CIVIL LAW CONSEQUENCES OF CORRUPTION IN INTERNATIONAL COMMERCIAL CONTRACTS

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Abstract: *National report for the purposes of the 19th International Congress of Comparative Law Vienna 2014 deals with the civil law consequences of corruption in international commercial contracts from the perspective of the Czech law. The report answers the questions of what actions may be considered corruption and classified as criminal acts. Attention is paid to civil law statutory regulation, i.e. unfair competition where the New Czech Civil Code is taken into consideration. The authors deal also with the applicability of general legal instruments of private law as good morals or principles of fair business conduct.*

Keywords: *corruption, civil law consequences, international, commercial, contract, good morals, unfair competition*

1. IS CORRUPTION A CRIMINAL OFFENCE IN YOUR COUNTRY, AND IF SO, HOW IS IT DEFINED?

Czech legislation (**Act No. 40/2009 Coll., the Criminal Code**) does not directly define corruption. However, it defines a legal term which is used as a synonym – "bribery". In addition to bribery, the Act sets out further merits of crimes that have elements corresponding to corrupt practices or elements that are close to bribery.

Both **natural persons** and legal entities can be criminally liable. Criminal liability of legal entities (i.e. corporate criminal liability) is regulated by a special law which was adopted relatively recently - **Act No. 418/2011 Coll., on corporate criminal liability and prosecution** (effective since 1 January 2012). The Act regulates the conditions of criminal liability of legal entities and the penalties that can be imposed on them. In respect of the merits of crimes pursuant to the Criminal Code that are set forth in Section 7 of the Act, the scope ratione personae is extended to legal entities.

The Criminal Code regulates corrupt practices and crimes related to corruption[1] in several parts of the text.

In Title Ten of the Special Part, under the title "Crimes Against Public Policy", it specifies the following crimes related to bribery: Accepting a bribe (Section 331 of the Criminal Code), Bribery (Section 332 of the Criminal Code), Indirect bribery (Section 333 of the Criminal Code).

There are also other crimes that have the potential elements of corrupt practices. Specifically, Title Five, Chapter Three of the Criminal Code stipulates "Crimes against the Binding Rules of Market Economy and Circulation of Goods in Relation to Foreign Coun-

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[1] For more details in the Czech literature see KALA, M. Korupce. ASPI. Wolters Kluwer ČR [cit. 20. 9. 2013].; RUŽIC, D. Komparace právní úpravy korupce v České republice a Slovenské republice. ASPI . Wolters Kluwer ČR [cit. 20. 9. 2013].

tries". These crimes are as follows: Misuse of information and position in business relations (Section 255 of the Criminal Code), Negotiating a benefit in awarding a public contract, in a public tender procedure and public auction (Section 256 of the Criminal Code), Collusion in awarding a public contract and in a public tender procedure (Section 257 of the Criminal Code), Collusion in a public auction (Section 258 of the Criminal Code).

In addition to the punishable corrupt practices of accepting a bribe and bribery, **failure to prevent** them is also a criminal offence (Section 367 of the Criminal Code). Failure to prevent a crime is committed by a person who learns in a credible manner that another person is preparing or committing the crime of accepting a bribe or bribery and fails to prevent the commission or completion of such a crime. A crime can also be prevented by notifying the State attorney or a police body of the crime in due time.

Failure to notify the crimes of accepting a bribe and bribery is also punishable (Section 368 of the Criminal Code). Failure to notify a crime is committed by a person who learns in a credible manner that another person has committed the crime of accepting a bribe or bribery and fails to notify a police body or the State attorney of the crime without delay. The said notification duty is not applicable to attorneys-at-law and their employees who learn about the commission of a crime in connection with the performance of the legal profession or law practice. The notification duty is also not borne by a priest of a registered church or religious society authorised to exercise special rights if (s)he learns about the commission of a crime in connection with confidentiality of the seal of confession or in connection with the exercise of a right similar to the seal of confession.

1.1 Is corruption a criminal offence only in the public sector or also in the private sector?

In the Czech Republic, corrupt practices are considered to be a criminal offence both in the public sector and in the private sector.

1.2 Is corruption a criminal offence also if committed by a national of your country in a foreign country?

The Criminal Code is applicable to assessment of whether an act is punishable provided that the act was committed in the territory of the Czech Republic (Section 4 of the Criminal Code, the principle of territoriality). Nevertheless, in accordance with Section 6 of the Criminal Code, the laws of the Czech Republic are also applicable to evaluation of whether an act is punishable if the act in question was committed abroad by a national of the Czech Republic or a stateless person who has been permitted permanent residence in the territory of the Czech Republic (the principle that penalties should be applied solely to the offender).

