosen the way of drafting new Civil Codes, however, only Czech Republic and Hungary have achieved to successfully finalize their recodification process, whereby, as the first countries from countries of the Visegrad Group, they may be rightfully proud of their new and modern Civil Codes.

HISTORICAL DEVELOPMENT OF CZECH PRIVATE LAW

DEVELOPMENT OF PRIVATE LAW UNTIL 1948¹

In the territory of the current Czech Republic, private law as a whole was not codified for a long time. The first General Civil Code applicable within this area was adopted in 1787 during the reign of Joseph II. and later became known as the Josephinian Civil Code. Civil law in general was codified in the early 19th century in the form of the well-known Austrian Civil Code adopted in 1811 under the title General Civil Code (in German: *Allgemeines bürgerliches Gesetzbuch*) (ABGB), which was applicable in the Czech Republic until 1950.

After the disintegration of the Austro-Hungarian monarchy, the ABGB remained applicable also in the Czechoslovak Republic as a successor state, however, only within the territory of Bohemia, Moravia and Silesia. Slovakia, as a former part of Hungary, retained customary law, as a result of which the Czechoslovak Republic was since its foundation in 1918 burdened with a legal duality of the Czech and Slovak law. Therefore, the fundamental aspiration of the recodification works during the first Czechoslovak Republic was the removal of the legal duality and creation of an unified regulation of the civil law. The recodification works commenced in 1920 with a view to build upon the tradition of the ABGB and to simultaneously procure its moderate modernization. In this regard, a governmental proposal of the Czechoslovak Civil Code was elaborated in 1937 which was never adopted.

THE ERA OF SOCIALIST LAW²

Under the influence of political changes in 1948, a more than a forty-year era of Czechoslovak socialist law commenced, which represents a key episode in the history of the Czech private law. The political development after 1948 brought significant interventions in the traditional conception of private law. The socialist law was seen as an unified law, ideologically leaning on the class principle and supported by power through the leading position of the Communist Party. The position of the totalitarian ideology with respect to civil law was based on three main hypotheses: (1) Civil Code is not *lex generalis* as regards private law, but merely a special law for certain legal relations of proprietary nature. (2) The first and fundamental principle of the civil law is the principle of equality. (3) Civil law

¹ For further information see explanatory report to the New Civil Code (“Explanatory report”) URL: <http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf>, pp. 1–2 (visited: May 15, 2017).

² Schelleová I.; Schelle K., *Vývoj kodifikace občanského práva*, Brno 1993, pp. 20–28.

is not private law, and thus rights and obligation from civil relationships arise also towards the society and the state³.

The result of legislative works of this period was the adoption of the Civil Code of 1950, which represents the first unified code of civil law with territorial jurisdiction for entire Czechoslovakia and the definitive end of the period of legal dualism of the Austrian and Hungarian Law. The gradual deepening of the opposition to legal dualism (of public and private law) was significantly reflected in the new codification of civil law, which was based on a deformed vision of a classification of regulated relationships and their integration into separate branches of law and which eventually led to an atomisation of the system of private law. A manifestation of this tendency was the gradual decodification of private law.

As a result of the aforementioned, the Civil Code of 1950 was later replaced by three separate statutes, namely the Act No. 40/1964 Coll., Civil Code (**Old Civil Code**), Act No. 109/1964 Coll., Economic Code (**Economic Code**) and the Act No. 101/1963 Coll., International Trade Code (**International Trade Code**). Each of these statutes represented an independent legal regulation separated from the remaining statutes without any possibility of their mutual subsidiary use, whereby a doctrine of separate codes and legal branches was created and which resulted in the division of the legal system into isolated sets of legal rules.⁴ The Old Civil Code in its content significantly interfered in the sphere of property rights and limited the principle of individual autonomy of subjects of civil legal relationships. Furthermore, standard institutions of private law as for instance possession, positive prescription of ownership, contractual lien and others were removed from its content. A characteristic feature of individual provisions of the Old Civil Code was the disproportionate prevalence of mandatory rules over non-mandatory rules⁵.

CHANGES IN CIVIL LAW AFTER NOVEMBER 1989

Changes in civil law after November 1989 arose from the process of rebuilding of the legal system, consisting in returning to the legal dualism of public and private law, and from changes in the political and economic field in gen-

³ Eliáš K., *Teoretické a praktické otázky rekonstrukce českého občanského práva*, "Právní forum" 2006, Vol. 3, issue 3, p. 19.

⁴ The scope of the Old Civil Code as for its content was limited to proprietary and personal relationships that originated in satisfying of personal needs of citizens and/or socialist organizations. The Economic Code governed relationships between socialist organizations arising from the management of the national economy and from economic activities of socialist organizations. Subject matter of the International Trade Code was relationships arising from foreign trade.

⁵ Švestka J., Dvořák J., Tichý L. (eds.), *Sborník statí z diskusních fór o rekonstrukci občanského práva*, Praha 2006, p. 29.

eral (i.e. transition to pluralist democracy and open market economy)⁶. Civil law, under the influence of the said changes, had begun to leave its close so-called „consumer” concept and a need to extend the scope of civil law regulation also to other groups of social private law relationship of a commodity-monetary nature had to emerge. Thus, a so-called “broader” concept of civil law started to be promoted⁷. Simultaneously, economic law in a previously established understanding proved to be absolutely unsatisfactory for development of business relationships, and so a need to restore commercial law as a separate legal branch emerged. Due to the changes in the legal system, both inside of individual branches of law and in relation to their mutual relationship, the necessity to adjust the position of civil law in such a manner that it was supposed to fulfil the function of a general legal regulation in relation to remaining branches of private law had emerged⁸. The aforesaid changes in the view of the structure of private law and in the understanding of mutual relationship between its respective branches of law of which it consists were also reflected in the results of the legislative work of this period.

