



# Association of Forwarding and Logistics of the Czech Republic

## I.

### Recodification of the civil law in the Czech Republic

consisting of

- the new Civil Code ( Act No. 89/2012 Coll.) hereinafter „NCC“
- the Business Corporations Act (Act No. 90/2012 Coll.) hereinafter „ BCA“
- the International Private Law Act (Act No. 91/2012 Coll.) hereinafter „IPLA“

as effective of January 1<sup>st</sup>, 2014 has introduced fundamental changes into the Czech legal order, in particular by

- annulment of the Commercial Code and thus
- the traditional double regulation regime of civil contractual obligations, i.e. generally by the Civil Code and specifically by the Commercial Code that was regulating , inter alia , contractual relations
  - a) between entrepreneurs ( business persons) relating to the business activities when circumstances indicated that such relations, on being established, related to their business activities ( sec. 261 para 1 of Commercial Code), or
  - b) disregarding the nature of the parties, whether entrepreneurs or not, if such relations resulted from the so-called “ absolute business contracts “ specified in para 3 under lit. (a) to (e) of sec.261 of the Commercial Code, inter alia e.g. forwarding contract ( as per sec.601 and subsequent of the Commercial Code ) or
  - c) when agreed by the parties in writing that their contractual relationship which otherwise would not fall under the definition of “business contractual relation “ shall be governed by the Commercial Code ( as per sec.262 of the Commercial Code).

It should be added that such an agreement was very often concluded by the parties by reference to general commercial clauses (terms and conditions) issued by one party only or , even more frequently, to the so-called General Terms and Conditions worked out and published by expert organizations or societies or other commercial rules known to the contracting parties or enclosed to the contract, e.g. SSL General Conditions of Freight Forwarding version 2005. ( as per sec.273 para 1 of the Commercial Code).

Since January 1<sup>st</sup>,2014 there is only **one legal regulation** of contractual relations irrespective of their nature, **by the NCC.**

## II.

### Introductory remarks on the NCC

- comprises of 3081 sections divided into 5 specific areas :
- general provisions ( sec. 1-654)
- family law (sec.655-975)
- absolute property rights (sec.976-1720)
- relative property rights (sec.1721-3014)
- common, interim and final provisions (sec.3015-3081) and
- replaces 238 statutory acts (or parts thereof) as specified in section 3080 NCC)

A number of new aspects and basic principles introduced by the NCC may be understood from reference to some provisions of chapter 1, part 1 under heading “ Private Law “, that is binding as per sec. 3030 also upon rights and obligations that are considered in accordance with provisions applicable prior to entry into force of the NCC, too, and that are not limited to sec. 1-8 ( Private Law)

but also to sec. 9-11 ( application of Civil Law provisions), sec.12-13 (protection of private rights) and sec.14 (self-help).

As an example of non-traditional provision may be quoted section 10 NCC :

**Para 1** : If a legal case cannot be determined on the ground of an explicit provision, it shall be evaluated according to a provision relating to a legal case that is narrowest to the contents and purpose of the case under evaluation.

**Para 2** : If there is no such provision available, the legal case shall be evaluated according to the principles of equity and principles upon which this Act is based so as to arrive at a good arrangement (settlement) of rights and obligations with regard to customs of private life and with consideration of the stage of legal doctrine as well as the established judicial practice.

#### **Under sec.13 NCC**

“ everyone who seeks legal protection can reasonably expect his legal case to be determined in **an analogous way** as another legal case that has been already determined and that coincides with his legal case in substantial features , has right to obtain **a convincing explanation** of the reason of such deviation”.

The quoted new provision is sometimes presented as a step forward and sometimes as a concession to voices calling for court judgements that could be expected or even foreseen.

In other words : different courts should decide similar cases in similar way.

Nevertheless, it does not mean that NCC introduces the system of binding precedents (like under the English and/or American law).

The most significant court decisions that should be taken into the account in judicial practice of courts are those published in Collection of decisions and standpoints of the Supreme Court and in the Collection of the findings (verdicts ) and standpoints of the Constitutional Court of the Czech Republic.