The links between a legal entity and acts punishable under the laws of the Czech Republic are assessed pursuant to Act No. 418/2011 (see above). Section 2 governs assessment of whether an act committed by a legal entity in the territory of the Czech Republic is punishable if the legal entity has its registered office in the Czech Republic or has its enterprise or branch located in the territory of the Czech Republic or if it at least performs its activities or has its assets in the Czech Republic.

A crime is also considered to have been committed in the territory of the Czech Republic when:

– The offender fully or partly committed the relevant act in the Czech Republic even if the breach or endangerment of an interest protected by the Criminal Code occurred or was to occur fully or partly abroad; or
– the offender breached or endangered an interest protected by the Criminal Code in the Czech Republic or if such a consequence was to occur at least partly in the Czech Republic even if the act in question was committed abroad.

Act No. 418/2011 (Section 3) is also applicable to assessment of whether an act is punishable if it was committed abroad by a legal entity with its registered office in the Czech Republic. The above provisions do not apply if this is not permitted by an international treaty to which the Czech Republic is a party.

2. IS YOUR COUNTRY PARTY TO ANY OF THE ABOVEMENTIONED INTERNATIONAL CONVENTIONS, OR TO ANY OTHER INTERNATIONAL INSTRUMENT, ON CORRUPTION?

The Czech Republic is a contracting state of the following international conventions:

– *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997* - 25/2000 Coll. Int. Tr.
– *Council of Europe Civil Law Convention on Corruption of 1999* - 3/2004 Coll. Int. Tr.
– *Council of Europe Criminal Law Convention on Corruption of 1999* - 43/2009 Coll. Int. Tr.

The Czech Republic has yet to ratify the following:

– United Nations Convention against Corruption of 2003

3. IS THERE ANY STATUTORY REGULATION IN YOUR COUNTRY DEALING SPECIFICALLY WITH THE CIVIL LAW CONSEQUENCES OF CORRUPTION? IF SO, PLEASE DESCRIBE ITS CONTENT.

Bribery is punishable in the Czech Republic also according to rules of private law, specifically pursuant to provisions on unfair competition, covered by Act No. 89/1012, the Civil Code[2] (Section 2972 et seq.).

Territorial scope of the provisions. The provisions on unfair competition do not apply to certain conduct insofar as it has effects abroad. An international treaty by which the Czech Republic is bound may stipulate otherwise (Section 2973 of the Civil Code). In relation to protection against unfair competition, foreign persons who are engaged in competition in the Czech Republic are treated as Czech persons (Section 2974 of the Civil Code).

Unfair competition is an objective civil offence. Culpability is not required.

Unfair competition is **prohibited** (Section 2976 (1) of the Civil Code). A person who, in business relations, is in conflict with good morals of competition as a result of his conduct capable of causing harm to other competitors or customers, is considered to pursue unfair

[2] The Code introduces comprehensive reform of Czech civil law. It also repeals the Commercial Code.

competition. Section 2976 (2) provides a non-exhaustive list of acts that are considered to be unfair competition. The list expressly names bribery (it is also mentioned in Section 2983).

In punishing unfair competition, Czech legislation uses the option of a general clause (Section 2976 (1) of the Civil Code) and a non-exhaustive list of special merits. The general clause contains general defining elements of unfair competition. These elements must also be fulfilled where specifically defined special merits are concerned. This includes bribery, which is subsequently regulated in Section 2983. The opposite is also true, i.e. any act which corresponds to the elements of the general clause may be prosecuted as unfair competition even if it does not fall under any of the special merits.

The general clause (Section 2976 (1)) sets out three general defining elements of unfair competition: action in business relations, variance with good morals of competition and capacity to cause harm to other competitors or customers.

Bribery is defined as special merit in Section 2983 of the Civil Code[3]. It is divided into two sub-merits - active bribery (subpar. (a)) and passive bribery (subpar. (b)).[4]

Permissible claims on the grounds of unfair competition are regulated by Section 2988 of the Civil Code. These include refraining from certain conduct, remedy of a defective state of affairs, appropriate satisfaction, compensation for damage and surrender of unjust enrichment. Given the nature of the conduct examined by us, we shall discuss especially compensation for damage, and as mentioned below where we provide model solutions, surrender of unjust enrichment.

4. ARE THERE ANY COURT DECISIONS/ARBITRAL AWARDS RENDERED IN YOUR COUNTRY DEALING WITH THE CIVIL LAW CONSEQUENCES OF CORRUPTION? IF SO, PLEASE PROVIDE AN OVERVIEW OF THEM.

