Current Legal Regulation and Perspectives of Conclusion of Business Contracts in the Czech Republic

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Abstract

Although we positively evaluate the part of the Commercial Code that regulates business obligations, there are duplications and problems that are solved by interpretation in compliance with the extending number of international treaties and developing EC law.

The use of commercial terms, business customs, and additional clauses is extending at the expense of regulations. We think this is correct.

Key words

civil law, the Civil Code, commercial terms, business law, the Commercial Code, business obligations, source of law, rule of law, principles of the Commercial Code, public procurement

Introduction to tenders

A new act about tenders was published as Act No. 137/2006. [1] The Act came into effect on 1st July 2006.

The temporary and final provisions of Act No. 137/2006 solve the relation to the previous regulation in Act No. 40/2004, which came into effect on 1st May 2004.

§ 158 of Act No. 137/2006 states that public procurement, public tenders for proposal, the review procedure of operations made by a contracting authority, and sanction procedures initiated before the effectiveness of the Act will be finished according to the previous legal regulation (§ 158 par. 1).

The review procedure of operations made by a contracting authority and sanction procedures that started after the effectiveness of the Act and are interrelated to public procurement or public tenders for a proposal pursuant to par. 1, will be ruled in compliance with the previous legal regulation. Review according to par. 1 is paid in conformity with the previous legal regulations (§ 158 par. 2).

It is clear that, for some time (we think 24 to 36 months, but it is impossible to express the time with a fixed date), we will use both regulations side by side: this means Act No. 40/2004 for "old" tenders, and Act No. 137/2006 for "new" ones.

Suppliers are provided with a chance to do a large amount of business thanks to tenders. A large portion of social dispensable resources is realized by tenders. "Tenders form relative stabile business relations with secure financing. The entrepreneur who gets the business has a minimal risk not to receive payment."[2] The new directives and national regulations try to contribute to a non-discriminatory and transparent procedure.

In general, it is required that one have a simple, transparent, and non-discriminatory procedure, and it is preferred that it be able to be reviewed in a quick and easy way.

The conceptual solution of the new Act is similar to the previous legal regulation.

The main reason behind the preparation of the new Act was to assure transposition of directives No. 2004/17/EC and 2007/18/EC into the Czech system of law and to eliminate some deficiencies in the foregone regulation.

The European directives regulate in detail the under-limit methods of public procurement. Under-limit public procurement is only regulated by the principles of transparency and non-discrimination. Our previous and new legal regulations describe under-limit methods of public procurement that are contrary to the directives. In the new Act, there is a special, simple procedure for under-limit tenders.

The new principles of legal regulation are:

- simplification of public procurement
- elimination of problems as well as consideration of the practical experiences achieved through implementation and application of Act No. 40/2004
- clarification of basic terms
- detailed specification of procedures
- establishing the position of subjects offering post services among sector contracting entities
- implementation of common shopping subjects
- establishing the possibility of the conclusion of a framework agreement for a public contracting entity
- constitution of a competitive dialog

- establishing an electronic procedure for public procurement.[3]

In our opinion, the publication of the new Act is welcomed. On the other hand, it has been only a short time since the publication of the previous act. We think praxis will take some time to understand the new regulation.

A new act about concessions was issued at the same time as the regulation of tenders. This act contains many links to the Act of tenders. Although there was the possibility to publish both regulations as one act, in the end this was not done.

Act No. 137/ 2006 governs awards of:

- supply,
- services,
- works.

In fact, public supply contracts, public service contracts, and public works contracts will not be concluded, but civil or business contracts will be.

Procedures finish at the conclusion of business contracts[4] (allowed by the Act in some cases), framework agreements (unnamed contracts pursuant to § 269 par. 2 CC), and often realisation contracts (named contracts in accordance to § 269 par. 1 CC, or unnamed contracts pursuant to § 269 par. 2 CC).

Business contracts in public procurement – in contrast to general legal regulation – are concluded in compliance with specifications that include commercial terms, and for a pecuniary interest and in writing (in general, these conditions need not to be met). If it is a tender, a contract change must be done in writing (if the change is possible according to the Act).