No doubt, it will take some time to find new decisions of the Czech courts in cases where the provisions of NCC were applied.

### **III.**

#### **Main principles the NCC is based upon :**

**1. Disposition principle** (expressed in sec.1 para 2, 1<sup>st</sup> sentence) :

“ Unless provided expressly otherwise by the Act (i.e. NCC) the parties are free to agree upon rights and obligations differently from statutory provisions. However, stipulations being contrary to good morals , public order or law relating to standing of persons , including the rights of protection of individual rights (privacy rights ) shall be prohibited “.

The statutory ban“ to agree independently of the statutory provisions “ is expressed in the NCC by words such as “ it is prohibited “ or by explicit specification of consequences as regards mandatory provisions, e.g. causing invalidity or inefficiency of the defective stipulations agreed upon by the parties.

**2. Examples of mandatory provisions in the NCC :**

- **Absolute property rights** governed by part 3 ( sec.976-1720) as laid down in sec.978 NCC: “ Provisions of this part may be departed from by agreement with effect towards third persons if it is admitted by an Act only”.
- **Consumer protection** as per sec.1810-1867 NCC as laid down in sec.1812 para 2 NCC :

“Agreements departing from provisions of the Act laid down for the protection of consumers shall be disregarded. This applies even in case when the consumer resigns from a particular right granted to him by the Act.”

- **Prescription (time-bar)** as per sec. 630 NCC:
  1. “Parties are free to agree upon a shorter or longer period of prescription running as from the day when the right could have been exercised for the first time, than set forth by the Act, however in duration **of one year** as a minimum and of **15 years** as a maximum.”
  2. “If the shorter or longer period has been agreed upon to the **detriment of a weaker party**, such an agreement shall be disregarded. Disregarded shall be an agreement upon a shorter prescription period, too, if it concerns the right on fulfilment resulting from prejudice to liberty, life or health, or a right arisen from **intentional breach of an obligation**. “
  
- **Business terms** as per sec.1753 NCC  
“ A provision of business terms and conditions that **could not be reasonably expected** by the other party, shall be ineffective if it has not been accepted by the other party expressly. An opposite stipulation shall be disregarded. The issue whether there is such a provision shall be considered not only with regard to its scope but with regard to manner of its expression as well. “
  
- **Contracts concluded in way of adhesion** as per sec.1801 NCC  
“ If the parties depart from sec.1799 or 1780 or if they exclude any provision thereof, the said shall be disregarded. That shall not apply to contracts concluded between entrepreneurs unless a party proves the clause mentioned beyond the proper text of the contract and proposed by the other contracting party is **in flagrant contradiction** with commercial usage (business custom) and the principle of a **fair business relation**. “
  3. **Changes in legal terminology** in comparison with precedent acts, e.g.
    - “Person” (individual) instead of “party” (participant)
    - “legal personality” instead of “capability to have legal rights and obligations”
    - “offer “ instead of “proposal to enter into contract”
    - “contractual representation” instead of “ representation under power of attorney”, etc.
  4. New legal definition of the term **“thing”** in broader sense (sec.498NCC):  
“A thing in the legal sense (hereinafter “ a thing” only) is everything which differs from an individual and serves the purposes of human kind. “
  5. The NCC tries to avoid using the wording “granting rights” and “ imposing obligations (duties)” on the parties, omitting e.g. the traditional “ is entitled/ is obliged “ and/or using “ shall” , etc.
  6. New regulation of **statutory prescription** (timebar) as per sec.609 and subsequent
    - a) Period of prescription is **3 years** (sec.629 para1 NCC) which corresponds to that of the old Civil Code (sec.101) but is shorter than that in business relations governed by the Commercial Code until the end of 2013, which was 4 years (sec.397 Com.Code), and
    - b) **Property rights** become statute-barred by lapse of **10 years** at the latest running as of the day of its maturity unless an Act sets forth explicitly another term of prescription(sec.629 para2 NCC)

A remark : another limitation period may be thus set forth not only by the NCC but by another Act as well.