There is a number of rulings of the general courts in the Czech Republic that pertain to application of the general clause of unfair competition (see Section 2976 of the Civil Code and Section 44 of the former Commercial Code). Although these decisions pertain to Section 44 of the former Commercial Code, they will likely also be applicable to Section 2976 of the Civil Code. However, no ruling has been found in databases in respect of the specific merits of "bribery". The below-specified decision is the only one to reflect the link between the general clause and the specific merits (i.e. Sections 44 and 49 of the former Commercial Code):

– Judgment of the Supreme Court File No. 32 Odo 59/2005 of 19 February 2007

[3] Section 2983 of the Civil Code:
Bribery in the sense of this Act is conduct whereby
a) a competitor directly or indirectly offers, promises or provides any benefit to a person who is the member of the governing body or some other body of another competitor or is employed by another competitor, in order to obtain priority or some other undue advantage in competition for himself or for some other competitor through that person's unfair conduct, or
b) a person set forth in subparagraph (a) above directly or indirectly requests, or has himself promised or accepts any benefit for the same purpose.

[4] For more details see Komentář k § 49 zákona č. 513/1991 Sb., obchodní zákoník. *ASPI*. Wolters Kluwer ČR [cit. 20.9.2013]; ELIÁŠ, KAREL a kol. *Kurs obchodního práva. Obecná část. Soutěžní právo*. 5. vydání. Praha: C. H. Beck, 2007, s. 332.

The defendant, as the plaintiff's employee in the position of head of the unit of procurement and stock management, was contacted, in a situation where the plaintiff experienced certain difficulties with the previous supplier of packaging products, by the R, v.o.s. company, which had previously been refused by the plaintiff. The plaintiff had concluded a purchase agreement with R, v.o.s. for the supply of packaging products, the price of which had been further reduced by the plaintiff itself from the originally proposed amount when signing the agreement. After the conclusion of the purchase agreement between the plaintiff and R, v.o.s., the defendant concluded, based on proposal of R, v.o.s., an agency agreement with the same company, where it was agreed that a commission would be paid to the defendant for every supplied product. The plaintiff (the purchaser of packaging under the agreement) enforced a claim against its employee on the grounds of unfair competition, specifically pursuant to Sections 44 and 49 of the Commercial Code. The appellate court upheld this classification. Nevertheless, the Supreme Court of the Czech Republic annulled the decision. According to the reasons stated in the said ruling, the defendant's acts were not capable of causing harm to the plaintiff, or consumers, and since it did not correspond to all the elements of the general clause of unfair competition, it did not amount to unfair competition.

5. IN THE ABSENCE OF A SPECIFIC STATUTORY REGULATION IN YOUR COUNTRY ON THE CIVIL LAW CONSEQUENCES OF CORRUPTION, WHAT PRINCIPLES OF GENERAL CONTRACT LAW WOULD BE RELEVANT IN THIS RESPECT:

5.1 – those concerning "illegal" or "immoral" contracts
5.2 – those concerning the authority of agents
5.3 – others?

Under civil law, only a limited range of corrupt practices can be punished under the express legal regulation analysed above. This is due to fact that the material scope of this legal regulation is limited only to unfair competition which must meet the elements of the general clause of unfair competition or, as an alternative, the elements of both the general clause and the merits of bribery. Acts that do not meet these elements are not punishable through the legal regulation in question.

Corrupt practices can further be punished through general instruments of private law. These instruments include variance of corrupt practices with the law and variance with good morals or principles of fair business conduct.

To explain the present status, we need to sum up the status according the former codes. Formerly the consequences of breach of the law or good morals were expressly stipulated in Section 39 of Act No. 40/1964 Coll., the Civil Code. According to the said provision, juridical acts were invalid if their contents or purpose were contrary to the law or evade the law or were contrary to good morals. This resulted in automatic invalidity of such acts. The judge took account of such invalidity *ex officio*. On the other hand, an act which was at variance with the principles of fair business conduct (an instrument expressly regulated by Act No. 513/1991 Coll., the Commercial Code), was merely not afforded legal protection. It was hence not automatically invalid. This consequence had to be invoked by the party

affected by such an act. The Supreme Court has also ruled that the difference between breach of good morals and breach of the principles of fair business conduct is based on the intensity of the breach. Good morals require greater infringement, which involves a stricter consequence.

