

## Czech Law of Contracts

### § 1 Definition

In the Czech legal system, contract law is a part of the law of obligations. It is a part of broader private law, comprising a set of legal rules on contracts (obligations). The central term of contract law is an obligation by which the following is usually understood:

- the obligation as legal relationship (obligation in a broader sense)
- the obligation arising from this legal relationship (obligation in a narrower sense).

Other fundamental terms of contract law are:

- claim and debt,
- creditor and debtor.

Under the contract law, a claim is a subjective right of one party (creditor) to the contract relationship to demand from the other party of the same relationship (debtor) certain performance, i.e. demand from him to give something, to act or to refrain from acting, i.e. omitting. If the claim becomes payable (mature) it principally becomes a title, i.e. unless a voluntary performance was provided by the debtor, it may be successfully claimed in a court or in an arbitral tribunal. The debt (obligation in a narrower sense) is a corresponding obligation (a duty) of a party to the contract (the debtor) to provide the other party to the same obligation relationship, the creditor, with the performance demanded by him and promised by the debtor in consistency with the claim. The creditor is generally the party to the contract who has a claim (rights), the debtor is the party who has a duty (obligation) to satisfy such a claim.

Binding legal relationships arising from contracts may be classified according to the branches of private law into civil contract law and commercial contract law, and possibly also into contract law of other branches (e.g. labour contract law). From another point of view, contract law distinguishes between general contract law and specific contract law. Further, binding legal relationships were historically classified according to its source of formation: obligations relationship arising from contracts and obligations enforceable from torts.

The most frequent and typical ground for formation of an obligation relationship is a contract. It is habitual to distinguish between provisions on obligations arising from contracts and also provisions on some quasi-contracts, e.g. benevolent intervention in another's affairs (acting for another's benefit without agency, *negotiorum gestio*), public promise and public tender. Contract is a fundamental notion of contract law. It is a bi-lateral or a multi-lateral agreement which gives rise to a binding legal relationship or which has some other legal effect.

### § 2 Historical background of the Law of Contract

During the eighteenth century, a general codification of private law was planned in order to rectify the fragmentation that had existed to that time. In 1753, the Empress Maria Theresia appointed a commission to compile the existing law and to fill in the gaps according to "right reason". The resulting *Codex Theresianus* of 1786 was, however, not adopted due to its casuistic and voluminous nature. A later *reworking* of this Code was enacted under the Emperor Joseph II in 1787 as the *Josephinisches Gesetzbuch*. On 1<sup>st</sup> June 1811, the Civil Code ABGB (*Allgemeines Bürgerliches Gesetzbuch*) was proclaimed entering into force on

1<sup>st</sup> January 1812. The Code was based predominantly on Roman law, and in part on German law, and was strongly influenced by the natural law doctrine. The ABGB applied in all territories that belonged to the Austrian half of the Empire, including the Czech lands – Bohemia, Moravia and the southern part of Silesia. The Commercial Code was adopted in 1863 and the Civil Procedure Code in 1895.

The development of the German Civil Code BGB in 1896 brought about a revision of the already hundred-year-old ABGB. In three revisions (1914, 1915 and 1916), the ABGB was in part newly organised according to the model of BGB. When the independent Czechoslovak state came into existence in 1918, the new Czechoslovak Republic continued to apply these generally valid codes in the Czech lands. In Slovakia, Hungarian law was applied in the sphere of civil law. From the very beginning of the independent Czechoslovak state, work on the new Czechoslovak Civil Code was started. The draft was ready in 1938 but due to the Nazi occupation and to the post-war development in Czechoslovakia it never entered into force.

After the liberation of the Republic in 1945 and particularly after the Communist takeover in 1948, the former legal system gradually underwent radical changes as a result of the transformation which occurred in the whole social and economic system. A new Civil Code was adopted in 1950 (No. 141, 1950 Coll.) which replaced the ancient ABGB.

The new Civil Code adopted in 1964 (No. 40, 1964 Coll.) was strongly influenced by the contemporary political trends. It was based on the theory that “civil law regulated only the economic relationships arising among socialist organisations and citizens and among citizens in the process of satisfying their own needs”. The rest of private law was divided into several branches each of them with a special codification – family law (Family Act No. 94, 1963 Coll.), labour law (Labour Code No. 65, 1965 Coll.), economic (commercial) law (Economic Code No. 109, 1964 Coll.) and private international law (Private International Law Act No. 97, 1963 Coll.). In the period of 1964-1989 it was impossible to apply the Czechoslovak Civil Code to international trade due to its strong political orientation. Therefore in Czechoslovakia there existed at that time in fact two Civil Codes – the “internal” Civil Code (No. 40, 1964 Coll.) and the “Civil Code for international trade” – International Trade Code No. 101, 1963 Coll. The Economic Code No. 109, 1964 Coll. was applied to “internal” economic contracts i.e. to “contacts among the socialist organisations”.

After 1989, when Czechoslovakia was re-establishing its democratic order and the rule of law, it became necessary to rebuild its legal system as a whole. Already in 1989 and 1990, the Constitution was substantially amended, in particular as regards democratisation of the society and basic freedoms in personal and property relationships. The first stage of the reconstruction of private law meant substantial amendments to the Civil Code. The International Trade Code was abolished; the Family Act and the Labour Code were amended. The Economic Code was abolished as well and commercial law was restored in the country with a new Commercial Code No. 513, 1991 Coll.

In the 1990s, in particular after the split of Czechoslovakia in 1993, the development of private law was oriented on two matters: to prepare the accession of the Czech Republic to the European Union with regard to the necessary approximation of legislations and to make a general reform of the Czech private law in compliance with modern needs. The first task was accomplished by the date of accession of the country to the European Union on 1<sup>st</sup> May 2004. The second one – the general reform of the Czech private law already went through its

principal stage and a draft of the new Civil Code has actually been accomplished. The new Civil Code should become a dominant and general source of private law with links to special legislation in different areas of private law, particularly the Labour Code (a new Labour Code was adopted – No. 262, 2006 Coll.) and the Commercial Code (a draft of new Commercial Code has been prepared). Codification of international private law should remain unchanged. This part of the reform is to be achieved by 2010.

### § 3 Classification of Contracts

Classification of contracts is based on the same criteria as classification of any other juridical acts:

1. According to the number of parties – bilateral or multilateral contracts
2. According to the value of the transaction – reciprocal or gratuitous
3. According to the form – formal or informal
4. According to the subject matter we recognise:
  - contracts with monetary performance where at least one party's performance is provided in money,
  - contracts with non-monetary performance.

Particular contract types may be classified as follows:

1. Contracts creating an obligation relationship – typical, “named” contracts (as described in the Civil or Commercial Code) or atypical, “unnamed” contracts (not explicitly described in the Codes) or mixed contracts (§ 491 Civil Code). Concluding unnamed or mixed contracts by parties is based on their freedom to contract; however, they must not be inconsistent with law, good morals and the intentions of the respective rules of law.
2. Contracts to guarantee obligation relationship
3. Contracts causing change in an obligation relationship (e.g. contract on assignment)
4. Contracts causing termination of an obligation relationship (e.g. agreement on setting-off).

### § 4 Contracts and Torts

Obligations as relationships may also be created by unlawful acts – torts. Tort in Czech Law is a private/civil non-contractual liability arising out of damage resulting from a breach of a legal duty that exists by virtue of the society's expectations regarding interpersonal conduct, rather than by contract or other private relationship. The essential elements of tort are: existence of a legal duty, breach of that duty and a causal relationship between the conduct and the damage. Torts are breaches of liability (no matter whether this is a liability created by contract or another liability *ex lege*). Torts are violations of rights and statutes. The Czech Civil Code describes torts under the general provision: “Everyone is liable for damage caused by him while breaching a legal obligation.”

Torts may be divided according to fault:

- Caused by fault
- Without fault.

Torts may also be divided according to consequences:

- torts causing threat of breach of legal relationship,
- torts causing breach of legal relationship.

The Czech law classifies the general rules of the law of contract and the law of unlawful acts – torts – under the heading of the law of obligations.

In the Czech Civil Code, important consequences of both unlawful act and failure in the performance of an obligation are regulated in a uniform way.

In some cases, the Czech law limits liability in a different way than non-contractual liability (a different regulation on legal capacity or a different period of limitation).

## § 5 Contract and quasi-contract

The recent Czech Civil Code did not accept the Roman classification of the sources of obligation in “*contractus, quasi-contractus, delictus, quasi-delictus*”. The Czech Civil Code states that all obligations arise from juridical acts, in particular from contracts as well as from damage caused by a person, unjustified enrichment or other facts laid by law. In the Czech law, a great majority of obligations in practice are created by contracts (*ex contractu*). There are, however, some unilateral juridical acts which could create an obligation. Such obligations, similar to obligations created by contracts, are called quasi-contracts. This term is not described by the Czech Civil Code.

The Czech Civil Code contains provisions on contracts, unlawful acts and some other sources of obligations, namely agency without mandate (*negotiorum gestio*) and unjustified enrichment.

In the view of similar consequences, quasi-contracts are, for example, public tender (§ 847 and fol. Civil Code), commercial public tender (§ 281 and fol. Commercial Code), public promise (§ 850 and fol. Civil Code), promise of indemnity (§ 725 and fol. Commercial Code).

## § 6 Contracts and the law of property

We can find in the Czech law a distinction between absolute rights and relative rights. An absolute right is a right to property that can be upheld against everyone. A relative right is connected with a person (all rights to the performance of an obligation are relative rights).

Absolute rights are right to property (ownership), copyright, patent, etc. There is a closed system of real rights whereas the system of obligations is open.

A majority of private law contracts are obligation contracts, i.e. contracts leading to the formation, a change or the termination of a contractual obligation relationship. There are, however, contracts leading to the formation, a change or the extinction of real rights.

These are exceptional under the Czech law, as a result of the two-phase construction adopted for obtaining ownership (or the formation of another real right), namely in relation to real property. The first stage means the formation of a contract; the second stage is registration of such a contract by a State authority – Land Register.

## § 7 Contract and trust

The trust as a specific legal conception is not known in the Czech law.

There are some cases of legal relationships on the basis which a person – owner of a certain property – is under a contractual duty to manage and administer this property on behalf of

someone else. An example can be the Czech Organisation of Copyright administering copyright on behalf of authors.

Various specific institutions such as *fideicomissum*, *Treuhand*, etc., are not known in the Czech law.

## § 8 Good Faith and Fair Dealing

As stated above, the Czech civil law is governed by three equity principles of contract law: Under § 39 Civil Code contracts must not be contrary to good morals (*contra bonos mores*). The term “good morals” is commonly interpreted as a set of moral rules applied together with the formal legal norms. The contracts that are contrary to good morals are void, i.e. they are deemed to be concluded but without any legal consequences.

The term “good faith” (*bona fides*) is applied under Czech law either as a general principle or a prerequisite of fairness in the conduct of parties to contracts or as a psychological category, expressing the psychological state in which the party to contract is not aware of legal errors related to the contract. In the latter sense, good faith applies only when expressly referred to by law.

In commercial contracts the principle of "fair dealing" is applied. It is similar to the principle of good morals in civil law but is of a slightly different nature and the principal difference concerns legal consequences. If a court concludes that a contract or its performance is contrary to fair dealing it is bound to refuse granting court protection to such acting.

## § 9 Style of drafting

The law of contract is based on some general principles of which the central one is equality of parties. Another primary principle is that of freedom to contract as an expression of autonomy of will. It is expressed e.g. in Act. 2, Par. 3 of the Czech Charter of Fundamental Rights and Freedoms which stipulates that “everyone is authorised to do anything what is not prohibited by law”.

Freedom to contract means predominantly the freedom to conclude or not to conclude a contract, to select a contractual party, the type of contract, to determine the content of the contract or the content of obligation relationship to be formed by a contract, to denote the form of the contract and finally to refrain from a contract under stated conditions.

- a) Freedom to contract - Party autonomy may be restricted by law only through imposing a duty to conclude a contract, e.g. a contract on energy supply, on public transport, on radio and television broadcasting. Certain restrictions of freedom to contract may also arise from voluntary contracting (e.g. *pactum de contrahendo*).
- b) Free choice of the contractual party may be excluded due to public interests (e.g. regulation on sale of the goods).
- c) Contractual parties may agree on other types of contracts, different from those stipulated by law; there is no *numerus clausus*, a limited number of contracts allowed (cf. options for atypical contracts - § 51).
- d) Freedom to contract - Party autonomy is established by mandatory rules of law that may not be excluded or diverted from by the parties in contracting. Mandatory

rules are not very frequent, at present they serve to protect the weaker party of the contract (e.g. consumer protection – see e.g. the provision of general consumer contracts or the particular provisions on liability for faulty goods sold in shops).

- e) Contractual parties can conclude contracts in any form – explicitly (in oral or in written form) or in another way which does not give rise to doubts on what the party wished to express; unless certain formalities have not been stipulated by statute or agreed by the parties.

## § 10 Sources of the law of contract

Law of contract is a part of private law. Legal regulation of contract law may found in several statutes.

a) Basic contract law regulations of the general nature are laid down in the Civil Code, Act No. 40, 1964 Col. At present, obligation relationships are provided in its two parts:

Part 6 “Liability for damage and for unjustified enrichment”, i.e. torts and quasi-torts, Part 8 Contract law in which Head I contains the general part of contract law, Heads II- XXI contain provisions on particular obligations (relationships) arising from juridical acts, mainly contracts, i.e. contract law and law of quasi-contracts.

The above mentioned provisions of the Civil Code are rather inconsistent as a result of gradual amendments to the Civil Code, mainly concerning provisions on liability for damage, preceding provisions on contract law, and the general part of obligations is placed in the part providing only for contracts.

b) An extensive set of obligation rules is contained in the Commercial Code, Act No 513, 1991 Col. Obligations are dealt with in Part 3 on business obligation relationships.

c) Further legal rules contain provisions on some specific kinds of obligations not regulated in the codes mentioned. These are for example:

- Act No. 121, 2000 Col. on copyright, the related rights and on some other acts of law as amended (Copyright Act),
- Act No. 527, 1990 Col. on inventions, industrial designs and innovations,
- Act No. 2007, 2000 Col. on industrial designs protection,
- Act No. 116, 1990 Col. on lease and sub-lease of non-accommodation facilities,
- Act No. 591, 1992 Col. on securities.

