| Chapter II |

Formation of Contracts

1. General considerations

1.1. The notion of contract

The analysis of the phases of contract formation must begin with the basics: the definition of a contract. From the perspective of most jurisdictions, this question should be relatively easy to answer: A contract is an agreement between two or more parties aimed at the creation, modification, or dissolution of a legal relationship. In general, what is required is a legally binding statement of consent according to which all interested parties want to achieve the same—legally binding—result. That is, plainly put, they all want to be bound by the same set of rights and obligations. This initial definition does not deal with any of the variations found in national legal systems of contract law. What will interest us in this chapter is the formation of a contract, which means all operational rules leading to the exchange of mutual binding promises. In most cases the same procedure will be applied to the contracts regulated in the law of obligations, contracts concerning property rights, and commercial contracts. What must be borne in mind is that this single system-wide definition of a contract is not something understood *per se*. Some legal systems follow the monist doctrine of the unity of private law and do not distinguish between civil, commercial, public, and consumer contracts. Others know these distinctions: Constituting more rather an exception than a rule, they adopt the monist idea, but nonetheless have specific norms for commercial and non-commercial contracts. Others still, such as common-law jurisdictions, have a very narrow concept of the notion of contract and

Stec, P., Hulmák, M., Menyhárd, A., Stępkowski, Ł., Veress, E., Dudás, A., Hlušák, M. (2022) 'Formation of Contracts' in Veress, E. (ed.) *Contract Law in East Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 35–81. https://doi.org/10.54171/2022.ev.cliece_chapter2

distinguish between contracts, agency, bailment, and trusts. For a continental lawyer all these notions come under an umbrella term 'contract,' even if some of them can also be created by a unilateral act. Furthermore, contractual or quasi-contractual rules may sometimes be applied to public contracts. Some, mostly Romanic systems, have a separate body of laws regulating public contracts (contracts concluded by the state) that are at least formally not a part of the private law. Others see no problem with using civil law rules in such agreements or introduce public-private contracting rules, for instance by creating new subtypes of procedures for the formation of contract or limiting the autonomy of the parties' will. Some legal systems, like that of Germany, have created a special sub-branch of law at the intersection between private and public law called public-private law (*Verwaltungsprivatrecht*). An interesting case is constituted by the contracts concluded by the European Union with various actors, where not only formation of the contract but even its content is provided for in EU norms.

Formation of contract rules can also be applied to so-called procedural contracts. Under this term we understand bilateral agreements concluded in the course of or in connection with civil or (seldom) criminal proceedings, such as a settlement compromise concluded under the supervision of the court, choice of forum or arbitration clauses, etc. In criminal law plea bargaining may also, at least partially, follow these rules. The legal nature of the aforementioned contracts is not always clear. Some jurisdictions put them outside the contractual system, while others allow the application of contract law either by the virtue of the law or as an effect of legal literature, *communis opinio doctorum*. Yet another tricky part of this problem comprises rules applicable to forced sales. In most jurisdictions they are not contracts and are governed solely by civil procedural rules. However, it may happen that various parts of this process are anchored, at least partially, in a given civil code. A good example of this is Article 230 of the Swiss Code of Obligations dealing with illegal practices related to auctions. These rules apply to private law and public law auctions alike.

Finally, there is the old Roman concept of *precarium*: a non-binding mutual promise to which some legal systems apply rules of the law of contract by analogy.

From our perspective the following areas should be covered:

— What can be classified as a civil law contract or a contract to which civil law rules apply?
— Who can participate in the procedure? Are there any third parties involved?
— How is consent formed?
— What is the impact of new technologies on the formation of contract? In particular, are blockchain and smart contracts real gamechangers or just glorified vending machines?

1.2. Parties and capacity

Although legal capacity is covered elsewhere in the body of this work, we must focus here on the main actors of contractual relationships and their capacity to enter into a contract.

Traditionally, and this concept is accepted as a principle all over Europe, there are two main actors in any given contractual relationships: humans (natural persons) and legal (moral) persons—corporations or foundations (with assets legally separated from those of founders, used for a defined purpose). Some systems also recognize legal capacity for various 'entities' not constituting legal persons, which may have a legal capacity or have a capacity to enter into specific types of contracts.

In the case of humans, their capacity depends primarily on legal age. The age limit is a simple and effective way to determine if a person is mature enough to enter into a contract. Usually there are various age thresholds, from a 'no capacity' flag through 'restricted' or limited capacity up to full capacity to enter into a contract. Some legal systems have—or until very recently had—exceptions relating mostly to matrimonial law, thus allowing an underage spouse, with the consent of the court, to acquire full capacity to enter into contracts after marrying (if the court believes you are mature enough to raise a family, you are mature enough to rent a flat). In contrast, matrimonial age for men was at times set to 21 years. This was (or, perhaps, in some countries still is) correlated with the rules on compulsory military service, which usually ended at the age of 21. Due to this limit, young men, as heads of family, could not claim the sole earner exemption to avoid being drafted. Another factor influencing a human being's capacity to enter into a contract is his or her mental condition and ability to make conscious and rational decisions. A person can be deemed unfit to decide and declared incapacitated. Incapacitation as a legal instrument comes in all possible colors and flavors, as lawmakers have varied in their level of medical knowledge and sensibility.

In the case of legal persons, the problem seems to be less complicated, at least at first glance. As a rule, all legal persons should have the same level of capacity to enter into a contract. Some legal systems, however, have introduced limitations in this respect, such as statutory prohibitions on entering into defined groups of contracts by all or some legal persons. Another problem concerns actions declared *ultra vires*, i.e., the result of a contractual limitation of the capacity to enter into a contract by this legal person's statute or Articles of Association. For example, what happens if an investment fund established by the Roman Catholic Church—which has a prohibition on investing in 'immoral' trades included in its Article of Association—buys out Durex and Pornhub? Another limitation can be the duty to obtain permission from a state or an ecclesiastical authority to enter into a contract (e.g., according to Canon Law, a parish or diocese needs its superior's permit to enter into several types of contracts). In Polish public law, a university needs permission from the Minister of Science to sell some of its more valuable assets.

Last but not least, the problem of who can represent a legal person should be mentioned briefly. This is the problem of representation and is mostly rooted in a national legal system's way of thinking about the nature of a corporation.

1.3. Offer and acceptance

Regardless of the fact that not all legal systems have a clearly outlined taxonomy of processes leading to the mutual exchange of promises and to the creation of a contract, there is a consensus that a contract can be formed by offer and acceptance, by negotiations, at an auction, or by a public tender. Thus, the starting point for further analysis will be offer and acceptance as the primary and most often used methods of forming a contract.

An offer is a binding proposal to enter into a contract. This proposition is non-negotiable, i.e., the other party is proposed a contract complete with all essential elements, and may choose either to accept it or refuse it, as the case may be. Therefore, an offer has to be sufficiently precise so that a simple 'yes' or 'no' from the other party will suffice to create a contract. There are legal systems that define the notion of offer in their civil codes, with definitions varying in their scope and content, but the slightly (over)simplified definition above can be understood as part of the common core of civil law systems. The details, like the need to present a complete contract or only its relevant elements, under the assumption that the rest will be implied by the provisions of the codes, are not irrelevant, but can be set aside at this point. For now, we will focus on distinguishing between an offer and other, non-binding proposals.

An offer has to be proposed, with the offeror's intent to be bound by its wording if accepted. The first test then will be 'was there a will to contract'? Standard schoolbook examples like a professor using the keys to her car to demonstrate *brevi manu traditio* or that of an actor writing his last will on stage apply. But that is where the easy part ends. The next test is applied to more complex factual situations, like documents containing all the required elements of a binding offer but without a clear indication that there is an intention to be bound by its contents. Classical examples are price lists, advertisements, catalogues, and simple information like 'Lemonade—1 EUR per cup.' There is no rule of the thumb as to the nature of such declarations. Some legal systems have the tendency to treat them as non-binding information, while others see them rather as offers unless proven otherwise. Finally, there are systems where some sort of guidance rules is provided—'when in doubt whether it is or is not an offer, but only an invitation to treat.' A good example is the rule in the PolCC stating that if you display a price on an object placed in public view at a vendor's place of business, this constitutes an offer unless proven otherwise.

Other promises, especially regarding information on the quality of a product, may also be considered legally binding. This is particularly so in advertising, where the distinction between a mere 'puff' and a contractual promise may decide the fate of a business in case of a lawsuit. Traditionally, advertisements were considered non-binding commercial exaggerations unless the intent to create a binding contract was ostensible, like in the famous case of *Carlile v Carbolic Smoke Co.* Thus, for instance, no one could reasonably expect that a washing powder advertised with the slogan 'RADION cleans clothes all by itself' (a Polish slogan from 1930s) would actually require no input on the buyer's side. Today, with buyers often being consumers, new

rules may apply. If the promise is clear and relates to verifiable qualities of a product, it may become an implied part of a business-to-consumer contract.

Finally, we have promises without legal effects, because they would be either unenforceable or because we had stopped thinking about certain areas of life in contractual terms. These are promises of 'eternal love and friendship,' matrimonial promises, promises that may be labelled as *precarium*, and, surprisingly, electoral promises. At least some of these acts were enforceable just several decades ago, like matrimonial promises. Others, like electoral promises, sometimes give ground to legal debate. Just two decades ago the Polish Supreme Court had to decide whether citizens can sue the President for an unfulfilled electoral promise.

The offer becomes binding from the moment stipulated in the norms governing the law of obligations or of contract. This can be the moment such offer is made, the moment it reaches the addressee, or the moment the addressee reads it, or, as the case may be, any possible combination thereof. It is also for the law to determine for how long the offeror must remain bound by his or her offer if the offer does not contain an *ad quo* limit. Again, there is no single rule, and the answers given by different legal systems vary. Basically, in doubtful cases it is up to the court to decide if the offer was accepted within a reasonable time limit. Sometimes specific rules exist relating, e.g., to auctions or to face-to-face or online communications.

Finally, the question of irrevocability of an offer arises. Depending on the legal system and various modalities of business-to-business and business-to-consumer relationships, an offer can be revoked under specific circumstances or be irrevocable up to a given duration. For instance, the PolCC, which is nowadays a surprising mix of civil and commercial codes, has separate rules on the revocation of commercial (business-to-business) and non-commercial offers. What is more, commercial offers can be made irrevocable.

In order to have a complete contract, an offer has to be accepted. The legal nature of acceptance is explained differently in various legal systems. These theoretical differences are both interesting and important, but at this point it is enough to state that both the offer and the acceptance have to be mirror reflections of each other; only then can they form a contract.

Acceptance can be either express or implied. In the first case the addressee clearly states that he or she agrees to the terms of the contract. In the latter, the actions of the addressee are interpreted by the offeror (or, later, by the court), who must decide whether they were equal to acceptance. Sometimes legal presumptions can be instituted as to the existence of an acceptance, for instance, that an offer made in the course of a long-lasting legal relationship between professionals is deemed to be accepted if it is one of many similar offers made in the course of this relationship and had not been explicitly rejected. In some, usually rare, circumstances, the law may impose on a party a duty to accept an offer. This usually happens in connection with mass contracts like standard insurance contracts and contracts for the supply of water, power, and gas. Refusal to enter into a contract has to be justified in such cases. Of course, the duty to accept an offer may also arise

from other transactions (*pactum de contrahendo*) by which contracts are promised or prepared.

In the case of automated contracts, we may encounter the problem of 'automated consent,' where the machine acts like a quasi-person, accepting an offer, e.g., by performing the desired course of actions. This may happen both in the case of analogous automata, such as vending machines and coin operated carousels, and that of computer-controlled machines (e.g., an ATM where you can by insurance) or smart contracts. The question, if there be one, as to whether there is a general law of automated consent or whether we have to analyze it *de casu ad casum* remains open.

As mentioned above, the acceptance, even if reduced to a simple 'yes,' must be a mirror reflection of the offer. So even the smallest deviations in the acceptance (a 'yes, but…' response) will preclude the formation of a contract. Most legal systems consider such conditional acceptances to be new offers, sometimes called counteroffers. Some legal systems provide an exception to this supposedly iron-clad rule by treating an acceptance with minor and negligible changes as a 'normal' acceptance. This rule should, at least in theory, lead to an increase in the legal security of the parties. A small typo or a computer error in rounding up decimal numbers will not lead to a dissonance in the parties' expression of consent and the non-existence of a contract. In such cases the parties will be bound by the contract as accepted, with minor and negligible changes.

The parties' consent and the contents of the contract are often documented in writing. If there is no written instrument available, the existence of the contract will be determined by other means. In commerce, it often happens that after having concluded a contract not recorded in writing, one of the parties prepares a written memorandum restating the terms of the contract and presenting it to the other party for acceptance. The legal effects of these memoranda are sometimes regulated by law and lead to the fiction that the parties have concluded a contract with the terms described in the memorandum, even if they deviate from what the parties had actually agreed on.

1.4. Negotiations and bargaining

Offer and acceptance imply binary choices: Either we accept what is on offer or decline it. Thus, either consent and a concluded contract results or no consent and no contract. In both business and non-business relationships, the parties are more flexible and engage in negotiations and bargaining to set the best possible terms of the contract. In such a case, the parties hold an open position and, technically, everything is negotiable.

Parties bargain during the negotiations, trying to find the optimal set of contractual clauses. They are ready to compromise and step back from an earlier proposal to accommodate the other party's needs. This differentiates negotiations from offer and acceptance, where the parties' positions are reduced to a rather stiff 'take it or leave it' option. However, the borderline between these two models of forming a contract is somewhat blurred, and an in-depth examination is sometimes required. For instance,

if a seller and a potential buyer discuss a price in a stock market while they are just yelling different prices ('100,' 'No, 50,' 'Not less than 90,' '75,' 'Done!'), are they negotiating or exchanging offers and counteroffers? The same goes for the legal qualification of advertisements, price lists, and other information aimed at potential clients, which can be either offers or invitations to treat.

Additional documents often accompany the process of negotiations, for instance, letters of intent or non-disclosure agreements. The legal nature of such documents varies from non-binding expressions of interest to contractual arrangements as to the scope and conditions of future negotiations.