For more on this, see for example ruling of the Supreme Court NS 29 Odo 1027/2006: According to the Supreme Court, the principle of good morals can apply even in commercial contractual relationships. Its application is not precluded by the regulation concerning variance with the principles of fair business conduct. The link between variance with fair business conduct and variance with good morals cannot be conceived as a link of cause (an act is at variance with the principles of fair business conduct) and consequence (and hence the act is contrary to good morals). It therefore cannot be stated beyond peradventure that if an act is at variance with the principles of fair business conduct, it is invalid because it is contrary to good morals according to the Civil Code.

According to the established case-law of the Supreme Court, juridical acts are at variance with good morals if their contents are at variance with a generally accepted belief which determines, in relationships among people, what the contents of their acts should be in order to comply with the basic principles of the moral rules of a democratic society. Good morals are interpreted as a sum of social, cultural and moral rules that have shown a degree of constancy in historical development, express substantial historical tendencies, are shared by a critical part of society and have the nature of fundamental rules (see, for example, Supreme Court rulings 33 Cdo 2776/2008, 33 Cdo 3368/2008, 33 Cdo 4377/2008, 33 Cdo 3123/2010).

The foregoing gives rise to the question as to which of the outlined potential consequences can be taken to punish acts which, at the criminal-law level, fulfil the elements of corrupt practices.

In accordance with ruling of the Supreme Court NS 30 Cdo 4665/2010, acts which fulfil the elements of a criminal offence from the viewpoint of criminal law are regarded as acts that are at variance with the law in terms of private law. However, the same ruling further holds that even acts that do not fulfil the elements of a criminal offence can still be found contrary to good morals.

We consider that the conclusions of the ruling will also be applicable *de lege lata* after the changes that are introduced by Act No. 89/2012 Coll., the Civil Code. Under the new regulation in Section 580 (1), juridical acts are also invalid if they are contrary to good morals and if they are at variance with the law, if so required by the sense and purpose of the law. Section 588 provides for automatic invalidity of such acts. The Civil Code stipulates in Section 1 (1) that the application of private law is independent of application of public law. However, as expressly stated in the explanatory report, this does not mean to say that both areas of the legal system are mutually independent. This provision points out the basic differences between the methods used by the two areas of the legal system, the different position of the individual towards the State, the principles on which private and public law are based, including the possible application of different methods of interpretation. At the same time the principle does not preclude exceptions and does not deny the existence of common aspects. While the explanatory memorandum expressly states that except where expressly indicated to the contrary, only public-law, and not private-law penalties can be associated with breach of public law, it is no way denied that an iden-

tical act with identical factual elements may be classified as an act fulfilling the elements of a criminal offence from the viewpoint of criminal law and as an act which is at variance with the law or act violating good morals in the eyes of private law. Indeed, it can hardly be concluded that an act which is classified as crime under criminal law will be found legal at the civil-law level. For the sake of completeness, we point out that the Civil Code does not provide for principles of fair business conduct.

6. IN APPLYING THE PRINCIPLES CONCERNING "ILLEGAL" OR "IMMORAL" CONTRACTS IN GENERAL AND/OR THE PRINCIPLES CONCERNING THE AUTHORITY OF AGENTS TO CONTRACTS AFFECTED BY CORRUPTION, WHAT WOULD THE CONSEQUENCES BE WITH RESPECT TO

a) the bribery contract, i.e. the agreement between the bribe-giver and the bribe-taker (normally an independent intermediary or an employee/public official of a principal-prospective counterpart to the main contract) whereby the bribe-taker undertakes, against payment of a "commission", to have the principal assign the main contract to the bribe-giver?

Automatic invalidity of an agreement on the grounds of variance with the law; for more details see the answer to question 5.

b) the main contract concluded between the bribe-giver and the principal?

The answer depends on whether the principal is the direct bribe-taker or the bribe-taker is the principal's advisor. In the former case, the answer would be identical to that under sub-paragraph (a) above, i.e. automatic invalidity of the given agreement on the grounds of variance with the law. In the latter case, it is necessary to further divide the answer depending on whether the agreement was concluded pursuant to the former Civil Code (i.e. by 31 December 2013) or already pursuant to the "New" Civil Code (i.e. after 1 January 2014).

Solution pursuant to the former Civil Code. We assume that the principal ascertained, after concluding the agreement, that the advisor whose advice led the principal to conclude the agreement had been bribed. This means that the principal had been misled and his will in the conclusion of the agreement with the bribe-giver was vitiated by defects. According to the former Civil Code, this defect (error) results in automatic invalidity of the given acts (Section 49a of the former Civil Code).