However, since the social and economic changes, due to their dynamism, surpassed the possible dynamics of adoption of new legislation, it was not possible to immediately perform comprehensive changes of a recodification nature. Therefore, as a more rational solution of this situation, a path of gradual changes by means of partial legal adjustments was chosen⁹. For the purposes of enabling prompt transformation measures, it was decided that the most optimal solution will be to substantially amend the Old Civil Code and to concurrently adopt a new Commercial Code, which will replace the unsatisfactory Economic Code and the International Trade Code. Simultaneously, it was, however, decided that the legal status thus created shall represent only interim solution and that it will be necessary to proceed to the elaboration of a new Civil Code as soon as possible¹⁰.

In 1991 both the Economic Code and the International Trade Code were repealed by the newly adopted Act No. 513/1991 Coll., Commercial Code (**Commercial Code**) and also Act No. 509/1991 Coll., i.e. so-called „great amendment” to the Old Civil Code, was adopted¹¹. The commissions that prepared the Commercial Code and the so-called „great amendment” to the Old Civil Code operated, however, in an uncoordinated manner and mutual isolation, which resulted

⁶ Plank K., *O potrebe a spôsobe okamžitej novelizácie česko-slovenského Občianskeho zákonníka*, “Justičná revue” 1991, Vol. XLIII, issue 2, p. 8.

⁷ Lazar J., *Úvahy o zmenách v systéme občianskeho práva*, “Justičná revue” 1991, Vol. XLIII, issue 2, p. 30.

⁸ *Ibidem*, p. 32.

⁹ E.g. adoption of the Act No. 105/1990 Coll., on Private Business, which was repealed and replaced by the Act No. 455/1991 Coll., on Trade Licensing and adoption of the Act No. 116/1990 Coll., on Lease and Sublease of Non-Residential premises.

¹⁰ Švestka J., Dvořák J., Tichý L. (eds.), *Sborník statí...*, p. 28.

¹¹ Lazar J. (ed.), *Návrh legislatívneho zámeru kodifikácie súkromného práva. Materiály z odbornej konferencie*, Bratislava 2008, p. 11.

in the duplication of the legal regulation contained in both of these statutes, particularly as far as the contract law was concerned¹².

In this relation, it should be noted that the main sources of inspiration of the „great amendment” to the Old Civil Code were, paradoxically, mainly local resources from the socialist era¹³. Despite this fact, it can be concluded that “great amendment” to the Old Civil Code has fulfilled its role which, together with the Commercial Code, consisted in a prompt creation of a legal basis necessary for the application of the market mechanism.

In the following years, the Old Civil Code was being amended by dozens of amendments, which were adopted due to the approximation of the Czech law with EU law, due to necessary improvement of legislation. Many amendments were, however, adopted without any deeper analysis and consideration of a broader context, which resulted in changes in the legislation that led to half-baked interventions, destabilization of legal regulation and legal uncertainty¹⁴.

Despite its multiple amendments, the Old Civil Code significantly deviated from the standards of legal culture of the continental Europe, as well as from local legal traditions that were rejected after 1948. The functional, systematic, content and expressional concept of the Old Civil Code still corresponded with certain approaches established by the socialist legislation¹⁵.

NEW CIVIL CODE

PROGRESS OF RECODIFICATION WORKS

Discussions on the concept of the new Civil Code and recodification works related thereto began in the Czech Republic from the 1990s. The first attempt to recodify private law occurred in the period before 1993, when, under the leadership of prof. Viktor Knapp and prof. Karol Plank, a proposal of the paragraphed wording of the Civil Code was elaborated. After the disintegration of the federation, however, works in the Czech Republic regarding this project did not further proceed.

In the middle of the 1990s, under the leadership of prof. František Zoulík, a further proposal of the Civil Code was elaborated and published. The aim of this

¹² Pelikánová I., *Otázky obchodního práva v rámci kodifikace českého práva*, (in:) V. K. Malý, P. Caroni, *Kodifikace a dekodifikace soukromého práva v dnešním právním vývoji*, Praha 1999, p. 194.

¹³ Explanatory report URL: <http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf>, p. 9 (visited: May 15, 2017).

¹⁴ *Ibidem*, p. 9.

¹⁵ *Ibidem*, p. 9.

proposal was to overcome the fragmentation of the legal regulation of private law and to create a so-called broad Civil Code that would among others include also the legal regulation of commercial law relationships, industrial property rights, employment contracts and legal regulation of securities. Due to systematic, as well as practical reasons, the said proposal was not adopted¹⁶. Further works on the new Civil Code did not further proceed.

A change occurred in 2000, when the works were renewed, however, without any direct connection to the earlier attempts. Prof. Karel Eliáš and doc. Michaela Zuklínová (Hendrychová) were assigned with the preparation of the material intention of the new Civil Code. In August 2000, the proposal of the material intention of the new Civil Code was submitted to the Ministry of Justice, which established the Commission for the recodification of the Civil Code (**Commission**)¹⁷ that further discussed the submitted proposal. Subsequently after the material intention was adjusted in terms of recognized comments of the Commission and completion of review procedure, the proposal of the material intention was submitted to the Government Legislative Council and to the Government. After the Government Legislative Council reviewed the material intention, the Government obliged the Ministry of Justice to submit, in addition to the draft of the Civil Code, also the draft of the new Commercial Code and Act on International Private Law and Procedural Law¹⁸. The material intention approved in these terms determined the future conception of the Civil Code and became a binding basis for the recodification Commission with respect to preparation of its paragraphed wording¹⁹.