## Selected Bibliography

- Bejček, J., Eliáš, K., Raban, P. a kol., Kurs obchodního práva. Obchodní závazky. Třetí vydání, C.H.Beck Praha, 2003, 551 stran, ISBN 80-7179-746-4
- Eliáš, K. a kol., Občanský zákoník. Velký akademický komentář. Volume 1,2, 1. vydání, Linde Praha, a.s. 2008, 2639 stran, ISBN 978-80-7201-687-7
- Fiala, J. a kol., Občanské právo hmotné. Třetí opravené a doplněné vydání, Masarykova univerzita a nakladatelství Doplněk, Brno, 2002, 436 stran, ISBN 80-210-2793-2, ISBN 80-7239-111-9

- Hurdík, J., Freedom of Will and Legal Order. In: Freedom of Contract Conference, MU Brno 1997, p. 49-58, ISBN 80-210-1683-3
- Hurdík, J., Fiala, J., Czech Private Law at the Beginning of the Third Millenium. Legal Studies and Practice Journal. Research Revue, Faculty of Law, Masaryk University in Brno, No IV, 2006, s. 351-355, ISSN- 1210-9126
- Knapp, V. a kol., Občanské právo hmotné, Volume I, II. Druhé, aktualizované a doplněné vydání, Codex Bohemia, 1997, 1998, 352, 496 stran, ISBN 80-901683-1-0, ISBN 80-85963-51-5
- Knappová, M. – Švestka, J. a kol., Občanské právo hmotné, Volume 1,2,3, Třetí, aktualizované a doplněné vydání, ASPI Publishing, Praha, 2002, 471, 631, 332 stran, ISBN 80-86395-31-6
- Marek, K., Obchodně právní smlouvy, 4. aktualizované vydání, MU Brno, 2003, 316 stran, ISBN 80-210-3064-4
- Zuklínová, M., Smlouva. Academia, Praha, 1985, 183 stran

## **Part I. General Principles of the Law of Contract**

### **Chapter 1. Formation**

#### § 1. Agreement and *quid pro quo* (reciprocity)

##### I. Offer and Acceptance

Under the Czech law, contracts are bilateral or multilateral juridical acts arising from bilateral or multilateral manifestation of will. Such expressions of will should be of an identical content and should express mutual assent.

One of the juridical acts is a proposal to conclude a contract - an offer. Offer is an expression of will, by which the offeror proposes the offeree to conclude a contract on the subject matter given in the offer. The offer contains two elements: the first one concerns the contractual assent, the second one the determination of the content of the future contract. The offer is

effective from the time it has been delivered to the offeree. The offer, even though it is irrevocable, may be revoked by the offeror, if the revocation reaches the offeree before the offeree has dispatched an acceptance.

The offer may not be revoked:

- within the time limit stated for its acceptance, unless the right to revoke prior to the expiry of that time is implied in the offer,
- if irrevocability is stipulated in the offer.

The offer is binding for the offeror, although not for an indefinite time. First, the time limit stated by the offeror for the acceptance of the offer must be considered. An offer may not be revoked for the reasons stated above. But an offer irrevocable expires:

- by the expiry of the time stated for the acceptance,
- by the expiry of a reasonable time taking into account the nature of the contract proposed and communication means used by the offeror for dispatching the offer,
- by delivering the offeree's rejection of the offer to the offeror.

Unless accepted immediately, an oral offer is terminated if not stated otherwise in the offer. The time limit set for the acceptance by the offeror in a telegram begins to run from the moment the telegram has been submitted to the post office. If the date is stated in the letter, the time for the acceptance runs since that date, or if such a date is missing, since the date stated on the envelope. The time limit for the acceptance, stated by the offeror by phone, telex or other means enabling immediate communication begins to run from the moment when the offer reaches the person intended.

The second juridical act is the acceptance. Accepting an offer, the offeree manifests his will to the offeror to accept his offer and concludes a contract with him on the subject matter as stated in the offer. The acceptance may be carried out by a declaration or a conduct by the offeree (e.g. by performance). In any case, it must be a manifestation of will carried out on time. The acceptance becomes effective upon the moment when the consent with the expressed offer reaches the offeror. A conveyance contract does not require any prompt declaration of acceptance by the offeree, a written declaration in the same document containing the offer is sufficient. The acceptance of an offer made to the absent offeror is effective only after the reply of the offeree reached the offeror.

The acceptance may be revoked if the respective revocation has reached the offeror sooner than or simultaneously with the acceptance. A late acceptance is nonetheless effective as the acceptance if without undue delay the offeror informs the offeree that it is treated as an effective acceptance. However, an answer expressing the acceptance but containing supplements, reservations, restrictions or other changes (modified acceptance) is a rejection of the offer and it is deemed to be a new offer (counteroffer).

The moment of conclusion of a contract is described by § 44, Par.1 Civil Code, under which a contract has been concluded at the moment when the acceptance of the offer has become effective. Silence or inaction in itself do not imply the acceptance.

## II. Intention to Create Legal Relations

Offer and acceptance are juridical acts, i.e. manifestations of will to conclude a contract. Thus, an offer and acceptance must contain:

- a) manifestation of will
- b) declaration of the extent of the manifestation of will to conclude a contract
- c) recognition of the manifestation of will by the rules of law



d) consequences following the intention expressed by the manifestation of will.

ad a) Manifestation of will is an essential concept, implying unity of two components: will and manifestation.

The will is an element of a juridical act together with awareness of legal consequences of the acting person as the subjective aspect of the manifestation of will. The will designates a mental category and expresses an inner mental relation of the acting person to the intended legal consequences. As a result, the will must understand the significance of a juridical act created in a qualified manner. The requirement that the will should be manifested in a certain way recognized by law denies or reduces legal relevance of the will of such persons who due to the lack of mental capacity or maturity are unable to properly predict the consequences of their will manifestation. Therefore, the manifestation of will made by a person incapable of rational decision making due to his lack of mental capacity or his age has no legal effect.

The will may be manifested in any manner enabling to recognize its content. According to manifestation of will we can distinguish:

- an explicit manifestation
- an implicit manifestation.

An explicit manifestation can be performed orally, in writing or by sign language. With regard to increasing use of modern methods of recording, processing and transfer of information, using of agreed or usual codes, signs, etc. is possible as well. For some juridical acts a certain manner of explicit manifestation is prescribed (e.g. a written form of a contract). Implicit manifestation of will is a manifestation communicated in other than an express manner, e.g. by acting (tearing the testament, etc.) or by omission (expressing the will not to make the contract by inaction of the offeree in reaction to the offer). Omissions are legally relevant only if it is inaction or silence in situations where acting is necessary.

In certain cases of inaction, civil law establishes a presumption or a fiction of a real will; however, such will is not apparent or demonstrable (§ 47, Par. 2 Civil Code).

Ad b) The requirement to declare the extent of manifestation of will means that the will must be intended to result in the rise, a change or the termination of legal relation (rights and obligations).

Various views within the civil law theory have been expressed involving the extent of will to cause legal consequences. The prevailing and most logical concept is that manifestation need not comprise all legal consequences of an act. It is not possible for a lay person (non-professional) to comprise by his will all detailed legal consequences that may be attached to his will by legal rules. Therefore, a will of a person including essential consequences is sufficient. Further consequences will necessarily arise under law if determined by cogent rules (conditioned by non-mandatory provisions unless excluded by the parties as agreed). Therefore, a person need not be clearly and entirely aware of all legal consequences, it is sufficient if he intends certain (fundamentals) legal consequences to arise.

From the above stated it follows *a contrario* that where there is no will to create legal consequences there is no juridical act. Acts of social service are not juridical acts for the same reason. For example, to refrain from smoking in places where smoking is not prohibited by law is not of legal nature; therefore such a manifestation of will is not intended to create legal consequences.

Ad c) Manifestation of will gives rise to legal consequences only if such a manifestation of will is recognized by law (approved). Therefore, recognition of will by legal rules is another concept of juridical acts. If this concept is missing the manifestation of will is not deemed relevant under law. The concept is related to the word “law” comprising the term juridical act as defined under § 34.

Ad d) For a juridical act it is not sufficient that manifestation of will is recognized by rules of law, but certain legal consequences must be attached to it by law. Moreover, it is stated under b) that these consequences are those intended to arise by the acting person (if concerning fundamental consequences). In other acts, e.g. in illegal acts as well as in persons’ behaviour which is not determined by will but which is subject to law, consequences also arise, however, not by the will of the acting person but by force of law.

### III. Consideration (Gratuitous Promises; Natural Obligations)

#### A. Consideration

The Czech law does not know the doctrine of consideration as it is known in the *common law system*.

#### B. Gratuitous promises

Gratuitous promises to perform something exist in the Czech legal system as exceptions, the standard form of such promises being a deed of donation and a public promise.

Unilateral contracts attach the debtor’s position to one party only and the creditor’s position to another party. Apart from all subsidiary rights and obligations of the debtor and the creditor, e.g. a duty to provide cooperation in performance and right to cooperation to be provided, the subject matter of the contract will be one performance only. An example, and in fact an exception to value relations governed by civil law of contracts, is the obligation established by a gift covenant (deed of donation).

Another type of a gratuitous contract under Czech law is a public promise.

A special position in contract law is held by a mental reservation. It is belief of a party to the contract that in relation to concluding a contract another advantage will be granted; this belief, however, is not expressed towards the other party in a significant manner. This mental reservation is not legally binding under Czech law and is not a part of contracts.

#### C. “Natural Obligations”

The Czech civil law distinguishes a subjective right, i.e. the ability of a person to behave in a legal way, and a claim, i.e. the property law based on its enforceability by the state power, exceptionally exercised by an authorized person.

The claim thus comprises the following:

- a) presents enforceability of a subjective right against the will of the obliged person,
- b) its existence is linked to a subjective right,
- c) presents an option to use state power or self-help for the claim enforcement.

In most instances the Czech law of contract provides subjective rights through claim, an exception being a group of the so-called **natural obligations**. These are rights that cannot be enforced by court or by an authorized person. These include rights which are subject to period of limitation, rights from wagering and games that are not permitted or organized by the state and rights arising from loans for such wagering and games (§ 445, Par. 1, 2 Civil Code).

Civil law recognizes as exceptions such obligations that the legislator refuses to provide with enforceability through state or personal enforcement, i.e. obligations that do not constitute a claim. It is in fact the type of incomplete rules (*lex imperfecta*) that are denoted as natural obligations (*obligationes naturales*) under contract law. These obligations are characterized by the two following features:

- lack of the ability to demand performance by enforcement. Performance may be exercised only through a voluntary act of the debtor,
- if performance was exercised in this manner, its return cannot be demanded under the stipulation on unjust enrichment,
- obligations arising from loans in wagering and games,
- obligations for which time period limitation has expired
- obligations invalid due to lack of formalities.

#### IV. Modifications of the contract

The Czech civil law recognizes the following changes in content and subject matter:

a) agreement of modification (*cumulative novation*)

b) debtor's delay (*mora debitoris*)

c) creditor's delay (*mora creditoris*).

Ad a) Agreement of the parties (*cumulative novation*)

With regard to the principle "pacta sunt servanda", the parties may, by agreement, modify their mutual rights and obligations. In fact, the parties conclude a new contract in order to modify the former one.

Cumulative novation, as a form of an obligation relationship change, may be considered an instance where the parties agree on a new obligation which will substitute the current obligation.

As the current obligation continues to exist, so does also the surety of the obligation. If the surety's consent has not been obtained for the novation, the surety is entitled towards the creditor to demur all he could have demurred prior to the novation agreement becoming effective.

Ad b) Delay of debtor (*mora debitoris*)

The term and its appearance

The Civil Code stipulates that a debt (obligation) must be fulfilled on time and properly for the obligation to be discharged by performance. If the debtor has not fulfilled his debt on time and properly he is in delay. Both performance terms must be given cumulatively to deem the obligation discharged by performance. So a debt fulfilled on time but having legally relevant flaws has the same effects as a debt not performed within the time stated.

Besides the general stipulation for debtor's delay in performance arising from an obligation, the Civil Code specifies special legal consequences for the particular types of obligations. We will deal with them in relation to the respective obligation types.

Legal consequences of a debtor's delay.

Debtor's delay causes a change in the obligation content, resulting either in a change of creditor's rights and debtor's duties or in the rise of new creditor's rights and new debtor's duties. These may be further classified as follows:

- Once the debtor is in delay, the creditor is entitled to determine additional reasonable time for performance. If the debtor does not perform within this time either, the creditor is entitled to withdraw from the contract. If the performance is severable, the creditor may withdraw from the contract effective only in a part of the performance. Legal consequences of the withdrawal involve all types of contracts, i.e. also the contracts registered by a state notary's office in the respective procedure. Thus the debtor's delay does not affect his obligation to fulfil the debt before the the creditor's withdrawal from the contract has become effective.
- The right to withdraw from the contract as mentioned in the previous paragraph does not involve the so-called fixed contract. In the case of an obligation where the time of performance was stated quite strictly and it is obvious beyond any doubt from the contract or from the nature of things that the creditor loses his economic interest upon delayed performance, under the Civil Code such a contract is cancelled *ex lege*. Only in the case where the creditor insists on the performance, he must announce it without an unnecessary delay to the debtor and thus the obligation continues to exist.
- In the case of a monetary claim, the creditor is entitled to demand interests for delay when the Civil Code or implementing provisions do not stipulate a duty to pay fees for delay for the particular case (the amount of interest and fees for delay are stated by the respective implementing provision).
- If the debtor is in delay with the performance, the risk of loss, damage or destruction of a thing has passed upon him, unless the damage would have occurred anyway.
- The debtor's delay entitles the creditor to claim compensation for the damage caused by the delay. In the case of monetary performance delay the debtor will be liable only up to the amount, which is not covered by the interest for delay or by fees for delay.

