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Assignment of a Contract in the New Czech Civil Code

The paper discusses the regulation of the assignment of contracts under the new Czech Civil Law and explores the subject matter of an assignment, its forms and the consent of an assigned party. First, the author denies that the transfer of contract is a new legal concept in the Czech Law System. He also points out that the provisions of Sec. 1895-1900 NCC were deeply inspired by the Italian Codice Civile (Art. 1406-1410 CC). On the contrary, the regulation of PECL (12:201) does not constitute, from author´s point of view, a sufficient base for the national legislation.

I Substance and Source of Inspiration

It has to be noted first of all that the legal institution of assignment of contract has been expressly laid down in our legal system for the first time in history. The previous national legal regulations were based on the traditional concept of the content of *obligation,* characterised by the terms *claim* and *debt,* which are further associated with the terms *creditor* and *debtor.* The *law of obligation* to date has therefore concentrated on the regulation of *succession* with regard to the individual claims and debts of the indebted person. The regulation of the legal institution of the so called *blanket assignment* is also in line with this tradition (See Sec. 1897 of the Czech law in the Annex). Through the assignment of contracts, however, a *change in the party of obligation* comes into effect, i.e. there is a succession into the *legal position of a party,* not only a change of the subject of the individual rights and *duties.*[1]

The newly introduced *legal institution* represents, from the legislative point of view, a shift in the development in the law of obligation. Whereas the Roman law interpreted the *obligation* as *iuris vinculum,* a legal tie, by which the parties of obligation were bound together, the development of economic relations in the 19th century constituted its relaxation with regard to individual claims

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[1] See J. Busche, U. Noack, V. J. Rieble von Staudingers, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Second Book.* (Recht der Schuldverhältnisse. §§ 397–432., Sellier – de Gruyter 2005, Berlin) 133.

and debts.[2] The legal institution of assignment of contract in a certain sense represents the completion of this development – the legal tie between the parties is fully loosened.

Despite all the above, the legal institution laid down cannot be considered as utterly unknown to our legal system to the present day. The idea of succession into the rights and duties of a party *to an obligation* was implemented e.g. by Sec. 680 paragraph 2 of the Civil Code 1964, according to which, in the case of a change of property, the transferee (purchaser) enters the legal position of a lessor. It is this entry 'into the legal position' of a party to an obligation that is characteristic of the assignment of contract as well.

It follows from the aforesaid that the previous regulations had foreseen the *succession into the legal position of a party.* It may be taken as a proof of fact that the legal institution of assignment of contract is compatible with the system of *civil law;* the explicit legal regulation is thus the reflection of its general *applicability.*[3] It is nevertheless clear that the assignment of contracts was possible also on the basis of the *previous regulations;* the contract of assignment of contract could be concluded as an *innominate contract* (Sec. 51 of the Civil Code 1964) by taking the basic *principle of the private law regulation,* i.e. the *equality of the parties,* into account. For the assignment of contract all three participating parties were thus obliged to deliver an *expression of will.*[4]

In Europe, the explicit regulation of assignment of contract appears only in a later period of time; in the first place, the Italian (Article 1406–1410 Cc), the Portuguese (Article 424–427 Cci) and the Dutch Civil Codes (6th book BW art. 159) should be mentioned.[5] Furthermore, we would like to draw attention to Article 12:201 of Principles of European Contract Law (PECL), which also addresses the regulation of assignment of contract. It is worth mentioning, above all, *paragraph 2,* basing itself on the presumption that if the assignment of contract represents a transfer of rights to performance, the provisions of PECL on assignment of claims apply, and, in the case of transferring debts, the provisions of PECL on debt assumption apply. We believe that the proposed 'European' concept is not right, as it does not fully capture the substance of the assignment of contract: not only the rights and duties from the *synallagmatic contract* are transferred to the third party, but the total legal position of the party of the obligation. The obligation is more than just a complex of claims and debts; it also involves, e.g. the *right to withdraw from the contract,* the *rights from the arbitration clauses* or the *rights from the prorogation agreements,* etc.[6]

The Czech legislator cannot be accused of not adopting the PECL model. However, not even the close attachment to the Italian regulations,[7] which often form an explicit basis for the national institution of assignment of contract, can be considered as utterly free of difficulty (See Sec. 1899 of the Czech law in the Annex).

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[2] See J. Sedláček, *Obligační právo [The Law of Obligation]. Obecné nauky o právních jednáních obligačních a o splnění závazků.* (2nd edn, Spolek Právník 1933, Brno) 140.

[3] K. W. Nörr, R. Scheyhing, W. Pöggeler, *Sukzessionen. Forderungszession, Vertragsübernahme, Schuldübernahme* (2nd edn, Mohr Siebeck 1999, Tübingen) 180.