For a rather long time, works on the new Civil Code were accompanied by a general lack of interest, which however significantly changed during the years 2001–2002²⁰. In the following years, many discussion forums, professional conferences, colloquia and seminars were organized, whereas findings therefrom were analyzed and the relevant ones were also incorporated into the draft²¹. Dis-

¹⁶ Ronovská K., *Poznámky k návrhu nového Občanského zákoníku*, “Časopis pro právní vědu a praxi” 2006, Vol. XIV, issue 2, p. 159.

¹⁷ In 2001, the Commission had 45 members and was interlinked with 9 sub-commissions for special questions, while each had from 8 to 22 members. The Commission itself consisted of professors, associate professors and assistants from all law faculties, judges, attorneys, notaries etc.

¹⁸ Material intention of the Civil Code (in Czech: *Věcný záměr Občanského zákoníku*) URL: http://obcanskyzakonik.justice.cz/tiny_mce-storage/files/vecny_zamer_OZ_2000.pdf (visited: May 15, 2017).

¹⁹ As for the progress of works relating to the material intention of the Civil Code, further see: K. Eliáš, M. Zuklínová, *Principy a východiska nového kodexu soukromého práva*, Praha 2001, pp. 37–61.

²⁰ J. Švestka, J. Dvořák, L. Tichý (eds.), *Sborník statí...*, p. 37.

²¹ See I. Telec, *O vládním návrhu občanského zákoníku*, “Právní rozhledy” 2009, Vol. 17, issue 19, p. 677.

cussions on the proposal of the new Civil Code took place both at the academic level and between law practitioners.

In January 2009, in addition to the proposal of the new Civil Code, also the proposal of the Act on Business Companies and Cooperatives, the main author of which is doc. Bohumil Havel, and the Act on International Private Law, the main author of which is prof. Zdeněk Kučera, were submitted to the Government for their approval. After the submitted proposals were approved by the Government, these statutes were published in the Collection of Laws as follows: Act No. 89/2012²² Coll., Civil Code (**New Civil Code**), Act No. 90/2012 Coll., on Business Companies and Cooperatives (**AoBC**) and Act No. 91/2012 Coll., on International Private Law (**AoIPL**).

As it is clear from the foregoing, recodification of the Czech private law does not consist only of the adoption of the New Civil Code, but is accompanied also by the adoption of further legislation, particularly AoBC and AoIPL. However, in the following text, the author focuses only on the analysis of the New Civil Code.

IDEOLOGICAL BASIS AND INSPIRATION SOURCES OF THE NEW CIVIL CODE²³

The main approach basis in the preparation of the New Civil Code was convention²⁴, discontinuity²⁵ and integration. The New Civil Code is based on the concept that the purpose of the Civil Code is to regulate private rights of individuals arising from their mutual relations, to facilitate and guarantee free formation of private life, and thus leave as much space as possible for the free initiative of individuals. Therefore, the New Civil Code emphasises on the freedom of individ-

²² Supposedly, the New Civil Code received the symbolic number “89” as a reference to the year in which the Velvet Revolution took place and in which the law began to return to the democratic track.

²³ Explanatory report URL: <http://obcanskyzakonik.justice.cz/fileadmin/Duvodova-zprava-NOZ-konsolidovana-verze.pdf>, p. 18–19 (visited: May 15, 2017).

²⁴ The aim was to create a Civil Code that will be conventional compared to standard legislations of the continental Europe with respect for tradition of the Central European legal thinking. This aim was considered questionable and was also further criticized. See: P. Lavický, *Kritické poznámky ke koncepci návrhu občanského zákoníku*, “Právní rozhledy” 2007, Vol. 15, issue 23, pp. 849–855.

²⁵ In terms of discontinuity against the “socialist” Civil Code of 1950 and 1964. Also this approach was subject to criticism, pursuant to which maintaining of legal continuity was, as an element of legal culture, a necessity. See e.g. I. Pelikánová, (in:) J. Švestka, J. Dvořák, L. Tichý (eds.), *Sborník statí...*, p. 78. P. Lavický, *Kritické poznámky ke koncepci...*, pp. 855–858. As for the opposite view on discontinuity, reactions on criticism of the discontinuity of the New Civil Code, as well as general criticism of the New Civil Code see: O. Frinta, P. Těgl, *O návrhu nového občanského zákoníku a jeho kritice (a taky o kontinuitě a diskontinuitě)*, “Právní rozhledy” 2007, Vol. 17, issue 14, pp. 495–501.

uals and hence considers the autonomy of will of the individual to be the primary value of private law. In this regard, the New Civil Code assumes that the primary tool of private law for arrangement of private affairs of individuals with other persons is the consensus expressed in an agreement of the concerned persons. Therefore, the law should limit the will of individuals in private relations as little as possible and represents only *ultima ratio*. For this reason, the New Civil Code prevalingly sets forth non-mandatory provisions over mandatory provisions²⁶. The New Civil Code is designed as an open system that is not only bound by its own text of written provisions and their literal interpretation, but it also highlights the need to assess legal cases not regulated by law pursuant to legal principles, or by judges themselves pursuant to a norm that they would create if they were legislators²⁷.

The basic ideological fundament of the New Civil Code was the draft of the Civil Code of 1937²⁸. Revision works were based on the critical evaluation of both development of private law in the territory of the Czech Republic since the beginning of the 19th century and the significant Civil Codes of continental law countries²⁹. Further, legal regulation contained in treaties, regulations and directives adopted at the EU level, as well as relevant multinational projects were also taken into account³⁰.