Solution pursuant to the Civil Code. The same situation brings a different solution. Misleading conduct is primarily associated with acts of only one of the parties to a contract (Section 583). Subsequently, Section 585 associates misleading conduct with the actions of a third person who participates in the acts of one of the parties to a contract. The principal was misled by a person (advisor) other than the one he concluded the agreement with (bribe-giver). However, the bribe-giver participates in the acts of the advisor and it can therefore be concluded that there the principal was misled in his conduct. The conduct of a person being misled results in "voidability" of the given act, i.e. the person

concerned (principal) must invoke invalidity of the contract (Section 588 of the Civil Code).

In addition to the above, Czech law contains two more options. First, the State attorney may lodge a petition for initiation of civil court proceedings on invalidity of a contract on transfer of property in cases where provisions limiting the freedom of its parties were not respected upon conclusion. This authorisation follows from Section 42 of Act No. 283/1993 Coll., on State attorneys. The above authorisation is applicable where a contract on transfer of ownership is automatically invalid on the grounds of statutory limitation of the contractual freedom of the transferor or the acquiror and where there is a public interest in determining the contract invalid. However, even if all cumulative conditions are satisfied, this statutory instrument is applicable only if neither of the parties to the invalid contract has yet lodged an action for declaring the contract invalid or an action for restitution. The purpose of public interest is to ensure that ownership is not abused to the detriment of the rights of others or at variance with public interests protected by law (Art. 11 (3) of the Charter of Fundamental Rights and Freedoms).

Secondly, in cases where a decision is made in administrative proceedings and the decision affects the rights of a certain person, a court action is admissible subject to compliance with the statutory conditions. **Corrupt practices can be one of the reasons for lodging such an action.** The statutory conditions are laid down in Act No. 150/2002 Coll., the Code of Administrative Justice. Under Section 65 of the Act, everyone who claims that his rights have been impaired either directly or as a consequence of infringement on his rights in the preceding procedure by an act of an administrative authority whereby his rights or duties are established, changed, cancelled or determined with a binding effect (hereinafter "decision") may lodge an action to claim that such a decision be cancelled or declared invalid. In Section 66, the Act grants a special locus standi for the protection of public interest also to other entities. The following are concerned: an administrative authority stipulated by law; the Supreme State Attorney if he finds a material public interest in lodging the action; the Public Defender of Rights if he demonstrates a material public interest in lodging the action; a person to whom the authorisation to lodge the action is granted by a special law or an international treaty which is part of the Czech legal system.

7. THE CIVIL LAW CONSEQUENCES OF CORRUPTION IN INTERNATIONAL COMMERCIAL CONTRACTS

Supposing the law governing the respective contracts is the law of your country, what in your view would be the answer to the questions posed in connection with the following cases?[5]

Note: In relation to the below-mentioned facts of these cases, we point out that the facts are outlined in a general, basic form. For the answers and solutions to be more specific, it

[5] The cases have been taken, with minor adaptations, from the Illustrations contained in the Comments to Articles 3.3.1 and 3.3.2 of the UNIDROIT Principles (see Attachment No. 1), which also suggest solutions based on these Articles. National Reporters may wish to indicate whether the solutions would be acceptable also under their respective domestic laws or, if not, explain why.

is necessary to also take into account additional facts supplementing or refining the basic terms of reference. In our answers, we always separately point out the need for such supplementation or presumption.

Case No. 1.

Contractor A of country X enters into an agreement with agent B ("the Commission Agreement") under which B, for a commission fee of USD 1,000,000 would pay, on behalf of A, USD 10,000,000 to C, a high-ranking procurement advisor of D, the Minister of Economics and Development of country Y, in order to induce D to award A the contract for the construction of a new power plant in country Y ("the Contract"). B pays C the USD 10,000,000 bribe and D awards the Contract to A.

***Ques. 1.1*: Can A refuse to pay B the agreed commission fee invoking the illegality of the Commission Agreement?**

From the perspective of Czech criminal law, the situation is clearer than for Czech private law. Acts that are punishable can be found in respect of contractor A (inciting to the criminal offence of bribery, i.e. conjunction of Sections 111 and 332 of the Criminal Code), agent B (Section 332 of the Criminal Code – bribery) and high-ranking procurement advisor C (Section 331 of the Criminal Code – accepting a bribe).

The punishable nature of the actions of A, B and C does not automatically affect validity and effects of the agreements concluded among them, or between contractor A and Ministry D. The solution to the outlined situation is not straightforward. The acts committed by A and B show, from the viewpoint of Czech law, variance with the law (see the answer to question No. 5 above) both in terms of the valid and effective regulation (Section 39 of the former Civil Code) and (Section 580 (1) of the Civil Code). As such, the acts under both of the above-mentioned legal regulations are automatically invalid and neither of the parties may invoke such an arrangement. There is also a rule that no right can arise from unlawful conduct (an express stipulation is contained in Section 579 of the Civil Code). A person who causes juridical acts to be invalid does not have the right to claim invalidity or claim a benefit for itself from invalid juridical acts. Moreover, a person who causes that juridical acts are invalid is obliged to compensate the party which was unaware of the invalidity for any damage incurred thereby. This, however, is not possible in the case concerned because both parties to the agreement were aware of the unlawfulness of the acts. In short, it can therefore be concluded that A need not pay the fee to B because the arrangement allegedly giving rise to that obligation is at variance with the law and hence automatically invalid.