- c) As an example of another, i.e. shorter term of statutory bar laid down by NCC itself, may be sec.625 NCC according to which  
“ In respect to the right resulting from **total destruction or loss of carried ( transported ) goods** starts the period of prescription to run as of the day on which the consignment should have been delivered to the consignee.  
However, if the carried goods were damaged only or delivered with delay the period of prescription will start to run as of the day of delivery of the consignment. “
- d) Another example : sec.2569 NCC :  
“If the right of compensation of damage is **not lodged against the carrier within 6 months** from taking delivery of the consignment or if the consignment has not been taken over within 6 months of the day on which it should have been delivered the court shall not adjudicate it if the carrier objects that the right has been lodged behind the time. “  
Note: old sec.771 Civ.Code : “otherwise the right shall be extinct”

#### 7. **Compensation of damages**

In case of material damage , it is differentiated between the terms for the compensation of damages based on the obligation breached by the harming party, i.e. whether the damage is caused by breach of statutory or contractual obligation or breach of good morals (sec.2009-2013). Preference is given to compensation of damage by restoring the original condition.

**Statutory liability** is based on principle of wrongful act and

**contractual liability** is based on the objective principle.

Compensation of non-material damages will be provided in the form of the so-called “satisfaction”.

The NCC imposes duty of prevention of damages.

#### 8. **Groundless (unjustified) enrichment** (sec.2991-3005)

there is no specification of factual grounds to be classified as groundless enrichment but a rule is laid down under which a property benefit without any justified cause shall be considered as groundless enrichment.

Sec.2991 para 2, NCC:

“Groundless enrichment arises in particular in case when someone who gains property benefit by fulfilment (performance) without legal title, by fulfilment on the ground of a legal title that no more exists, in case of using alien’s values contrary to the law or in case that there was a fulfilment (performance) in his place to the extent in which he should have effected fulfilment(performance) himself.”

#### 9. **Incorporation of legal regulations of EU (sec.3015NCC)**

It is stated that the NCC incorporated relevant legal regulation of EU and the note under line specifies them.

10. **Legal relations** based on former legal provisions and/or contracts concluded **before January 1<sup>st</sup> 2014**, in particular the right to be compensated for damage arisen due to breach of obligations imposed by legal provisions effective until the end of 2013 shall be evaluated in conformity with the previous legal provisions (sec. 3079 NCC).

#### IV.

#### Freight forwarding contract

1. Freight forwarding contract is defined by sec.2471 para 1 of the NCC as follows:  
“ Under a freight forwarding contract, the freight forwarder undertakes to arrange for the principal in his own name and at principal’s account the carriage (the transport) of a consignment , or , as the case may be, to arrange or perform (provide) services connected with the carriage(the transport), as well, and the principal undertakes to pay remuneration to the freight forwarder. “

When compared with the definition of freight forwarding contract in sec.601 para 1 of the Commercial Code applied until the end of 2013, the new definition extends the subject of that contract by **inclusion not only arrangement of services** connected with the transport **but also performance thereof** by the freight forwarder.

No reason can be found in the official motivation of the draft of NCC by the government to the parliament in addition to a general statement that “ the existing regulation under the Commercial Code was taken over “ into the NCC draft.

2. It should be noted that – due to the extended wording – the performance of services connected with the transport may be executed by the freight forwarder even without any direct connection with the arrangement of the transport as such and cannot be interpreted as exercise of freight forwarder’s right to perform the activity that should be arranged by him on the basis of the so-called “ self- entry provision” of sec.2474 NCC under which

“Unless it is contrary to the contract or unless it is forbidden by the principal prior to the commencement of the performance of the carriage at the latest, the freight forwarder may himself effect the carriage that he should otherwise arrange.”

By the way, the performance of such services by the freight forwarder may be also felt as a strange element in the freight forwarding contract with regard to the provision of sec.2482 NCC according to which

“In the rest, provisions relating to contracts with commission agents(“commission contracts”) shall adequately apply to freight forwarding “( sec.2455-2470 NCC).

In the structure of the NCC , both are ranged in part 5 under the title “ Engagements under contracts of mandate type” consisting of division

- 1- mandate
- 2- brokerage
- 3- commission
- 4- freight forwarding
- 5- commercial representation

It is open for discussion on professional level, in the doctrine, etc, but it will take some time for establishing the judicial practice in this specialised field.