SUBJECT MATTER AND TAXONOMY OF THE NEW CIVIL CODE

The legal regulation of the New Civil Code concentrates on the general regulation of questions concerning status of persons, things, legal acts (in Polish: *czynności prawne*) and institutions of general nature. Certain commercial law issues³¹, which were originally provided in the Commercial Code, have also been incorporated into the New Civil Code since the Commercial Code separately regulated individual types of contracts and also certain general institutions of law of obligations. By the adoption of the New Civil Code, the Commercial Code

²⁶ Explanatory report URL: <http://obcanskyzakonik.justice.cz/fileadmin/Duvodova-zprava-NOZ-konsolidovana-verze.pdf>, p. 20 (visited: May 15, 2017).

²⁷ J. Švestka, J. Dvořák, L. Tichý (eds.), *Sborník statí...*, pp. 30–31.

²⁸ The outline of Czechoslovak Civil Code of 1937, as the basis of the New Civil Code, was often questioned and criticized. See: I. Pelikánová, (in:) J. Švestka, J. Dvořák, L. Tichý (eds.), *Sborník statí...*, pp. 77–79.

²⁹ Namely Austrian, German, Swiss, Italian, Dutch, Polish, Quebec and Russian legislation. In certain partial cases also the French, Belgian, Luxembourgish, Liechtenstein, Spanish, Portuguese and Slovak legislation. See: J. Švestka, J. Dvořák, L. Tichý (eds.), *Sborník statí...*, pp. 34–36.

³⁰ Principles of UNIDROIT and projects as for instance: CEC, PECL, PETL, PEFL, DCFR etc.

³¹ For more information, please see: I. Pelikanova, *Koncepce obchodního práva v nové soukromoprávní kodifikaci*, “Časopis pro právní vědu a praxi” 2015, Vol. XXIII, issue 1, pp. 39–49.

was repealed and partially replaced by AoBC³², whereby the duplicity in the field of law of obligations was removed. Furthermore, family law, which was previously regulated by a special law, was also incorporated into the New Civil Code. The New Civil Code also repealed other statutes, which separately regulated matters related to private law and incorporated legal regulation of further private law matters into the New Civil Code (e.g. associations, foundations and endowment funds, securities, residential co-ownership, insurance contracts, liability for damage caused by defective products)³³. On the contrary, legal regulation of international private law and procedural law remained to be separately regulated by AoIPL. Similarly, certain areas of harmonized consumer law, intellectual property legislation, special types of securities, employment rights and obligations between the employees and employers remained to be governed by special laws³⁴.

The New Civil Code contains in total of 3081 sections and is divided into 5 parts – (1) General provisions (§ 1–654); (2) Family Law (§ 655–975); (3) Absolute property rights (§ 976–1720); (4) Relative property rights (§ 1721–3014); (5) Common, transitional and final provisions (§ 3015–3081). Particular parts are subdivided into titles, chapters, divisions and subdivisions. To a major extent, the New Civil Code applies the principle that a section shall contain no more than two subsections and one subsection shall contain no more than two sentences.

THE MOST SIGNIFICANT CHANGES BROUGHT BY THE NEW CIVIL CODE

This chapter is divided into four separate subchapters corresponding with the first four parts of the New Civil Code. Each subchapter briefly describes the main characteristics of individual parts of the New Civil Code, as well as the most significant changes that the New Civil Code provides for. It should be pointed out that the designation of particular changes or new institutions as the most significant ones represents only a subjective opinion of the author. It should be also noted that, due to the extent of this paper, the aim of the author is not the provi-

³² For more information, please see: Právní rádce. Vol. 2012, issue 5 on topic “*Rekodifikace: hlavní změny v právu společnosti*”.

³³ The New Civil Code repealed the following statutes: (1) Act No. 83/1990 Coll., on Association of Citizens, as amended; (2) Act No. 116/1990 Coll., on Lease and Sub-lease of Non-residential Premises, as amended; (3) Act No. 72/1994 Coll., adapting certain co-ownership relations to buildings and certain ownership relations to apartments and non-residential premises and supplementing certain acts (the Apartment Ownership Act), as amended; (4) Act No. 59/1998 Coll., on Product Liability, as amended; (5) Act No. 591/1992 Coll., on Securities, as amended; (6) Act No. 248/1995 Coll., on benevolent associations and amending and supplementing certain acts, as amended.

³⁴ J. Švestka, J. Dvořák, L. Tichý (eds.), *Sborník statí...*, pp. 32–33.

sion of a comprehensive analysis and evaluation of quality of the legal regulation brought by the below changes or new institutions brought by the New Civil Code.

GENERAL PROVISIONS

The General provisions are rather extensive and mainly define particular terms, with which the New Civil Code further operates. In its introduction, the New Civil Code defines private law as law, which governs mutual rights and obligations of individuals and the application of which is independent from public law. The New Civil Code sets forth basic principles of private law following the constitutional principles and also rules of interpretation and application of the legislation. The New Civil Code provides for the presumption and protection of good faith, principles of fair trade and prohibition of abuse of rights. The New Civil Code distinguishes between two spheres of legal relations: legal relation with an entrepreneur (“b2c” – business to consumer) and legal relations between entrepreneurs (“b2b” – business to business). Further, the New Civil Code also regulates legal relationships of private persons, who are not entrepreneurs and for these purposes neither consumers. In this relation, the New Civil Code contains legal regulation of commercial and consumer nature, as well as legal regulation of relationships of private persons that are not entrepreneurs.

The second title of the first part contains a complex legal regulation of natural and legal persons³⁵. Within the framework of rights of individuals, the definitions of an entrepreneur and a consumer, as special subjects to which certain special provisions of the New Civil Code relate, are further included.