Note: However, the solution appears more difficult if we assume that a fictitious due arrangement was established between the parties (e.g. in the sense of a mandate contract). Should B initiate proceedings against A to claim payment of the agreed fee, it is likely that neither of the parties would take a line of argument suggesting that the actions were punishable. In that case, if the real heart of the arrangement between A and B were concealed from the civil court, its decision would depend on the wording of the agreement (whether the agreement would be concerned with certain action or with a certain result).

***Ques. 1.2*: In the case that, although B has paid C the bribe, D does not award A the Contract, can B request the payment of the agreed commission fee from A, and can A recover from B the bribe B has paid to C?**

Our answer to the question of whether the acts of the individual parties are punishable will be the same as in question 1.1. The assessment from the civil-law perspective is also similar to that in the previous question. The specified arrangements between A and B, as well as those between B and C, are at variance with Czech law and as such they are automatically invalid. As a result of this automatic invalidity, the parties are obliged, on the grounds of unjust enrichment, to return to each other any performance provided between them to that date (Sections 451 and 457 of the former Civil Code, Section 2991 of the Civil Code). This conclusion applies to the arrangements between A and B as well as to those between B and C.

Note: However, if we considered the course of the court proceedings in which A and B raise against each other the claims indicated in the terms of reference, it can again be assumed that neither of the parties would argue in a way revealing the punishable nature of their actions. In that case, the decision of the civil court would again depend on the wording of the agreement.

***Ques. 1.3*: Supposing that D, when awarding the Contract to A, did not know nor ought to have known of the bribe paid to C, can D choose to treat the Contract as effective, with the consequence that A would be obliged to perform and D to pay the price, subject to an appropriate adjustment taking into consideration the payment of the bribe?**

If Minister D ascertained, following conclusion of the agreement, that expert C was bribed, it is not possible under Czech law to consider the agreement concluded between contractor A and Minister D to be valid and effective. Minister D would be misled as a result of the actions of expert C. From the viewpoint of the existing legislation, juridical acts that are vitiated by such a defect are automatically invalid (Section 49a of the former Civil Code). On the grounds of unjust enrichment, the parties would be obliged to return the performances provided between them to that date. From the viewpoint of Czech law, the agreement between A and D cannot be found valid. It is equally impossible, under Czech law, to adjust the amount of the agreed price.

The legal regulation in the Civil Code is quite different. It is comprehensive and brings a different solution. The invalidity of the actions of Minister D follows from Section 583 in conjunction with Section 585 of the Civil Code. These two provisions must be combined because Section 583 applies merely to the parties to juridical acts (in the case concerned, contractor A and Minister D). However, under Section 585 of the Civil Code, contractor A is a person participating in the actions of a third party (advisor C) that misled Minister D. Under the Civil Code, automatic invalidity is caused only by actions that are obviously contrary to good morals, at variance with the law or contrary to the public policy. The affected party must invoke invalidity caused by an error. If D failed to invoke such invalidity, the agreement would have to be performed. If D did invoke invalidity of the agreement, the agreement would be found invalid. Performance under the agreement would therefore

be impossible. If the parties provided consideration to each other, they would be obliged to return it on the grounds of unjust enrichment.

Ques. 1.4: **Still supposing that D, when awarding the Contract to A, did not know nor ought to have known of the bribe paid to C, can D choose instead to treat the Contract as being of no effect, with the consequence that neither of the parties has a remedy under the Contract?**

The solution to the situation follows from the above. Under Czech law, the agreement between A and C is automatically invalid (under the legal regulation in the former Civil Code) or the affected party must invoke its invalidity; in this particular case, it would be invoked by Minister D (under the Civil Code). The parties are obliged to return to each other any unjust enrichment. An enriched party who did not act in good faith (contractor A) will surrender everything he acquired through the enrichment, including fruits and benefits derived therefrom (Section 458 (2) of the former Civil Code). The same solution is offered by the Civil Code. In addition, it provides for the obligation of the enriched to provide compensation for benefits that would otherwise have been obtained by the impoverished (Section 3004 (1) of the Civil Code). In addition, under the Civil Code, the actions of A, who initiated the entire process of bribery, are penalised in that a person who fraudulently incites another person to juridical acts is obliged to pay damages for the harm caused thereby. Contractor A would therefore be obliged to compensate any harm incurred by Minister D (Section 587 (2) of the Civil Code).