#### Ad c) Creditor's delay

The term and its appearance

Creditor's delay occurs when the creditor has not accepted any performance from the debtor, or when the creditor failed to provide the necessary cooperation to the debtor in performing the obligation.

Legal consequences of creditor's delay

Creditor's delay results in what as follows:

- a) during the time of the creditor's delay the debtor's delay may not occur.
- b) if the thing was a performance, the risk of loss, damage or destruction of the thing lies on the creditor for the time the creditor is in delay,
- c) if costs or a damage incur to the debtor during the time of the creditor's delay, the creditor is bound to compensate
- d) if the nature of the debtor's performance so allows, the debtor can fulfil the debt through an official deposit.

## § 2. Formal and evidence requirements

### I. Formal Requirements.

Under the Czech law contracts can be made, unless stipulated otherwise by law or agreed by the parties, in a form which does not give rise to doubts about the content of will as manifested by the parties to the contract.

The forms of a juridical act may have various forms, the basic classification being into written or oral ones. The Civil Code does not specify the oral form. The written form is further classified into a simple form and that of an official record. The simple written form requires a written expression and a signature. Typically, the writing of contracts means that the text of a contract is embodied in a document. The text itself may be made by any technical means (unless expressly stipulated for some juridical acts that it must be made in one's own hand, the signature must be in one's own hand. Replacing signature by technical means is admissible only where it is ordinary (§ 40, Par. 2). If the juridical act has been carried out by electronic means, it may be signed electronically under § 40, Par. 3 of the Act No. 227(2000 Col. Requirements of the written form are met if a juridical act has been carried out by telegraph, telex, or by electronic means enabling recording of the juridical act and denoting the person who has carried it out. In contracts manifestations of the parties may be made in different documents, only in real property conveyance the expressions of the parties must be included in the same document. In the cases stated by law the written form is made more restrictive by the signature attestation as prescribed (e.g. signatures of the parties to the public auction contract - § 19, Par. 4 of the Act No. 26(2000 Col.). The form of the official record is a qualified written form, at present it is a public notary's record.

The cases where the parties are bound to submit to one another a written confirmation about a juridical act or to make a record must be strictly distinguished from a written form (e.g. § 141, Par. 2). However, validity of juridical act is not linked with such requirements.

Lack of the form required by law results in the contract being void, lack of the form as agreed on is related to the contract being voidable (§ 40a Civil Code).

The accepted performance based on a juridical act being void due to the lack of formalities (arising either from law or from an agreement) is not deemed unjustified enrichment. This cannot be deemed a validation of a juridical act because by the provision quoted only one of the possible consequences of a void juridical act is excluded, i.e. a duty to return the unjustified enrichment obtained through a void juridical act.

## Tender

Tender is a specific manner of concluding a commercial contract enabling to select the most suitable offer from the bids. Therefore tender is used mainly for contracts where one of the parties is a public authority and where the tender is obligatory, declared and conducted exactly according to the rules stipulated by a special law. In commercial obligation relationships it is the case where a person (the announcer) on his own will announces the tender for the most suitable proposal to conclude a contract. The tender is not yet an offer for making contract, only a call to submit offers for its making. The call for tenders done in the form of a tender is related to legal consequences. In announcing tender the terms of competition are required to be published.

## II. Contract under seal

The "obligation" contract under seal is not mandatory in the Czech contract law. See more in V. Function of Notary and Notarial Instruments.

## III. "Solemn" contracts

Solemn contract as a manner of concluding contracts is unknown to Czech law. An exception

is marriage solemnization, which, however, is not generally deemed a contract.

#### IV. Evidence Requirement

As for a special form of contracts required by law or agreed on by the parties, see the previous text.

Only in cases stated by law some declarations of the parties to the contract require a special form of the so-called official record which can either be a public notary record or in some cases also a record made by bailiffs under the Judgment Enforcement and Execution Act. (See more in V. Function of the Notary and Notarial Instruments.)

#### V. Function of the Notary and Notarial Instruments

Under the Czech law the notary is a public clerk, his duties involving, among others, drawing up contracts in the cases where an official form of the notarial record is required by law or by agreement of the parties.

This form is required by law in the following instances:

- generally for all juridical acts of such persons who are unable to read or write, not even while using a technical device enabling them to get acquainted with the text of the document to be signed and to sign them in turn by their own hands

- where it is specified by law (cf. forms of testament, establishing certain types of companies).

The position of the notary is regulated in the Notary Act. The notary is appointed for life by the Notary Chamber. The notary candidate must have a university degree in law and a preliminary practice. There are quantitative limits for establishment (imposed by the Notary Act and by the decisions of Notary Chamber. The notary is obliged to comply with high professional standards and must exercise due care in the execution of his activities. The notaries are subject to disciplinary jurisdiction executed by the Notary Chamber.

The Notary Act furthermore includes provisions on the form of notarial records and other requirements which must be met. The notarial record has the value of an authentic act (public instrument).

The notary has the power to issue a special notarial act (e.g. a contract) with an execution clause which may serve as a writ to execution.

The task of the notary lies especially in the field of law of matrimonial property (marriage contracts, etc.), law of artificial legal persons (establishing, modification, transfer and termination of companies, associations, foundations, etc.), law of succession (e.g. testamentary dispositions) and law of immovable things.

#### VI. Burden of Proof

The distinction made between “obligation of means” and “obligation of results” as a general concept is unknown to Czech law.

Czech law distinguishes situations where the expression of will and manifestation of will are not identical, i.e. the cases when the content of will is different from what follows from its manifestation. As will manifestation as a feature of a juridical act necessarily presumes compliance of will with its manifestation, in the case of inconsistency of will and its manifestation an essential feature of the juridical act is missing. Various inconsistency variants of a will and its manifestation may occur, one of the basic criteria of their classification being the relationship of inconsistency and the awareness of the acting person.

Thus deliberate and accidental inconsistency of will and its manifestation may be distinguished.

a) Deliberate inconsistency of will and its manifestation is one-sided where one party's will and its manifestation are inconsistent and both parties are aware of it.

One-sided deliberate inconsistency of will and its manifestation arises as a mental reservation or a one-sided simulation.

Mental reservation (inner reservation) means that the acting person includes a reservation in the will he manifests but does not explicitly manifest that reservation. Thus the will and its manifestation of the acting person are not consistent to some extent; the acting person is aware of it but the other parties of the juridical act or third persons are not because the reservation is of inner nature, not being explicitly manifested.

One-sided simulation (pretending) of *some* will is of similar nature; the acting person manifests a different will from the one he really has. He realizes this fact but he pretends to other party and third parties to have the will he has manifested.

The consequence of one-sided deliberate simulation results from the fact that the will manifested is not serious. Therefore it results in the juridical act being void (§ 37). This voidness can be claimed only against the party who was aware of the will and its manifestation inconsistency. On the other hand, the party, having presumed that the act was made seriously, may claim it as if it were valid (cf. § 41, par.2).

A shared deliberate inconsistency of will and manifestation occurs when in bi-lateral or multi-lateral juridical acts all parties manifest something different from what they really want. Their real wills are consistent, so are their manifestations, but there is no consistency between their real wills and real manifestations. It is a simulation where the parties pretend to carry out a juridical act (relative simulation). A simulated (fictitious) juridical act suffers from inconsistency of will and its manifestation; moreover, the will manifested is not serious. Therefore, they are sanctioned by being held void under the Civil Code. Also in this case voidness of the act may not be claimed against the party who considered it unveiled. A veiled juridical act is a dissimulated juridical act. If this veiled juridical act corresponds with the will of the parties and meets all the requirements, it is valid (41, par.2).

b) Accidental (unknown) inconsistency of will and its manifestation is a mistaken manifestation.

As for mistakes, errors, see Part 1, Chapter 2, § 2.1.

### **§ 3 LIABILITY AND NEGOTIATIONS**

#### **I. Pre-contractual liability**

For the parties to be able to conclude a contract properly several fundamental terms must be met, including:

a) terms concerning the entity involved, i.e. legal personality and capacity of a person to make the contract in question, or the capacity of the person representing the party in concluding the contract,

b) the title of the party to the contract subject matter, i.e. title to the thing to be sold under the contract.

Other pre-contractual liabilities basically are not generally required under the Czech law.

There are in the Czech Civil Code pre-contractual duties between a business and a consumer

in the consumer contracts:

- information duties (general duty to disclose information about goods and services, specific duties for the business delivering goods or services to consumers, duty to provide information when concluding contract with a consumer who is at a particular disadvantage, information duties in distance communication, information duties when concluding consumer contract by electronic means. Generally, the information must be clear and precise and expressed in a plain and intelligible language.
- duties to prevent input errors,
- duty to negotiate in accordance with good faith and fair dealing (good morals).

## II. Breakdown of Negotiations

Generally, the persons are free to negotiate and are not liable for failure to reach an agreement. Termination

Contractual negotiations may be terminated prior to conclusion of the contract, the basic principle being that the offeror or offeree are both bound by contractual manifestations. It is necessary to distinguish the possible terminating of the offer by the offeror and offeree (about this subject matter, see more above in Chapter 1, § 1, I. Offer and Acceptance).

In Czech Civil Code *clausula rebus sic stantibus* or as a term in *pactum de contrahendo* are not stated. But in the Commercial Code we can find the *clausula rebus sic stantibus* as an instrument of the deliberation of one of the contractual parties from the duty to conclude a future contract.

The Czech Law does not state the concept of *culpa in contrahendo* as the written norm, either. But at the beginning of the 21<sup>st</sup> century, the Czech Constitutional court accepted the principle of legitimate expectation, subsequently applied by courts, that in the cases when a person refuses to make a contract without a sufficient reason and the other person suffers loss then such a person is awarded damages.

## Chapter 2. Conditions of Substantive Validity

Contracts arise upon two unilateral addressed juridical acts. For their rise and for their validity it is necessary that their addressing be mutual, identical in content and expressing assent to contract. More about the right to revoke or reject the offer or acceptance see above in Chapter 1, § 1, I. Offer and Acceptance.

The contract content will be specified mainly by the offer, for some types of contract the law prescribes which essential parts must be contained in the contract in question, otherwise it does not exist (cf. contract for sale and purchase as an agreement on the subject matter and the price). The contract may also contain the content of the contract on a future contract, the non-mandatory rules included in law, etc. The instant of concluding the contract is stipulated by § 44, par.2, under which a contract is made upon the instant when acceptance of the offer becomes effective. Silence or inaction themselves do not imply acceptance.

The same principle also applies to carrying out multilateral juridical acts where expression of will of more than two parties is required and the substance of which is also assent, mutual and harmonious will of all parties to the contract.

Sometimes another fact is required (e.g. assent of other parties or ruling of a relevant authority) to be added to the unilateral will manifestation, or manifestations of will of two or more parties.



Formation and subsequent existence of a juridical act is one of the prerequisites for its validity.

Formation and validity must be distinguished from a juridical act when becoming effective, i.e. from a situation when effects of a juridical act are connected with such a will manifestation by a rule of law. In the majority of cases the rise, validity and effect of a juridical act fall within one instant. Only in specific cases the law binds the effect of a valid juridical act to meeting further requirements. Such process is regulated in the present Civil Code under § 47 par.1 and 2; for the cases where ruling of a respective authority is necessary for a contract, the contract takes effect only upon that ruling. Unless an application for the respective ruling has been filed within a three-year term following the conclusion of the contract, the parties are deemed to have withdrawn from the contract (§ 47 par.2). Withdrawal from the contract is effective *ex tunc*, i.e. at the time of the conclusion of the contract. Within an established period of time it is necessary for the application to be submitted to the respective authority. The purpose of this provision is to prevent further existence of contracts that did not become effective and are thus purposeless (in 1983-1992 this construction was broadly applied in registering contracts by state notaries).

### **Essential elements**

For the contract as juridical acts to have capacity to give rise to proper legal consequences it is necessary – in addition to existence of its respective terms – to meet quality requirements, the fundamental elements or essentials of a juridical act. These essentials usually involve the following:

- a) capacity of the parties,
- b) will to contract,
- c) manifestation of will,
- d) will in relation to expression,
- e) subject matter.

Ad a) The prerequisites of the parties to carry out juridical acts are, first, their capacity to exercise rights and take liabilities, and, secondly, their capacity to act. General capacity of a natural person in juridical acts (capacity to act) is regulated by § 8 – 10, of juridical person by § 19 – 20 Civil Code. The effects of incapacity are contained in § 38 Civil Code.

If a party lacks capacity to act the juridical act becomes void. The law does not expressly stipulate this effect; however, it is implied in the nature of this essential condition. Such a case may occur with some juridical persons whose capacity is of a specific nature (extent).

The lack of capacity to perform juridical acts results in voidness of the respective juridical act. It will be so in the case of minors if they carried out a juridical act inconsistent with their limited capacity, in the case of persons incapacitated by a court ruling or persons with limited capacity. A juridical act carried out by a person not incapacitated or restricted in capacity by a court ruling will also be void if such a juridical act was performed in a state of mental disorder that made the person incapable to act (§ 38, par.2). This provision relates to cases of temporal mental disorder (including drunkenness) as well as the cases in which court could have ruled on incapacitation or a restricted capacity but it has not done so yet.

Ad b) As for the will essentials, usually the following are named: existence, freedom, seriousness, lack of error.

### Existence of will

The requirement of real will means inevitability of its existence. In this regard, including real will as an essential condition among the essentials of the juridical act is redundant as it overlaps with the necessity of will existence as a feature of a juridical act. If there is no will, no juridical act is formed. Therefore, such a juridical act must be deemed non-existing (*non negotium*). However, the Civil Code does not know this notion and therefore it may only sanction lack of will by voidness.

The cases where the will is missing are clear but sometimes the will of an acting person appears to be present, even though it is not. An example is the will enforced by physical duress comprising physical pressure upon the party who expresses the will of the person exercising duress upon him instead of his own. This means that the will of the acting party does not exist here.

