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Commercial terms and conditions according to the civil code

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Concept and function of commercial terms and conditions

Commercial terms and conditions are commonly used tools enabling the simplification of contract administration. Not surprisingly, the fields of application of commercial terms and conditions are constantly expanding. The Civil Code has thus responded to the practical need to apply commercial terms and conditions in contractual relations.

The former Commercial Code provided that part of the content of a contract may be determined using a reference to general commercial terms and conditions prepared by professional or special interest organisations or by referring to other commercial terms and conditions familiar to the contracting parties or attached to the contract offer. This regulation has been almost verbatim inserted into the new Civil Code, with certain additional provisions. The Civil Code, in particular, protects the "addressee" of the commercial terms and conditions against "surprising clauses". The rule governing the solution of conflicting, different commercial terms and conditions submitted by the contracting parties is also entirely new. The legal regulation contained in the Civil Code now allows for the possibility of unilateral amendments to commercial terms and conditions. However, it covers only certain contracts and applies only to a limited extent. At the same time, the regulation provides protection to the party that is entitled to terminate the contract if it finds unacceptable the proposed amendments to the commercial terms and conditions (see below).

Commercial terms and conditions and framework agreements

Framework agreements are similar to commercial terms and conditions in terms of their character and function. Framework agreements set the basic rules governing particular future contracts to be agreed between the parties to the framework agreement ("implementation agreements"). Framework agreements are thus normative agreements and, as such, they do not submit the contracting parties to contractual obligations or particular claims and receivables. By means of framework agreements, in particular delivery terms, agreements on invoicing and payment procedures and the method of accepting orders, etc. are agreed. The provisions agreed in the framework agreement become part of an implementation agreement when this implementation agreement (such as particular purchase agreements) is entered into based upon the framework agreement to the extent to which the parties have not agreed otherwise in the implementation agreement.

The Supreme Court also stated that it is the role of framework agreements to lay down the terms of particular subsequently concluded implementation agreements, which means they predetermine their contents to various extents. According to the Supreme Court, framework agreements are, in fact, a certain type of general terms and conditions.

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Despite this view, the concept of the framework agreement and of commercial terms and conditions cannot be interchanged. The framework agreement arises based on the mutual agreement of the contracting parties and not as a document drawn up by only one of the parties to the contractual relationship. It is also not possible to unilaterally amend the framework agreement as is the case with certain commercial terms and conditions. The application of the provisions of the Civil Code that serve as a protection against "surprising clauses" is also excluded in the case of framework agreements.

Commercial terms and conditions as part of a contract, conflict of commercial terms and conditions