A significant change brought by the New Civil Code is the return to a broad understanding of a concept of a thing, which means everything that is different of a person and serves the needs of people. From this general rule, there are certain exceptions, as for instance living animals, human body or its parts. The definition of things includes not only tangible things, but also intangible things. The extended understanding of things enables that also various tangible assets, that are not specifically regulated, e.g. know-how, internet domains etc. fall within the subject of ownership right. Pursuant to the aforementioned, the New Civil Code also redefines security as an instrument incorporating a right in such a manner that after issuing the security the right cannot be asserted or transferred without the relevant instrument. This new definition represents a significant shift from the previous legal regulation, in terms of which the definition of securities was addressed with an exemplary enumeration of securities which was later supple-

³⁵ The New Civil Code promotes the older fictional theory of legal persons, under which they are deemed to be artificial entities. Therefore, a legal person does not act directly, but through its representative that is its statutory body. On his conduct “on behalf” of the company, legislation governing representation shall fully apply.

mented with an addition, that securities may also be further instruments declared by law as a security.

A significant change is also represented by restoration of the principle *superficies solo cedit*, as a result of which buildings set up on a land plot will no longer be separate things in legal terms, but will form a part of the land plot.

Further, the fifth title of this part of the New Civil Code and legal facts set forth therein have undergone a significant change. The New Civil Code regulates invalidity of legal acts in a new manner. As a fundamental principle and material rule on the interpretation concerning the assessment of validity or invalidity of legal acts, the New Civil Code establishes the principle that legal acts are to be preferably considered valid rather than invalid. As a further change, the New Civil Code promotes the concept of relative invalidity and cases of absolute invalidity are reduced to only a few exceptions.

FAMILY LAW

Second part of the New Civil Code governs family law including marital property rights. The concept of family law remains in principle unchanged and the New Civil Code follows to a large extent the original Family Act. Therefore, the vast majority of the changes are of wording nature.

However, a considerable change is reflected in the context of the legislation concerning joint marital property, which, until the adoption of the New Civil Code, was subject to a statutory regime. The New Civil Code supplements the legal regulation of the joint marital property by a new regulation of the so-called contractual regime of joint property, which may have a form of separate property of both spouses, a form which reserves the creation of joint property on the date of dissolution of marriage, as well as a form which extends or reduces the scope of joint marital property in a statutory regime. A regulation of consanguinity and in-law relationships represent novelty as well.

ABSOLUTE PROPERTY RIGHTS

RIGHTS *IN REM*

The legal regulation of rights *in rem* follows the conception of things in legal terms. In accordance with the aforesaid, provisions relating to rights *in rem* shall apply not only to tangible things, but also to intangible things. With respect to rights *in rem*, the New Civil Code highlights the importance of public records and thus it is under the new legislation no longer possible to invoke lack of knowledge on existence of those rights which are registered in public registers. Similarly, in cases where registration in public registers does not reflect reality, the New Civil Code protects the acquirer, who acted in good faith with respect to such registered state. The New Civil Code further provides substantial changes

in the acquisition of ownership right and includes also a legal regulation of residential co-ownership³⁶.

In connection with the restoration of the principle of *superficies solo cedit*, the New Civil Code introduces the right of *superficies*, as an instrument which permits temporary separation of the ownership of the building and the land plot³⁷.

The New Civil Code further significantly expands the legal regulation of right *in rem* on things of others and divides easements into servitudes, consisting of a passive obligation to tolerate or abstain from doing something in favour of another, and real burdens, consisting of an active obligation to provide something or to do something for another entity³⁸. In relation to liens, the New Civil Code builds on previous legislation, while enriching it by several novelties³⁹.

As a further novelty, the New Civil Code introduces the legislation of administration of property of others and the legislation of the institution of trust, as a form of certain “assets set aside”, which are separated for a purpose and do not form property of any person. This newly introduced concept of trusts raises considerable doubts and questions with respect to the fact, whether such instrument does have its place in the legislation of the Czech Republic, as a country with a continental legal system, due to the fact that this institution has its origins in the common law.

LAW OF SUCCESSION

In the field of law of succession, the New Civil Code introduces substantive changes and considerably extends the decedent’s freedom of disposal, which may be seen as a significant progressive element. The most significant changes are the introduction of legislation governing inheritance contracts and legacy. The

³⁶ See: J. Tomšej, J. Šindelář, *Jak se změní bytové vlastnictví?*, “Právní rádce” 2013, Vol. 2013, issue 3, pp. 24–25. For criticism of certain provision of legislation governing residential co-ownership provided for in the New Civil Code see: P. Čech, *Zmrazí rekonstrukce hypoteční trh s byty?*, “Právní rádce” 2013, Vol. 2013, issue 1, pp. 6–7 and P. Čech, R. Pelikán, *Nekolik dalších nedorozumění v nové úpravě bytového spoluvlastnictví*, “Právní rádce” 2013, Vol. 2013, issue 8, pp. 32–36. In response to this criticism see: K. Eliáš, *Blokace hypotečního trhu s byty nehrozí*, “Právní rádce” 2013, Vol. 2013, issue 2, pp. 30–31.

³⁷ Right of *superficies* (Sec. 1240 New Civil Code) represents pursuant to the New Civil Code a right *in rem* belonging to a person other than the owner of land, which consists of the right to have on or below the surface of the land plot a construction. In terms of the New Civil Code, the right of *superficies* is an immovable thing and may be established only as a temporary right lasting no longer than a period of 99 years. Right of *superficies* can be transferred and burdened. For further information concerning the constructions and lands see: M. Němcová, R. Lörincová, *Stavby a pozemky podle nového občanského zákoníku*, “Právní rádce” 2013, Vol. 2013, issue 3, pp. 10–13.