### Freedom of will

Free will is freedom to act, i.e. freedom of a party to decide in what legal relations he/she will participate through juridical acts the basis of which being their will. Free will does not exclude general limitations and conditions stated by law for juridical acts.

Under civil law theory, free will is deemed excluded when the following circumstances are present: physical duress, wrongful threat, and distress.

By physical violence another person forces the acting person to express the will of the person exercising violence upon him, instead of his own. It is of no significance if the violence comes from the other party or from the third party. Neither is decisive whether the other parties to a juridical act were aware of physical force exercised upon the party or not. For physical duress to be legally relevant it must be illegal and a causal relationship must be found between it and the expression made by the person under pressure, i.e. the performed expression must be the result of duress. As physical duress excludes the will of the acting person the fundamental element of a juridical act is missing and therefore such an act is futile and as such void under the Civil Code.

Wrongful threat is an illegal threat affecting the will of a party causing in him a reasonable fear of injury which is threatened. In this manner the will of the person under threat is created contrary to his real will. The difference between physical violence and wrongful threat is that in wrongful threat the person under threat expresses his will, but such a will that is deformed by a wrongful threat. While in the case of violence the acting person has the only option, i.e. to express the will of the person exercising violence upon him, he has two options in the case of a wrongful threat, either not to subdue and to express his own real will, or to subdue and express the deformed will. Avoidance of the contract entered due to the wrongful threat is possible also in the case where such wrongful threat was exercised by a third party, even if the other party of the contract was not aware of the third party's duress.

Wrongful threat is relevant under law while satisfying the following conditions:

- The threat must be wrongful, i.e. the threat comprises something that is not allowed (e.g. to cause bodily harm) or the threat comprises something that the threatening person is entitled to use, but not for the purposes to make another person to perform a certain juridical act (e.g. by filing a complaint against somebody for an actually committed offence if the contract is not made).
- There must be a causal link between the threat and the expressed manifestation; the threat must incite fear influencing directly the will of the person under threat.
- The threat must be of such intensity as to be able to give somebody real fright. The

seriousness of the threat to cause fear is judged individually considering both the subjective situations of the acting parties and the particular circumstances involved.

Wrongful threat makes a legal act voidable.

Free will is excluded also by distress, which means an objective condition of the acting person regardless of how or due to whom the distress has arisen. Distress is an economic, social, health or another condition that alters by its existence the true will of the acting person in such a way that it forces the acting person to carry out a juridical act under strikingly disadvantageous terms. As the condition of distress is of objective nature, the party benefiting from it need not be aware of it. However, if a party caused the other party's distress, he will be liable for its unfavourable consequences.

Strikingly disadvantageous terms are judged individually. In contract to mutual performance the decisive aspect may be an economic equivalence of the performances provided. This aspect is not the only one; strikingly disadvantageous terms may have various forms and may also occur in gratuitous contracts.

The party who entered contract under distress can withdraw from it.

The will of a party is not serious if the acting person does not want to give rise to legal consequences that are related with such a will and its manifestation under law. A broader interpretation of seriousness of will – when the will does not intend to invoke legal consequences – also includes mental reservation, simulation (see the explanation on accordance of will and manifestation).

Lack of serious will has to be assessed as an error leading to a futile legal act. Pursuant to the Civil Code the lack of seriousness of will results in voidness (§ 37).

From the view of legal certainty of third parties it is necessary to consider whether non-serious will is binding. If lack of seriousness is clear to the other party, too, naturally the other party understands that the will is not directed to a juridical act and does not intend to result in legal consequences. If it is not obvious, protection of the other party relying on seriousness of the will must be secured. Three concepts of meeting this requirement can be found in civil law. One part of the legal theory considers such an act void but its consequences are to be effective in relation to the relying party based on the expressed manifestation. It means that here the manifestation is preferred despite the will quality. The theory of trust protection considers the juridical act as non-existing but in relation to the rightfully trusting party the same legal consequences will come as from a valid act. Most common is the concept of consequences of liability related to § 37 Civil Code, so the consequences of a juridical act will not arise but instead liability consequences will arise under § 42 Civil Code, presuming the acting party was liable (cf. § 420 Civil Code).

An error – similarly to lack of serious will – presents discord between legal consequences which the party intended to give rise to and the consequences actually arising. The error of will means wrong or insufficient awareness of legal consequences arising from a juridical act (this differs from an error of expression which is a discord of will and expression). The consequences of legal invalidity relate only to a certain qualified error of will (such error is deemed legally significant). Other errors cause no such legal consequences. An error is of legal significance if:

- it is concealed (the party acting in error is not aware of it)
- the other party shared in its rise,
  - he incited it intentionally,
  - he incited it in another way or he must have known about it (in this case an error must be based on a fact that is decisive for the juridical act to be carried

out, the so-called substantial error (mistake to content).

Substantial error may concern the following circumstances:

- legal grounds (*error in negotio*) - the party incorrectly presumes that the will is directed to a certain act while it is another act in fact (the exchange of deed of donation instead of contract for sale),
- the subject of a juridical act, either its identity (*error in corpore*) the party thinks to be buying the thing A, but subject of the purchase contract is subject B, or the properties of the subject (*error in qualitate*) - the party is buying e.g. an antique which is not an antique, though,
- persons (*error in persona*) involving a change of the person,
- other circumstances without which a juridical act would not be carried out.

Error of will may result in voidability (by 1991 an option of withdrawal was stipulated).

Ad c) Essential requirements for manifestation are intelligibility, definiteness and in some specified cases also a form.

The expressing of will is unintelligible if its content is not clearly said and it is not possible, according to an interpretation, to find out what have been in fact expressed.

Unintelligible manifestation of will cannot give rise to legal consequences and therefore it is sanctioned by voidness (§ 37).

Civil law is based on the principle of no-form expression, which means that a juridical act may be carried out in any form, unless specifically stipulated by law. Even if no formalities have been prescribed, the parties may agree to carry out a juridical act in a certain form. Therefore formalities can be imposed by statute or by contract.

The forms of juridical acts may be various, the basic classification being into written and oral ones. The oral form is not prescribed by the Civil Code. The written form is then classified as simple and by official record. The simple written form requires the act to be recorded in writing and a signature appended. Typically, the written form means that the content is given in a document. The text itself may be made by any technical means (unless stipulated that they must be made in one's own hand). The signature should be in one's own hand. If replaced by technical means, it is admissible only where it is ordinary (§ 40, par. 2) If a juridical act is performed by electronic means, it may be signed electronically under Act No. 227, 2000 Col. The written form is made permanent if a juridical act is carried out by telegraph, telex or electronic means, enabling recording the content of the juridical act and denoting the person who carried it out. In contracts, expressions of parties may be in different documents; only in the case of contract on conveyance of immovable property the expressions of parties must be placed in one document. The written form in the cases as specified may be made stricter by a prescribed certified signature (e.g. signatures of parties to the contract of public auction pursuant to Act No. 26, 2000 Col.). The form of the official record is a qualified written form; at present it is a public notary's record. The following forms are required by law:

- in general for all juridical acts of those who cannot write or read, not even while using special equipment enabling them to get acquainted with the content of the documents signed, and to sign it by their own hands
- in specially stipulated cases (cf. form of last will, establishing a limited liability company by a single person).

Lack of the formalities prescribed by law results in voidness while lack of the agreed formalities results in voidability.

Voidness due to lack of form is related to special situations, not occurring in other reasons for

voidness. Under § 455 Civil Code, accepted performance, based on a juridical act which is void as a result of lack of form (both under law and under contract), is not deemed unjustified enrichment. It cannot be said that it is a validation of a void legal act because by the stipulation quoted above only one of the possible consequences of a void legal act is excluded, namely the duty to return unjustified enrichment obtained from a void legal act.

Ad d) The essentials of the relation of will and its manifestation, and their conformity.

Civil law analyses in detail the situations where the will and its manifestation are in discord, i.e. the cases when the content of will is something different from what follows its manifestation. The will manifestation as a feature of a juridical act necessarily presumes a concord of the will with its manifestation; in the case of discord of the will and its manifestation a fundamental feature of a juridical act is missing. Various combinations of will and manifestation discord may occur; one of the essential criteria of their classification is the relation of discord and the awareness of the party. Accordingly, known and unknown discords of will and manifestation are recognized.

A known discord of will and manifestation is one-sided, when the will is in discord with the manifestation of one party, or common (bi-lateral or multilateral) when the will and the manifestation are in discord on all sides and both parties know about it.

One-sided known discord of will and manifestation comes as mental reservation or one-sided simulation.

Mental reservation means that the party makes a reservation in the will he manifests without explicitly expressing that reservation. It means that the will and manifestation of the acting person are in discord to a certain extent; the acting person is aware of it but the other parties to the juridical act or third parties are not because the reservation is of an inner character, it is not explicitly manifested.

One-sided simulation (pretending) of will is of a similar character; the party manifests something different from his true will; he is aware of the situation but pretends before other parties to have the will he is manifesting.

The consequence of one-sided intentional simulation follows from the fact that the will expressed is not serious. Therefore the result is voidness of the juridical act (§ 37 Civil Code). This voidness may, however, be claimed only against the party who was aware of the discord of the will and manifestation. On the contrary, the party who presumed the act to be serious may claim it as if it were valid (cf. § 41a, par.1).

A common (shared) known discord of will and manifestation is given when in a bilateral or a multilateral juridical act all parties express something different than they want in fact. Their real wills are in accord, so are their manifestations, but there is no concord between their real will and the manifestations expressed. It is a simulation when the parties pretend to carry out a juridical act even though they want to carry out none (absolute simulation) or they pretend to carry out a certain juridical act to disguise another juridical act (relative simulation - *dissimulation*). Simulated juridical act suffers from discord of will and manifestation; moreover, the will manifested is not serious. Civil Code therefore sanctions it by voidness. Also in this case voidness of the act may not be claimed against the party who deemed it unconcealed. Concealed juridical act is a dissimulated juridical act. If this concealed act in law is consistent with the will of the parties and satisfies all conditions, it is valid.

Unknown discord of will and manifestation is an error of manifestation. Also here one-sided and two-sided discords may be recognized.

Unilateral unknown discord arises when the acting person's will is in discord with its manifestation in a unilateral juridical act or the will and its manifestation of one party in

multilateral juridical act. These are the situations where the actor expresses that he wants something but in fact wants something else without realizing error in his manifestation (slip of a tongue - *lapsus linguae*, mistake in writing, etc).

Similarly as errors of will various types of errors in manifestation are recognized:

- error in a juridical act – the acting person has expressed a will for a juridical act to be carried out, even though he in fact intended to carry out another act (e.g. instead of the intended donation he expressed the will to make a contract of purchase),
- error in the content of a juridical act – the error in the effects to be brought about by the juridical act – e.g. error in time, place and manner of performance(,
- error in subject may have various forms, e.g. error in identity of the thing, error in kind (quality), property and amount of a thing,
- error in the person of the contracting party, e.g. erroneous person gifted under a deed of donation.

If manifestations of will of two or more parties are in discord, the consent to contract is missing and thus a juridical act in theory may not arise. This is true if the discord concerns a substantial matter but discord does not prevent a juridical act to arise if it is only formal and may be resolved by an interpretation. The non-substantial elements of a juridical act affected by discord will be governed by the relevant stipulations.

Two-sided discord gives rise to voidability, too.

ad e) Subject matter must be possible and allowed

The possibility of subject matter in a juridical act should be understood as the possible conduct of the party in correspondence to rights and obligations arising from the juridical act. Most often it will be performance. Possibility of performance arising from a juridical act is objectively an inevitable requirement of validity of a juridical act. If the subject matter of a juridical act is performance that cannot be provided such act cannot be legally binding (voidness).

The possibility of subject matter of a juridical act must not be made identical with the existence of a thing. It is not the thing that is impossible but the performance related to such a thing, e.g. donation of such a thing is impossible, etc. When the subject matter of performance is a generic thing the performance is actually impossible in practice, too. However, there can be an exception, namely with the things that ceased to be produced or imported and are no more available in the period from the moment of making the offer and the actual contract making (e.g. in mail-order sale and purchase).

Impossibility of the subject matter of a juridical act results in its voidness but the impossibility must be absolute (physical). This also concerns the cases when performance is so extraordinarily difficult that with the regard to good morals the owing party cannot be rightfully expected or demanded to overcome the obstacles. Any other level of impossibility of performance cannot be deemed an impossible performance. Also such performance is not impossible that is only relatively impossible, i.e. such that is impossible only due to subjective reasons, i.e. only in the view of the owing party.

Impossibility must be initial, i.e. it must exist upon the rise of the juridical act. If such impossibility arises only after the juridical act occurred it results in termination of the existing obligation.

An allowed juridical act means that such act is legally possible, i.e. it is judged according to

rules of law. A not allowed subject matter results in the juridical act being void. Examples being the subject matter being inconsistent with law, evading law or being contrary to good morals.

- Inconsistency with law is evident mainly when certain behaviour is expressly prohibited by law. Inconsistency with law may concern the content, too, which is not expressly worded but it is implied in the stipulation. Inconsistency with the purpose of law cannot be judged so easily and in the sphere of civil law § 3 par.1 Civil Code must be applied.

- The subject matter of a juridical act evades law if it does not violate directly the requirement given by law but is inconsistent with the objectives of the given law. For example, according to an older court decision, a contract under which a criminal offender transferred his property in order to frustrate enforcement of forfeiture was declared void. Law is evaded by such a contract in spite of the fact the contract itself is not contrary to any provision of law.

- Inconsistence with good morals means that the subject matter of a juridical act is not contrary to law or evades it but the social objectives of the act or relationship to arise from it are breached.

In the sphere of civil law the principle “everything is allowed what is not banned” is applied.

## **Chapter 3. The Content of a Contract**

### **§ 1 GENERAL EXPLANATION**

The content of a contract means legal consequences of forming, changing or terminating a legal relationship, or rights and obligations. The content of a legal relationship is thus stated (even though indirectly) as forming, changing or terminating upon a juridical act.