Business contracts are not concluded only in the procedure for the award of public works contracts, public supply contracts, and public service contracts, but in general beyond this procedure. The relevant legal norms must be kept.

About the conclusion of business contracts

The aim is to introduce and analyse the current business legal regulation.

The conclusion of business contracts often has many mistakes, such that there are contracts which are void and which are valid but with deficiencies. We can improve this state of things by introducing the following basic questions.

It is necessary to find out if it is a business contract. Business contracts have their types enumerated in § 261 par. 3 CC or conditions stated in § 261 par. 1 CC or in § 261 par. 2 CC, or parties agree on the regulation according to § 262 par. 4 CC.

Business contracts are concluded between (among) entrepreneurs or non-businessmen. Non-businessmen are governed according to § 262 par. 4 CC.

In other cases, civil contracts are concluded (including contracts pursuant to § 261 par. 7 CC).

Discussion and results

The legal regulation of business obligations appears in the Third Part of the Commercial Code, which means § 261–755 CC. This regulation is mainly dispositive, and parties can depart from or exclude it, except for cogent norms that are enumerated in § 263. In Par. 1, the norms are enumerated; in Par. 2, the norms are defined.

In the Commercial Code, some provisions refer to the others (similar or adequate use). In our opinion, it will be better if a dispositive norm refers to another dispositive norm, and vice versa with cogent norms. However, there are situations where a dispositive norm (the norm not enumerated in § 263 CC) refers to a cogent norm. We believe that this "dispositive" norm is impossible to exclude or change. So, we title it as a *mediated* (or *secondary*) *cogent norm.*

A contract conclusion in the Commercial Code is regulated in § 269–275 under the title "Some Provisions about Contract Conclusion." This means that these questions belong among those that are partly regulated. The base of the legal regulation is in § 43 -51 CC, and for business obligations stands for what is stated either in § 269–275 CC.

Contracting parties

- can use one of the contract types cited in the Commercial Code (e.g., to conclude a contract of purchase whose subject of the contract is a good, a contract of sale of a company, a contract of work)
- can use one of the contract types cited in the Civil Code (see § 261 par. 6 CC) if the contract type is not contained in the Commercial Code (e.g., a mandatory contract, a contract of purchase for real estate, a general lease contract, etc.)
- can conclude (see § 269 par. 2 CC) an unnamed contract, which means it is not one of the contract types (e.g., a contract of cooperation, a contract of concurrence, a contract of action, etc.).

Parties in business obligations cannot use one of the contract types from the Civil Code (see § 1 par. 2 CC) if the Commercial Code regulates the contract type, e.g., a contract of work.

The basic rule of a contract conclusion that must be fulfilled is an agreement about the whole content of the contract. The exception in a contract conclusion is an

acceptance of a draft contract made by a certain operation (fulfilling conditions stated in § 275 par. 4 CC).

The contract types contained in the Civil Code must have their essential parts stated in the Code. Contracting parties must also be determined.

In the case of unnamed contracts, contracting parties must also agree on the content, which means to state the rights and duties of the parties. The provisions of Head I, Third Part of the Commercial Code are used for unnamed business contracts (that is, a general business obligation regulation) but not (according to § 269 par. 1 CC) provisions of one of the contract types (which is similar to the content) without agreement. Thanks to the principle of contractual freedom, it is possible to agree on the use of contract regulation.

The contract types contained in the Commercial Code must have their essential parts defined in the basic provision of each contract type. The basic provision determines the essential parts of a contract. It is not important at all if the provision is titled (e.g., in the case of a contract of purchase or a contract of work) or not (e.g., in the case of a mandatory contract or a contract of business representation). The basic provisions are the first provisions of the contract types in Head II, Third Part of the Commercial Code (e.g., the essential parts of a contract of purchase are: seller and her/his obligation to deliver good, good, obligation of the seller to transfer ownership, buyer and her/his obligation to pay a purchase price, and an agreement about the purchase price – that is, a fixed purchase price or a way of stating the purchase price if it is not clear that the contracting parties would like to conclude the contract without the purchase price) or in Head III, Third Part of the Commercial Code (see contract of exclusive sale).