[4] D. Looschelders, *Schuldrecht. Allgemeiner Teil* (6th edn, Heymanns 2008, Köln et al.) 370.

[5] Ch. von Bar, R. Zimmermann, *Grundregeln des Europäischen Vertragsrechts. Part III.* (Sellier 2005, München) 716.

[6] See K. Larenz, *Schuldrecht. First Volume. Allgemeiner Teil* (14th edn, CH Beck 1987, München) 616–617.

[7] See von Bar, Zimmermann (n 5) 717.

II General Interpretations

The legal regulations state that a contract, by which one of the parties of the *contractual obligation* as an *assignor* transfers their rights and duties of *the contract* or part of it to a third party *(assignee),* is a *bilateral contract.* The *party of the assigned contract ('assigned party')* is not in the position of a contractual party from the view of the assignment contract, and therefore does not intervene in the *legal relationship* between the assignee and the assignor. Their *competence* consists in the prior or subsequent consent to the assignment of contract (Sec. 1897), by which this assignment comes into effect (Sec. 1898).

However, it is not excluded that the *expression of the will* of all three participating parties are laid down *in the same document.* Unless otherwise stipulated in the assignment of contract, the *consent* to the assignment has exclusive effect of fulfilment for the *assignor.* For the party entering the existing contractual relationship in replacement (assignee), the contract is of an *obligation nature.*

With regard to the fact that the contract on the assignment of a contract constitutes a *causal obligation*, its conclusion assumes a certain *cause* (Sec. 1791). This can be the *purchase*, *exchange* or *donation*, and, where appropriate, the entry into a *substitution of another person's obligation* for the purpose of *fulfilment* of one's own debt (Lat. *causa solvendi*). In any case, it is required to draw a distinction between the two kinds of rights and duties among the parties of the assignment of contract: on the one hand, there are the *obligations of an assignment of contract* and on the other hand the *obligations of a legal relationship,* entered into by the assignee instead of the assignor.[8]

The law does not accept the assignment of contract if it is excluded by the *nature of the contract.* The legal ban obviously refers to cases when the assigned contract is of a unilaterally binding *nature (non-synallagmatic).* This *interpretation* seems to be underlined by the Italian regulations, which explicitly govern only the cases of contracts committing to *reciprocation of performance* (Article 1406 Cc). We nevertheless believe that there is no reason whatsoever for any restrictions regarding the assignment of contract in this context. With regard to assignment of contract, the whole legal position of the party is being transferred from one person to another, and not only a certain *assignment of claim* or *assumption of debt.* The legal position of a party also involves some other *rights, competences and duties* which, together with the assignment of claim or assumption of debt, do not necessarily have to be transferred (the right to withdraw from the contract, information duties).[9] It is therefore possible that even *donation* (Sec. 2055), *precarium* (Sec. 2189) or *loan* (Sec. 2193) etc. can turn into the object of assignment.

[8] See Sedláček (n 2) 141.

[9] Armin Ehrenzweig, Adolf Ehrenzweig, H. Mayrhofer, *System des österreichischen allgemeinen Privatrechts. Second Book* (Das Recht der Schuldverhältnisse. First Section. 3th edn, Manz 1986, Wien) 534.

III Subject Matter of an Assignment

The law is not quite clear in its addressing of the assignment of contract. The *direct subject matter of the obligation* arising from the contract on assignment of contract is the assignee's duty to enter the legal position of the original party of the obligation (assignor). This duty is typically fulfilled at the moment of the assigned party agreeing to the assignment.

As an *indirect subject matter of the obligation* arising from the assignment of contract, we consider the complex of rights and duties that originate from the legal position of a contractual party. The assignee is not only assigned with all the rights and duties referring to the *performance,* including all their *accessories* (Sec. 513), but also the complete *ancillary rights* (e.g. accessions of a claim) and *competences* linked to the legal position of the obligation party. For demonstration purposes, some of them are listed by the law *(conventional fine, right to withdraw from the contract, arbitration clause)* (Sec. 1896).

With regard to the fact that the *subject matter of an assignment* is not a contract but the *legal position of the party of obligation*, there is no obstacle for the transfer of rights and duties from those legal relations that are formed differently than by contract (Sec. 1723). If the *assigned party* agrees to this, there is no reason for the transfer not to be accepted. In such cases, the provisions on the assignment of contract will be able to be applied directly and not only adequately (Sec. 10). The *subject matter of an assignment* might not only be the existing obligations, but also future obligations.[10]

IV Forms of Assignment

The law does not lay down a requirement of written form for the contract on assignment of contract. In principle, the assignment of contract comes into effect even in the event of an oral agreement on the assignment by the participating parties;[11] the assignment of contract *by an implied contract* is unlikely to be applied in practice. The *absence of requirements as to form* of the contract on assignment of contract is in line with the regulation of the form of *assignment of claim* (Sec. 1879) and with the form of the *assumption of debt* (Sec. 1888) or of the *accession to the obligation* (Sec. 1892).