The content of a contract is determined by the parties within their autonomy of will but it must respect certain cogent stipulations of legal rules, either stipulating content essentials or excluding elements in some juridical acts. The contract content may also be influenced by the decision of a respective authority as well as by the content of non-mandatory rules unless their effects were not excluded by the acting person’s conduct.

Contract terms are classified according to their frequency and their legal relevance into substantial, regular and incidental.

a) Substantial terms are such that are unconditionally required. These terms are given by legal norms (e.g. subject matter and price in contract for sale) and can be specified by the parties, i.e. they are of subjective nature (enabling the parties to denote such element essential which they themselves consider important).

b) Regular terms are such that occur as a rule but their absence has no effect on the rise and validity (e.g. agreement on the time and place of performance).

c) Incidental (subsidiary) terms are such that arise only incidentally and irregularly. These are mainly conditions, time determinations and some others.

Conditions are such subsidiary provisions by which the consequences of the juridical acts are made dependent on unknown circumstances (conditional juridical acts). Such an uncertain circumstance may be a future fact that is not known to the parties whether it will occur or not

or a fact that will certainly occur but the parties do not know when, or a past fact about which the parties do not know that it had already occurred.

For more about the conditional contracts, see below in § 3.

Time fixing as a provision in a juridical act is similar to subsidiary condition. It means that effects are conditioned on the expiry of time. Unlike a condition, in the case of time fixing it is certain that the time stated will expire and the effects of the juridical act will come into existence or terminate. Time fixing may be of two types: in the first case the effects of a juridical act will come into existence only after a certain time, in the other case the effect of a juridical act will terminate after the expiry of the fixed time (about time-limited rights and obligations see more below).

### Consequences

Consequences of a contract may be the rise, a change or the termination of a juridical act (rights and obligations). These consequences concern persons affected by the juridical act and things that denote legal relations (rights and obligations) established, changed or terminated by the contract.

As a rule the contract has effects only for the parties who made it. This conclusion arises also from the character of civil law regulation method, where the party in a civil law relationship may not one-sidedly interfere with legal relations of other individuals, except for the cases given by law. The exception is a contract in favour of a third party (*pactum in favorem tertii*). It is a contract where one party (the debtor) promises the other (the creditor) to perform in favour of a third party. Such a case is an insurance contract for insuring property, life or health of third parties.

As for the subject matter, the contract has consequences only for the legal relationship directly involved. An exception is accessory relations linked in their existence with prime legal relationships (as a rule *security* relations on securing a claim).

### Grounds and consequences of invalidity

Such consequences are linked to the contract inconsistent with rules of law and can be divided as follows:

#### a) Futility

A juridical act is deemed futile (*non negotium*) that misses one of the substantial features. Basically, it is an act that only seems to be a juridical act but misses e.g. will, expression, etc. Civil Code does not define futility; the cases that in theory are reasons for the juridical act futility are sanctioned by voidness.

#### b) Invalidity

Invalidity in relation to a juridical act or a legal relationship means that the juridical act or the relationship is void or has been avoided. There are two types of invalidity, voidability and voidness.

The voidability as included under the Civil Code is rather a distinct form of the general notion of invalidity.

### Voidness

Void juridical acts are deemed existing but invalid if certain requirements or essentials sanctioned under law by voidness are missing. No legal consequences arise from such juridical acts for the parties or third parties. It is characteristic that voidness arises directly under law (*ex lege*) without the necessity to claim the consequences by either party. Voidness may be claimed by anyone legally involved, not just by the parties. The court will not



consider voidness *ex officio*. Grounds for voidness include inconsistency with law, good morals, evading law, lack of freedom and serious will, uncertainty and unintelligibility of manifestation, etc.

The effects of voidness of a juridical act can be considered according to time and subject matter.

As for the time voidness is effective as a rule *ex tunc*; the juridical act is void since its origin. The voidness is effective immediately. Voidness persists even though the grounds of such voidness became extinct later; a void juridical act may not become valid later. Voidness cannot be rectified through confirmation of an obligation. Only the so-called conversion is possible, which means that if a void juridical act complies with the essentials of another juridical act it may have consequences of that juridical act.

As for the extent, the effects of voidness are considered according to whether the whole act, or only its part, is void. The solution is found in § 41 Civil Code under which only that part of an act that is affected by the grounds for voidness is void. The part of the act not affected remains valid being a separate whole.

### Voidability

The essence of voidability is the fact that a juridical act which is deemed valid, induces legal consequences as if valid by the time its invalidity has been claimed or declared by the respective authority. Voidability is taken into consideration only upon the objection brought by the entitled party. Pursuant to the Civil Code it is the person affected by such an act, i.e. the party to a juridical act or a third party who was affected by the ground of voidability. A person who has caused invalidity may not object the voidability of juridical act.

The question of the qualified claiming of the effects of voidability is not quite satisfactorily resolved in the legal theory. There is an opinion that the principle of equality of the parties must be respected and therefore it is possible to induce consequences of voidability in two ways:

- The part affected by voidability will claim voidability in relation to the other party by a unilateral juridical act who will accept the objection and they both together take measures for removing negative consequences of the voidable juridical act
- If the other party will not accept the objection, the party wishing consequences of voidability to occur must file a complaint with the court for invalidity to be declared. In such cases legal consequences of voidability will occur only on the grounds of the court decision.

However, a different opinion has been accepted by majority of legal writers, (which also prevails in court practice and is supported by the authors of this text) based on distinguishing direct and indirect voidability. In direct voidability, claiming voidability by the party entitled is sufficient. For the effects of voidability to arise an out-of-court notice is sufficient by which the entitled party claims voidability (it is a real one-sided addressed juridical act). The voidability becomes effective upon the instant when the notification reaches the other party or all the parties to the act. In the case of indirect voidability the voidability of a juridical act must be declared by court. The Civil Code establishes direct relative voidability.

The possibility to claim voidability is bound to a certain time limit. The court practice, however, holds that this right of the party is subject to the expiry of a three-year period. This time limit begins to run on the day of carrying out the juridical act.

The grounds of voidability of juridical act are in comparison with grounds of voidness less serious and therefore personal incentive of the party affected is expected to avoid the consequences of the invalid act. This also includes lack of the agreed formalities for the expression of the juridical act, lack of consent of another party, etc. (§ 40 Civil Code).

Voidability affects juridical acts in respect of time and subject matter, too.

As for the time, voidability as a rule is effective since the beginning (*ex tunc*) but unlike voidness only on the condition that the respective claim for voidability has been made. Unlike voidness, in the case of voidability a validation may be admissible. If the flaw that might have led to voidability was removed or rectified, invalidity cannot be claimed (e.g. by a subsequent consent with the subject matter of the juridical act which exceeds a usual management of common property of spouses).

#### c) Withdrawal from an invalid act

Withdrawal is a unilaterally addressed juridical act of the entitled party intended to prevent the effect of the act. An invalid act is deemed existing and valid and thus causing legal consequences; however, one can withdraw from it. The option to withdraw from an invalid act is available exclusively to the entitled party, i.e. the party affected by the invalidity with which the option to withdraw is linked.

The effects of withdrawal become effective at the moment when the expression of withdrawal has reached the other party, while effective *ex tunc*, i.e. retroactively since the time when the juridical act was carried out, unless prescribed by law or agreed by the parties otherwise. The effects of invalidity of a juridical act by which the entitled party withdraws from an invalid act occur automatically (*per se*), and are not dependent upon the decision of the other party or the court. The court may only check whether the juridical act by which the entitled party withdraws meets the given terms or not. The effects of withdrawal are definitive, validation or a following confirmation of the act is not possible. The effects of withdrawal might be removed only by carrying out a new juridical act.

As for the extent, withdrawal has the effect identical to invalidity, even though this is not expressly stipulated by law. The opinion prevails that withdrawal is reasonable only to the extent to which the juridical act is affected by a respective flaw, provided that the part to remain valid is a separate unit.

The grounds of withdrawal due to invalidity of the juridical act are regulated by the Civil Code. It is for example the case when a contract was concluded in distress with strikingly disadvantageous terms. Withdrawal is admissible also in other cases not resulting from invalidity of a juridical act.

#### d) Contesting

Contesting of juridical acts means an option to claim legal consequences ineffective only towards a certain person (creditor).

(See more below in Chapter 4, § 4 Actio Pauliana)

#### e) Liability for invalidity of juridical acts

Liability consequences connected with invalidity of a juridical act originate as a consequence of invalidity or withdrawal from an invalid juridical act. The following liabilities are possible:

- mutual restitution duty, i.e. the duty of parties to return everything they have received due to the invalid juridical act; general provisions on unjustified enrichment will be applied but it should be noted that performance under the juridical act that is invalid due to lack of formalities agreed by the parties is not deemed unjustified enrichment
- duty to compensate damage arising as a result of an invalid juridical act.

#### Influence of the time on the legal relationships

Legal relations as well as rights and liabilities may be formed for a period of indefinite duration and as such are unlimited in time, or their duration is limited for a fixed time. There are rights the existence of which is not limited in time (property right, personal rights, personality rights) and for which no time of limitation applies. On the other hand, there are

rights that are by their nature and designation limited for a certain time. These include the right to use a borrowed thing, right to temporary dwelling, etc. Third group is made by the rights that may be restricted for a certain time but this restriction does not arise from their substance and designation (e.g. restriction of lien for a certain period).

The extinction occurs by the lapse itself on the last day of the time stated and no further legal facts are necessary.

### Preclusion

The consequence of preclusion is the extinction of a right which is not exercised in the preclusive period of time. Therefore two conditions have to be met in order for the right to extinguish:

- lapse of a certain period (precisely given by law)
- failure to exercise the right within this period.

If both conditions have been fulfilled, the following legal consequences of preclusion occur:

- a subjective right extinguishes (along with the claim)
- the respective authority takes into consideration the preclusion *ex offio*,
- if performance is carried out after the preclusion period lapsed, it is deemed an unjustified enrichment as its legal grounds have become extinct as the result of preclusion (see explanation of unjustified enrichment).

Preclusion terms are rather exceptional in civil law and must be explicitly stated by law, namely in such a manner that upon failure to exercise the right in this period the right becomes extinct. These are mostly time limits for claiming liability for damage – deadlines for complaints. Preclusion terms cannot be prolonged and their running is not suspended or interrupted. There are exceptions to this general rule when a certain time is not included in the preclusion period.

### Limitation (Statutory limitation of right)

Unlike the above given consequences of preclusion, under limitation a right does not terminate by lapse of time but is weakened considerably as the claim (actionability) as a part of subjective right becomes conditioned.

A right extinguishes unless exercised within the period stated by the Civil Code. By the lapse of time the first phase of a right extinguishing is fulfilled if two facts have taken place: the lapse of time and the failure to exercise the right.

When the period of limitation expires the legal relationship between the owing party and the entitled party continues; a subjective right or a claim do not become extinct, only the claim becomes conditioned, i.e. dependent on whether the owing party claims the lapse or not. Upon the lapse of time the right to claim that lapse has arisen to the owing party, if the entitled party demands the performance of his subjective right. The entitled party may claim protection of his right with a respective authority even after the lapse of the statutory time, as his right has not become extinct (unlike in preclusion). The owing party may also voluntarily carry out his obligation even after the lapse of period of limitation and it will not be deemed as an unjustified enrichment of the entitled party as legal grounds for performance have not become extinct.

The second phase of limitation comes at the moment when the entitled party has claimed his right in court. Then it is necessary to distinguish the instances where the owing party has not

exercised his right to claim the lapse of time and where he has claimed it. If the owing party has not claimed limitation, the respective authority does not take it into consideration *ex offio*. Claiming the limitation in relation to the facts from the first phase of lapse causes that the right terminates; the right becomes unenforceable and the respective authority cannot impose it. The subjective right continues to exist, though; it is only considerably weakened (as a result of the claim extinction) existing in the form of a natural obligation. If the performance occurred in this second phase, again it would not be unjustified enrichment.

Not all rights are subject to limitation. With respect to their nature and function the limitation is not applied to personality rights, personal rights and personal property rights. Under the law limitation does not apply to:

- ownership rights,
- lien if there is a debt surety
- rights from deposits in banks and current accounts if the deposit relationship continues.

#### Deadlines and time limits

For the consequences of right extinction a time limitation is required. The Civil Code stipulates the time limitation in such a manner that it lays down the rules for determining its beginning, length and specification of some obstacles influencing its running.

The beginning of period of limitation is determined either objectively or subjectively. In general, the beginning is the day when the right could have been exercised for the first time (*actio nata*). Such a day is the one when the right could have been claimed in court for the first time. In theory is it not quite clear when *actio nata* will occur in the case when the performance consists in the duty to suffer something (e.g. to suffer trespassing one's land from the part of others). In the court practice it has been held that *actio nata* will only occur when the owing party breaches his duty for the first time, i.e. he behaves to prevent behaviour of the entitled party. The other opinion that *actio nata* is the day when the owing party ceased to exercise his subjective right is supported by the interpretation related to easements which will lapse unless exercised within the statutory time limit. The objective beginning of the period of limitation is based on the wording that "the right could be exercised". Therefore it is not decisive if the entitled party really was not able to exercise his right or if there was an obstacle preventing him from doing so (a long-term illness, staying abroad), or if he did not know about the existence of that right.

The objective beginning of the statutory period of limitation is specified in some cases:

- for the rights that must first be exercised by a natural or a juridical person the period of limitation begins to run on the day when the right was exercised
- for the rights related to performance in instalments the period of limitation of the individual instalments starts to run since the day of their maturity. If agreed, the whole debt becomes payable if the party fails to pay some of the instalments. The period of limitation starts to run on the day on which the unpaid instalment became due.
- for indemnity rights the period of limitation begins to run one year after the insurance event.
- for the rights of an entitled heir to demand the inheritance to be released the period of limitation begins to run since the court decision about terminating the probate proceeding becomes effective
- in the cases mentioned above the start of running is dependent on subjective facts, which is an expression of protection of the entitled party. This manner of fixing the beginning is used by the Civil Code for the right to compensation for damage and the right

to have unjustified enrichment released.

The length of the period of limitation may vary as stipulated by law.