3. A further example of problems arising from deleting the traditional term “**professional care**” from freight forwarding contract regulation by NCC and replacing it, under sec.2475 NCC, by the term “**needed care**” which is neither defined by NCC nor used in connection in other contract types, e.g. under contract of carriage (sec.2559 NCC), where it is imposed upon the carrier to perform carriage “with professional care “ explicitly.  
The new term “needed care “should be nevertheless understood and interpreted as including “professional care, if needed.” Besides “professional care” of the freight forwarder

as entrepreneur offering his services to clients should be deduced from general provision of sec.5 para 1 of NCC:

“Who refers publicly or in contact with another person to professional service as a member of a certain profession or standing shall be deemed to announce thereby that he is capable to act with knowledge and care connected with his profession or standing. If he acts without such **professional care**, it shall be to his charge. “

4. There is **no more 1 year statutory prescription (time-bar) period** for rights resulting from damage caused to goods carried and/or from delayed delivery of the consignment towards the freight forwarder and towards the carrier corresponding to previous sec.399 of the Commercial Code.

However, the parties may agree upon a **shorter or longer** prescription period running as of the day when the right could have been lodged for the first time than that set forth by an Act in duration of **1 year** as a minimum and **15 years** as a maximum (sec.360 para 1 NCC).

Such an agreement may be concluded by the parties in individual freight forwarding contracts as well as with reference to General Freight Forwarding Terms issued by the Association of Forwarding and Logistics of the Czech Republic in accordance with sec.1751 para 3 of the NCC in the following wording :

“When concluding contracts by and between entrepreneurs it is possible to determine a part of contents of the contract by a mere reference to business terms and conditions elaborated by professional or special-interest organizations.”

Note :

**General Freight Forwarding Terms and Conditions (version 2014)** were adopted by the general meeting of the Association on June 12, 2013 with validity and effect as of January 1, 2014 (item 5.1.) and form an integral part of the freight forwarding contracts entered into after the date of entry into force thereof (January 1,2014).

If the principal of the freight forwarder is a natural person- non-entrepreneur (**consumer**) in the sense of sec.419 NCC, the said General Terms and Conditions shall be a part of a concluded Freight forwarding contract on the ground of an **explicit agreement** of the parties reached subject to **observance of the procedure** according to sec.1810 and subsequent of the NCC (“consumer contracts”).

Express stipulations in the contract shall have priority over the wording of the General Freight Forwarding Terms and Conditions even if the general terms and conditions form an integral part of the concluded contract (item 5.5. and sec.1751 para 1, 2<sup>nd</sup> sentence NCC).

Relations arising from Freight forwarding and/or other contracts concluded prior to January 1<sup>st</sup>,2014 as far as such concluded contracts refer to general freight forwarding terms shall be governed by those elaborated by the Association in the wording effective as of July 1<sup>st</sup> 2005 (item 5.6.)

5. There is **no statutory provision** in the NCC regarding
  - Limit of freight forwarders liability for damages
  - Significance of fixed prices accounted by the freight forwarder for his services as remuneration
  - Freight forwarders right to obtain advance payment on account of freight and costs and charges connected with his services prior to the commencement of his duties and/or after the conclusion of the contract with the carrier ( in contrast with previous sec.607 para 1 and 2 of the Commercial Code).

Consequently, such questions are left to the parties to agree upon individually or by reference to general terms and conditions where such questions are regulated explicitly.

6. On the other side, there is a **new provision** in sec.2479 NCC according to which “If the **consignee** of the consignment knew of the freight forwarders claim resulting from the freight forwarding contract towards the principal, or if he must have known of it, the consignee becomes a **guarantor** as to such claim by receipt of the consignment.”
7. Freight forwarders **statutory lien** on the consignment is laid down in sec.2481 NCC as security of debts of the principal arising from the contract as long as the consignment is in his custody or while he is in possession of documents entitling him to dispose of the consignment, which also applies in case that the consignment or the documents are in possession of someone who has them in possession on freight forwarder’s behalf.