Negotiations are a delicate process requiring a certain degree of trust between parties, at least in theory. Parties should negotiate in *bona fide* or, in German, *mit Treu und Glauben.* In the course of negotiations, they often divulge confidential information and set aside potential business opportunities because dealing with a competitor at the same time can potentially be seen as a breach of a fiduciary relationship. This raises the question of what happens if this trust is broken. There is no one standard answer. Most systems allow compensation for a breach of confidence in the course of the negotiations. This may constitute either a civil law delict or breach of an unwritten, implied contract to act loyally toward a partner. Some systems have provisions in their norms regulating liability for disloyal negotiations or for divulging confidential information without the other party's consent. A minority view, represented by judgements of various high courts in some common-law jurisdictions, is that trade is like a war between merchants, so anything goes so long as you win. If you let the other party use an unfair advantage, you are the one to blame, and no damages will be awarded.

1.5. Auction and tender

'An auction is a way of selling or letting things by means of competitive bidding'.[1] Although one of the oldest forms of trade, auctions are only rarely regulated by the norms of civil law in greater detail. Traditionally, several standard types of auctions are recognized: the English auction (ascending bids), the Dutch auction (descending bids), auctions by candle (sale by inch of candle, i.e., time limited bidding), etc. American (penny) auctions, where the highest bidder gets an object but all bidders pay the price they offered, is yet another type of an auction, closer to gambling than to forming a contract.

Various questions arise regarding the legal qualification of consecutive stages of an auction. The nature of an advertisement of an auction remains moot. Depending on the circumstances, it can be either an invitation to treat or a veritable offer. Conditions of sale at auction are often understood as a binding contract as to the process of reaching an agreement. These conditions may contain, e.g., a reserve price or a 'without reserve' clause. The former means that the seller reserves a right not to sell

1 Halsbury's Laws of England (online).

if the price bid is not high enough. The latter is an unconditional promise to sell to the highest bidder, even if the price is below the market value.

An auction bid usually constitutes an offer. Some legal systems have rules regarding how long their bid binds the bidders; some infer it from the general rules of offer and acceptance. In the case of a Dutch auction, where the auctioneer makes an offer, the bid is just an acceptance.

Some legal systems have additional formalities regarding auctions, like the need for the minutes of an auction to be notarized. These rules are more procedural or have the nature of a public law, and have a limited impact on the formation of a contract. One exception is constituted by priority, or pre-emption rights of museums and other similar entities buying at art auctions.

An unresolved question (at least unresolved in most of the legal systems under analysis) is what happens if we want to auction off assets, in the case of which transfer of title must take place in writing? The most common solution is concluding a *pactum de contrahendo* (a promise to conclude a contract in the prescribed form), but some legal systems solve this problem by granting the highest bidder the claim for concluding a contract in the future.

Tenders are used to select an offeror by comparing multiple offers in writing. They allow the organizer to compare offers using numerous criteria. In most jurisdictions, standard rules on offer and acceptance will govern tenders. Only a handful of legal systems have specific civil law provisions in this respect.

As both auction and tender are prone to manipulation, the problem of dealing with unfair auction practices arises. Some legal systems know a unique claim to rescind a contract concluded at a rigged auction, while the majority of legal systems rely on standard doctrines like mistake or deceit.

1.6. E-contracting

Rules on electronic contracts are *in statu nascendi*. We can deal pretty well with offer and acceptance online, and these rules are more or less uniform. The blockchain, or, more precisely, 'distributed ledger' technologies used for the automation of the formation of contracts, and so-called smart contracts (automatically processed requests resulting in the parties being bound by an agreement just because the program thinks they want to be bound, and the automatic exchange of performance against counter-performance) are more problematic. Automated contracts have been known for decades, but the principal question to be answered here is the following: Do smart contracts differ from old-fashioned automated contracts concluded with the use of a vending machine or another analogue device, for instance a jukebox? Does their complexity make them different? Or is this merely a case of old wine in a new bottle?

2. The Czech Republic

2.1. The notion of contract

The law defines a contract narrowly as an expression of the will of several parties to establish an obligation between them and to be governed by the contents of the contract.[2] However, the rules for contracts also apply to agreements to modify or terminate the obligation, unless there is a special provision, e.g., for form.[3] Some rules may even be applicable to unilateral juridical acts.

The notion of contract is unified throughout Czech private law. There are no substantial differences in concluding business-to-consumer or business-to-business contracts with one exception, the application of rules on commercial letters of confirmation.[4]

The CzeCC also considers there to be some contracts that do not create an obligation, e.g., designating heirs or having direct *in rem* effects. Pursuant to § 11 of the CzeCC, the general provisions on the creation, modification, and extinction of obligations shall be used appropriately regarding the creation, modification, and extinction of other rights and obligations under private law. It follows from § 170 of Act No. 500/2004 Sb. on Administrative Procedure that the provisions on the formation of contracts in the CzeCC apply *mutatis mutandis* to public law contracts as well.

2.2. Formation of contract

A contract is a bilateral or a multilateral juridical act. Therefore, the general requirements for juridical acts apply.[5] The formation of a contract requires consensus, whether actual or normative. Its minimum content consists of the essential elements of the type of contract or the definition of the debt in the case of innominate contracts, or another legal consequence in the case of agreements. In principle, however, full consensus on the entire content of the contract is required. Following the model of the German Civil Code, the BGB (§ 154 and § 155), the CzeCC also regulates dissensus, both overt and covert.[6]

In some cases, consensus is not sufficient for the formation of a contract; the performance by one of the parties is also required, typically the delivery of a thing (real contracts), e.g., a loan.[7] If the parties intended to be bound without such a delivery already having been made, another type of contract may be involved, e.g., a credit[8] or innominate contract.[9] In other cases, court approval is required to create a valid contract, e.g., approval of acts for a minor under § 898 of the CzeCC.

2 CzeCC, § 1724.
3 CzeCC, § 564.
4 CzeCC, § 1757.
5 CzeCC, § 545 et seq.
6 CzeCC, § 1726; Hulmák in Hulmák et al., 2014, p. 41.
7 CzeCC, § 2390.
8 CzeCC, § 2395.
9 CzeCC, § 1746.

The rules for the conclusion of contracts are laid down as supplementary[10] once consensus has been achieved. The legislator only provides for the offer-acceptance model in a subsidiary manner. The parties may therefore also agree on other ways of concluding the contract: four steps, through a third party, by silence of the acceptor, etc.

Parties are obliged to negotiate in good faith.[11] Pre-contractual liability is explicitly governed in § 1728 et seq. of the CzeCC. Articles 6–8 of the European Contract Code were the inspiration for this regulation.[12] Thus, parties will be liable for invalidity, negotiating without an intention to conclude a contract, unjustified breaking off of negotiations, and breach of information duties or confidentiality. There is ongoing discussion of the character of such liability (non-contractual or contractual) and the scope of damages (positive or negative interest).[13] The Supreme Court of the Czech Republic prefers compensation only for negative interest.[14]

2.2.1. Offer and acceptance

The offer (*nabídka*) must contain at least the objective essential elements of the contract, or the definition of the obligations of the debtor in the case of innominate contracts, and must make clear the intention to be bound in the event of acceptance. It may be either addressed to a particular addressee or to indeterminate addressees (e.g., to the public at large). If such requirements are not met, the expression of will as a rule is to be regarded as a mere invitation to offer (*invitatio ad offerendum*). It can also constitute[15] a public promise of reward (*veřejný příslib*).

Any offer may be cancelled if the expression of the intention to cancel reaches the offeree no later than the offer itself. Moreover, a revocable offer may be revoked as long as the offeree has not sent the acceptance. An offer is in principle revocable. An offer shall be deemed irrevocable if it specifies a time limit for acceptance or otherwise implies irrevocability.

An oral offer must be accepted immediately. The same shall apply to a written offer made between present parties. A written offer must otherwise be accepted within a reasonable time, though the offer may indicate otherwise. Late acceptance shall not give rise to a contract unless the offeror notifies the offeree that a contract has been formed. If it is apparent that acceptance would have occurred in time but for a delay in shipment (delayed mail, technical difficulties in transmission of a message etc.), a contract will be formed unless the offeror notifies the offeree that he considers the offer to have lapsed.

The acceptance (*přijetí*) must correspond in substance to the offer. Reservations or additions will be considered a counteroffer and will, like a refusal, lead to

10 CzeCC, § 1770.
11 CzeCC, § 6.
12 Gandolfi, 2001.
13 Janoušková, 2021.
14 Supreme Court Ref. No. 23 Cdo 836/2021.
15 CzeCC, § 2884.

the termination of the original proposal. Following the example of Article 19 (3) of the CISG, the CzeCC now allows for the formation of a contract on the basis of an acceptance with additions or reservations that do not substantially alter the proposal (e.g., extension of a price or inflation clause to also cover price decreases), unless the offeror rejects such an acceptance without undue delay. The CzeCC also has special provisions on the 'battle of the forms' based on the knock-out rule.[16]

The contract is formed when the acceptance reaches the offeror.[17] The offer or the circumstances thereof may show that acceptance is already affected, for example, by another behavior under the offer, e.g., by shipment of the goods, dispatch of the acceptance, or initiation of proceedings before the Land Registry.[18]

2.2.2. Special methods of concluding the contract

The legislator has provided in the CzeCC for auction,[19] public offers,[20] competition for the most advantageous offer,[21] and pre-contracts[22] as special cases of contract formation.

The regulation of the auction is based on § 156 of the BGB: The contract is concluded by affixing a seal. Dispositively, the auction is conceived as an auction with the stipulation of a reserve. It is not considered an auction under the regulations for enforcement or a public auction governed by a special law (Act No. 26/2000 Coll.). There is a detailed discussion of the relationship between such an auction[23] and the special law on public auctions. Historically the private law auction was conceived as a way to conclude a contract, while the public law auction under special laws is not primarily a means of contract formation. Currently, case law has started to reconcile these differences. Auctions organized under the procedural rules on enforcement remain outside the application of the rules on private auctions in any event.[24]

In the case of a highest-bidder auction procedure,[25] a call for proposals is published and the tenderer subsequently selects the best bid. The tenderer is obliged to choose the best offer unless the right to refuse all offers has been reserved. It is questionable the extent to which these rules are compulsory or dispositive.[26] Public procurement is governed by special law (Act No. 134/2016 Sb.).

16 CzeCC, § 1753.
17 CzeCC, § 1745.
18 Supreme Court Ref. No. 31 Cdo 1571/2010.
19 CzeCC, § 1771.
20 CzeCC, § 1780.
21 CzeCC, § 1772.
22 CzeCC, § 1785.
23 CzeCC, § 1771.
24 Supreme Court Ref. No. 27 Cdo 1045/2019; Supreme Court Ref. No. 20 Cdo 2927/2020.
25 CzeCC, § 1772.
26 In favor of supplementary rules see Hulmák in Hulmák et al., 2014, p. 257; for mandatory rules see Pelikánová and Pelikán in Švestka et al., 2014, p. 110; and for quasi-mandatory rules see Bříza and Pavelka in Petrov et al., 2019, p. 1846.

A public offer is an offer that is not addressed to given entities. In this case, the contract is concluded with the first acceptor, though the offeror may specify otherwise in the offer. The law imposes the obligation to inform not only the first acceptor of the conclusion of the contract, but also the acceptors whose acceptance did not lead to the creation of the contract. Failure to comply with this information duty in respect of unsuccessful acceptors may lead to the creation of a contract with them. The law presumes a public offer[27] in a situation where an entrepreneur, in the course of his business, addresses unspecified addressees with a proposal to supply goods or services at a specified price by means of an advertisement or a catalogue or by displaying goods with a price. It is very often applied to websites (e-shops) or vending machines as well. In such cases, the trader is contractually bound by each acceptance in turn until the stocks are depleted or the ability to perform is lost.[28]

There are no special rules for e-contracting, which is considered rather an issue of contractual form.

3. Hungary

3.1. The concept and content of the contract

The paradigm of Hungarian contract law is freedom of contract.[29] As a primary rule, legal norms providing rights and obligations between the contracting parties are default rules. Rules addressing contractual rights and obligations are of a mandatory nature only if explicitly provided for by law. Norms, other than those pertinent to establishing contractual rights and obligations, e.g., providing definitions or describing legal consequences, are normally mandatory rules. Important limits of the freedom of contract emerge from compulsory contracting. Direct compulsory contracting must be provided for by statutory law or by contract (pre-contract). Statutory laws provide compulsory contracting primarily for banks, insurance companies, and companies providing public services. Specific legislation against discrimination establishes indirect compulsory contracting; this legislation is a result of the implementation of European anti-discrimination directives. While the court shall establish the contractual relationship between the parties with the judgement in cases of direct compulsory contracting, in cases of indirect compulsory contracting, such as discrimination cases, the remedies available for the victim are damages and/or *solatium* (non-pecuniary damages), according to the rules of protecting rights inherent to persons.

Contract is defined as a consent resulting in an obligation to perform and a right to claim performance. Such consent is the result of the mutual juridical acts of the

27 CzeCC, § 1732 (2).

28 Hulmák in Hulmák et al., 2014, p. 78; Šilhán in Petrov et al., 2019, p. 1778; critically regarding this concept, Pelikánová and Pelikán in Švestka et al., 2014, p. 32.

29 Rules of the concept and conclusion of contract are covered by §§ 6:58–6:85 of the HunCC.

parties, where the juridical act is a declaration of will aimed at producing legal effect. Juridical acts can be concluded orally, in writing, or by way of implied conduct. Silence or abstention from a certain conduct qualifies as a juridical act only if the parties expressly agreed upon such a consequence.[30] A contract is enforceable if it exists, is valid, and is effective between the parties, provided that it had not been frustrated. A contract is created by an offer and its acceptance. The offer and the acceptance are juridical acts. Although the presumption prevails that for contractual services, there is a counter-performance to be provided, that does not mean that consideration is a precondition for creating contractual obligations. The precondition of creating a contract is its cause (*causa*), sometimes referred to as 'legal title' in Hungarian. Contracts having a valid cause are enforceable, even innominate contracts. As contracts are concluded via mutually binding juridical acts of the parties, they are to be assessed according to the general rule of interpretation of juridical acts if the declarations of the parties intended to create a legal obligation are unclear.

The content of the contract shall be established according to the construction of the juridical acts of the parties, but contractual terms may be implied as well. General clauses, such as the requirement of good faith and fair dealing, the purpose of the contract or customs, and practices may be sources of the content of the contract, even if the parties did not expressly refer to them. Usages established by the parties or prevailing in the relevant business may enter the content of the contract, although the parties are free to agree that such usages and practice are not to be implied as part of the content of their contract.