Shorter periods are stipulated:

- for rights to recovery of damage in the case of a subjectively stated beginning (2 years)
- for rights to waive the performance from unjustified enrichment in the case of a subjectively stated beginning (2 years)
- for rights arising from transporting (1 year) except the right to recovery of damage of transportation of passengers.

A longer period of limitation is stipulated:

- for rights to recovery of damages caused intentionally or damages arising from corruption, i.e. breach of obligation resulting from offering or promising bribe by another person than the injured, or as a result of direct or indirect bribe demanding from the injured person (10 years)
- for rights to waive the performance related to easement (10 years)
- for rights imposed by a court decision or another authority (10 years), the same term applies for instalments into which the performance was divided
- for rights acknowledged in writing by the debtor concerning the ground and the amount (10 years), the same applies to instalments.

When dealing with time it is suitable to deal with the so-called combined times that are those in which several times of limitation (with an objectively or subjectively stated beginning) are applied concurrently in law. In these combinations, various situations may occur; a right extinguishes upon the lapse of a subjectively stated limitation but no later than on the lapse of an objectively stated limitation. The following instances may objectively occur:

1) The beginning of the subjective term occurs during an objective term and by its lapse the whole subjective term lapses.

A right extinguishes upon the lapse of the subjective term.

2) The beginning of the subjective term occurs during the objective term but by its lapse only a part of subjective term has lapsed and another part has lapsed only after its end. The right will extinguish upon the end of the objective term as it is evident from the wording "a right extinguishes no later than".

3) The beginning of the subjective terms occurs only after the objective term has lapsed. The right extinguishes upon the lapse of the objective term and the subjective term is entirely irrelevant.

The running of the period of limitation is continual since the beginning to the end unless an obstacle occurs with which the law connects the consequences stated. A change in the person of the creditor or the debtor has no influence on the run of the period of limitation. The new debtor may also claim the limitation against the new creditor.

Based on the existence of relevant obstacles the following effects may occur:

- period of limitation has not begun,
- period of limitation has not ended,
- period of limitation has been interrupted,

- period of limitation has been suspended.

The period of limitation has not started if a fact occurred from which the period of limitation starts to run as usually but due to an obstacle predicted by law the beginning is postponed. Pursuant to the Civil Code the following situations are included:

- in the case of rights of persons who must have a statutory representation and do not have it, or in the case of rights against these persons.
- in the case of rights between statutory representatives and minors and other represented persons; this does not apply if interests and repeated performance are in question. The same applies to rights between spouses.

If the beginning of the period of limitation has begun and the time runs but during its course an event occurs that causes putting off the end of the period of limitation which would otherwise occur, we can consider the period of limitation not coming to an end. The following cases are included:

- If these are rights of persons who must have a statutory representation and have lost it, or rights against these persons. The period of limitation continues to run but it will not end before one year lapses after which a statutory representative will be appointed to these persons, or when the obstacle becomes extinct in another way.
- If during the period of limitation such an obstacle occurred, the course of the period of limitation has been interrupted. The parts of the period of limitation that expired before and after the obstacle will be added up. The Civil Code establishes the following cases for period of limitation interruption:
  - if the creditor during the period of limitation brings a suit to court or another respective authority to satisfy the claim and duly continues in the proceeding,
  - if the right was duly granted and enforcement of judgment was proposed to court or another respective authority
  - if subsequently a situation occurred when exercising a right between statutory representatives on the one hand and minors and other represented persons on the other hand is in question unless there are interests and repeated performance involved.

The cases mentioned here are sometimes designated as interruption in a narrower sense and the cases stated above when the period of limitation does not begin or end are designated as interruption in running in a broader sense.

If such an event occurs that causes suspension of the period of limitation in running it means that the part of the lapsed period of limitation is not taken into account (becoming legally irrelevant) and the period of limitation starts to run from the beginning again. Pursuant to the Civil Code the lapse of the period of limitation occurs:

- if the right was granted by an effective court decision or another authority,
- if the right was acknowledged by the debtor in writing as for the grounds and the amount.

In both cases a 10-year period of limitation is applied.

The most serious difficulties are in distinguishing an interruption and a suspension of the period of limitation. If an interruption occurs the period of limitation is not running but after removing the obstacle the periods of limitation, i.e. the periods before and after the obstacle are added up. With a suspension of the time limit the time lapsed is not taken into consideration and after removing the obstacle the period of limitation starts to run again from the beginning.

## **§ 2. INTERPRETATION**

A juridical act is interpreted whenever applied and whenever it is necessary. The purpose of the interpretation is to establish the will of the acting person expressed in the content of the juridical act. The interpretation then ascertains the existence of real consequences of a juridical act, i.e. formation, changes or termination of legal relationships, or rights and obligations.

Usually the content of a juridical act is ascertained from the verbal form of the juridical act. This, however, does not always provide an unambiguous path to ascertain the real content of will manifestation, therefore other circumstances in which the will manifestation was presented must be also taken into consideration. The content cannot be derived merely from the name of a juridical act.

An interpretation of a juridical act is done by the acting persons themselves mainly in exercising the rights arising from it, or by the respective state authorities, especially the courts that decide about the exercised rights.

For interpretation of juridical acts and legal provisions the same legal rules are generally applied. This principle applies mainly to sets of particular interpretation methods (see jurisprudence texts).

In interpretations of juridical acts special attention should be paid to unification of results of all manners and methods of interpretation. Particular aspects of the content interpretation of a single juridical act and all respective aspects in their mutual links should be understood within this framework. Acts expressed in words should be interpreted not only consistently with their expressing in the language but also consistently with the will of the person who carried out the respective juridical act unless this will is contrary to the verbal expression. Juridical acts expressed in another manner are interpreted consistently with what the manner of their expression commonly means. The will of the acting person is considered and the good faith of the person to whom the juridical act was directed is protected.

## **§ 3. CONDITIONAL CONTRACTS**

The contractual terms regulating a right or obligation may provide that it is provided upon the occurrence of an event of which the parties do not know that it may occur at all, or an event that certainly will occur, but the parties do not know when, or a past event that the parties are unaware of.

The condition may involve an objective fact (e.g. reaching an age) or a subjective fact (concluding a contract).

The purpose of the condition enables the party to carry out a juridical act also at the time when not all facts are known that will be involved when the juridical act will be carried out. This applies in the instance when both the rise and the termination of legal consequences are tied to the fulfilment of the condition.

Conditions must be objectively possible and allowed. A condition must be objectively possible, i.e. there must be a possibility to carry it out. Physical objective impossibility of a suspensive condition results in invalidity of a juridical act in respect of annulling the condition (invalidity of the condition as a whole or partially); objective impossibility of resolutive condition results in invalidity of the condition (the condition is disregarded).

Condition is admissible if it is not contrary to law, may not evade law or is not inconsistent with good morals. An inadmissible condition should result in invalidity of the juridical act or a condition.

In the Czech law conditions are classified according to various criteria, one of the most significant being dependence of the juridical act effectiveness upon the fulfilment of a condition. Therefore conditions are divided into suspensive and resolutive. Suspensive conditions are linked with effectiveness of a juridical act in such a manner that the juridical act made dependent on such a condition takes effect upon the fulfilment of the condition at the time when the juridical act exists as valid but is not effective. After fulfilment of the suspensive condition the juridical act becomes effective as a rule since the condition has been fulfilled. The juridical act does not take effect if fulfilment of the condition was intentionally caused by the party obtaining benefit from it even though he was not supposed to cause it. In such a case fulfilment of the condition is regarded as not executed. The ultimate impossibility to fulfil the condition results in the final decision that the juridical act will not take effect in the future, either, and the same consequences occur due to prevention of the condition fulfilment, i.e. rendering fulfilment impossible through some kind of interference. If the fulfilment of the condition was intentionally prevented by the party gaining benefit from that the juridical act becomes unconditional. Resolutive conditions take effect in such a manner that by fulfilling them the effect (relevant right or obligation) of a juridical act comes to an end. This means that the juridical act was effective but upon fulfillment of a resolutive condition the effectiveness expires. Before the condition was resolved a state of uncertainty had existed based on the question whether the juridical act may become ineffective or not. By fulfilling the resolutive condition the effect of a juridical act expired, as a rule upon the instant of its fulfilment with the effect *ex nunc*. A juridical act does not become ineffective if the fulfilment of the condition was caused intentionally by the party who benefited from it but the party was not supposed to cause it. Finally, the decision that the condition cannot be fulfilled results in the juridical act to continue and ceases to be conditional. Preventing the fulfilment of a resolutive condition has the same effect; only in the case when the fulfilment of the condition was prevented intentionally by the party benefiting from it, the juridical act becomes unconditional.

Another criterion for the conditions classification is the nature of conditions. Therefore we distinguish positive conditions (depending on whether a certain situation will occur, has occurred or exists), and a negative condition (depending on whether certain situation will not occur, has not occurred or does not exist).

From the viewpoint of the party influencing a condition to occur we may distinguish the conditions that can be fulfilled (potestative), accidental (causal) conditions and mixed conditions. Potestative conditions are those the content of which is a fact that can be performed by the party. It means that their fulfilment or failure to fulfil can be influenced by human will. Fulfilment of accidental conditions is out of human will. Thus fulfilling these conditions depends on circumstances that are not under the control of persons.

## **Chapter 4**

### **Privity of Contract**

#### **§ 1. THE RULE OF PRIVACY OF CONTRACT**

The Czech law of contract is based on equality of the parties to the contract. This means that:



1. either party may not one-sidedly impose his will on the other party, and
2. either party may not one-sidedly decide in his own dispute (*nemo est index in propria causa*).

### I. Third Parties and the Contract

The principle of equality mentioned above means that a third party is not bound by agreements of contract parties, the exceptions being the cases established by law or the cases when the third party joins actively the contractual relationship concluded between other parties.

### II. Contract for the Benefit of a Third Party

An initial requirement of equality of parties prevents third parties from being affected by contractual agreement. However, the Czech law of contract admits to conclude a contract for the benefit of a third party, the effects of such contract being bound to the consent of third party.

Obligations for the benefit of a third party arise upon a contract by which the debtor (promisor) is obliged to the creditor (provisor) to perform upon the contract relation to the third party (tertius). The tertius will not participate actively in this contract relation. The tertius becomes a creditor, entitled to demand performance, at the moment when he has manifested his will in a legally relevant form to accept the performance (the form of will manifestation is not prescribed, it may only be implied). If a third party was to accept a performance without his consent, it would be violation of a civil law principle under § 2, Par. 2 on equality of parties. At the moment the tertius manifests the will to accept the performance arising from the contract he takes part in the creditor's rights with all objections available to the creditor. It is therefore immaterial whether the creditor has had these (subjective) objections and intended to exercise them, or he might have been unaware of them, or he could not or did not want to exercise them. The debtor also retains all objections he might have against the creditor. Pursuant to the same provision of the Civil Code the creditor himself may claim performance, unless agreed otherwise. If the tertius refuses to accept the performance, the promisor is entitled to demand performance but only if so agreed in advance. If the tertius refuses his consent to the performance arising from the contract, the promisor is entitled to demand the performance, unless agreed otherwise.

Any contract may be concluded for the benefit of a third party unless it is inconsistent with its nature, i.e. it is inconsistent with law, evades law or is inconsistent with good morals. Typically, such contracts are included in the Civil Code as e.g. insuring third parties, or vouchers etc.

Obligations for the benefit (but also to the debt) of third parties must always be distinguished from agency. For these obligations a third person is a party to the contract whereas the agent is not.

### III. Contract to the Debit of a Third Party

The Civil Code does not recognize obligations to the debit of third parties because they present a principal violation of civil regulation of equality of parties by the fact that one party obliges the other that is not a party to the contract for the benefit of the creditor. The concept of obligations to the debit of third parties is not acceptable in this pure form. Contractual obligation cannot arise to a person who himself is not a party to the contract. Therefore parties to the contract may only agree on the so-called promise of intercession of the debtor with a

third party to provide performance. Then it is the breach of promise of intercession of the debtor with the third party that will be deemed as a breach of obligation, not failure to perform by the third party for the benefit of the creditor

## § 2 TRANSFER OF CONTRACTUAL RIGHTS AND/OR OBLIGATIONS

### I. The term and kinds of changes in obligations

It is socially desirable to enable one or more elements of the structure of contract relations to undergo certain changes while they endure. In some cases a change may be deemed so principal that the changed obligation is required by law to be deemed a new obligation. In other cases the current obligation, upon undergoing changes, has retained characteristic features of the original obligation to such an extent that it is not considered as a new contract but merely as an altered contract.

Changes in contracts may arise only if during the existence of the original obligation certain legal situation arises that is prescribed by law as a change of certain terms only. The alteration of contract may be performed under an agreement of the parties or a unilateral juridical act, an official ruling or an illegal conduct of a person (delay). Legal grounds for a change of an obligation are the original legal situation along with a new situation causing the obligation to change.

Contract relations are usually classified according to which contract element is involved in the change. These changes are classified as:

- changes involving the parties
- changes in the content and subject matter of an obligation

Changes in the content and subject matter of an obligation are included in one category because a change in the subject matter causes in turn a change in single rights and obligations of the parties. Besides, under traditional classification of contract changes the above mentioned uncertainty reflects, involving differentiation of a subject matter and a content of legal relationships.

(More about changes in the content see above in the Chapter 1, § 1, IV. Modifications).

The Czech law recognises the following kinds of changes involving the parties:

- a) assignment of a claim (*cessio*)
- b) assumption of debt - substitution of a new debtor
- c) accession to an obligation - adhesion to liability for debt
- d) agreement to perform through a third person - voucher (*assignatio*) and instrument (voucher) for performance in securities
- e) transfer of contractual position

#### Ad a) Assignment of a claim

The term and the rise of the legal relationship

Assignment of a claim is such an alteration of obligation where, based on a certain legal situation (most frequently a contract between a debtor and a creditor), a new creditor, also called a cessionary or assignee, replaces the previous creditor, also called assignor, in the relationship while the original relationship continues to exist.