Commercial terms and conditions as part of a contract

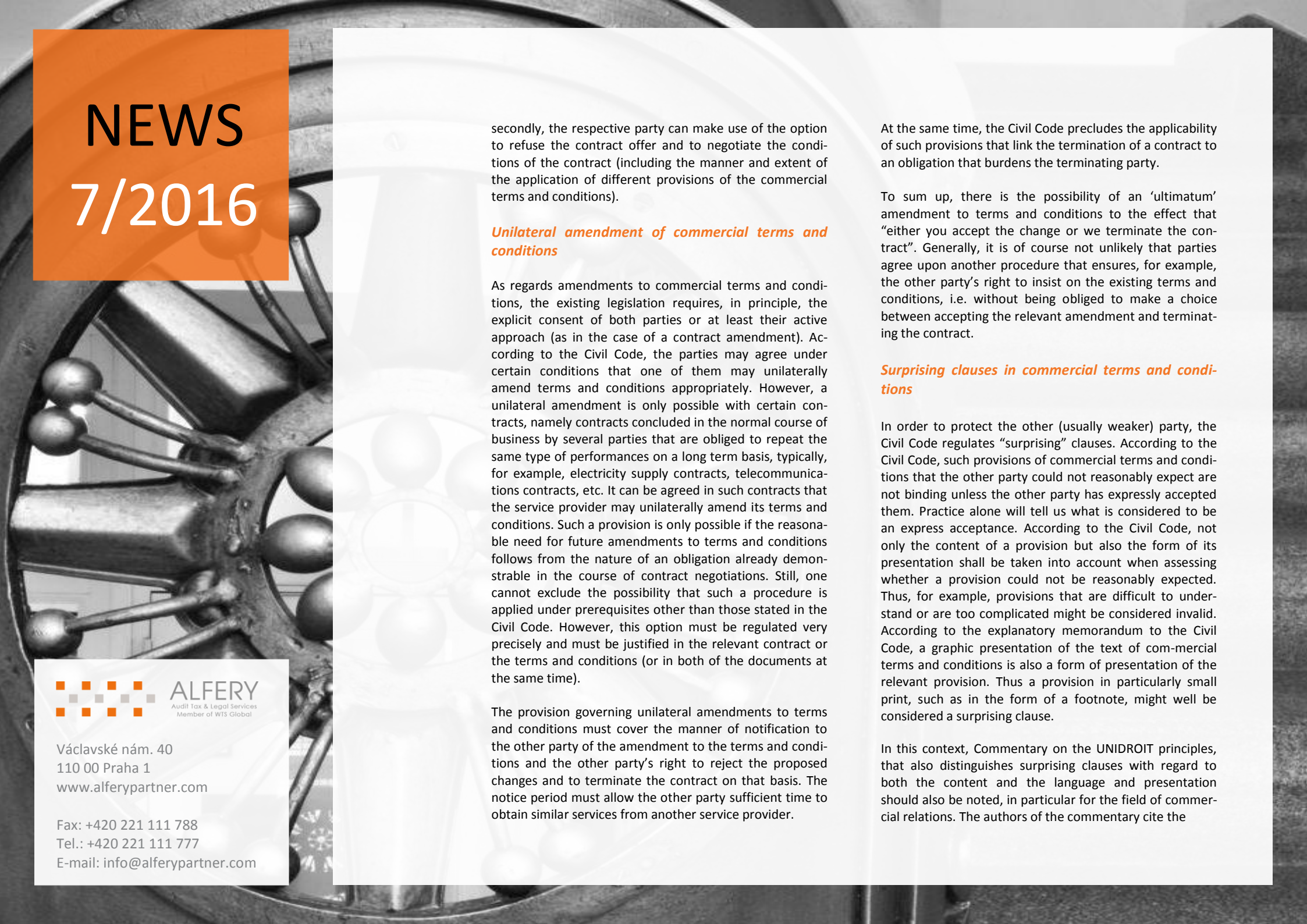
In principle, the Civil Code adopts the regulation contained in the previously applicable Commercial Code con-cerning the incorporation of commercial terms and conditions into contracts. For the purposes of applying com-mercial terms and conditions, the Civil Code requires a reference to the commercial terms and conditions in the contract. The Civil Code also requires that the addressee should have an opportunity to become acquainted with the contents of commercial terms and conditions as, for example, in German law. In this regard the text of the law assumes that the commercial terms and conditions are "known" to the other party. If they are not actually known to the addressee (or if, for example in the case of commercial terms and conditions drawn up by professional or special interest organisations, it is not assumed that these terms and conditions are known), they must be attached to the contract offer.

Other cases of the incorporation of commercial terms and conditions are not included in the law, although this does not mean that a reference to the firm's webpage upon which the commercial terms and conditions are available cannot be used when concluding a contract. However, the reference should be sufficiently definite such that it is possible to locate the applicable terms and conditions easily and unambiguously on the basis of such a reference (companies being permitted to use several types of terms and conditions for different types of contractual relations).

Conflict of different terms and conditions

The Civil Code also regulates conflicts between different terms and conditions in cases where each party attaches its own terms and conditions to the contract (the first party when submitting, the second party when accepting the contract offer). If the parties refer to conflicting terms and conditions in the contract offer and the offer acceptance, the contract is still deemed as having been concluded. In such a case, the contractual relationship shall be governed by those provisions of both terms and conditions that are not in conflict with each other. However, if without undue delay one of the parties refuses the above method of application of both terms and conditions, the contract shall not be deemed to have been concluded.

Problems arise when the terms and conditions of both parties contain a clause excluding the application of the other party's terms and conditions. In such a case, it is not obvious whether the civil law principle applies according to which an agreement shall be concluded using those provisions of commercial terms and conditions that are not in conflict with each other or whether the application of such terms and conditions is excluded. Two possible approaches can be taken to solve such a situation. Firstly, this situation can be "preventatively" regulated in the terms and conditions or in the contract offer;



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secondly, the respective party can make use of the option to refuse the contract offer and to negotiate the conditions of the contract (including the manner and extent of the application of different provisions of the commercial terms and conditions).