³⁸ For further information see: L. Kislerová, T. Maternová, *Jak se změní věcná břemena?*, “Právní rádce” 2013, Vol. 2013, issue 3, pp. 22–23.

³⁹ See: P. Čech, *Jak se změní zástavní právo k nemovitosti?*, “Právní rádce” 2013, Vol. 2013, issue 3, pp. 14–17.

inheritance contract represents a new title of succession which supplements the already existing statutory manners of succession and testamentary succession, while by the conclusion of an inheritance contract, the right to be a heir in case of the decedent's death arises to the contractual heir. The introduction of legacy enables the decedent to leave a particular thing (subject of heritage) to a specific person without a concurrent transfer of debts of the decedent, as the concept of legacy is not connected with an universal succession, and therefore, debts of the decedent do not pass to the legatee together with the legacy⁴⁰.

Other major changes may be seen in the: (1) introduction of the possibility to include clauses of lesser importance in a testament in form of a condition, determination of time or a command, (2) capacity of a legal person to be a heir under the conditions set forth in the New Civil Code, (3) extension of the circle of statutory heirs, (4) introduction of the possibility of renunciation and waiver of succession right and (5) introduction of the obligation of a heir to pay the debts of the decedent primarily in the full amount⁴¹.

RELATIVE PROPERTY RIGHTS

LAW OF OBLIGATIONS⁴²

The most important change with respect to the contract law is the removal of duplication of the legislation of law of obligations. The New Civil Code puts significant emphasis on the contractual autonomy of the parties, which is reflected in the form of increased informality of legal acts. Under the New Civil Code, the parties may agree on a different process of concluding contracts than the process set out by law. The broad contractual freedom of the parties is also reflected in several other issues. For instance, the parties may extend or reduce the limitation period by an agreement. The New Civil Code also removed the prohibition of waiver of rights in advance, unless the law provides otherwise. Thus, under the New Civil Code it is possible to waive the right to withdraw from a contract, to issue an unjust enrichment, to claim late payment interest etc.

The New Civil Code in many cases waives the requirement of a written form⁴³. It also decreases requirements for certainty of contracts and their completeness as regards the essential particulars. A substantive change lies in the possibility of additional clarification of originally indeterminate or incomprehensible content

⁴⁰ For more detailed information see: J. Pavelka, D. Šmída, *V čem spočívá dědičská smlouva a odkaz?*, "Právní rádce" 2013, Vol. 2013, issue 7, pp. 20–21.

⁴¹ For further information see J. Pavelka, I. Jahodová, *Jak sa bude...*, pp. 8–11.

⁴² At the beginning of this sub-chapter it should be noted that the New Civil Code follows the path of non-retroactivity, i.e. contracts concluded under the Old Civil Code may, subject to certain exceptions, further be governed by the old legislation.

⁴³ It is for instance possible to conclude agreement on contractual penalty, on assignment of receivable, debt assumption, accession to debt, on assignment of a contract, debt relief.

of a contract with a retroactive effect, i.e. to the moment of conclusion of the contract. A further considerable change may be seen in the so-called modified acceptance of an offer. Pursuant to the New Civil Code, a contract shall be concluded upon delivery of the acceptance with modification, i.e. as amended by the recipient's additions or variations provided that these will not substantially alter the conditions of the offer and unless an offeror rejects such an acceptance without undue delay.

Another change may be seen in the invalidity of certain contractual provisions contained in commercial terms, or in so-called adhesion contracts. Provisions of commercial terms, which concerned a party could not reasonably expect shall be ineffective, unless such party will explicitly accept them. In case of contracts of adhesion, clauses which are particularly disadvantageous to the weaker party without any reasonable ground shall be invalid. This relates also to clauses which can only be read with particular difficulties or clauses which are incomprehensible to a person with an average intelligence in case these could cause harm to the weaker party.

A considerable change is also the possibility to unilaterally change standard commercial terms. This is under the New Civil Code allowed with respect to contracts on long-term recurrent performance of the same kind in case the nature of the obligation already indicates in the course of the contract negotiations that subsequent changes thereto will be reasonably necessary. This possibility is, however, subject to the condition that such possibility of change is agreed in advance and that the other party will be entitled to reject such amendments and to terminate the obligation.

As a further novelty, the New Civil Code introduces the institution of pre-contractual liability of *culpa in contrahendo*, which was not in the Old Civil Code expressly provided for. The New Civil Code defines in this regard certain obligations, which the parties will have to comply with before the conclusion of a contract.

In conclusion, the aforementioned changes, as well as other changes that in view of the extent of this report cannot be specifically described, should significantly improve the flexibility of the contraction process and the number of invalidly concluded contracts will undoubtedly be reduced.

OBLIGATIONS ARISING FROM TORTS⁴⁴ AND UNJUST ENRICHMENT

The general legal regulation of liability or obligations arising from torts are set forth in provisions of sections 2894–2919 of the New Civil Code and sections 2951–2971 of the New Civil Code, which are followed by provisions regulating

⁴⁴ For more information see: M. Tomsa, *Náhrada škody a nemajetkové újmy v novém občanském zákoníku*, "Obchodní parvo" 2013, Vol. 22, issue 11, pp. 386–392. Z. Švarc, *Odpovědnost podnikatele za škodu z provozní činnosti*, "Obchodní parvo" 2014, Vol. 23, issue 7, pp. 256–263.

specific cases of liability for damage⁴⁵. An important systematic change can be seen in the inclusion of abuse of unfair competition and restriction of competition into the obligations arising from torts, as well as the inclusion of liability for damage from operational activities into cases of special liability, which under the Old Civil Code fell within general liability.