As for this type of change regulated under Czech law, we distinguish an assignment of a claim established by the agreement of the parties (*cessio voluntaria*) and an assignment of a claim independent of the will of the parties (*cessio necessaria*, forced assignment of claim) which

can be either a statutory assignment of a claim (*cessio ex lege*) arising directly from rules of law, and an assignment of a claim arising from a court decision (*cessio iudicialia*). While statutory assignment of a claim is stipulated for particular situations in various legal provisions (e.g. providing performance to the creditor by the guarantor under the surety on behalf of the debtor) and the same applies to the change of the creditor based on a court decision (a number of such instances are stipulated under the Civil Procedure, e.g. enforcement of judgment by ordering a claim), general provisions of contract law under the Civil Code concern contractual assignment of the rights.

Voluntary assignment of the rights arises by a written contract based on which previous creditor, the assignor, transfers his claim upon a new creditor, the cessionary.

The debtor is excluded from the procedure as under law his consent to the transfer of the claim is deemed unnecessary for the claim transfer to be valid as the debtor's situation undergoes no change by the claim transfer. Regarding the obligatory nature of the claim transferred, the Civil Code stipulates instances where a claim cannot be transferred. Such claims are excluded due to their nature which become extinct no later than upon the creditor's death (e.g. the right to recover compensation for injuries and for a difficult social position and assertion), claims the content of which would change upon the change of the creditor (e.g. an obligation to teach music) and claims not enabling legal recourse through enforcement. Besides, the possibility of an assignment of a claim may be excluded in advance by an agreement of the creditor and the debtor (§ 525, par.2).

#### Content of legal relationship

The content of an assignment of a claim, i.e. mutual rights and obligations between the parties will differ according to whether the claim has been ceded for money or gratuitously. In the case of an assignment of a claim subject to payment the assignor is liable to the cessionary where:

- the claim was not assigned to cessionary with the content agreed,
- the debtor has performed the obligation to the assignor before the assignment of the claim,
- the claim ceded or its part became extinct by setting off the debtor's claim to the assignor.

The assignor is liable for the claim recoverability only if so stipulated expressly by a contract, and only up to the amount of the claim obtained along with ancillary rights. The assignor's liability, as stated above, is absent, if the assignor has not claimed the debt ceded in court without an unnecessary delay.

Contrary to that, if the claim has been ceded gratuitously, the assignor, as may be deduced from the arguments given in the provisions mentioned above, has no such liability.

At the instant of the assignment of claim the assignor forfeits the claim and the right to performance which is obtained by the cessionary. The condition is that the debtor must be notified about the assignment of the claim, i.e. the duty to notify rests on the assignor. However, regarding the written form of the agreement on an assignment of a claim, it is also possible for the cessionary to notify but in a satisfactory manner (e.g. by submitting the written text of the contract). Before the the debtor has been notified about the claim ceded he may perform for the benefit of the assignor or to settle the claim otherwise with him. The assignor is bound to hand over to the cessionary and transfer upon him all legal remedies and security tools concerning the ceded claim and to give him all the necessary information.

The necessity to protect creditor's rights has led to the provision that even after the assignment of a claim the debtor keeps all defences (remedies) he had against the initial

creditor at the time of the assignment of the claim. Moreover, the debtor may claim his objections against the assignor and also against the cessionary, even though they have not yet been matured at the time of the assignment of the claim.

If the ceded claim has been secured by a surety, the assignor is bound to notify the person who provided the surety about the assignment of the claim.

Even if a claim has been effectively ceded the assignor may, when demanded by the cessionary, claim the debt from the debtor at the cessionary's cost. If the debtor has been notified about the assignment of the claim, such a debt may be claimed only if it is not claimed by the cessionary himself and the assignor passes the cessionary's consent to the debtor.

#### Ad b) Assumption of debt - Substitution of new debtor

##### The term and the origin

An assumption of a debt arises when a new debtor joins the existing obligation relationship instead of the current debtor.

A true assumption of a debt probably arises only in cases presuming it upon an agreement between the debtor and the third party with the creditor's consent.

On the other hand, the Civil Code regulates situations where the third party has agreed with the creditor to take over the debt without an agreement with the debtor. Transfer of liabilities upon the third party is inconsistent with the civil law principles. In such a case the law does not specify performance of mutual relationship in liabilities.

A mandatory written form is required by law in such a case. Even though the content of obligation basically does not change by the debt assumption, the surety provided by the third party is preserved only if this person has expressed his consent to the debt assumption. Besides, a major part of the claim surety becomes extinct, due to the nature of the matter (exceptions may be material sureties) as it is bound to the person of the debtor and upon changing the debtor it has no sense (e.g. an agreement on wage deductions, etc.) To secure the position of the creditor it may be held that the claim surety provided by acknowledgement of the original debtor (§ 558) is effective also for the new debtor.

##### The content of legal relationship

Being there a valid assumption of the debt, the new debtor is bound to perform instead of the original debtor and the creditor is entitled to claim the performance from him. Even without an express stipulation by law it is presumed that the content of obligation has not changed upon the debt assumption and thus the new debtor has all defences available as the original debtor had to assert them against the creditor, except the manifestation directed to set off the claim of the original debtor towards the creditor. There are no mutual claims of the creditor and the new debtor and thus setting off is implicitly excluded, as the original debtor has withdrawn from the debt.

If a contract of a debt (obligation) assumption has been made between debtors but the creditor either did not consent to or refused his consent to the debt assumption, such a contract is effective under law only in relation to the original debtor and the new debtor, but does not have legal effects for the creditor, who is entitled to demand performance from the original debtor and to refuse accepting performance from another party. Therefore, the new debtor

would have to give, under such a contract, performance to the original debtor, who will in turn give this performance to the creditor.

#### Ad c) Accession to an obligation - adhesion to liability for debt

##### The term and the origin of the legal relationship

Accession to debt is such a type of a change of the contractual relationship when a third party joins the current creditor and obliges himself to perform his monetary obligation on his behalf. In this case adhesion to the obligation is effective without an agreement with the creditor.

On the other hand, if a third party agrees with the debtor to pay his debt to the creditor, he thus obliges himself to the debtor to perform for his creditor. The creditor who is not a party to such an obligation is not directly entitled to demand performance from the third party – the new debtor.

##### The content of legal relationship

Following an effective accession to a debt obligation, the creditor may demand performance both from the original and from the new debtor, or from both. Regarding the possible wording of the statement of claim (as a rule, the creditor is entitled to sue both co-debtors simultaneously for performance to be provided jointly and severally), a relation of passive solidarity arises. This, however, applies only to the relationship of co-debtors towards the creditor. Under law no recourse relationship arises between the debtors after one of them has duly performed. It could be taken into consideration only if solidarity relationship was agreed between co-debtors in advance. By performing the debt by one of the debtors the obligation of the other to perform becomes extinct, too. Unless the original debtor wishes to be bound by the new debtor as a result of the debt performing (based on inner relationship between the co-debtors), he should precede the cessionary in performing.

After concluding such an agreement, the new debtor is obliged to the previous debtor, for whom a right to demand performance by the new debtor for himself arises directly towards the creditor. No direct titles or duties arise to the creditor under this obligation.

#### Ad d) Agreement to perform through a third person - voucher (*assignatio*) and Instrument - Voucher for performance in Securities

This agreement is called “voucher“ – *assignatio* – in the Czech law. The holder of voucher is entitled to obtain performance from a third party (remittent) who is authorized to perform for the voucher holder on the account of the remitter. A voucher is a compound obligation relationship under law which, even if classified among changed obligations, is aimed to perform through a third party.

A voucher is composed of three basic relationships, arising among three different parties. The parties are: the creditor (assignee), the debtor (assignor) and a third party performing for the assignor. The respective relationships arising within a voucher are:

- Relationship of value, expressing as a rule the basic value of the relationship as a whole, which is the value of performance between the creditor and the debtor. This relationship arises through conclusion of agreement between an assignor and an assignee, under which the assignor's debt will be performed by accepting performance from the third party.

- Relationship of remittance (payment) arises by authorizing the third party by the assignor to

perform to the assignee. Two variants are possible here: if the third party is bound to the assignor to accept the voucher (e.g. based on a contract of current account or of credit already made), he is bound to accept the voucher. If there is no such relationship, an agreement on accepting the voucher must be made between the assignor and the third party.

- Relationship of payment arises by accepting the voucher by the third party and notifying the assignee about accepting the voucher. By this act the assignee obtains a direct right to performance provided by the third party.

Voucher is a general type of an obligation change and has no prescribed form in neither of the juridical acts in which it arises and is executed.

As for the nature of performance voucher is an obligation with a vicarious performance.

As it is a three-sided relationship, causing the risk of imbalance in legal relationships of the parties, these relationships are regulated by law in such a manner as to allow conditions for its balance.

An important reference to the appropriate application of the provision on the contract of mandate if the parties did not agree otherwise is contained under.

Voucher may be cancelled only by the time it has been accepted by the third party.

A special form of a voucher regarding a security warrant is provided by the Civil Code. These are abstract obligations where the cause need not be stated. If the warrant bears the claimant's name, it can be transferred by endorsement by which all rights arising from the warrant are transferred to the entitled person based on the endorsement.

The person who has accepted a voucher issued by a monetary institution is bound to perform for the person for whose benefit the voucher was issued or transferred, under.

More detailed provisions describe regulations of bills of exchange and cheques.

## 5. Transfer of contractual position

Transfer of the whole contractual position of a party to a third person is not known in Czech Law as a specific (named) type of transfer of rights and obligations. For such a purpose an unnamed contract (*contractus innominatus*) can be used.

## § 3 THE SPECIAL CASE OF A SUB-CONTRACT, E.G. THE (NOMINATED SUBCONTRACTOR IN BUILDING CONTRACTS)

Czech contract law does not specify a sub-contract. However, the terms sub-contract and sub-contractor are used, especially in building contracts. These contracts are not expressly stipulated by law and thus it is up to the parties' will to define its content. One of the few exceptions is a mutual tie of guaranty periods in the principal contract and the sub-contract, under which the guaranty under sub-contracts may not lapse before the guaranty concerning the subject matter of this sub-contract under the principal contract.

## § 4. ACTIO PAULIANA

The Roman *actio pauliana* is applied under the Czech Civil Code to the institute of contesting (raising objections to demand relative ineffectiveness of the juridical act).

Actio Pauliana in is based on the option to claim ineffectiveness (invalidity) of legal consequences towards a particular person only. The creditor may demand the court to determine that the debtor's juridical acts, if reducing his own recoverable claims (enforceability is not necessary), are ineffective. It is possible to raise objections against juridical acts performed by the debtor in the past three years with the intent to reduce enforceability of the creditor's claim, were the other party aware of the intention or the juridical acts between the debtor and persons close to him, except for the instances where the other party was then unable, even though exercising due care, to recognize the debtor's intent to reduce the enforceability of creditor's claim. The creditor's success in raising an objection results in the option for the creditor to demand the debt be satisfied from the part by which the debtor's property was reduced through the objected juridical act. If this is impossible (e.g. the subject matter of performance has become extinct or transferred to another party), the creditor may claim recovery from the party which obtained benefit from the objected juridical act.

## Chapter 5. TERMINATION OF A CONTRACT

The particular manners of termination of an obligation can be classified according to various criteria.

With regard to whether upon termination of an obligation also creditor's debt has been discharged we distinguish obligations as:

a( obligations with the creditor satisfied (*cum satisfactione creditoris*) which are e.g. performance, novation or settlement,

b( obligations without the creditor satisfied (*sine satisfactione creditoris*) which are e.g. withdrawal from the contract, impossibility or waiver of a right.

Under the Czech law termination of a contract can be made in the following ways:

- § 1 debt fulfilment – performance and breach
- § 2 impossibility and hardship: unforeseen impossibility
- § 3 withdrawal from the contract
- § 4 setting off (unilateral and by agreement)
- § 5 agreement on a new obligation (novation)
- § 6 waiver of a right
- § 7 remission of a debt
- § 8 settlement
- § 9 lapse of time
- § 10 death of the debtor or the creditor
- § 11 preclusion of rights
- § 12 debtors delay under “fixed“ contract
- § 13 merger of debts

### 1. DEBT FULFILMENT - PERFORMANCE AND BREACH

Performance is a juridical act by which the debtor (or a third party, the surety, etc.) gives performance to the creditor who accepts this performance (it is not a bilateral juridical act). Mutual consent of the parties is not necessary – this is basically given in a juridical act itself, giving rise to the obligation, and in law governing rules for performing an obligation. For example, a debtor can perform even without the creditor's cooperation by placing a thing in an official deposit and this act will be deemed as performance, although the respective creditor's act will be missing in this case.

The essentials of performance of an contractual obligation are:

- a) existence of an obligation,
- b) unilateral act of the debtor, directed to provide performance
- c) unilateral act of the creditor, who accepts the performance.

Parties to performance are as a rule identical to the parties to the obligation.

On the debtor side, it is mostly the debtor himself; this is explicitly stated by law for the obligations. The subject matter is performance that must be provided by the debtor in person, as performance by a third person would be of a different quality. Performance, however, may be provided also by a third person who is bound to perform either under law, by an official ruling or under a contract. Thus, the surety will be bound to provide performance if the debtor has not performed his debt upon the call of the creditor (for example, a salary payer who has not complied with the contract of payroll deduction, a spouse performing on behalf of the other spouse, if it is the case of community property of spouses, performance provided by an agent, etc). Recourse between the party who performed instead of the debtor and the debtor is possible only if stipulated by law. Performance provided by the third person should be based



on specific legal grounds. If there are no grounds, such performance establishes the relationship of unjustified enrichment and a duty of the benefiting person to return the performance.

On the creditor's side, principally it is the creditor, who is entitled to accept performance (the duty to provide performance to the creditor in person is stipulated under law, but it may also be a person different from the creditor).