3.2. Offer and acceptance

A contract is concluded if the offer and the acceptance resulted in an agreement upon all substantive terms. Substantiveness is a legal concept referring to issues that are essential for defining the core content of a contract. Normally the parties, the performance, the counter-performance, and the cause constitute such core content.[31] That is, in the absence of agreement on these issues, there is no contract between the parties. Agreeing upon the price is, however, somewhat of an exception, because if the parties failed to determine the price but agreed upon the performance, it can be inferred by the court as being the market price.[32] If the parties agreed that one of them should start performing because the other would accept it—that is, a minimum core content of the contract can be established—the contract shall be deemed concluded (the 'deal is on' approach). Agreement on further issues that are considered substantive by the parties shall be a precondition for the contract's formation if a party has clearly stated that in the absence of agreement on these issues it does not intend to conclude the contract.

30 HunCC, § 6:4.
31 Vékás, 2016, p. 177.
32 HunCC, § 6:63 (3), Supreme Court, Legf. Bír. Gf. I. 31. No. 689/1993. BH 1995. No. 107.

The offer is a juridical act that clearly expresses the intention of the offeror to conclude a contract and covers all substantive issues. Acceptance creates a contract if it has been communicated to the offeror within the period while the offer had a binding effect, and if it has been made as a juridical act indicating assent to the offer. Acceptance differing from the offer on a substantive issue shall be considered a new offer. Acceptance indicating assent to the offer but containing additional or different terms that do not qualify as substantive issues is capable of creating a contract, because there is consent regarding the substantive issues. In such cases, the additional or different terms become the content of the contract according to a 'last-shot' rule: Such terms shall become part of the contract unless the offer itself explicitly limited the possibility of acceptance to those terms that are provided in it, or else the offeror objected to the additional or different terms without undue delay.

3.3. Auction and tender

If the contract falls under public procurement legislation, it shall be concluded according to the public procurement procedure. Legislation on the public procurement procedure in Hungary complies with European public procurement rules. If, outside the scope of public procurement legislation, the party published an invitation for tender but failed to conclude the contract with the bidder submitting the best offer, the consequences of non-compliance with the statutory law or with the invitation are limited to compensation for the costs of submitting the bid. If there was a compulsory bidding procedure, but a party subject to this obligation failed to initiate the procedure and, ignoring this obligation, concluded a contract in its absence, omission of bidding renders the contract illegal and, as such, null and void. Non-compliance with the terms of the invitation, however, does not make the contract invalid. That is, if the party complied with the duty to make an invitation to bid but concluded the contract with a bidder that did not submit the best bid or otherwise violated the rules for bidding (e.g., providing unfair advantage to one of the bidders), this does not make the contract null and void.[33] Such non-compliance establishes the liability of the party calling for the tender. This liability is limited to the costs of preparing and submitting the bid and shall not cover lost profit.[34]

3.4. Non-compliance with formal requirements

If a contract is subject to the written form, i.e., it is required that it be made in writing, it is valid if its substantive content is recorded in writing. If the written form was required either by statute or upon agreement by the parties, non-compliance with the formal requirement shall result in the contract being null and void. As far as terms not qualified as substantive are concerned, such terms, even if they are not in writing, can become part of the content of the contract. The same is to be applied to amendments of existing contracts. The traditional written form (a paper-based 'hard copy') shall

33 Supreme Court, Legf. Bír. Pfv. VIII. No. 20.678/2003. EBH 2004 No. 1117.
34 Supreme Court, Legf. Bír. Gfv. IX. No. 30.030/2005. EBH 2005 No. 1220.

qualify as a juridical act recorded in writing if it has been signed by the party making it. The same holds for documents that comply with the requirements of the eIDAS Regulation. As for other types of juridical acts, the HunCC provides a 'technology-neutral,' open norm that may allow juridical acts (including contracts) to qualify as recorded in written instruments if they have been presented in a form that enables their content to be properly recalled by and for the person who made the juridical act, and if the act is written so as to allow the time when it was made to be identified.[35] This flexible norm provides the court with the power to decide whether the actual juridical act complies with these requirements and can be qualified as recorded in a written instrument. This is a source of legal uncertainty in transactional practice. The question arises whether scanned PDF documents, e-mails, text messages, signing a tablet, etc. could qualify as written instruments and, if so, under what circumstances. This is left to be answered by the case law. Courts seem to tend to follow a rather conservative approach and are inclined to give a negative answer. This issue, however, has not been tested and considered by the Supreme Court thus far.

The absence of compulsory formal requirements results in the contract being null and void. However, a contract that is null and void on the grounds of non-compliance with such a formal requirement shall become valid upon the acceptance of performance with respect to the performed part. This effect of acceptance of performance shall not be applied if mandatory formal requirements provide that the contract is to be drawn up as an authentic instrument (a 'public deed') or as a private written instrument with full evidentiary value, or the contract is aimed at the transfer of ownership rights over real estate. The amendment, termination, or rescission of a contract that takes place disregarding the mandatory formal requirements shall also be valid, if the actual situation reflecting the amendment, termination, or rescission has been established by the parties' mutual consent. This rule is not to be applied to contracts that must be contained in authentic instruments (public deeds) or in written instruments with full evidentiary value, or when the contract is aimed at the transfer of ownership rights over real estate.

3.5. Standard contractual terms

Statutory control of contracting with standard contractual terms is the result of mass production and mass transactions. Although, in line with European trends, Hungarian contract law developed autonomously, the legal system today is fundamentally influenced by European Union legislation. In Hungarian contract law, there is a two-tiered system instituted for the protection of parties' interests, where general rules are provided for all contracts concluded on the basis of the standard contractual terms of one or both of the parties, and further specific rules are to be applied to consumer contracts (in business-to-consumer relations). Standard contractual terms are deemed to be those that are not negotiated individually by the parties but determined unilaterally and in advance by the person applying them for the purpose

35 HunCC, § 6:7.

of concluding several contracts. The party applying the standard contractual terms shall be responsible for proving that these terms were individually negotiated by the parties.

Standard contractual terms shall enter the content of the contract if, before the conclusion of the contract, the party applying them facilitated the other party in becoming acquainted with their content, and the other party agreed to these terms. The counterparty shall be informed separately of any 'surprising' standard contractual term that derogates significantly from statutory rules or from customary contractual practice, unless it complies with the usages established between the parties. The counterparty shall also be informed separately of any standard contractual term that differs from the terms applied previously between the parties. Such terms shall become part of the contract if the counterparty, after being informed of them separately, explicitly accepted them. If a standard contractual term is in conflict with another (non-standard) term in the contract, the latter shall become part of the contract. Specific rules implement the *in dubio contra proferentem* doctrine. That is, if the meaning of a standard contractual term or of any other term that was not individually negotiated between the parties could not be clearly established by applying the provisions on the interpretation of juridical acts, the unclear term shall be construed against the party that proposed it. For contracts between consumers and undertakings (professionals), this rule shall apply to the interpretation of any of the contractual terms. There are specific rules provided for the 'battle of the forms.' If the offer referred to the standard contractual terms of the offeror and was accepted by the offeree under the offeree's own standard contractual terms, the standard contractual terms of both parties shall enter the content of the contract. If the standard contractual terms differ concerning substantive issues, the contract shall not be formed. If the standard contractual terms differ concerning issues that are not substantive, the contract shall be formed and the standard contractual terms that are not contradictory to each other shall enter the content of the contract.

3.6. Culpa in contrahendo

Hungarian contract law does not follow the *caveat emptor* principle. It requires the parties to disclose all the relevant information to one another, even in the absence of any direct request or an agreement upon such duty of disclosure. This duty stems from the requirement of good faith and fair dealing and from the duty of cooperation and disclosure. The counterparty, however, must also take care of its own interests, according to the general clause regarding the required standard of conduct. That is, the risk of information asymmetry is shared accordingly between the parties. In line with the general clause of the requirement of good faith and fair dealing, then, as a general duty, the parties to a contract shall cooperate during contractual negotiations, upon the conclusion of the contract, and during its existence, execution, and dissolution. The parties shall disclose to each other any important circumstances concerning the contract. There are, according to the choice of the aggrieved

party, two possible consequences of non-compliance with the duty of disclosure: unenforceability of the contract according to the provisions of mistake and deceit; or claiming damages. If the contract was concluded, the party breaching the duty of cooperation and disclosure shall be required to compensate the counterparty for damages arising from the breach in accordance with the general rules on liability for breach of contract. If the contract was not concluded, the party who breached this duty of cooperation and disclosure shall be liable according to the general rules on non-contractual liability. Business risks, however, are not to be shifted to the other party.

There is, however, a specific risk allocation rule of the HunCC, providing protection for legitimate expectations even in the absence of a contract. According to this rule, in a way similar to promissory estoppel, the court may award damages, payable in full or in part, against a party whose willful conduct has explicitly induced another person in good faith to act in a way that caused harm to this second person through no fault of his or her own. This rule aims at providing a positive sanction as a consequence of non-compliance with the requirement of good faith and fair dealing, especially *venire contra factum proprium*, with compensation of what the German legal terminology refers to as *negative interesse.* The rule provides an authorization to the court deciding on partial or complete compensation for the loss suffered by the aggrieved party. However, Hungarian courts seem to be quite reluctant to award even partial compensation on this ground for frustrated expectations as far as the conclusion of a contract is concerned. They also have established that normal business risk or the costs of preparing the contract should not be shifted to the other party according to this rule.[36]

3.7. Technological development and contracts

There are thorough professional discussions as to smart contracts, blockchain, tokenization, and other consequences of technological development. Digital ledger technology systems are also applied in practice, but there is no specific legislation or court practice covering the legal qualification of such phenomena. The most relevant issues seem to concern primarily property and inheritance (digital legacy).

3.8. E-contracting

There are specific rules provided for electronic contracting. Those provisions in the HunCC (§§ 6:82–6:85) address the duty of disclosure of the party providing the electronic means, shifts the liability for defects of transmission to this party, and makes such juridical acts effective.

36 E.g., Supreme Court, Legf. Bír. Pf. VI. No. 25.404/2001. EBH 2003 No. 936; Supreme Court, Kúria Gfv. VII. No. 30.181/2012. BH 2013 No. 275 (BH 2013 No. 248).

4. Poland

4.1. Introductory remarks

Polish law of contracts is primarily, albeit not exclusively, governed by the PolCC (*Ustawa z dnia 23 kwietnia 1964 roku—Kodeks cywilny* – Act of April 23, 1964—Civil Code). The PolCC recognizes several modes of forming a contract, negotiation[37] (*negocjacje*) being one of them. The primary modes of forming a contract governed by the PolCC are an offer and acceptance thereof, an auction, a tender, and negotiation of a contract.[38] The contents of relevant Polish law are stated here as they stood on November 5, 2021.

According to the rule enshrined in Article 353[1] of the PolCC, the parties forming a contract may frame their legal relationship according to their discretion, provided that the contents or the objective thereof are not opposed to the features (the nature) of that relationship, to a statute, or to the principles of social coexistence. Where the parties transgress this freedom of contract, Article 58 §§ 1–3 of the PolCC provide (in § 1) that a juridical act[39] that is contrary to a statute or intended to circumvent it shall be null and void, unless the applicable provision prescribes a different result, in particular the one that the relevant provisions of a statute, substituted in place of the invalid terms and conditions of the juridical act at issue, would lead to. Furthermore (§ 2), a juridical act that is contrary to the principles of social coexistence shall be null and void. Lastly (§ 3), where only a part of the juridical act is affected by nullity, the remainder of that act shall remain in force, unless it follows from the circumstances that the act at issue would not have been concluded without the terms and conditions affected by nullity.

All modes of forming a contract pursuant to the PolCC, negotiation included, consist in making a statement of intent (*oświadczenie woli*) to the other party,[40] whereupon to form a contract, the other party would normally make a statement to the

37 PolCC, Article 72 § 1.

38 More specific legal rules may vary the general approach found in the PolCC, for instance by requiring a party to extend (or accept) an offer, or by designating specific bodies as the only parties capable of forming certain contracts. There is a separate statute as regards concluding contracts with consumers (the Act of May 30, 2014, on Consumer Rights, *Ustawa z dnia 30 maja 2014 o prawach konsumenta*), which acts as a *lex specialis* vis-à-vis the PolCC. In addition, the Polish rules on public procurement stipulate a separate (and highly specific) mode of forming a contract with a contracting authority, with the PolCC applicable to the extent that those rules do not provide otherwise [according to Article 8 of the Act of September 11, 2019—the Law on Public Procurement (*Prawo Zamówień Publicznych*)].

39 In the original Polish, *czynność prawna*, of which a contract is an example.

40 See, e.g., judgment of the Polish Supreme Court (*Sąd Najwyższy*) of May 20, 2014, case Ref. No. V CSK 396/13, reported in Wolters Kluwer's LEX, No. 1504853. The concept of a statement of intent is defined by Article 60 of the PolCC, which provides that, save where the act provides otherwise, the intent of a person performing a juridical act may be expressed through any behavior that discloses their intent in a sufficient manner, the expression of such an intent in an electronic form included.

effect that they accept, subject to the specific rules of a given mode. In case of doubt, as a rule enshrined in Article 70 § 1 of the PolCC, the contract is considered to have been formed when the offeror receives a statement of acceptance, unless making a statement of acceptance is not required. Should the latter be the case, the contract is formed when the offeree commences performance of the contract. As to the place where the contract is deemed to have been concluded, pursuant to Article 70 § 2 of the PolCC, and in case of doubt, the contract is considered to have been concluded at the place where the offeror received the statement of acceptance of the offer. Note that it is not required that a statement of acceptance reach the offeror or where the offer is made by electronic means, at the offeror's place of residence or the offeror's headquarters, at the moment of conclusion of the contract.

Formation of a contract is also possible through judicial decisions, namely where a party is required to make a statement of intent yet fails to do so, and then the other party makes a claim before a competent court to find that the party in default has a duty to make such a statement. Pursuant to Article 64 of the PolCC, a decision of a court with the effects of *res judicata*, holding that a party has a duty to make a statement of intent, shall substitute for such a statement.