The terminology of the New Civil Code distinguishes between compensation for caused damage (i.e. pecuniary harm) and compensation of non-pecuniary harm. A summary term provided for in the general provisions on the obligation to compensate is compensation for harm. In case there is an obligation to compensate for harm caused, this obligation always involves damage compensation, while the obligation to compensate non-pecuniary harm occurs only in cases specifically stipulated by law. Such cases are listed in the New Civil Code and may be also stipulated by other laws. The New Civil Code stipulates the obligation to compensate non-pecuniary harm in case of interference with absolute right of the victim. Further general merits for compensation of non-pecuniary harm are provided for in the New Civil Code in relation to the general obligation to compensate non-pecuniary harm caused by an unlawful act if justified by special circumstances that make the conduct of the tortfeasor especially reprehensible. In addition, the New Civil Code stipulates in special cases the obligation to compensate non-pecuniary harm caused by unfair competition and restriction of competition. Obligation to compensate for damages (i.e. pecuniary harm) is stipulated in the New Civil Code in case damage is caused by breach of good morals, breach of a statute and breach of contractual duty. This division is important not only in terms of assessment of the breached obligations, but with respect to further prerequisites of incurring of liability, also in relation to fault.

The New Civil Code newly defines damage as harm to assets, which is being understood as both factual reduction of property of the victim (assets) and the emergence of debts (liabilities) on the side of the victim. The victim is under the New Civil Code entitled to claim damage compensation already at the moment, when as a result of conduct of the tortfeasor, debt is incurred by the victim and not after the factual payment of the debt and reduce of property of the victim, as previously.

As the New Civil Code emphasizes the autonomy of will of the individual, it allows to contractually stipulate a limitation of the liability for damages or to

⁴⁵ Damage caused by a person unable to assess the consequences of his acts, damage caused by a person with dangerous qualities, damage resulting from operating activities, damage caused by a particularly hazardous operation, damage to an immovable thing, damage caused by the operation of a means of transport, damage caused by an animal, damage caused by a thing, damage caused by a product defect, damage to a thing taken over, damage to a thing brought inside, damage caused by information or advice. The New Civil Code sets forth also outside of this Chapter special obligation to compensate damage (e.g. in relation to pre-contractual liability section 1729), damages caused due to invalidity of a juridical act (section 579).

waive a right to compensation. However, it is not possible to agree on a limitation of liability in cases of harm caused to natural rights, harm caused intentionally or by gross negligence. Similarly, right to compensation may not be validly waived or limited by a weaker party.

IMPACT OF NEW CIVIL CODE ON SELECTED AREAS OF LAW

One of the consequences of the recodification of private law are among others also extensive changes in the field of legal regulation of public registers, the legislation of which was until the adoption of the Act No. 304/2013 Coll., on public registers of legal and natural persons (**Public Registry Act**) fragmented into several pieces of legislation. The new Public Registry Act creates an independent system of the public register of legal and natural persons and further includes the legal regulation of the register of associations, foundation register, register of institutes, register of associations of unit owners, commercial register and register of benevolent associations.

The new private law legislation naturally necessitated also changes in tax laws⁴⁶, which were not only of technical nature concerning the unification of terminology, but also changes of material character due to the introduction of new legal institutions. Laws amending the tax legislation consisted of two statutory measures, namely the statutory measure of the Senate No. 340/2013 Coll., on tax on acquisition of real estate⁴⁷ and the statutory measure of the Senate No. 344/2013 Coll., on amendment of tax laws in connection with the re-codification of private law and on amending certain laws⁴⁸.

Certain extensive changes introduced by the New Civil Code were also reflected in the field of real estate and the land registry e.g. in form of a new definition of real estate, reintroduction of the principle *superficies solo cedit* and introduction of several new types of easements that have to be registered with the land registry. The New Civil Code further introduced a requirement for registration of several other matters, which before the adoption of the New Civil Code were not required to be registered. All these changes necessitated the adoption of

⁴⁶ For more detailed information concerning the changes in taxation of immovable things due to the New Civil Code, see: M. Skála, *Dopady nového občanského zákoníku na zdaňování nemovitých věcí v roce 2014 – I. díl*, “Daně a právo v praxi” 2013, Vol. XVIII, issue 9, pp. 2–11. M. Skála, *Dopady nového občanského zákoníku na zdaňování nemovitých věcí v roce 2014 – II. díl*, “Daně a právo v praxi” 2013, Vol. XVIII, issue 10, pp. 2–10. M. Skála, *Dopady nového občanského zákoníku na zdaňování nemovitých věcí v roce 2014 – III. díl*, “Daně a právo v praxi” 2013, Vol. XVIII, issue 12, pp. 2–11. M. Handlosová, *Daň z nabytí nemovitých věcí – 2. část*, “Daně a právo v praxi” 2013, Vol. XVIII, issue 12, pp. 21–24. M. Skála, *Dopady nového občanského zákoníku na zdaňování nemovitých věcí v roce 2014 – IV. díl*, “Daně a právo v praxi” 2014, Vol. XIX, issue 1, pp. 30–38. J. Vychopeň, *Změny v zákonech o daních z příjmů od 1.1.2014*, “Daně a právo v praxi” 2014, Vol. XIX, issue 1, pp. 2–7.

⁴⁷ URL: <http://www.psp.cz/sqw/sbirka.sqw?cz=340&r=2013> (visited: May 15, 2017).