The unnamed contract pursuant to § 51 Civ.C. is impossible to conclude in business obligations (the Commercial Code has its own regulation of the unnamed contract and the conclusion of the unnamed contract regards § 51 Civ.C. traverse the § 1 par. 2 CC).

Some contracts have to be in writing according to the provisions in the Commercial Code, e.g., bank contracts or contracts about the transfer of real estates (which must be in writing on one document, and ownership is transferred by real estate deposit), or pursuant to a special act (e. g., a licence contract for the subject of industrial property which must be in writing, and enforcement of law becomes valid by registration in a relevant register of the law).

The written form can be an agreed by contracting parties – where the act does not state it. If a contract is conducted in writing, its changes should be in writing, but this must be negotiated (see § 272 CC).

If a business is not marginal, we would recommend a written form also in cases in which the form is not stated.

In general, it is suitable to describe in a contract the contracts meaning and purpose. These provisions can help with the identification of the character of the good according to its kind, if it is not defined in the contract; it is possible to take advantage of the provisions about the defeat of purpose of the contract; putting in use provisions about the foreseeing of damages (in the case of a breach of contract) can help with the application of the moderate law of contractual fine, etc. [5]

It is recommended eventually to define terms in reference to § 264 par. 2 CC and the agreement that business commons define used terms.

Provisory instruments can be used in contracts (e.g., contract fine, guarantee or bank guarantee, or use of a procedure that increases a secure of filling (e.g., letter of credit).

It is also recommended to use provisions about billing and provisions about paying, and the cap on interest for delayed payments in case of delay.

Then it is possible to conclude payment (see § 473 CC) and currency clauses (see § 744 CC).

The arbitrator clause (see Act No. 216/1994) enables the rendering of a decision by an arbitrator (see www.soud.cz).

If a contract refers to an appendix (which is an integral part of a contract), it is better to cite the appendix before the signatures of the contracting parties. Then there will be no doubt that an enclosure is part of the contract.

Provisions of contract can define the part of the contract that is ruled by commercial terms (§ 273 CC) and the other part governed by additional clauses (§ 274 CC).[6]

It is possible to think of a common content of international treaties and national regulations in other countries that admits a “free” conclusion. For example, the acceptant consents to the essential parts of a contract and proposes a change of some inessential parts (e.g., a reference to some commercial terms), then, when the offeror does not express her/his disapproval in time, the assumption is that the contract, concluded in wording proposed by the acceptant, will be fulfilled.

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The European directives about tenders regulate in detail public procurement procedures; in the case of under-limit tenders, the directives are limited only by the principles of transparency and non-discrimination. Our new legal regulation – meaning Act No. 137/2006 – in contrast to these directives, describes under-limit methods of public procurement; there is an effort to shorten time limits, to have less administration, and to simplify procedures.

If we attempt to compare the trends of legal regulation of the European Community and the new Czech legal regulation (Act No. 137/2006), we can say that the main streams formed by the regulation of the EC correspond with the principles stated for the new Act.

Concession contracts are not regulated in the new Act about tenders but in the individual Act No. 139/2006, which in many cases refers to the new Act about tenders. It is a question whether only one act about tenders and concessions was more suitable.

The new Act is about one-third more capacious than the previous legal regulation. It is difficult for a common user of the Act to find "bridges", connections between certain provisions that interrelate. Publications – e.g. commentaries or texts of the Act with a commentary – can help users.

The use of commercial terms, business customs, and additional clauses (see § 264, 273, 274) to the detriment of regulation in an act is correct.

In the last few years, there has been continuous work on the recodification of private law. The aim of this work is a new civil code and a new general legal regulation of business obligations, which means commercial code or commercial act.[7]

There can be doubted whether it makes sense to analyse the topic of contractual business law that arises from contemporary legal regulation. Mr. S. Plíva answers this question in his publication Business Obligations,[8] and he is, in this sense, persuaded. We consent with his opinion. Discourses about the issue are still useful. The new civil code is partly prepared, but the Code will not come into effect in the foreseeable future.

This article about contractual business law is influenced not only by the current proposal of the new civil code, but also by the European development in civil law.