Such cases occur most frequently if:

a) the creditor must have a statutory representative due to his incapability to carry out the particular juridical act (taking over performance), the debtor is bound to perform into the hands of the statutory representative in order to discharge his duty,

b) the creditor will authorize an attorney to take over the performance,

c) in assignment of claim by the time the debtor has been duly informed about the assignment of claim

d) the debtor performs for the person who will present the creditor's voucher on debt receipt, presuming that the debtor acts *bona fide*. In this case the debtor can refuse to perform for the person who submitted the creditor's voucher of receipt only if it is a person different from the creditor.

Subject matter of performance can be determined either individually, or just by generic signs, stating that one of the parties (the debtor, unless stated otherwise) will make the selection of the particular things for performance (concentration).

In some cases unity of performance is required. However, in certain cases performance in part (partial performance) is allowed by law:

- The debtor is bound to perform the obligation all at once only if so expressly agreed; if nothing is agreed in this sense, the debtor must pay the debt all at once only if it were contrary to the nature of the debt by the proof of the contrary.

- Except for the cases stated under the debtor may provide also a partial performance and the creditor is bound to accept it

- Performance by instalments may be provided by the debtor, if so agreed with the creditor. The agreement presumes the deadlines agreed in advance and the amount of the instalments.

If the debtor is supposed to perform several debts for the same creditor and the performance is insufficient to cover them all, it is up to the will of the debtor to denote the debt for which the performance is intended as appropriate; if he fails to do so the performance is appropriate for that debt which is due or is the first one to fall due. In the case of monetary obligation, the performance is to be appropriate first for interests.

The subject of performance must be identical with the subject matter of the obligation (indirect). The creditor is not bound, with some exceptions (e.g. *alternativa fakultas*), to accept another performance, such performance is not deemed duly provided and results in the debtor's delay. Another exception to be mentioned is a possibility to conclude a contract during the time of performance, under which the debtor provides a different performance from that originally stated and the creditor accepts it. This institute, called traditionally *datio in solutum*, i.e. giving instead of performance, is not expressly stipulated by the Civil Code and could be established by an atypical contract. Different is the case of *datio solutionis causa* i.e. giving for the purpose of performance. Here the debtor transfers a certain thing or a right upon the creditor to satisfy the creditor not through the thing or the right itself (its usable value as a rule) but through its realization (e.g. through sale of the thing and obtaining the sale price, i.e. realizing its value). Under this contract the debt has been discharged upon the moment of value realization of the substitute performance.

The time of performance is stipulated by Civil Code only in general. Under the Civil Code the

following principles can be enumerated for determining time of performance:

- Determination of time of performance is principally left up to the parties.
- It is possible under law *to leave* the time of performance to be fixed by the debtor. If the debtor will not determine the time of performance the creditor may any time ask the court to determine it in consistence with good morals (good faith and fair dealing).
- In the cases of an increased interest in timely and accurate performance time of performance is regulated by law.
- If time of performance has not been agreed on, regulated by law or determined by court ruling, the debtor is bound to fulfil the debt on the first day after he was so required by the creditor.

In the case of incompliance with time of performance the debtor (or the creditor, in respect to cooperation in performing) is in default legal consequences of which have been described above.

Place of performance is defined as follows: A debt must be performed at the place determined by the parties' agreement. If the place of performance has not been agreed on, the place of performance will be the residence of the debtor. In performing a monetary debt by mail or through a financial institution the debt is deemed to be paid up at the instant of remitting the respective amount but the parties may agree otherwise, too.

#### Consequences of performance

Performance results in discharge of the obligation. Other legal consequences are: extinction of surety relations as an ancillary relation and the rise of the duty of the creditor to release to the debtor a receipt of debt fulfilment. If the performance was provided by a surety a mutual recourse relationship arises between the surety and the debtor. Finally, as an expression of a functional synallagma the right to demand performance from the other party arises for the party which has fulfilled its debt in mutual claims.

#### Breach of contract

Obligations must be performed properly and on time. If one of these conditions has not been met, a situation called delay occurs under the Czech law. Consequences of delay as a breach of contract are described in Chapter 4, § 2.

## 2. IMPOSSIBILITY AND HARDSHIP: UNFORESEEN IMPOSSIBILITY

Debtor's duty to perform terminates when performance becomes impossible. Impossibility of performance is an objectively assessed impossibility, i.e. not an impossibility based merely on the debtor's belief in impossibility to provide performance as required. Economic impossibility (hardship) does not fall within this category. Economic impossibility (hardship) is given if:

- an obligation can be fulfilled only in more difficult conditions or the cost of performance has increased,
- obligation can be fulfilled only after some time of performance.

It arises from the nature of things that performance may become impossible on the basis of merely individual assessment. Generical performance can be, if of extinction or destruction, or non-attainability, replaced by another performance and does not cause obligation extinction. If only a partial impossibility occurs, the performance terminates only for this part, however the creditor is entitled to withdraw from the contract, as far as the rest of performance is concerned. In case of partial impossibility the respective part of obligation terminates. However contractual relationship terminates as a whole, if from the nature of

contract or the purpose of performance, which was known to the parties at the time of the rise of the obligation, derives that the remaining part of obligation has lost economic value for the creditor, unless the creditor has informed the debtor without a delay that he insists on the rest of the performance being provided.

### 3. WITHDRAWAL FROM THE CONTRACT

Under Czech law it is possible to avoid an obligation by withdrawal from the contract. In some situations it is not possible to insist justifiably on strict adherence to the contract (*pacta sunt servanta*). An important interest of those involved in civil relations led to adopting some exceptions to the principle as stated above. One of the exceptions is the option to withdraw from the contract under Civil Code. Besides, the creditor is entitled to withdraw from a contract under general provisions on obligations under the Civil Code in case of debtor's delay when an additional time fixed by the creditor for the debtor to perform has lapsed. In addition to this, there are other reasons for withdrawal from a contract contained in the Civil Code, involving partial impossibility to perform, unless this concerns the part of performance that has not become extinct as a result of impossibility of performance. Other options enabling withdrawal are stipulated for specific obligation relationships stated under the Civil Code.

Upon withdrawal, the rights and duties arising from the obligation terminate *ex tunc* (from the very beginning, which means that:

- the debtor is no more bound to pay,
- parties are bound to return to one another the performance already provided,
- right to compensation for damage accrues to the creditor, but only up to the amount, to which the damage is not covered by possible interests of delay, fees of delay or penalization agreed under the contract (liquidation damages).

### 4. SETTING OFF (UNILATERAL AND BY AGREEMENT)

Unilateral settlement is a unilateral juridical act by which a party sets off its *mutual* debt against the creditor's claim. The obligation has been discharged at the moment when the mutual debts meet which occurs at the instant when the last debt has matured. The conditions of one-sided set off are as follows:

It must be a type of debt for which setting off is admissible. Setting off against claims involving compensation for bodily or mental harm is excluded unless both debts are of the same kind. The same applies against debts for which enforcement of judgment is not possible. Special provisions allowing setting off against debts in maintenance claims are included in the Family Code.

It must be a kind of debt that may be set off. Deposit debts and debts not recoverable by court (natural obligations) cannot be set off. Setting off a debt not mature against the debt already mature is not possible, either.

Performance of mutual debts must be of the same kind (e.g. mutual monetary debts). By setting off the debts that cover one another they become extinct.

Setting off by an agreement arises upon a creditor-debtor agreement, by which the parties set off their mutual debts in accordance with the conditions set by law. Setting off by an agreement has the same legal ground as setting off with the exceptions as follows:

Setting off by an agreement presumes mutual consent of the parties, also mutual debts, excluded from unilateral setting off may be set off by an agreement. Only the debts involving maintenance paid to minor children are excluded from setting off by an agreement under Family Code.

Legal consequences of obligation termination by setting off as a rule do not arise upon an effective agreement made, but upon the instant when the mutual debts meet.

In addition, an obligation to perform upon a contract may become extinct as a result of an objective situation as follows:

#### 5. AGREEMENT ON A NEW OBLIGATION (*NOVATION*)

While in previous instances one-sided withdrawal from contractual obligation was involved, an agreement may be concluded between the parties, by which the parties absolve one another from the duties arising from the contract and which can include the following:

##### III. An agreement on a new obligation (*novation*)

This manner of obligation discharge is also called a novation of privity that is distinguished from cumulative novation in which the original obligation does not become extinct, persisting along with the new obligation. Therefore cumulative novation is usually listed among the ways of changing contractual relationships.

Agreement on a new obligation as a way of an obligation discharge presumes an agreement between the creditor and the debtor. It can be agreed that another obligation can be performed instead of the original obligation, e.g. instead of paying monetary debt ceding a respective part of a real property to the creditor for temporary use withat the time stated. By making (concluding) an effective agreement of a new obligation the original obligation between the parties directed to carry out the original performance becomes extinct. Concurrently, a new obligation arises directed to provide the performance as newly agreed on. Unless anything else has been agreed on, surety of the original obligation terminates along with the novation. An exception is the provision involving suretyship which in relation to privity novation is retained in the original extent only if the surety has not expressed his consent to continue. In doubts on replacing the original obligation by a new one, the legal rules in favour of doubtless content of the agreement on the new obligation apply, i.e. the content of the original agreement becomes extinct only to the extent it has been doubtlessly replaced by the new contract content.

The formalities of the original obligation apply to the agreement of novation. Under the same provision, the written form is necessary for novation of a statute barred obligation. As a modification of privity novation, the provisions of Civil Code stipulate the possibility to cancel the original obligation between the parties without replacing it by a new obligation. In this way also a part of existing obligation may be cancelled.

#### 6. WAIWER OF A RIGHT

Waiver of right arises by an agreement of the debtor and creditor, on the basis of which the creditor waives his right to demand the whole debt or its part to the debtor. Unlike debt remission, which is of a similar nature, waiver of right is typical for obligations involving non-monetary performance.

The conditions for waiver of rights are:

An agreement in writing between the creditor and the debtor. The requirement of a written agreement is given by its significance because it interferes unilaterally with the position of contractual parties.

The creditor may not effectively waive his rights that may arise in the future; only as such an agreement would be sanctioned by invalidity. For example, it is not possible, at the time of purchasing a new product, to waive the right to claim compensation in liability for faulty products within warranty period.

The legal consequence of waiver of right is termination of obligation to the extent stated. Surety of obligation terminates only if the creditor has waived the debt as a whole.

## 7. REMISSION OF DEBT

Remission of debt is a manner similar to termination of an obligation by waiver of a right, which can be seen in stipulating both manners of termination in one provision by attaching the same legal consequences to debt remission and waiver of right.

The difference between remission of debt and waiver of debt is their application. Each of these manners are used for termination of different types of obligations

Like waiver of right, remission of debt arises upon an agreement of both parties under which the creditor remits the debtor's debt.

If several individuals are included on the debtor's party, the nature of plurality will be decisive. For severable performance remission of debt will be possible also towards some of the debtors or just one debtor. In non-severable performance that can be fulfilled only by common activities of debtors. It follows that the debt can be remitted only to all debtors simultaneously. In the relationship of passive solidarity remission of debt towards one of the debtors does not influence existence of the right of recourse among the co-debtors.

Remission of debt has different legal consequences depending on whether it involves the whole performance arising from the obligation or from a single debt or its part. If the whole content of obligation is terminated by remission of debt, the whole obligation terminates, too; otherwise only one debt or a part of a debt terminates.

The respective agreement to be valid must be made in writing.

## 8. SETTLEMENT

The current obligation can be replaced also in such a manner that the parties settle their mutual rights and obligation, so far questionable, by an agreement.

This agreement, also called *transactio*, is aimed to make up for the current content of the obligation, which was questionable, by new rights and obligations. Thus all rights (the entire content of the obligation relationship), or only some of them, can be settled between the parties. If all the rights are being replaced, only those rights are exempt that the party making the contract could not consider.

Settlement presumes replacement of current obligation by an obligation arising from settlement. Apparently, settlement is close to privity novation, but it may replace only a part of the current obligation content; then it will be close to cumulative novation.

Settlement agreement will be voidable in case of mistaking what is objectionable or doubtful between the parties and this mistake will be caused by fraudulent conduct of one party.

## 9. BY LAPSE OF TIME

A number of rights and obligations arising from obligation relationships become extinct by lapse of time for which they have been limited. An example may be lapse of the lease period. By lapse of time as an objective legal situation either a single right or an obligation, or the entire obligation relationship becomes extinct. Lapse of time as a fact giving ground for termination of rights, duties or the entire obligation may be fixed by law or by an agreement of the parties.

## 10. DEATH OF THE DEBTOR OR THE CREDITOR

One principle of obligation law is permanence of the obligation in spite of various circumstances influencing either side. Therefore, for the sake of legal certainty the Civil Code

stipulates that a debtor's or a creditor's death does not principally result in the obligation termination and by the death of either of them the rights and obligations are passed to the respective legal successors. The exception is an obligation termination as a result of the death of the debtor, the content of which was a performance to be provided by the debtor in person. This is not exclusively a performance that cannot be provided by another person; the duty to provide performance by the debtor will derive from the content or nature of the obligation relationship. As for creditor's death, the Civil Code stipulates an exception, under which such debts which are restricted to the creditor's person exclusively are not passed on the heir (for example, claim to recovery for injuries and difficult social position and assertion).

#### 11. PRECLUSION OF RIGHTS

Unlike other ways of termination of obligation preclusion is established mainly by lapse of time. The termination of rights and duties arising from an obligation is bound upon the cumulative existence of the two prerequisites as follows:

- lapse of time
- inaction of the entitled party.

#### 12. DEBTOR'S DELAY UNDER "FIXED" CONTRACT

It may be concluded that termination of contract *ex lege* occurs as a result of cumulative co-existence of the two facts:

- a debtor's delay in a fixed contract, i.e. if the contract has stipulated a strict period for performance and it arises from the contract or from the nature of the thing that the creditor has no interest in delayed performance,
- creditor's failure to notify without delay that he insists on performance in spite of the debtor's delay.

#### 13. MERGER OF DEBTS

Merger as a reason for termination of obligation may arise due to various legal grounds, therefore this type is listed separately as a type of termination under § 584 of the Civil Code.

A merger of debts arises when the attributes of debtor and creditor are united in the same (natural or legal) person in the same capacity.