[10] See B. Dvořák, in M. Hulmák (ed), *Občanský zákoník V. Závazkové právo. Obecná část. Komentář.* (Commentary on the Czech New Civil Code. Part V., CH Beck 2014, Praha) 796.

[11] See W. Möschel in M. Krüger (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Second Volume.* (Schuldrecht Allgemeiner Teil. §§ 241–432. 5th edn, CH Beck 2007, München) 2565, in contrast to it Busche, Noack, Rieble (n 1) 133.

V Consent of the Assigned Party

The prerequisite for the coming into force of the contract on assignment of contract is the *consent of the assigned party.*[12]

Consent can be granted only by the person who is, in the time of the consent, a party to *the obligation,* from which the rights and duties are transferred to the *assignee.* The law does not stipulate to whom that consent shall be given; by definition it seems to be clear, however, that this must be to at least one of the parties *of assignment contract.* The assignment of contract comes into force at the moment of receiving the assigned party's consent. Should consent to the assignment of contract be given beforehand, the moment of the assignment of contract coming into force is the moment when the assigned party receives the *notification of the assignor* on the assignment or when the *assignee proves the transfer of contract.*

The consent of the assigned party refers only to the *part of assignment* which regulates the *assignment of the legal position of assignor to assignee.* It is not the assigned party's task to comment on the *provisions of assignment referring to its cause,* or even on the *ancillary provisions.*

However, it is exactly in the aforementioned context that the problematic nature of the provisions of Sec. 1899 comes to the surface, which grants the *assigned party* the right to amend their *given consent* at a later date.

VI Conclusions

The regulations concerning the assignment of contract in a certain sense represent the completion of the development of the obligation law from the originally rigid obligation in the sense of *'iuris vinculum'* to the relaxation of the relationship between the obligation parties.

The Czech legislator does not solve the issue of rights and duties of the *parties of assignment* in the event that the *assigned party* does not give their consent to the assignment. We agree with this position, as it always depends on the will of the parties in each individual case.

The *absence of requirements as to the form of assignment* raises the question of which form should be required when the *assigned contract* must be in *written form.*

Rather problematic and complex, in our view, is the right of the assigned party to reject the *release of the assignor from their obligation* (Sec. 1892).

[12] Nörr, Scheyhing, Pöggeler (n 3) 193.

Annex

Sec. 1896 – 1900 of the New Czech Civil Code

Assignment of a contract

Section 1895

(1) Unless excluded by the nature of a contract, either party may, as an assignor, transfer his rights and duties under a contract or part thereof to a third person if the assigned party agrees and if the contract has not yet been fully executed.

(2) Where a continued or periodic performance is envisaged under a contract, the contract may be assigned with effects in respect of the part of the contract which has not yet been executed.

Section 1896

In the case of a partial assignment of a contract or assignment of a contract to several assignees, the rights of the assigned party under ancillary clauses in the contract may not be prejudiced; ancillary clauses include, without limitation, stipulations on condition, advance payment, earnest, contractual penalty, withdrawal from contract and withdrawal fee, and the arbitration clause.

Section 1897

(1) Assignment of a contract becomes effective against the assigned party upon its consent. If such consent was granted in advance, the assignment of the contract against the assigned party becomes effective when the assignment of the contract is notified to that party by the assignor or proved to it by the assignee.

(2) If a contract concluded in writing contains a stipulation that it has been concluded to the order of one of the parties or another stipulation having the same meaning, that party shall assign the contract by endorsing the instrument. The essential elements of an endorsement, as well as the persons entitled thereunder and the manner in which they demonstrate their right, shall be governed by legal regulations on promissory notes. They are also relied on when considering the person who may be required to provide the document to a person who has lost it.

Section 1898

When the assignment of a contract becomes effective against the assigned party, the assignor becomes released from his duties to the extent of the assignment.

Section 1899

(1) The assigned party may prevent the consequences under Section 1898 by declaring, vis-à-vis the assignor, that it refuses such release. In that case, the assigned party may require the assignor to perform in case the assignee fails to perform the duties assumed.

(2) The declaration may be made within fifteen days from the date on which the assigned party became or must have become aware that the assignee failed to perform. Although a declaration made late does not eliminate its effects under Subsection (1), the assigned party shall compensate any damage caused by the default.

Section 1900

The assigned party shall also retain all the contractual defences against the assignee. The assigned party shall retain other defences which it had against the assignor if such retention is reserved in the contract or in the consent to the assignment of the contract.