4.2 Offer and acceptance

Among the modes provided for in the PolCC, the most basic mode of forming a contract is through an offer. An offer is constituted by a statement of intent that specifies the main (substantive) terms and conditions of a contract.[41] It is also a part of that which constitutes a contract and not a standalone, unilateral juridical act.[42] Where an offer is made by an offeror (*oferent*), the offeree (*oblat*) must make a statement of intent to the offeror that such offer is accepted. Tacit acceptance of an offer, where the counterparty (the offeree) does not commence performance or otherwise express his or her intent to accept is normally not possible, unless the offer is made between entrepreneurs (professionals) who remain in regular commercial relations and within the scope of their business. Where that would be the case, absence of an immediate reply to an offer is deemed acceptance thereof.[43] According to Article 66 § 2 of the PolCC, unless the offeror specified a time limit in the offer during which he or she shall await a reply, an offer made in the presence of the other party or via means of instantaneous telecommunication shall lapse if not accepted without delay; whereas, if it is made in a different manner, it shall lapse after the expiry of a period during which in the normal course of events the offeror could have received a reply sent without undue delay by the offeree. While not set out explicitly in the PolCC, it is generally accepted in legal literature that an

41 PolCC, Article 66 § 1.

42 According to judgment of the Polish Supreme Court of January 23, 2014, case Ref. No. II CSK 190/13, reported in Wolters Kluwer's LEX No. 1459158, wherein the Supreme Court specifically denied that an offer is a unilateral juridical act (*jednostronna czynność prawna*).

43 PolCC, Article 68^2.

offer does not need to have a known addressee (offeree); it can be validly issued to the general public.[44]

There is a specific rule in the PolCC regarding offers made via electronic means.[45] Pursuant to Article 66[1] § 1 of the PolCC, an offer made via electronic means binds the offeror where the other party confirms receipt of the offer without delay. According to Article 66[1] § 2 of the PolCC,[46] an entrepreneur making an offer via electronic means is obliged, before the conclusion of a contract, to inform the offeree in an unequivocal and understandable manner of:

- the technical activities that result in the conclusion of the contract,
- the legal effects of confirmation of receipt by the other party,
- the principles and means of recording, securing, and making the contents of the contract concluded by the entrepreneur with the other party,
- the methods and technical means aimed at detection and correction of errors in data input that the entrepreneur is obliged to make available to the other party,
- the languages in which the contract may be concluded,
- the codes of ethics that are applied by the entrepreneur, and their availability via electronic means.

Pursuant to Article 66[1] § 3 of the PolCC, the rule in § 2 cited above shall apply *mutatis mutandis* when an entrepreneur invites the other party to commence a negotiation, to make offers, or to conclude a contract by other means. Furthermore, Article 66[1] § 4 of the PolCC provides that the provisions of Article 66[1] §§ 1–3 of the PolCC are not applicable to concluding contracts via e-mail or by similar means of individual telecommunication. They also do not to apply between entrepreneurs where the parties have so stipulated.

The PolCC specifies the moment when an offer (itself a specific statement of intent) is considered to have been made and provides for rules on revocation of an

44 Olejniczak and Grykiel in Gutowski, 2021, on Article 66 of the PolCC; Machnikowski in Gutowski, 2021; Gniewek and Machnikowski, 2021, on Article 66 of the PolCC. To this should be added that the PolCC recognizes a public promise as a separate means of obliging oneself, not by an offer but by a unilateral juridical act capable of creating an obligation (*jednostronna czynność prawna*), according to Article 919 § 1 of the PolCC; judgment of the Polish Supreme Court of October 30, 2019, case Ref. No. V CSK 134/18, reported in C.H. Beck's Legalis, No. 2277390. As regards a contract of sale, the public display of a good (*rzecz*, which denotes either movable or immovable property) at the place of sale with an indication of the price is deemed an offer of sale (see Article 543 of the PolCC).

45 For more on offers via electronic means pursuant to Polish law, see Węgierski, 2020, Chap. III, Subchapter III: 'Charakter prawny oferty elektronicznej.'

46 The rule at issue is aimed at transposing Article 10 of Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') OJ L 178, 17.07.2000 p. 0001–0016. Whether the legislator succeeded in transposition is a matter of debate. In any case, this rule should be interpreted in accordance with EU law. For more, see Żok, in Kuniewicz and Sokołowska, 2017.

offer. Pursuant to Article 61 § 1 of the PolCC, a statement of intent that is to be made to another person is made at the moment when it reached that person in such a manner that they were capable of familiarizing themselves with its contents.[47] Revocation of such a statement is effective when such revocation reached the addressee simultaneously with an offer or earlier. According to the rule in Article 61 § 2 of the PolCC, a statement of intent made by electronic means is made to the addressee at the moment when it was uploaded to a means of electronic communication in such a manner that the addressee could familiarize himself or herself with its contents. There are further specific rules contained in Article 66^2 of the PolCC. Pursuant to § 1 in relations between entrepreneurs, an offer may be revoked before the conclusion of a contract, where a statement of revocation was made to the addressee before that party sent a statement of acceptance of the offer. Nevertheless, according to § 2 of the same norm, an offer may not be revoked where it follows from its contents or it specified a time limit for acceptance.

The above rules are complemented by Article 67 of the PolCC, which stipulates that where the statement of acceptance as regards an offer is received belatedly, yet it follows from its contents or from the circumstances that it was sent in appropriate time, the contract is formed, unless the offeror notifies the offeree without delay that they find the contract not to be concluded due to the delay of a reply.

Further on acceptance, where the offeree accepts the offer yet does so on condition of amending or adding to the offer, this acceptance is considered to be a counteroffer instead,[48] and the contract is not formed. However, where entrepreneurs in regular relations are involved, a reply to an offer on condition of amendments or additions thereto that do not materially alter the contents of such offer is deemed to be an acceptance. Where that is the case, the parties are bound by a contract consisting of the contents specified in the offer, taking account of the reservations.[49] However, pursuant to Article 68^1 § 2 of the PolCC, the rule in §1 is not applicable where it was provided in the contents of the offer that it may only be accepted without any reservations, where the offeror immediately objected to the inclusion of reservations in the contract, or where the offeree in reply to the offeror has made the acceptance conditional on the consent of the offeror to the inclusion of reservations in the contract and has not received such consent immediately.

Apart from Article 68^2 of the PolCC above, a contract may also be formed tacitly pursuant to Article 69 of the PolCC, in accordance with a set usage in regard to given relations or in accordance with the contents of the offer, when it is not required that the statement of acceptance reach the offeror. In particular, such a situation is also

47 It should be noted that this rule does not require actual receipt of the statement of intent. For instance, where a party deliberately forgoes receipt, the statement of intent is still considered made at the time when familiarizing oneself with it became possible (according to a judgment of the Polish Supreme Court of May 20, 2015, case Ref. No. I CSK 547/14, reported in C.H. Beck's Legalis, No. 1310181).

48 PolCC, Article 68.

49 PolCC, Article 68^1 § 1.

present when the offeror requests immediate performance of the contract, and the contract is formed if the other party commences such performance in due time; otherwise, the offer will cease to bind.

Finally, according to Article 71 of the PolCC, notices, advertisements, price lists, and other similar information addressed either to the public or to respective persons are, in case of doubt, deemed not to be offers but rather invitations to conclude a contract.

4.3. Auction and tender

Outside of making an offer, the PolCC allows for concluding a contract by an auction (*aukcja*) or a tender (*przetarg*), which is set out explicitly in Article 70^1 § 1 of the PolCC. According to Article 70^1 § 2 of the PolCC, a notice for an auction or a tender must specify the time, place, object, and either the terms of the auction or the tender themselves or provide for a way of making those terms available. Article 70^1 § 3 of the PolCC provides that the notice and the terms of an auction or a tender may be amended or revoked only when so provided in their contents, whereas § 4 thereunder sets forth that an organizer is obliged to follow the stipulations of the notice and the terms of an auction or a tender as of the moment when such terms are made public. An offeror is obliged in the same way as of the moment of submitting an offer.

4.3.1. Auction

An auction is governed by the rule enshrined in Article 70^2 §§ 1–3 of the PolCC. Pursuant to § 1, an offer made in the course of an auction ceases to bind where another participant in the auction (bidder) made a more advantageous offer, unless specified otherwise in the terms of that auction. § 2 further specifies that the conclusion of a contract as a result of an auction takes place when the bid is 'knocked down' (*z chwilą udzielenia przybicia*) i.e., when there are no further bids and the last one standing is selected, with or without the auctioneer having to bang an actual gavel. According to § 3, where the validity of a contract is dependent on specific requirements specified in a statute, both the organizer of an auction and the participant whose offer has been selected may make a claim for the contract to be concluded.

4.3.2. Tender

A tender is in turn regulated by Article 70^3 §§ 1–3 of the PolCC. An offer made during a tender shall cease to bind when another offer is chosen, or where the tender was closed without choosing any of the offers, unless specified otherwise in the terms of the tender (§ 1). Pursuant to § 2, the organizer is obliged to immediately notify the participants in a tender in writing of the result of that tender or of the closing of the tender without making a choice. The rule in § 3 provides that the provisions on acceptance of an offer are applicable for ascertaining the moment of concluding a contract by tender unless the terms of the tender specify otherwise. The provisions of Article 70^3 § 3 of the PolCC apply *mutatis mutandis*.

4.3.3. Common provisions for auctions and tenders

Both in regard to auctions and tenders, the PolCC provides for a deposit (*wadium*). According to the rule in Article 70^4 § 1 of the PolCC, the terms of an auction or the terms of a tender may specify that the participant at an auction or a tender must, on pain of non-admittance, pay a specified sum to the organizer or provide an appropriate security for the payment thereof (constitute a deposit). Pursuant to the rule in § 2 therein, where a participant in an auction or a participant at a tender evades conclusion of a contract whose validity is contingent on meeting specific requirements provided for in statute, despite their offer having been selected, the organizer of the auction or tender may retain the deposit or make a claim against the security offered. In other cases, the deposit paid must be immediately returned, whereupon the security shall lapse. Where the organizer of the auction or the tender evades conclusion of the contract, the participant whose offer has been selected may claim payment of the deposit doubled, or may claim damages.

There is a remedy that may be exercised in order to avoid the concluded contract in cases where the auction or tender turns out to have been rigged. Article 70^5 § 1 of the PolCC provides that an organizer or a participant at an auction or at a tender may request the avoidance[50] of the contract concluded, where a party to that contract, another participant, or a person acting in collusion with them has affected the result of the auction or tender in a manner contrary to the law or good morals. Where a contract has been concluded to the benefit of another, that contract may also be avoided upon the request of the party to the benefit of whom the contract has been concluded, or that of his or her mandatary. However, pursuant to Article 70^5 § 2 of the PolCC, the right referred to above lapses upon the expiry of a term of one month from the day on which the person entitled became aware of the existence of the ground for avoiding the contract, and no later than a year since the contract was concluded.

4.4. Negotiations

As a separate mode of forming a contract according to the PolCC, negotiation is governed by Article 72 §§ 1 and 2 of the PolCC. Where the parties engage in negotiation in order to conclude a particular contract, the contract is concluded when the parties arrive at an understanding as regards the entirety of the terms and conditions subject to negotiation (§ 1). It should be noted here that the parties are free to limit the scope of negotiations to certain of all the terms and conditions of a given contract, and they may conclude a separate contract governing the negotiation itself, even one at variance with the rule in Article 72 of the PolCC on the moment when the contract is concluded. In any case, essential terms and conditions have to be agreed upon, yet if negotiation proceeds beyond the essential terms and conditions for a contract and

50 It should be added here that while the contested act is not null and void since its commission for the purposes of Article 70^5 of the PolCC, a judicial decision on voidability renders it void *ex tunc*, such a decision being constitutive of nullity (see Brzozowski in Pietrzykowski, 2020, on Article 70^5 of the PolCC).

the parties have not agreed otherwise, the contract is not formed until the negotiation is completed.[51] Pursuant to § 2, a party that commenced or continued to negotiate in a way contrary to good morals, in particular with no intent to conclude a contract, shall be obliged to redress any damage that the other party suffered by the fact that they relied on the conclusion of the contract. Where negotiation involves a letter of intent, a primary purpose for a letter of intent pursuant to Polish law according to the Supreme Court is to express the intent of the parties to conclude a specified, definitive contract, usually following negotiation. Thus, letters of intent are not definitive and do not form contracts in and of themselves, neither do they bind the parties by the rules on negotiation, unless it follows otherwise from a specific letter of intent at issue. However, such a situation would have to be proven on a case-by-case basis.[52]

Confidentiality of negotiation is subject *inter alia*[53] to Article 72^1 §§ 1 and 2 of the PolCC, where it is provided (§ 1) that if, in the course of negotiations, a party disclosed information on condition of confidentiality, the other party is obliged not to disclose and not to transmit such information to any third parties and not to use that information to their own ends, unless the parties have agreed otherwise. Pursuant to § 2, where there is a complete or partial failure to perform the obligations referred to in § 1 cited above, the entitled party may claim either redress of damages against the counterparty or surrender of profits acquired by that counterparty. While the above rules on liability are standalone statutory rules,[54] the parties may conclude a contract for negotiation and arrange their rights and duties in the course thereof, including on the issue of confidentiality. However, they cannot relieve themselves of their liability for intentional harm to each other, as any such terms and conditions would be null and void.[55]

5. Romania

5.1. Pre-contractual negotiations

The contract can be formed instantly, or it can be negotiated progressively as it is formed, following negotiations and exchanges of proposals. The making of the agreement is generally preceded by negotiations to conclude the contract. Even if negotiations do not always lead to the conclusion of a contract (the parties involved do not

51 According to the judgment of the Polish Supreme Court of May 15, 2014, case Ref. No. II CSK 450/13, reported in Wolters Kluwer's LEX, No. 1487084.

52 According to the judgment of the Polish Supreme Court of October 6, 2011, case Ref. No. V CSK 425/10, reported in OSNC 2012/4/52.

53 Among other things, where information made available as confidential is a business secret (*tajemnica przedsiębiorstwa*), illicit use or disclosure thereof may constitute an act of unfair competition (*czyn nieuczciwej konkurencji*) prohibited by the Act of April 16, 1993, on Combating Unfair Competition (*ustawa o zwalczaniu nieuczciwej konkurencji*), Article 11 (1).