Unilateral amendment of commercial terms and conditions

As regards amendments to commercial terms and conditions, the existing legislation requires, in principle, the explicit consent of both parties or at least their active approach (as in the case of a contract amendment). According to the Civil Code, the parties may agree under certain conditions that one of them may unilaterally amend terms and conditions appropriately. However, a unilateral amendment is only possible with certain contracts, namely contracts concluded in the normal course of business by several parties that are obliged to repeat the same type of performances on a long term basis, typically, for example, electricity supply contracts, telecommunications contracts, etc. It can be agreed in such contracts that the service provider may unilaterally amend its terms and conditions. Such a provision is only possible if the reasonable need for future amendments to terms and conditions follows from the nature of an obligation already demonstrable in the course of contract negotiations. Still, one cannot exclude the possibility that such a procedure is applied under prerequisites other than those stated in the Civil Code. However, this option must be regulated very precisely and must be justified in the relevant contract or the terms and conditions (or in both of the documents at the same time).

The provision governing unilateral amendments to terms and conditions must cover the manner of notification to the other party of the amendment to the terms and conditions and the other party's right to reject the proposed changes and to terminate the contract on that basis. The notice period must allow the other party sufficient time to obtain similar services from another service provider.

At the same time, the Civil Code precludes the applicability of such provisions that link the termination of a contract to an obligation that burdens the terminating party.

To sum up, there is the possibility of an 'ultimatum' amendment to terms and conditions to the effect that "either you accept the change or we terminate the contract". Generally, it is of course not unlikely that parties agree upon another procedure that ensures, for example, the other party's right to insist on the existing terms and conditions, i.e. without being obliged to make a choice between accepting the relevant amendment and terminating the contract.

Surprising clauses in commercial terms and conditions

In order to protect the other (usually weaker) party, the Civil Code regulates "surprising" clauses. According to the Civil Code, such provisions of commercial terms and conditions that the other party could not reasonably expect are not binding unless the other party has expressly accepted them. Practice alone will tell us what is considered to be an express acceptance. According to the Civil Code, not only the content of a provision but also the form of its presentation shall be taken into account when assessing whether a provision could not be reasonably expected. Thus, for example, provisions that are difficult to understand or are too complicated might be considered invalid. According to the explanatory memorandum to the Civil Code, a graphic presentation of the text of com-mercial terms and conditions is also a form of presentation of the relevant provision. Thus a provision in particularly small print, such as in the form of a footnote, might well be considered a surprising clause.

In this context, Commentary on the UNIDROIT principles, that also distinguishes surprising clauses with regard to both the content and the language and presentation should also be noted, in particular for the field of commercial relations. The authors of the commentary cite the

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exclusion of the possibility of setting off claims (here, however, with reference to the practice of international trade) or the choice of law of a state that is unconnected with the contractual relation (in any element) as examples of surprising clauses with respect to the content. Examples of defective provisions of commercial terms and conditions as regards the form of presentation are agreements made in a foreign language of which the counterparty has had knowledge and has knowingly agreed the contract in this language yet in which the contractual terms include such expressions a knowledge of which could not be reasonably required of the acceptor considering the various semantic connotations of the relevant expression.

As mentioned above, a surprising provision is not invalid if the accepting party has expressly accepted it. The authors mention in the commentary that surprising provisions shall not mean such provisions that the offeror expressly pointed out and despite which the acceptor agreed the contract without objection. This means that an implied declaration of will may also result in the validity of an otherwise surprising provision.

Legal fictions in commercial terms and conditions

There is a tendency to use contractual assumptions in commercial terms and conditions, such as the fiction of the delivery of postal items (for example, a postal item being considered delivered for the purposes of the contract on the third day following the posting of a registered letter).

However, this issue is not explicitly regulated in the applicable legislation and the former case law of the Supreme Court is based on the assumption that "only legislation may construct assumptions, their nature and consequences associated with them. Autonomy of the will of contracting parties may not extend regulatory instruments used by legislation and, in principle, construct at will new legal facts along with the consequences associated therewith".

Although the above opinion may be criticised (also taking into account the general principles contained in the Civil Code), the validity of such provisions cannot be assessed unequivocally. The solution depends on the stance that courts will take in future.

Conclusion

Considering the relatively radical changes with regard to the content and application of commercial terms and conditions, a review and, if necessary, a revision of terms and conditions is recommended (in particular if they were drawn up during the period of application of the Commercial Code). This recommendation arises both from the new legislation and ongoing practical experience of the application of this legislation.

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