⁴⁸ URL: <http://www.psp.cz/sqw/sbirka.sqw?cz=344&r=2013> (visited: May 15, 2017).

the new Land Registry Act – Act No. 256/2013 Coll., on Cadastre of Real Estate (Cadastral Act)⁴⁹.

THE FIRST AMENDMENT TO THE NEW CIVIL CODE

On December 30, 2016 the first amendment to the New Civil Code was published in the Collection of Laws under No. 460/2016 Coll. (**Amendment**) which came into force on February 28, 2017. The Amendment was long awaited as the discussions about the need for its adoption began almost immediately after the effectiveness of the New Civil Code.

The Amendment solved certain questions of legal regulations of the New Civil Code and removed a few problematic provisions. According to the explanatory report, the Amendment responds to urgent suggestions related to certain problematic provisions and provides for solutions of certain conflicting situations that arise when the New Civil Code is applied.

Changes that Amendments brought specifically concern, for example, the rules governing the employment capacity of minors, the limitation of the legal capacity of natural persons, the performance of autopsies, the question of the special form of power of attorney, the regulation concerning joint marital property, trusts and legal regulation concerning the lease of an apartment and the lease of a building.

The most significant changes introduced by the Amendment are those relating to trusts⁵⁰. Fundamental reason for the respective changes is to remove the elements of anonymity of both, the settlors and the trustees of the trusts established for private purposes, due to the concerns that the trusts could be abused for illegal activities e.g for money laundering. Therefore, the Amendment established an obligatory registration of trusts in the central registry of trusts. Respective registration has a constitutive nature which means that trust will be created (incorporated) by registration in the central registry of trusts. Furthermore, appointment or other designation of a beneficiary of trust would be effective from the date on which beneficiary will be enlisted in the respective central registry of trusts; i.e. without such registration the beneficiary would not be able to benefit from trust. Aforementioned regulation on the registrations of beneficiaries is applicable only with respect to private trusts and not to trusts established for public benefit. Additionally into central registry of trusts are recorded information concerning the

⁴⁹ For further information concerning new the new Cadastral Act see: D. Šustrová, *První rok s novým katastrálním zákonem*, “Bulletin advokacie” 2014, Vol. 2014, issue 12, pp. 64–67.

⁵⁰ Changes introduced by the Amendment relating to trusts come into force on January 1, 2018.

settlors, trustees and other information concerning trusts. It is also very important to emphasize that also foreign trusts active in the Czech Republic shall be registered in central registry of trusts.

CONCLUSION

In relation to the content of the New Civil Code, on the one hand the New Civil Code brings a lot of positive changes and innovations, on the other hand, however certain flaws and room for improvement can always be found.

Among the most significant positive changes brought by the New Civil Code, it is necessary to particularly highlight and state the following changes: preference of validity of legal acts before their invalidity, exclusion of preference of absolute invalidity before relative invalidity, significant strengthening of autonomy of will of the individual and of contractual freedom, unified legal regulation governing law of obligations within private law and emphasis on regulation of personal rights that are standing above the regulation of proprietary rights. After decades, the New Civil Code supplements the Czech legislation with a whole range of institutions that are in legislations of other countries commonly available, particularly as regards law of succession.

However, the New Civil Code concurrently contains, in addition to certain clerical errors⁵¹, also certain negative elements and suffers from uncertainties and errors. Criticism in this regard was raised towards the approach, extent and terminology of the New Civil Code⁵², selective and not carefully performed reciprocal works and the late start of the preparation of accompanying legislation⁵³.

Summarizing and taking into account all of the above, it may be clearly concluded that the New Civil Code as a whole, particularly with respect to its conception which incomparably better reflects the role of civil law in a democratic state by removing remnants of the socialist law and by the general tendency to

⁵¹ E.g. provisions of section 2072 subsection 2 of the New Civil Code, where instead of “against the close person of the donor” the following text occurred “against the close person of the donee”; provisions of section 2438 subsection 1 of the New Civil Code, where the terms “mandator” and “mandatary” were substituted; provisions of section 1341 subsection 1 of the New Civil Code, where the adjectives “owned” and “pledged” were substituted.

⁵² See: J. Huleš, *Bude nový občanský zákoník opravdu „sexy“?*, “Právní rozhledy” 2008, Vol. 16, issue 17, pp. 640–642. For responses to this contribution and criticism contained therein see: P. Bezouška, *Návrh občanského zákoníku a jeho místo mezi evropskými kodexy*, “Právní rozhledy” 2008, Vol. 16, issue 19, pp. 711–717.

⁵³ P. Čech, *Rekodifikace soukromého práva za dveřmi (a presto zahalena nejistotou)*, “Právní rádce” 2012, Vol. 2012, issue 4, pp. 28–31. J. Vlastník, *Některé připomínky k návrhu občanského zákoníku*, “Bulletin advokacie” 2011, Vol. 2011, issue 11, pp. 30–36.

traditional civilistics, undoubtedly represents a contribution to the Czech private law, as well as Czech legislation in general.

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NEW CZECH CIVIL CODE

Summary

The paper is devoted to the new Czech Civil Code, thanks to which the Czech private law has experienced its greatest legislative change in the last fifty years representing its ultimate diversion from the socialist law principle. The author discusses briefly the development of Czech private law in general, as well as the recodification process. However, the focus of the paper lies mainly in the presentation of the new Czech Civil Code to the public of Visegrad Group countries. The aim of the presented paper is to provide a complex and unbiased view on the new Czech Civil Code, which in some respects may serve as an inspiration for the drafters of the new Slovak and Polish Civil Code.

KEYWORDS

recodification, private law, civil law, Czech Civil Code

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rekodyfikacja, prawo prywatne, prawo cywilne, czeski kodeks cywilny