54 For more on pre-contractual liability in the course of negotiation see Kubsik, 2015, Chap. VII 'Odpowiedzialność z tytułu nieuczciwych negocjacji na gruncie prawa polskiego.'

55 According to the PolCC, Article 473 § 2.

reach an agreement), pre-contractual negotiations are crucial, and the legislator has therefore devoted specific rules to them.

The parties are free to initiate, conduct, and break off negotiations, and cannot be held responsible for their failure to reach an agreement. Any party entering into a negotiation is, however, bound to respect the requirements of good faith. The parties cannot validly stipulate—by an arrangement governing the manner in which pre-contractual negotiations are to be conducted—any limitation or waiver of this obligation. It is contrary to the requirement of good faith, *inter alia*, for a party to enter into or continue negotiations without the honest intention of concluding the contract. It also constitutes bad faith conduct if a person enters into contractual negotiations knowing that he or she lacks the technical, organizational, or financial capacity to meet the other party's requirements and will be unable to perform the contract.[56]

The party who initiates, continues, or breaks off negotiations contrary to good faith is liable for the damage caused to the other party (*culpa in contrahendo*). For example, if a person requests a contractual offer without any intention of accepting it, the preparation of which requires some effort (e.g., preliminary design work), he or she may be held liable for damages. In assessing the loss, account will be taken of the costs incurred during negotiations (*damnum emergens*), but also of opportunity lost due to the other party's rejection of offers from third parties (*lucrum cessans*) and any similar circumstances.

For instance, it is contrary to the principle of good faith if there are ongoing discussions about purchasing a property and the potential buyer has expressed an intention to buy only if specific changes are made to the property and has provided building plans for this purpose. If the owner starts to implement the changes but the potential buyer then stops negotiating, the latter may be held liable for damages.[57]

Another aspect of particular importance is the duty of confidentiality in pre-contractual negotiations.[58] Thus, according to the law, when confidential information is communicated by one party during negotiations, the other party is bound not to disclose it and not to use it for its own benefit, regardless of whether the contract is concluded or not. Breach of this obligation entails liability for the party at fault.

Nothing prevents the parties from concluding an agreement (a preparatory contract) determining and detailing the legal framework applicable to the pre-contractual negotiations. If such an agreement exists, the contractual liability of the person at fault will be triggered in the event of a breach. If there is no such agreement, as is mostly the case, the perpetrator's non-contractual liability (for an unlawful act by which damage was caused) will be triggered.[59]

56 Roppo, 2011, p. 168.
57 Diaconiță, 2018, p. 649.
58 Almășan, 2015, p. 2.
59 For further details, see Goicovici, 2008; Dincă, 2009; Almășan, 2013.

5.2. The offer to contract

The contract is concluded by the parties negotiating it or accepting without reservation an offer to contract. For the contract to be concluded, it is sufficient for the parties to agree on the essential elements of the contract, even if they leave certain secondary elements to be agreed upon later or entrust their determination to a third party. The contract is perfectly valid even if the parties do not agree on the elements considered secondary, or the third party appointed to determine these elements does not make any decision. In such a case, the court will be called upon to order the contract to be supplemented by these secondary elements at the request of either party, taking into account, according to the circumstances, the nature of the contract and the intention of the parties. In other words, partial consent, made on elements considered essential, creates the contract.

The offer is a genuine unilateral juridical act; it may issue from the person who takes the initiative to conclude the contract, which determines its content, or, depending on the circumstances, the one who proposes the last essential element of the contract. We are in the presence of an offer only if such an express or tacit expression of will satisfies certain conditions. In general, these requirements can be systematized by the serious, firm, precise, and complete nature of the offer and, lastly, by the requirement that the offer be addressed to a specific person.[60] A proposal addressed to unspecified persons (*ad incertas personas*, i.e., an offer addressed to the public at large), even if it is precise, does not count as an offer but, depending on the circumstances, as a request for an offer or an intention to negotiate. However, a proposal addressed to unspecified persons is an offer if it follows from the law, from custom, or without doubt from the circumstances.

The offer is irrevocable in three situations. An offer containing a time limit for acceptance is irrevocable until the expiry of the specified period. An offer is also irrevocable when it can be considered as such based on the agreement of the parties, established practices between them, negotiations, the content of the offer, or usages (customary practice). An offer without a time limit addressed to a person who is not present is also irrevocable within a reasonable period, determined by the circumstances within which the addressee must receive it, consider it, decide whether to accept it, and, as the case may be, communicate acceptance.

The offer lapses if the acceptance does not reach the offeror within the time limit (in the case of an offer with a time limit for acceptance) or within a reasonable period of time (in the case of an offer without a time limit for acceptance addressed to an absentee).

An offer without a time limit for acceptance addressed to a person present also lapses if it is not accepted immediately. These rules also apply to an offer made by telephone or other means of telecommunication if those means are able to immediately display any acceptance that may occur. The offer also lapses if the offeree refuses it. The submission of a counteroffer by the addressee constitutes a refusal of the initial offer.

60 Veress, 2020, pp. 36–37.

5.3. The acceptance

Any action of the offeree constitutes acceptance if it unambiguously indicates his or her consent to the offer and reaches the offeror in due time, even if the offeror does not take cognizance of it for reasons beyond his control. As was stated by the Romanian High Court of Cassation and Justice, in order to constitute an acceptance, the expression of the will of the offeree must not be limited to a simple confirmation of receipt of the offer but must unequivocally express the will of the offeree to be legally bound, i.e., to conclude the contract under the conditions proposed in the offer.[61]

Silence or inaction on the part of the addressee shall, as a rule, not constitute acceptance, unless it results from the law, the agreement of the parties, established practice between them, usages, or other circumstances. Acceptance may, however, be tacit. Thus, tacit acceptance may be expressed in a shipment of the goods ordered or an advance payment, as different from mere silence, which is not expressed in anything.

In conclusion, the acceptance must be consistent with the offer (the requirement of conformity), must be unconditional and unquestionable, must issue from the offeree, and must occur before the offer lapses or is revoked. In reality, an unsatisfactory acceptance does not mean acceptance since there is no agreement of wills (the will of the offeror must be matched by the will of the offeree in order to give rise to the contract). The offeree's reply does not constitute acceptance if it contains amendments or additions that do not correspond to the offer received. The offeree's reply expressed in these terms may, depending on the circumstances, be regarded as a counteroffer.

The offer and its acceptance and revocation take effect only when they reach the addressee, even if the addressee does not become aware of them for reasons not attributable to him. Therefore, the RouCC applies the system of reception.

6. Serbia, Croatia, Slovenia

6.1. Offer and acceptance

6.1.1. Serbia

In the SrbLO the notion of consensual contract dominates the rules on the formation of contracts. This is supported by the very first rule specifying that a contract is deemed to have been concluded when the parties reach agreement on its essential (substantive) elements.[62] The law, however, does not define which elements of the consent of the parties are to be construed as essential. The traditional answer in the legal literature is that these are the elements without which the contract may not exist and regarding which it has been concluded.[63] The court may not substitute the parties

61 Commercial Section, decision No. 35/2009, published in Buletinul Casației No. 3/2009, p. 33.
62 SrbLO, Article 26.
63 Draškić in Perović, 1995, p. 63.

in determining the building blocks of the content of a contract. For this is reason it is up to the parties to devise at least the essential elements of their agreement. Some elements are considered essential because the law requires them. However, the parties are also free to raise the relevance of any non-essential element to the level of an essential one. These are elements that become essential by the parties' will.[64] The requirement to reach an agreement on essential elements does not necessarily mean that the parties need to specify them in their agreement in all necessary detail. The contract is deemed valid if the consent of the parties is sufficiently defined and complete.[65]

Often, one or both parties may be obliged to conclude a contract, either because the law so mandates or the parties have agreed to do so in a pre-contract. In this regard, the SrbLO prescribes that if according to the law there is a duty to conclude a contract, the interested party may request the conclusion of the contract without delay.[66] In addition, if there is a mandatory regulation affecting the content of a contract, entirely or in part, such regulations are considered part of the contract concluded, supplementing or replacing the terms of the contract that are at variance with the regulations.[67] Failing to conclude a contract triggers a special form of liability for damages of the party who was obliged to conclude it.[68]

The statements of the parties by which they reach an agreement, that is the offer (*ponuda*) and acceptance (*prihvat ponude*), may be communicated in any form capable of conveying meaningful information unless a specific formality is prescribed. The SrbLO provides that the parties' contractual intent may be expressed by words, by usual signs, or by other conduct from which the existence of the contract can be inferred with certainty.[69] Quite often, the consent of a third party is required for the contract to be valid (in case of minors, parties lacking capacity to contract, etc.). These situations are properly regulated in the rules pertaining to those specific situations. In the part pertaining to the general rules of contract law the SrbLO specifies, however, that the consent of a third party may be given before or after the conclusion of the contract. The former is named a permission (*dozvola*), the latter an approval (*odobrenje*) in the meaning of 'ratification.'[70] In both cases the consent of a third party must be given in the same form that is prescribed for the contract, if there is a formal requirement for a given contract.[71]

Concerning the time and place of the formation of contract, the SrbLO provides that the contract is considered concluded when the offeror (*ponudilac*) receives the acceptance from the offeree (*ponuđeni*) by which the latter accepts the terms of

64 Draškić in Perović, 1995, p. 64.
65 Živković, 2006, p. 208.
66 SrbLO, Article 27 (1).
67 SrbLO, Article 27 (2).
68 SrbLO, Article 183.
69 SrbLO, Article 28 (1).
70 SrbLO, Article 29 (1).
71 SrbLO, Article 29 (2).

the offer.[72] The authoritative sources of legal literature are of the opinion that this approach, the so-called theory or system of reception, protects the interest of both parties, since neither may influence the time of the conclusion of the contract contrary to the principle of good faith and fair dealing. On the other hand, both parties bear the risk of the non-delivery of their respective statement: the offeror of the offer and the offeree of the acceptance.[73] As for the place of formation of the contract, unless otherwise specified in the contract, it is considered that the contract has been concluded where the offeror had his or her headquarters or place of residence, as appropriate, at the time when the offer was made.[74]

The law provides strict requirements for the statement of the offeror intended as an offer in order to be qualified as legally binding. A proposal to conclude a contract addressed to a specific person is legally binding if it contains all the essential elements of the prospective contract, expressed in a way enabling the formation of the contract by its simple acceptance.[75] The statements of the parties are not required to include non-essential elements, and the parties' failure to address non-essential elements will not result in flawed formation of the contract. In lack of an agreement to the contrary, any non-essential elements may be determined by the court, taking into account the precontractual negotiations, established practice between the parties, and usages.[76] Normally the offer must be addressed to a specified person, who is the offeree. Exceptionally, the SrbLO considers valid an offer made to an indefinite number of persons (a general offer), if it comprises the essential elements of the contract the offeror intends to conclude, unless a different conclusion may be implied from the circumstances of the case or applicable usages.[77] The law specifically states that displaying merchandise along with a price is considered an offer, unless the circumstances of the case or usages justify a different conclusion.[78] This is called a real (in the sense of 'material') offer (*realna ponuda*), since it consists of real (material) acts of the offeror embracing essential elements of the contract and not from dispatching an offer formulated in words, either in oral or in written form.[79] The vast majority of goods in the retail market is merchandised in this manner. However, not all proposals to conclude a contract qualify as an offer in the legal meaning of the word. The law explicitly states that dispatching catalogues, quotations, price-lists, and notifications of other kind, such as commercials in printed media or flyers, by radio or TV channels, or in any other way, shall not constitute an offer for the conclusion of the contract but merely an invitation to make an offer (*poziv da se učini ponuda*) under the proffered terms.[80]

72 SrbLO, Article 31 (1).
73 Draškić in Perović, 1995, p. 75.
74 SrbLO, Article 31 (2).
75 SrbLO, Article 32 (1).
76 SrbLO, Article 32 (2).
77 SrbLO, Article 33.
78 SrbLO, Article 34.
79 Draškić in Perović, 1995, p. 82.
80 SrbLO, Article 35 (1).

Although an invitation to make an offer does not produce the legal effects of a legally binding offer, one should not rush to the conclusion that it does not produce any effects. After all, the dispatcher initiated the procedure of precontractual negotiations by sending (solicited or unsolicited) commercial or advertising material. Therefore, the law prescribes that the dispatcher of such material shall be held liable for damage caused to the other party (in this case the offeror) if that dispatcher rejects the offer received without a justifiable cause.[81] The term 'justifiable cause' is to be construed similarly as in relation to the liability for *culpa in contrahendo*: The dispatcher shall be held liable if he or she declined the offer without a sound economic reason.[82]

The core issue in relation to the conclusion of a contract by consonant offer and acceptance is whether the offer produces a legally binding obligation, and if it does, under what conditions. The position of the SrbLO law is fairly strict, taking into account that the offer must include the essential elements of the prospective contract. The SrbLO prescribes explicitly that the offeror is bound by the terms of his or her offer, unless it is associated with a disclaimer that states in advance his or her intention not to consider the terms of the offer binding, or if such a disclaimer may be implied from the circumstances of the given case.[83] In addition, the offer may be revoked (or replaced by another with different terms) only if the statement on revocation or modification of the offer reaches the offeree prior to, or at the same time as the initial offer at the latest.[84] This presupposes that the statement on revocation or modification of the offer is dispatched by means that are quicker than the means by which the initial offer has been sent (for instance, the initial offer was sent by regular mail, the statement revoking or altering it by e-mail, phone call, text message, etc.). Under the SrbLO, therefore, an effective offer, that is, one that has been delivered to the offeree, can be neither revoked nor modified by the offeror. The initiative for the conclusion of the contract shifts to the offeree, who is the one who decides whether the contract will be concluded.[85]

Having in mind the profound legal consequences of the binding nature of the offer, the question as to how long the legal effects of the offer exist seems crucial. The SrbLO prescribes that an offer in which a time limit for its acceptance has been indicated binds the offeror until its expiry.[86] Although this might seem self-explanatory, a question reasonably arises as to on which day the time limit commences. The law envisages that if the offeror specified the time limit in a letter or telegram, it commences from the day indicated in the letter or when the telegram has been dispatched at the post office. Likewise, in the case in which the letter is undated, the time limit commences from the day when it was dispatched at the post office.[87] The greatest dif-