Ques. 1.5: **Supposing that A, after having been awarded the Contract, has almost completed construction of the power plant when in country Y a new Government comes to power which claims that the Contract is invalid because of corruption and refuses to pay the outstanding 50% of the price, would the parties be left where they are or would they be granted restitutionary remedies, i.e. A be granted an allowance in money for the work done corresponding to the value that the almost completed power plant has for D, and D restitution of any payment it has made exceeding this amount?**

The solution again follows from what has been said above. The agreement between A and C is automatically invalid (under the former Civil Code) or the affected party must invoke its invalidity; in this particular case, it would be invoked by Minister D (under the Civil Code). The parties are obliged to return to each other any unjust enrichment. On the part of Minister D, unjust enrichment is represented by the almost completed construction of the power plant. Restitution is not really possible and contractor A is therefore entitled to pecuniary compensation in the amount of the usual price, rather than the price of the Contract (Section 2999 of the Civil Code). If the compensation corresponded to an amount exceeding the specified 50 % of the price of the Contract, D would be obliged to pay the difference. In contrast, if D has already paid more than an amount corresponding to the usual price for the completed part of the construction, A would be obliged to refund the difference. Otherwise, everything indicated above regarding compensation following from fraudulent conduct and compensation for fruits and benefits again applies in this case.

Case No. 2.

A, an aircraft manufacturer in country X, knowing that C, the Ministry of Defence of country Y, intends to purchase a number of military aircraft, enters into an agreement with B, a consultancy firm located in country Y, by which B, for a commission fee, is to negotiate the possible purchase by C of the aircraft manufactured by A ("the Agency Agreement").

Ques. 2.1: **Supposing that C, despite B's efforts, does not buy the aircraft from A, can A refuse to pay B the agreed commission fee, invoking a statutory regulation of country Y prohibiting the employment of intermediaries in the negotiation and conclusion of contracts with governmental agencies?**

Note: Classification of the said action as action punishable by the Criminal Code is problematic. The facts described in the terms of reference tend to suggest that B lobbied for the benefit of A. The arrangement would be a commercial-law arrangement and the terms of reference do not provide enough information for its precise classification. In our opinion, the situation must also be assessed from the viewpoint of private international law. The statutory regulation of country Y as described in the terms of reference can be classified as an overriding mandatory rule in the sense of, for example, Art. 9 of the Rome I Regulation (for contracts concluded on or after 17 December 2009).[6] Where a rule under Czech law is concerned and where the Czech Republic is also the forum for a potential dispute between the parties, that rule shall be applied and reflected automatically.[7]

The rule in question existed at the time of conclusion of the agreement; the parties were, or ought to have been, aware of it, and hence they were aware that they acted incorrectly: under Czech law, the impossibility to perform the subject of a contract at the time of its execution results in invalidity of the contract (Section 37 (2) of the former Civil Code, Section 580 (2) of the Civil Code). This is automatic invalidity both under the former legal regulations and *de lege lata* (Section 588 of the Civil Code).

If the "statutory regulation of country Y" is part of some other legal system, it might also be taken into account, with an impact on validity of the agreement and with the above consequences. It may form part of *legis causae* or part of the legal system of a third country. Both the Rome I Regulation and Czech legal regulations on private international law make it possible to take account of the impact of these rules. Obviously, subject to various conditions depending on whether they form part of the governing law (*legis causae*) or part of the legal system of a third country.

[6] Overriding mandatory rules are provisions whose observance is enforced by the State with the objective of protecting its public interests (political, social, economic), regardless of the law to be applied to the relevant contractual relationship (contract). This is what distinguishes these rules from usual mandatory rules.

[7] For more details concerning Rome I Regulation in Czech literature see ROZEHNALOVÁ, N. *Závazky ze smluv a jejich právní režim (se zvláštním zřetelem na evropskou kolizní úpravu).* Brno: Masarykova univerzita, 2010; ROZEHNALOVÁ, N., VALDHANS, J., DRLIČKOVÁ, K., KYSELOVSKÁ, T. *Mezinárodní právo soukromé Evropské unie (Nařízení Řím I, Nařízení Řím II, Nařízení Brusel I).* Praha: Wolters Kluwer ČR, 2013; BĚLOHLÁVEK, A. *Římská úmluva a Nařízení Řím I. Komentář.* Praha: C. H. Beck, 2009; PAUKNEROVÁ, M. *Evropské mezinárodní právo soukromé.* Praha: C. H. Beck, 2013; PAUKNEROVÁ, M. Přímo použitelné administrativněsprávní normy a mezinárodní právo soukromé. *Právník.* 1983, pp. 477–489; PAUKNEROVÁ, M. Přímá aplikace administrativněsprávních norem v mezinárodním právu soukromém. *Studie z mezinárodního práva.* 1984, sv. 18., pp. 145–179.