The statutory lien is, however, limited to freight forwarder’s claims resulting from the freight forwarding contract only and does not cover his claims from previous freight forwarding contracts concluded with the same principal as it was the case under the Commercial Code. It is therefore necessary to agree upon a broader extent of the lien expressly .

8. Another new provision is contained in sec.2482 para 2 NCC : “Upon request of the former freight forwarders the **intermediate freight forwarder** shall enforce all rights resulting from this lien, and has **right and obligation** to satisfy their rights. If he does so they pass on him together with lien securing them. “
9. Having in mind the established judicial practice of the Supreme Court of the Czech Republic regarding the issue of fixed prices (rates) of freight forwarders, i.e. that it has no influence on the legal standing of the freight forwarder as such, unless expressly agreed by the parties otherwise, in other words that freight forwarder shall not be considered as acting as carrier in case if his remuneration is accounted according to fixed prices (rates). The judgments are based on the argument that there is no legal provision under the Czech law regarding any role the fixed prices (rates) should have on the legal standing of the freight forwarder.

Since the situation remains unchanged under the NCC ( see 5 above), there is no reason for changing the stand point after January 1<sup>st</sup>, 2014. In order to confirm the position the General Terms and Conditions of freight forwarding-version 2014 include explicitly (item 4.6.2) a new provision:

“a contractual agreement regarding a fixed remuneration of the freight forwarder or, as the case may be, accounting the freight forwarder’s remuneration in a fixed rate (the so-called taking over rate) does not mean that the freight forwarder takes over the carrier’s liability by contractual agreement. “

10. 1 year prescription(time-bar) period agreed upon by reference to general terms and conditions (item4.11.2.) is not applicable as regards rights resulted from intentional breach of freight forwarder’s obligations or if it is agreed upon to the detriment of a weaker party (item 4.11.3. as well as sec.630 para 2 NCC).

**V.**  
**Business Corporation Act**  
(Act no. 90/ 2012 Coll.-“the BCA”)

Replaces the former provisions of the Commercial Code relating to business corporations and is effective as of January 1<sup>st</sup>, 2014. It regulates in addition to general provisions of the new Civil Code business corporations in details.

**VI.**  
**International Private Law Act**  
(Act no. 91/ 2012 Coll.-“the IPLA”)

1. It replaces provisions of the former Act on International Private and Procedure Law No.97/1963 Coll., as amended, and takes into consideration legal regulations of EU and refers to international treaties binding upon the Czech Republic.

It consists of 125 sections with a number of paragraphs and specifies in sec.124 under items 1-19 acts and other legal provisions that are repealed by it.

2. From the party's view it might be interesting to draw attention to the principle of **choice of law** under sec.87 para 1 of IPLA :  
“Contracts shall be governed by the law of the state with which the contract is most related unless the contracting parties have chosen a decisive law. The choice of law must be expressed explicitly or must result, without any doubt, from the provisions of the contract or from the circumstances of the case. “

There are no additional supporting rules for the applicable law in case there is no choice of law as they were provided for in the former act, e.g. according to the seat (domicile) of the freight forwarder.

3. A special new provision can be found under sec.87 para 2 of IPLA as to the legal relation based on a consumer contract that is in narrow relation to the territory of a member state of EU. The consumer cannot be deprived from the protection appertaining to him according to the Czech law if the proceedings are held in the Czech Republic, even if the law of another state than a member state of EU has been chosen or even if such other law should be applied otherwise.
4. Insurance contracts shall be governed by the law of the state where the insured person has usual domicile (sec.87 para 3 IPLA).
5. Prescription (time-bar) shall be governed by the same law as that is the subject of the prescription (time-bar) as per sec.46 .
6. Admissibility of an arbitration agreement shall be considered according to the Czech law. Other requisites of an arbitration agreement shall be considered according to the law of the state where the arbitral award should be issued (sec.117 para 1 IPLA). As far as the form of an arbitration agreement is concerned, the law decisive for other requisites of the arbitral agreement shall be applied, however, it will be sufficient if the law of the place or places where the will of the parties was expressed have been complied with (sec.117 para 2 IPLA).

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