81 SrbLO, Article 35 (2).
82 Draškić in Perović, 1995, p. 84.
83 SrbLO, Article 36 (1).
84 SrbLO, Article 36 (2).
85 Dudaš, 2008, pp. 832–833.
86 SrbLO, Article 37 (1).
87 SrbLO, Article 37 (2) and (3).

ficulty in determining the time period in which the offer binds the offeror is when the contract is being concluded between parties who are in legal terms considered absentees, and the offer does not provide a deadline for acceptance. Legally, parties are absent (i.e., not present) if there is no possibility for them to maintain direct communication.[88] For this situation the law provides that if the offer is made to a person who is not present and no deadline for acceptance is indicated in the offer, it binds the offeror for the time regularly required for the offeree to receive the offer, deliberate on it, and decide whether he or she accepts the offer, and for the acceptance to have been delivered to the offeror.[89]

The principle of parallelism (symmetry) of formalities applies to the offer as well. The SrbLO provides that if the contract is to be concluded under some formal requirement, the offer binds the offeror only if it has been communicated in the form prescribed for the valid contract.[90]

As for acceptance, the SrbLO prescribes that the offer is deemed to have been accepted when the offeror receives the statement of the offeree by which he or she accepts the terms of the offer.[91] This rule is in line with the one provided for regarding the moment of the conclusion of the contract, specifying that the contract is deemed to have been concluded when the offeror receives the acceptance. Since the offer needs to satisfy strict requirements (the most notable being that it must contain all essential elements of the contract), the requirements provided for the acceptance are less strict. The SrbLO explicitly states that the offer may be implicitly accepted by conduct: For instance, if the offeree dispatches the thing that is the object of the contract, pays the price, or performs any other act that could be considered a statement of acceptance in light of the offer itself, the practice developed by the parties, or any applicable usages.[92] Regarding revocation of the acceptance, the rules are the same as in relation to the offer: The acceptance may be revoked if the offeror receives the statement on revocation earlier or at the same time with the acceptance, at the latest.[93]

The SrbLO regulates explicitly the process of conclusion of a contract between parties who are considered present. In legal terms, the parties are present if there is a possibility of direct communication between them, though it is not required that the parties be physically in the same place.[94] If the parties are legally considered present, the offeree is required to accept the offer immediately, otherwise it is considered rejected, unless the circumstances of the case imply that the offeree is entitled to a certain time for consideration.[95] Specifying somewhat obsolete technological means by today's standards, the law states that an offer communicated by telephone,

88 Radovanović in Pajtić, Radovanović and Dudaš, 2018, p. 259.
89 SrbLO, Article 37 (4).
90 SrbLO, Article 38 (1).
91 SrbLO, Article 39 (1).
92 SrbLO, Article 39 (2).
93 SrbLO, Article 39 (3).
94 Salma, 2009, p. 243.
95 SrbLO, Article 40 (1).

teleprinter, or direct radio link is considered an offer made to a person who is, in legal terms, present.[96]

The offeree may act in different ways. He or she may simply neglect the offer or reject it outright. In these cases, the contract is not concluded, but the pre-contractual negotiations may still continue. If the offer is unconditionally accepted by the offeree, the contract is formed.[97] A somewhat more delicate situation arises if the offeree accepts the offer, but does so while altering the terms of the offer. In this case the initial offer is considered as being rejected, whereas the statement of the offeree shall be construed as a new offer issued by the offeree and addressed to the offeror.[98]

Since the requirements for the validity of the acceptance with respect to its content are far less stringent than those relating to the offer, the range of cases in which it may be expressed by implied conduct is wider. It is far easier to express the mere consent to—or rejection of—an offer by different forms of implied or indirect conduct, since the essential elements of the contract need not be indicated in the acceptance explicitly. The acceptance is merely a reaction to the offer. However, a question arises as to whether complete inactivity, that is, the silence and passive conduct of the offeree, may constitute acceptance. The SrbLO explicitly states as a general rule that the silence of the offeree does not mean acceptance of the offer.[99] Thus, the philosophical maxim[100] from canon law, according to which the one who is silent is considered to have agreed (*qui tacet consentire videtur*), does not apply in contract law as a general rule.[101] In addition, the offeror cannot alter the application of this rule unilaterally: He or she cannot impose a presumption according to which silence of the offeree shall constitute acceptance.[102] The same idea is reflected in the rule of the SrbLO prescribing that a term of the offer according to which the silence of the offeree or other omission on his or her behalf (e.g., failure to refuse the offer within the indicated time limit, or to return delivered goods or the subject of the contract offered to be entered into within the indicated time limit) is to be considered acceptance, shall be without any legal effect.[103] The rule according to which silence does not constitute acceptance knows, however, two general and several special exceptions. The first general exception is the norm whereby silence of the offeree shall constitute acceptance if he or she is in a long-term business relationship with the offeror, the offeror makes an offer relating to the goods with respect to which the relationship has been developed, and the offeree failed to reject the offer immediately or within the designated deadline.[104] The purpose of this rule is to facilitate transac-

96 SrbLO, Article 40 (2).
97 Orlić, 1993, p. 345.
98 SrbLO, Article 41.
99 SrbLO, Article 42 (1).
100 Liber Sextus Decret, 5, 12, regula XLIII—Source: Orlić, 1993, p. 349.
101 Draškić in Blagojević and Krulj, 1980, p. 141.
102 Draškić in Blagojević and Krulj, 1980, p. 141.
103 SrbLO, Article 42 (2).
104 SrbLO, Article 42 (3).

tions between long-term business partners with respect to goods that are usually sold between them.[105] The second general exception is related to mandate-type contracts. The SrbLO provides that if a person proposed to another person to perform specific transactions him- or herself according to the latter's orders, and whose professional activity is the performance of such orders, must perform an order received if it is not immediately rejected.[106] For instance, if a commercial agent receives a mandate to represent a client in a transaction, he or she needs to reject it immediately, for otherwise his or her silence shall be considered acceptance of an offer to conclude a contract on mandate. The law further states that the time of the conclusion of the contract shall be the time when the offer or the mandate was communicated to the offeree.[107] Aside from these general exceptions to the rule according to which silence of the offeree does not constitute acceptance, there are numerous other exceptions in relation to specific contracts. The most notable is that in relation to insurance contracts, regarding which the SrbLO provides that a written offer communicated to the insurer that is in line with the terms of the insurance communicated to the insured person is considered accepted if the insurer does not reject it within 8 days (or within 30 days if medical examination of the insured is required).[108]

The SrbLO differentiates the consequences of a belated acceptance from those of a belated delivery of the statement of the offeree containing acceptance. If the offeree accepts the offer when the right to accept had already lapsed (i.e., the offeree exceeded the stipulated deadline for acceptance, or the reasonable time required for deliberation has elapsed when no explicit deadline was set), the acceptance shall be considered a new offer communicated by the offeree to the initial offeror.[109] As indicated earlier, dispatching an offer produces a binding effect on the offeror. He or she therefore has a legitimate interest that the binding effect of the offer and the offeree's power to create the contract by accepting the offer cease at a foreseeable point in time. Enabling the offeree to conclude a contract by accepting the offer after the deadline or the reasonable time for deliberation has elapsed endangers this legitimate interest of the offeror. Therefore, belated acceptance cannot produce a contract, since the binding offer of the offeree ceased in the meantime.[110] A different situation arises, however, when the acceptance has been given in a timely manner but delivered to the offeror after the deadline or the reasonable time for acceptance has expired. For this situation the law provides that the contract is formed, and the acceptance achieves its contract-creating function, if the offeror knew or should have been aware that the acceptance was dispatched before the expiry of the deadline, or the reasonable time for deliberation if no deadline is determined.[111] Nonetheless, even in this case the

105 Orlić, 1993, pp. 354–355.
106 SrbLO, Article 42 (4).
107 SrbLO, Article 42 (5).
108 SrbLO, Article 901 (2) and (3).
109 SrbLO, Article 43 (1).
110 Draškić in Blagojević and Krulj, 1980, p. 143.
111 SrbLO, Article 43 (2).

offeror may prevent the formation of the contract if immediately or at the latest on the next working day, or even before the receipt of the acceptance but after the deadline or reasonable time for accepting the offer have elapsed, he or she informs the offeree that the terms of the offer are no longer binding.[112]

The SrbLO regulates the impact of death or incapacity of either party on the existence of the offer and its binding effect. It states that if the death or incapacity of either party occurred before the acceptance of the offer, this does not make the offer ineffective unless a different conclusion may be drawn from the parties' intent, usages, or the nature of the transaction.[113] For instance, the offeror may state in the offer that it loses its binding legal effect if either party dies or loses capacity to contract. Some contracts are by their nature inseparably tied to parties, making the contract pointless if the initial party dies or loses capacity. These are the *intuitu personae* contracts.[114]

6.1.2. Croatia

The HrvLO in the most part follows the content and logic of the rules on formation of contract inherited from the former federal law on obligations. In the same wording as the SrbLO, it specifies when the contract is considered as having been concluded; the duty to conclude a contract and the mandatory content of the contract; the means of expressing contractual intent; consent or approval by a third party; the time and place of the formation of contract; offer; general offer; display of goods; dispatching catalogues and advertising material; the binding legal effect of the offer; the time limitation of the offer's binding effect; the form of the offer; acceptance; acceptance by an offeree who is present; acceptance with alterations; silence of the offeree; belated acceptance and belated delivery of the statement of acceptance; and the impact of the death or incapacity of either party on the binding effect of the offer.[115] Regarding these rules only a few changes have been introduced, which are in the most part justified by the evolution of means of communication since the adoption of the former federal law. The HrvLO specifies, namely, that aside from the requirement that these must be capable of expressing the existence of the intention to conclude a contract, they also need be capable to transmit information about its content and the identity of the person who formulated it.[116] The former federal law merely required that the means of communication of intent must be capable of expressing information on its existence. In addition, the HrvLO explicitly states that the contractual intent can be expressed by different means of communication.[117] There were no such rules in the former federal law. The literature is of the opinion that today the means of communication have evolved and changed to such an extent that no closed enumeration of possible means of communication could accommodate such changes. Therefore, a general

112 SrbLO, Article 43 (3).
113 SrbLO, Article 44.
114 Draškić in Blagojević and Krulj, p. 145.
115 HrvLO, Articles 247–250, 252–259, 262–267.
116 HrvLO, Article 249 (1).
117 HrvLO, Article 249 (2).

clause allowing any means of communication seems a more prudent course of action for the legislator.[118]

In addition, there are some new rules in the HrvLO that do not have a direct counterpart in the former federal law. These rules seem to be aimed at adapting the process of formation of contract to everyday realities of commercial transactions.

First, the HrvLO regulates the validity of an offer issued by an unauthorized person on behalf of a business organization. It states that a written offer signed by an unauthorized person obliges the offeror, provided it is issued on the template of a commercial letter usually used by the apparent offeror in business transactions and signed by the usual means, relating to a transaction in which the offeror is usually engaged in, and it is within the confines of the ordinary scope of such transactions, and provided that the offeree acted in good faith (if he or she did not know, nor should have been aware of the fact, that the offer was signed by an unauthorized person).[119] The same rules apply to acceptance as well.[120] These conditions must be satisfied cumulatively.[121]

Second, the HrvLO prescribes that an offer communicated by the offeror by phone or telegram must be confirmed (i.e., repeated) to the offeree in written form and must be dispatched by registered mail the next working day at the latest.[122] The offeror's omission to comply with this requirement does not render the contract invalid, but that offeror shall be liable to the offeree for any damage caused.[123] These rules are also applicable to acceptance *mutatis mutandis*.[124]

6.1.3. Slovenia

For the most part, the SvnCO retained the rules on offer and acceptance inherited from the former federal law.[125] The only difference in the structure of this part of the law may be identified in the translocation of the rules on mistake from the part pertaining to flaws of contractual intent into the one pertaining to formation of contract,[126] which is discussed in more details in the chapter regarding the flaws of contractual intent.

In terms of the content of the rules on offer and acceptance, only minor discrepancies may be identified in comparison to the former federal law. The SvnCO has specific rules applicable to a case where the offeree accepts the offer with modification of only minor relevance. The general rule is the same as in the former federal law: An acceptance with modification of the terms of the offer is considered rejection of the offer received and constitutes a counteroffer.[127] However, if the modifications

118 Gorenc in Gorenc, 2014, p. 372.
119 HrvLO, Article 260 (1).
120 HrvLO, Article 260 (2).
121 Josipović and Nikšić, 2008, p. 78.
122 HrvLO, Article 261 (1).
123 HrvLO, Article 261 (2).
124 HrvLO, Article 261 (3).
125 SvnCO, Articles 15, 17–19, 21–32.
126 SvnCO, Article 16.
127 SvnCO, Article 29 (1).

of the offer do not substantially supplement or change the terms of the initial offer, the offer is considered accepted, unless the offeror immediately objects to such an acceptance. If he or she fails to do so, the contract is considered concluded in accordance with the terms of the offer, as modified by the acceptance of the offeree.[128] The law further specifies the kind of modifications of the terms of the offer that have such significance as to modify the offer substantially. These are modifications relating to price, payment, the quality or quantity of the goods, the place and time of delivery, the scope of liability of one party in relation to the other, and means of dispute resolution.[129] In addition, the rules on the effects of belated acceptance and belated delivery of acceptance have also been changed to a minor extent in comparison to the former federal law. The SvnCO prescribes that an offer accepted with a delay shall be regarded as a new offer by the offeree, unless the offeror immediately notifies the former that the contract is considered concluded according to the initial offer.[130] Regarding belated delivery of the acceptance, it prescribes that if it is clear from the document containing acceptance that it was sent under circumstances that imply that the offeror would have received it in time had it been duly transmitted, the contract shall be deemed to have been concluded, unless the offeror immediately informs the offeree that he or she no longer considers the offer binding.[131]