Case No. 3.

A, an aircraft manufacturer in country X, knowing that C, the Ministry of Defence of country Z, intends to purchase a number of military aircraft, enters into an agreement with B, an intermediary located in country Z, by which B, for a "fee" of 5% of the contract price, is to "negotiate" the purchase by C of the aircraft manufactured by A ("the Agreement"), on the understanding that B will pay half of the "fee" to a high ranking procurement advisor of C.

Ques. 3.1: **Supposing that A, after C has purchased the aircraft from A, refuses to pay the agreed "fee" invoking the illegality of the Agreement, can B require payment on the ground that in Country Z not only is there no statutory regulation prohibiting the employment of intermediaries in the negotiation and conclusion of contracts with governmental agencies, but it is a generally accepted practice that intermediaries "share" their "fees" with their contact persons in the governmental agencies concerned?**

Again in this case, it is difficult to determine whether the actions are punishable. With the exception of extraterritorial tendencies obvious in the conduct of some countries, the nature of criminal law as a component of public law is territorial, i.e. limited by territory. Czech laws may be applied to acts committed in the territory of the Czech Republic or acts committed abroad by a Czech national or a stateless person with permanent residence in the territory of the Czech Republic For relationships among legal entities, see the answer to question I.

The terms of reference expressly state that the acts of intermediary B and advisor C in country Z are not prohibited; to the contrary, they represent a generally accepted practice. We further deduce from the terms of reference (this is not explicitly stated) that the acts do not have the nature of a criminal offence under the laws of country Z.

It is equally problematic to evaluate the case from the perspective of private law. The aircraft manufacturer refuses to pay the agreed commission fee to the intermediary, contesting validity of the agreement on the basis of which it supplied aircraft to Ministry D and (probably) received payment, on the grounds of unlawfulness of the agreement. The said unlawfulness allegedly lies (as we infer from the terms of reference) in the procedure of B and C of which, as explicitly follows from the terms of reference, A was aware from the outset. Unwilling to pay the commission fee, A questions the existence of the agreement under which he himself has already performed (supplied the aircraft) and (likely) obtained consideration.

In terms of validity of the agreement between A and D, we assume that it is a contract with an international element. Under the Czech laws, in a situation where the State is a party to a private-law relationship, the State is considered to be a legal entity (Section 21 of the former Civil Code, Section 21 of the Civil Code). We do not consider the purchase of aircraft to be *acta iure imperii*. We must therefore deal with private international law and, from a material point of view, application of the Rome I Regulation. If the other preconditions of application are met (in particular temporal application to contracts concluded from 17 December 2009), the applicability of the agreement will be assessed in ac-

cordance with Art. 10 pursuant to *lex causae* applicable to the agreement. The primary connecting factor consists in the choice of law in Art. 3. Where there is no choice of law, the further procedure is regulated by Art. 4. It is possible to consider both application of Art. 4 (1) (a) and the right of the seller and, given the nature of the parties to the agreement, application of Art. 4 (3), i.e. obviously a closer connection with another country. In the case at hand, this would be the purchasing country, particularly if some accompanying performance was provided in connection with the sale of the aircraft, such as pilot training, software adjustments and technological adjustments for further equipment and fittings belonging to the purchasing country.

The agreement between A and B, i.e. a contract between two private entities which is not connected to public interests, can be classified as a civil and commercial contract in the sense of Art. 1 (1) of the Rome I Regulation (see the ruling of the CJ EU in Case LTU v. Eurocontrol; 29/76). If the other conditions for application of the Regulation are met, the validity of the agreement shall be assessed in accordance with *lex causae*. The latter shall be determined through choice of law under Art. 3 or, under Art. 4 (1) (b), as the law of the country where the provider of the service, i.e. the intermediary, has his place of residence, and the law of country Z.

Given that the acts of B and the advisor are not illegal from the perspective of civil law or punishable under criminal law at the place where they took place, i.e. country Z, we do not find any reason why it should cause invalidity of the agreement between A and C and hence invalidity of the entire contract. We therefore also infer that B has the right to request the agreed performance from A.