We are particularly interested in the area of civil law. European civil law is neither civil law valid in the member states in the European Community nor the principles of the jurisdictions. European civil law is understood as the relevant norms of communitary law.[9]

It is typical that only a few particular questions in European civil law are regulated and that European civil law does not form an integrated system. A "European civil code" that could close the law of member states does not exist. There are questions about it. It seems that there is a possibility to compose a "Join reference framework" about questions of contractual business law. This is acceptable. If the "Join reference framework" were a recommendation, it would also be a great starting point for legislators for contracting parties.

Today, the direction that aims at an approximation of civil – private law – is an approximation of private projects. For example, UNIDROIT belongs to such projects.[10]

We should respect European trends and anticipate legal continuation and review of the valid legal regulation in the process of the formation of the new civil and commercial code. It is important to deepen comparative research.[11]

This does not mean that we can draw from the experience of finished legislation works.

We can also analyse current legal regulation of the contract types of the Third Part of the Commercial Code. Most of the text of the Act can be used in recodification.[12]

The final preparation of a European civil law whose base is the civil code is too far into the future. Nowdays we can expect fragmentary edits to the actual partial problems.

In the area of European secondary law, a huge amount of coordination work has already been done. It is known that newer directives are replacing older ones, through the incorporation method.

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[1] In the Slovak Republic was also published the new Act No. 25/2006 about public procurement. – See Moravčíková, A. "The New Act No. 25/2006 about Public Procurement." In: Moravčíková, A.: *Liability and Risk with Running a Business*. Verlag Dashofer Bratislava 2005.

[2] Plíva, S.: *Business Obligations*, ASPI Prague 2006, 1st edition, p. 49.

[3] Poremská, M.: "Electronic Tenders and Their Security," *Legal Studies and Practice Journal*, No. 3/ 2006, p. 250 - 257.

[4] Details in, e.g., Krč, R.; Marek., K.; Petr, M. *The Act about Public Procurement and the Concession Act with Commentary*, Linde Prague 2006.

[5] Poremská, M.: "Compensation for Damages by Using Modern Communications and the Internet," *Legal Advisor*, No. 6, 2007

[6] Details in, e.g., Bejček, J.; Eliáš, K. and team: *The Course of Business Law*, Prague, C. H. Beck, 3rd edition. Bejček, J.; Hajn, P.: *How to Conclude Business Contracts*, Linde Prague, 2004. Ovečková, I. and team: *The Commercial Code, Commentary*, Iura Edition, Bratislava, 1995. Patakyová, M.; Moravčíková, A.: *The Commercial Code, Economical and Legal Adviser of a Business Man*, No. 5 – 6/2002. Štenglová, I.; Plíva, S.; Tomsa, M. and team: *The Commercial Code, Commentary*, Prague, C. H. Beck, 10th edition, 2005.

[7] To these questions see Pelikánová, I.: "The Proposal of Civil Legal Regulation," *Legal Forum*, No. 10/2006, p. 347.

[8] Plíva, S.: *Business Obligations*, ASPI Prague, 1st edition, 2006.

[9] The same see Hurdík, J.; Fiala, J.; Lavický, P.; Ronovská, K.: The Base and the Tendencies of Development of Civil Law after the Entrance of the Czech Republic into the European Union, Symposium of the European Context of Development of Czech Law after 2004, AUMBI 2006, p. 156 atc.

[10] For details, see, e. g., Šilhan, J.: European Contractual Law, Legal forum No. 11/2006, pp. 381-389. Čech, P.: "Some Other Notes to the Limitation of Damages," *Legal Forum*, No. 12/2006, p. 429.

[11] Pelikánová, I.: "The Proposal of Civil Codification," *Legal Forum*, No. 10/2006, p. 343-354.

The proposal of changes of the Third Part of the Commercial Code see Bejček, J.; Eliáš, K. and team: *The Course of Business Law, Business Obligations, Stocks and Shares*, C. H. Beck Prague, 1996, 2nd edition 1999 and 3rd edition 2003; Bejček, J. *Business Obligations* (general regulation and contract of purchase), MU Brno, 2nd edition, 1994, p. 217 ect. To the changes of provisions in Pelikánová, I.: *Commentary to the Commercial Code*, 3rd, 4th and 5th edition, Linde Prague, 1996, 1997, 1999, 959 p.