6.2. Negotiations and bargaining

6.2.1. Serbia

The principle of the freedom of contract means also the freedom not to conclude a contract. This idea is reflected in the rule of the SrbLO prescribing that pre-contractual negotiations do not imply a duty to conclude a contract and that either party may break them off at any time.[132] Negotiations, however, always entail some costs. The SrbLO distributes these in a fair manner: Each party bears his or her costs of precontractual negotiations while the common costs are distributed evenly, provided the parties have not agreed otherwise.[133] These rules apply to conducting negotiations in good faith. The principle of good faith and fair dealing obliges the parties to demonstrate earnest intention in negotiations and make efforts to reach a meeting of minds. This principle is further elaborated in the rule providing for sanctions for the party that conducted negotiations in bad faith. The SrbLO specifies that a party that conducted negotiations without earnest intention of concluding a contract shall be liable to compensate the other party for any damage accrued in relation to these negotiations. Likewise, the party shall be held liable for damages if he or she initiated negotiations with sincere intentions to conclude a contract, but withdrew from them without a

128 SvnCO, Article 29 (2).
129 SvnCO, Article 29 (3).
130 SvnCO, Article 31 (1).
131 SvnCO, Article 31 (2).
132 SrbLO, Article 30 (1).
133 SrbLO, Article 30 (2).

justifiable cause.[134] It is the court's task to assess whether the cause of the withdrawal from the negotiations was legitimate, taking into account the circumstances of the case.[135] Legal literature classifies these into several groups.[136] First, there are reasons related to the party withdrawing from negotiations (for instance, an assessment that deadlines cannot be met or the required quantities cannot be produced). Second, circumstances on the side of the other party also may constitute justifiable cause for a withdrawal from negotiations, such as gaining knowledge of other party's insolvency or default in performing obligations. In addition, circumstances outside the parties' reach may also be relevant: import or export restrictions, regulations of state authorities, etc. Finally, a justifiable cause for withdrawal from negotiations may be the cessation of the economic reason to conclude the contract or having missed the opportunity of concluding another contract that was a precondition of the conclusion of the contract on which the parties negotiated.[137] In all these cases the withdrawing party is required to notify the other party in due time about the emergence of circumstances that represent a justifiable cause of withdrawal from the negotiations.[138]

6.2.2. Croatia

In relation to precontractual negotiations, the HrvLO introduced important amendments in comparison to the rules of the former federal law. As its predecessor, it also states that the results of precontractual negotiations are not binding.[139] It does not prescribe explicitly, as the SrbLO does, that the parties may discontinue the negotiations at any time, but the same conclusion seems evident. The rule on the distribution of costs is the same as in the SrbLO.[140] However, major changes have been introduced regarding *culpa in contrahendo*, that is, the liability for damage caused by conducting negotiations in bad faith. The HrvLO explicitly states that the party conducting or discontinuing negotiations contrary to the principle of good faith and fair dealing is obliged to compensate the counterparty for the damage caused.[141] The subsequent section names only one of the two particular cases that trigger liability for damage in the SrbLO, which is conducting negotiations without an earnest intention to conclude a contract.[142] The section on discontinuance of the negotiations without a justifiable cause has been repealed from the text of the former law. However, such case could still be implied by the general prohibition of conducting negotiations contrary to the principle of good faith and fair dealing. The major difference between the SrbLO and the HrvLO is that the SrbLO specifically enumerates the two situations that may trigger liability for *culpa*

134 SrbLO, Article 30 (3) and (4).
135 Orlić, 1993, p. 99.
136 Barbić, 1980, p. 17; Draškić in Blagojević and Krulj, 1980, pp. 118–119.
137 Orlić, 1993, p. 100.
138 Barbić, 1980, pp. 17–18.
139 HrvLO, Article 251 (1).
140 HrvLO, Article 251 (6).
141 HrvLO, Article 251 (2).
142 HrvLO, Article 251 (3).

in contrahendo, whereby the list becomes exclusive. On the other hand, the HrvLO makes the emergence of liability dependent on the infringement of the principle of good faith and fair dealing.[143] The one specific case is mentioned only as an example; any conduct of the parties in relation to pre-contractual negotiations infringing the principle of good faith and fair dealing triggers liability for damage. Linking the liability for damage accrued as a consequence of conducting negotiations directly to the principle of good faith and fair dealing may be considered a better regulatory method.[144]

Another novelty of major importance in the HrvLO in comparison to the former federal law is that it explicitly regulates the legal consequences of divulging or misusing confidential information shared by the parties in pre-contractual negotiations.[145] It prescribes that if one party to the negotiations shared to the counterparty confidential information or enabled him or her to acquire such information, the counterparty, unless otherwise agreed, is not entitled to disclose it to a third party, nor to make use of it in his or her own interest, regardless whether the contract has subsequently been concluded or not.[146] If the party in negotiation infringed this duty of confidentiality, he or she may be held liable for the damage caused by the disclosure of confidential information and may be ordered to transfer the counterparty the benefits gained in relation to disclosure.[147] Therefore, the parties' duty to respect the confidentiality of information accessed during negotiations, in order to act in conformity with the principle of good faith and fair dealing, means both a prohibition on sharing such information with third parties and on misuse in their own interest.[148] This rule comprises only information that has been willingly provided by the other party in the course of negotiations. Should the party obtain confidential information by unlawful means, other legal institutions shall apply, such as deceit, threat, or coercion.[149]

6.2.3. Slovenia

The SvnCO contains[150] verbatim the same rules on precontractual liability as the SrbLO. This means that the rules from the former federal law on obligations have been transposed to the SvnCO without any significant alterations.

6.3. Auction and tender

6.3.1. Serbia

The SrbLO does not contain any general rules pertaining to the conclusion of a contract by means of auction or tender in the part pertaining to the formation of contract, but

143 See Slakoper at al., 2022, p. 569.
144 Josipović and Nikšić, 2008, p. 77; Dudaš, 2007, p. 383.
145 See Slakoper at al., 2022, pp. 569–570.
146 HrvLO, Article 251 (4).
147 HrvLO, Article 251 (5).
148 Slakoper in Slakoper, Gorenc and Bukovac Puvača, 2009, p. 290.
149 Gorenc in Gorenc, 2014, p. 376.
150 SvnCO, Article 33.

that by no means implies that a contract is not formed properly if it has been concluded by means of an auction.[151] However, this means of concluding a contract is specifically regulated in relation to contracts for works (*locatio conductio operis*). The law prescribes that an invitation sent to a definite or indefinite number of persons to tender for the performance of certain works, under certain conditions and with certain guarantees, obliges the person who sent the invitation to conclude a contract for works with the one offering the lowest price, unless such obligation was excluded in the invitation for bidding. In case of exclusion of the obligation to conclude a contract, the invitation to make a bid shall be considered an invitation to submit an offer to contract under the conditions set in the invitation.[152] These statutory norms have gained different interpretations in the legal literature, since it is not clear from the wording which party makes the binding offer.[153] Some assert that the invitation to make a bid is an offer, unless the person who made the invitation excluded his or her obligation to conclude a contract.[154] Though the wording of the statutory rules indeed provides grounds for such a conclusion, there are other authors who consider that a call for auction is always considered a simple invitation to make an offer.[155] Thus, in the newer literature another solution is suggested: The conclusion of contract by way of auction or tender should not be assessed under the rules of the formation of contract at all, but under the rules on the public promise of reward or call for applications or those on participating at a tender, as separate sources of obligations that should appropriately be applied. By the application of the rules on the public promise of reward, the bidder of the most competitive bid would be considered to have satisfied the public promise, and as a reward might request the conclusion of the contract from the party who initiated the auction or tender.[156]

6.3.2. Croatia

The HrvLO does not regulate explicitly the conclusion of contract by auction or tender in the part pertaining to the general rules of the formation of contract either. However, the rules on general offers are formulated in such a way that they may comprise this means of conclusion of a contract. It the case law it has been established that inviting interested parties to take part in concluding a contract by auction is not considered an offer, only an invitation to make an offer.[157] Though this decision was delivered at the time when the former federal law was still in force in Croatia, the legal literature considers it relevant in relation to the HrvLO.[158] In addition, the HrvLO has the same special rules on conclusion of contract for works by auction or tender[159] as the SrbLO.

151 See in more detail Mićović, 1988, pp. 1513–1524.
152 SrbLO, Articles 604–605.
153 Radovanović in Pajtić, Radovanović and Dudaš, 2018, p. 277.
154 Vizner in Bukljaš and Vizner, 1978, p. 1899.
155 Perović in Perović, 1995, p. 1088.
156 Radovanović in Pajtić, Radovanović and Dudaš, 2018, p. 278.
157 Decision of the Supreme Court of Croatia No. Rev. 3771/99.
158 Gorenc in Gorenc, 2014, p. 383
159 HrvLO, Articles 594–595. See in more detail Momčinović in Gorenc, 2014, p. 949.

6.3.3. Slovenia

As the SrbLO and HrvLO, the SvnCO also does not regulate auction as a means of concluding the contract in the part pertaining to general rules of formation of the contract either, but took over verbatim from the former federal law the rules on concluding a contract for works by auction.[160]

7. Slovakia

7.1. On civil law contracts in general

The SvkCC does not define the term contract (*zmluva*). However, it is generally accepted that a contract is a bilateral or multilateral juridical act based on mutual and substantively identical declarations of intent of two or more subjects of law.[161] Just as the SvkCC does not define what a contract is, neither does it define what a civil contract is. Therefore, it must be assumed that such a contract is a contract that establishes, modifies, or extinguishes a civil law relationship, or that establishes, transfers, modifies, extinguishes, or encumbers a subjective right under civil law.

The SvkCC contains a general regulation of contracts in §§ 43 to 51. This regulation applies not only to contracts concluded under the SvkCC but also to other civil law contracts, including contracts concluded in commercial relationships, even if the State is a party to the civil law relationship.[162] *Per a contrario*, this regulation does not directly apply to so-called public law contracts, nor, for example, to labor law contracts, given the relatively separate position of labor law in the Slovak legal order. On the other hand, since there is no specific general regulation of public law contracts and the labor law regulation is also rather austere, and since civil law rules are an expression of a certain reasonable setting that is not inherent only to civil law regulation, it is not ruled out that civil law rules also apply—to a certain extent—to contracts that are not *per se* civil law contracts.

The binding contractual relationship (*obligatio*) is to be distinguished from promises of so-called social favors (*spoločenské úsluhy*), an institution of law also known as *precarium*, where there is no intention to be bound. These include various, sometimes gratuitous benefits provided by family members, neighbors, etc. It can sometimes be difficult to distinguish these non-binding favors from gratuitous contracts, such as a loan. Thus, the question of whether a juridical act is indeed a contract or merely a social favor must be resolved at the level of interpretation of the intention of the parties.[163]

As regards the actual process of concluding contracts, the SvkCC generally regulates only the conclusion of a contract by means of an offer to conclude a contract

160 SvnCO, Articles 623–624.
161 According to Vojčík, 2018, p. 89.
162 SvkCC, § 1 (2) and § 21.
163 Luby, 1954, p. 498.

and acceptance of such an offer.[164] For commercial relations, the SvkCommC also regulates the negotiation of a contract,[165] the public offer to conclude a contract,[166] and the public commercial tender.[167] The principle is that the content of the contract is determined exclusively by the future parties (or is determined directly by law). Exceptionally, it is permissible in commercial relationships for a court or a third party to supplement certain non-essential parts of the contract.[168] Similarly, in commercial relationships, a contract for the conclusion of a future contract may be concluded with the object of performance being determined only in general terms; in such a case, in the event of disagreement as to the precise content of the contract, recourse may be had to the court or to another designated person.[169]

7.2. Offer and acceptance

When a contract is concluded by means of an offer to conclude a contract (*návrh na uzavretie zmluvy*) and acceptance of such an offer (*prijatie návrhu*), the offer must be sufficiently definite and must imply the intention of the offeror to be bound by it if accepted. The offer is effective from the time it reaches the offeree. It may be terminated only if the termination reaches the offeree at the latest at the same time as the offer itself. Thereafter, the offer may only be revoked provided that the revocation reaches the offeree before he or she has sent the acceptance of the offer. However, the offer may not be revoked if the offeror has expressed in it that it is irrevocable or has fixed a time limit for its acceptance, unless it appears from the offer that it may be revoked even before that time limit.

An oral offer must be accepted immediately, or it shall lapse unless its contents indicate otherwise. Other offers shall be accepted within a specified period or, if no such period has been specified, within a reasonable period. An offer which has been rejected shall lapse.

An offer may be accepted by a timely statement made by the offeree or by other timely action on his or her part from which his or her assent may be inferred. Silence or inaction shall not by itself constitute acceptance of the offer. Acceptance of the offer must reach the offeror since the SvkCC does not recognize the conclusion of a contract by the acceptance of an offer that has not reached the offeror. On the other hand, for commercial relations, the SvkCommC provides at § 275 (4) that, taking into account the content of the offer to conclude a contract or as a result of the practice established between the parties, or taking into account the usages applicable under the SvkCommC, the offeree may accept the offer by performing a certain act in time (e.g., dispatching the goods or payment of the purchase price) without notifying the offeror, in which case the contract is concluded by that act.

164 SvkCC, §§ 43a–44.
165 SvkCC, § 269 et seq.
166 SvkCC, § 276 et seq.
167 SvkCC, § 276 et seq.
168 SvkCommC, § 270.
169 SvkCommC, § 289 et seq.

The acceptance may be revoked if the revocation reaches the offeror at the latest at the same time as the acceptance. Late acceptance may also lead to the conclusion of the contract in two cases: First, if the offeror notifies the offeree without delay that he considers the contract to be concluded despite the late acceptance; and second, if it appears from the letter or other document expressing acceptance that it was sent in such circumstances that it would have reached the offeror in time if it had been transmitted in the usual manner, and the offeror does not without delay notify the offeree that he or she considers the offer to have lapsed.

Acceptance of an offer that contains additions, qualifications, limitations, or other changes shall constitute a rejection of the offer and shall be deemed a new offer. However, a reply that defines the content of the proposed contract in other words is an acceptance of the proposal unless the reply implies a change in the content of the proposed contract.

The contract is concluded at the moment when the acceptance of the offeree to conclude the contract takes effect.

7.3. Negotiations for the conclusion of the contract

Regarding the conclusion of contracts in the context of negotiations (*rokovania o uzavretí zmluvy*), the SvkCommC sets out several basic rules in § 269 et seq. First, the SvkCommC allows for a contract to be considered concluded even if full agreement has not been reached on all its provisions. However, this is under the condition that the provisions that have not been agreed upon must relate only to non-essential parts of the contract. At the same time, the parties must either agree on a method allowing for additional determination of the content, if that method does not depend solely on the will of one party, or they must make it clear beyond any doubt that the contract is valid even if the non-essential part of the contract is not agreed upon or supplemented in the future. Second, where several contracts are concluded in the same negotiation or included in a single instrument, each of those contracts is to be considered separately. However, where the nature or purpose of those contracts known to the parties at the time of their conclusion makes it apparent that they are interdependent, the creation of each of those contracts constitutes a condition precedent to the creation of the others.

7.4. Public offer to conclude a contract

In a public offer to conclude a contract (*verejný návrh na uzavretie zmluvy*) pursuant to § 276 et seq. of the SvkCommC, the offeror addresses unspecified persons for the purpose of concluding the contract. It must be clear from the offer what nature the contract to be concluded shall have, and what are at least its essential elements; otherwise, the offer is deemed merely an invitation to submit offers.[170] An offer may be revoked if the offeror gives notice of the revocation prior to the acceptance of the public offer in the manner in which the public offer was published. The contract is concluded with the

170 Ďurica, 2016a, p. 1125.

person who, in accordance with the content of the public offer and within the time limit specified therein, or otherwise within a reasonable time, first notifies the offeror that he or she accepts the offer, and the offeror confirms the conclusion of the contract. If several persons accept the public offer at the same time, the offeror may choose to which person he or she will confirm the conclusion of the contract. The conclusion of the contract must be confirmed by the offeror without undue delay. If he or she confirms it later, the offeree may reject the contract. However, he or she must also do so without any undue delay. According to the legal literature, if the offeror does not confirm the acceptance of the proposal, the offeree may seek confirmation or damages in court.[171]

7.5. Public commercial tender

Pursuant to § 281 et seq. of the SvkCommC, the contract may also be concluded on the basis of a 'public commercial tender' (*obchodná verejná súťaž*), by means of which the party announcing the tender (*vyhlasovateľ súťaže*) publicly invites offers to conclude a contract. That party must specify in writing and in a general manner the subject-matter of the obligation sought and the principles of the remaining content of the intended contract the conclusion of which he or she desires, and must determine the method of submission of offers and specify the time limit within which offers may be submitted and the time limit for the notification of the successful tenderer. The party that announced the tender shall select the most suitable of the offers submitted and announce its acceptance. If he or she notifies the acceptance of an offer after the specified deadline, the contract shall not be concluded if the successful tenderer notifies him or her, without undue delay after receipt of the notification of the acceptance of the proposal, that he or she refuses to conclude the contract. The party that announced the tender shall be entitled to reject all proposals submitted if he or she has reserved this right in the terms of the tender. According to the legal literature, a breach of the obligation to select the most suitable offer gives rise to an obligation to pay damages. An offeror who believes that his or her proposal was the most suitable and should have been accepted may seek in court to replace the declaration of intent of the party that announced the tender to accept the offered contract,[172] or the invalidity of the contract concluded by that party with another tenderer.[173]

8. Concluding remarks

The process of forming a contract seems to follow similar rules, stemming from the common core of all civil law systems. The notion of a contract is more or less uniform, regardless of the sometimes different wording used. All jurisdictions under analysis are familiar with the notions of offer and acceptance, negotiation, and bargaining.

171 Ďurica, 2016a, p. 1128. See Ovečková in Ovečková, 2017.
172 Ďurica, 2016a, pp. 1135–1136.
173 Ovečková in Ovečková, 2017.

As for auctions and tenders, there are jurisdictions that have regulated them in their norms of civil law, and others that apply the general rules on the formation of contracts to these two specific models. It may also be noted that depending on the legal system, the rules on formation of contracts will or will not apply to public law contracts. It should also be stressed that the notion of 'public contracting' differs significantly depending on the jurisdiction, so application of private law rules to the public sphere requires further scientific enquiry.

It should also be noted that most of the legal systems under consideration have a single set of rules on the formation of contracts for business and non-business relationships. Regardless of the identification of the parties as businesses, consumers, or other entities, the contracts will be concluded in the same way. This shows the tendency toward uniformization of private law. However, two notable exceptions should be listed: Slovakia, with its Commercial Code containing *lex specialis* regarding at least some rules on formation of contract, and Poland. The latter case is interesting, because despite not having a separate commercial code, Polish law recognizes differences between commercial contracts and other contracts. We could almost say—at least as far as the rules on formation of contracts go—that Poland has two separate systems, one for commercial transactions and another for the non-commercial ones. This legislative solution seems odd, yet it appears to be a deliberate choice of the lawmaker.

The good faith (and fair dealing) principle seems to be important to all legal systems considered, although there is no standard model for regulating acting in good faith. The most important example of this principle is the duty to act honestly and in good faith (or, perhaps, trusting that the other party plays fair) during the process of negotiations. Another such example would be the requirement of preserving the secrecy of confidential information divulged by another party in the course of the formation of a contract, and not using such information to achieve undue personal gain. Both cases are strongly connected with the liability for *culpa in contrahendo.*

Rules on offer and acceptance seem again to follow the same model, with an offer being a unilateral act, generally either irrevocable or revocable only in certain circumstances. There is a very clear distinction between an offer and an invitation to treat in all legal systems, with the general conclusion that in case of doubt, an expression of will is an invitation to enter into a contract rather than an offer.

Negotiations also seem to follow the same model, with some of the systems realizing that the division between various procedures of reaching an agreement, e.g., offer and acceptance, negotiations, auctions, and tenders, are rather volatile and in real-life situations often overlap.

The most diverse set of rules regards auctions, tenders, and electronic contracts. Some of the countries have not regulated them and instead rely on standard rules on the formation of contracts. This leads to inevitable discussions of the legal nature of, e.g., an auction bid (for example, is it an offer or just an invitation to treat?). What can be inferred from these systems is that rules on the formation of contract are flexible enough to accommodate various economic and technical novelties without the

need for 'fixing the code.' On the other hand, there are systems that regulate specific modes of formation of contract in this context, usually by having specific rules on auction bids or tenders. Basically, they follow either the Germanic model, which has very limited regulation of auctions, or the Swiss one, where auctions are quite heavily regulated. The same is true of the formation of contract by electronic means, where rules vary from minimal or no regulation, through regulations tailored to pre-Internet technologies, up to detailed regulations of online contracting. Again, there is no winning model: All the countries in question have ways and means to deal with the contractual effects of technological progress.

References

Almăşan, A (2013) *Negocierea şi încheierea contractelor* [Negotiating and Concluding Contracts], Bucureşti: C. H. Beck.

Almăşan, A (2015) 'Despre rolul obligaţiei de confidenţialitate, reglementată prin Article 1184 Cciv.' [About the Role of the Obligation of Confidentiality, Regulated by Article 1184 Civil Code] in Popescu, D A and Popa, I F (eds) *Liber amicorum Liviu Pop. Reforma dreptului privat român în contextul federalismului juridic european*, București: Universul Juridic, pp. 1–8.

Barbić, J (1980) *Sklapanje ugovora po Zakonu o obaveznim odnosima: (suglasnost volja)* [Conclusion of Contract According to the Law on Obligations: Parties' Agreement], Zagreb: Informator.

Blagojević, B and Krulj, V (eds) (1980) *Komentar Zakona o obligacionim odnosima* [Commentary of the Yugoslav Law on Obligations], Vol I, 1st, Beograd: Savremena administracija.

Bukljaš, I and Vizner, B (1978) *Komentar Zakona o obveznim (obligacionim) odnosima* [Commentary on the Act on Obligations], Zagreb (publisher not available).

Diaconiță, V (2018) 'Despre libertatea de a (nu) contracta: prejudiciul reparabil în caz de rupere în manieră ilicită a negocierilor' [On the Freedom (Not) to Contract: Reparable Damage in Case of Unlawful Breach of Negotiations] in Nicolae, M, Rizoiu, R and Toma-Dăuceanu, L (eds) *In honorem Valeriu Stoica. Drepturi, libertăți și puteri la începutul mileniului al III-lea*, București: Universul Juridic, pp. 635–662.

Dincă, R (2009) *Protecţia secretului comercial în dreptul privat* [Protection of Commercial Confidentiality in Private Law], Bucureşti: Universul Juridic.

Dudaš, A (2007) 'Odgovornost za nesavesno vođenje pregovora u pravu Srbije, pravim nekih reformskih zemalja i savremenim pisanim izvorima lex mercatoria' [Liability for Conducting Negotiations in Bad Faith in the Laws of the Republic of Serbia, Several SEE Countries, PECL and in the UNIDROIT Principles of International Commercial Contracts], *Zbornik radova pravnog fakulteta u Novom Sadu*, Nos 1–2, pp. 369–386.

Dudaš, A (2008) 'Mogućnost opoziva ponude za zaključenje ugovora i odgovornost ponudica za nesavesno vođenje pregovora' [Revocation of Offer and Liability for Conducting Negotiations in Bad Faith], *Zbornik radova pravnog fakulteta u Novom Sadu*, Nos 1–2, pp. 819–837.

Ďurica, M (2016a) 'Komentár k § 276, 279 a 287' [Commentary on § 276, 279 and 287] in Patakyová, M et al. *Obchodný zákonník. Komentár* 5th, Bratislava: C. H. Beck.

Gandolfi, G et al. (2001) *Code européen des Contrats. Avantprojet*, Milano: Giuffré editore.

Gniewek, E and Machnikowski, P (eds) (2021) *Kodeks cywilny. Komentarz* [Civil Code. Commentary] 10th, Warszawa: C. H. Beck.

Goicovici, J (2008) *Formarea progresivă a contractului* [Progressive Formation of Contracts], Bucureşti: Wolters Kluwer.

Gorenc, V (ed.) (2014) *Komentar Zakona o obveznim odnosima* [Commentary of the Croatian Law on Obligations], Zagreb: Narodne novine.

Gutowski, M (ed.) (2021) *Kodeks cywilny. Komentarz do Art. 1–352* [Civil Code. Commentary to Articles 1–352], Vol. I, 3rd, Warszawa: C. H. Beck.

Halsbury's Laws of England (2022) LexisNexis (online), https://www.lexisnexis.co.uk/legal/commentary/halsburys-laws-of-england.

Hulmák, M et al. (2014) *Občanský zákoník V Závazkové právo. Obecná část (§ 1721–2054)* [Civil Code V. Law of Obligations. General part (§ 1721–2054)] 1st, Praha: C. H. Beck.

Janoušková, A (2021) *Náhrada škody při porušení smluvní a mimosmluvní povinnosti v občanském právu* [Damage Compensation for Breach of Contractual and Non-Contractual Obligations in Civil Law], Praha: Wolters Kluwer.

Josipović, T and Nikšić, S (2008) 'Novi zakon o obveznim odnosima i hrvatsko obvezno pravo' [The New Law on Obligations and the Croatian Law of Obligations], *Evropski pravnik*, Vol. 3, No. 4, pp. 61–94.

Kubsik, S (2015) *Przedkontraktowa odpowiedzialność odszkodowawcza z tytułu nieuczciwych negocjacji* [Pre-Contractual Liability for Damages Due to Unfair Negotiations], Warszawa: C. H. Beck.

Kuniewicz, Z and Sokołowska, D (eds) (2017) *Prawo kontraktów* [Contract Law], Warszawa: Wolters Kluwer.

Luby, Š (1954) 'Teoretické otázky týkajúce sa predmetu a obsahu záväzku' [Theoretical Questions Regarding the Subject and Content of the Obligation], *Právnické štúdie*, Vol. 2, No. 3, pp. 717–753.

Mićović, M (1988) 'Zaključenje ugovora javnim nadmetanjem' [Formation of Contract by Auction], *Pravni život*, Vol. 38, Nos 10–12, pp. 1513–1524.

Orlić, M (1993) *Zaključenje ugovora* [Formation of Contract], Beograd: Institut za uporedno pravo.

Ovečková, O (2017) in Ovečková, O et al. *Obchodný zákonník. Veľký komentár* [Commercial Code. Great Commentary], Vol. II, Bratislava: Wolters Kluwer (online).

Pajtić, B, Radovanović, S and Dudaš, A (2018) *Obligaciono pravo* [Law of Obligations], Novi Sad: Pravni fakultet u Novom Sadu – Centar za izdavačku delatnost.

Perović, S (ed.) (1995) *Komentar Zakona o obligacionim odnosima* [Commentary of the Yugoslav Law on Obligations], Vol I, 1st, Beograd: Savremena administracija.

Petrov, J, Výtisk J, and Beran, V (eds) (2019) *Občanský zákoník. Komentář* [Civil Code. Commentary] 2nd, Praha: C. H. Beck.

Pietrzykowski, K (ed.) (2020) *Kodeks cywilny. Komentarz do Art. 1–449(10)* [Civil Code. Commentary to Articles 1–449(10)], Vol. I, 10th, Warszawa: C. H. Beck.

Roppo, V (2011) *Il contratto, seconda edizione*, Milano: Giuffrè.

Salma, J (2009) *Obligaciono pravo* [Law of Obligations] 6th, Novi Sad: Centar za izdavačku delatnost Pravnog fakulteta u Novom Sadu.

Slakoper, Z, Gorenc, V and Bukovac Puvača, M (2009) *Obvezno pravo – opći deo* [Law of Obligations – General Part], Zagreb: Novi Informator.

Slakoper, Z, Mihelčić, G, Belanić, L and Tot, I (2022) *Obvezno parvo – opći deo s uvodom u privatno pravo* [Law of Obligations – General Part with Introduction into Private Law], Zagreb: Novi Informator.

Vékás, L (2016) *Szerződési jog. Általános rész* [Contract Law. General Part], Budapest: ELTE Eötvös Kiadó.

Veress, E (2020) *Drept civil. Teoria generală a obligațiilor* [Civil Law. The General Theory of Obligations] 5th, București: C. H. Beck.

Vojčík, P (2018) in Vojčík, P et al. *Občianske právo hmotné* [Substantive Civil Law], Vol. I and II, Plzeň: Aleš Čeněk.

Węgierski, M (2020) *Charakterystyka prawna umów zawieranych drogą elektroniczną* [Legal Characteristics of Contracts Concluded Electronically], Warszawa: C. H. Beck.

Živković, M (2006) *Obim saglasnosti neophodan za zaključenje ugovora* [The Extent of Parties' Agreement Required for the Formation of a Contract], Beograd: Pravni fakultet Univerziteta u Beogradu – JP Službeni glasnik.