Chapter III

Pre-Contracts

1. General considerations

1.1. The concept of pre-contract

The pre-contract (*pactum de contrahendo*) is the agreement (also called a provisional or preliminary contract) by which the parties undertake to conclude a contract in the future. In many cases in which the parties intend to conclude a contract, the legal or economic conditions necessary for that agreement have not been met at a particular time. Nevertheless, they want to create a legal relationship even in this situation, to which end one or all of the parties produce a legally binding agreement between themselves according to which they will conclude the anticipated contract in the future. Pre-contracts can be unilateral (only one party undertakes to conclude the anticipated contract, the other party having an option to do so) or bilateral (both parties undertake to conclude the anticipated contract).

For example, a building is not yet listed under the seller's name in the Land Register. Through a bilateral pre-contract, the promisor-seller undertakes to register as an owner within three months from the date of the pre-contract (which has a preparatory character for the anticipated contract), and both parties establish that they will conclude the contract of sale in 15 days after the record in the Land Register is made. Therefore, by the pre-contract, the promisor-seller preserves the consent of the promisor-buyer, and conversely, the promisor-buyer preserves that of the promisor-seller for the future. In many cases, based on a pre-contract, an advance or even a full payment is also performed.

Veress, E., Hulmák, M., Stępkowski, Ł., Dudás, A., Hlušák, M. (2022) 'Pre-Contracts' in Veress, E. (ed.) *Contract Law in East Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 83–107. https://doi.org/10.54171/2022.ev.cliece_chapter3

The pre-contract must contain all those clauses of the anticipated contract in the absence of which the parties could not fulfill the promise. There is a question regarding the form of a pre-contract: Does it have to respect the form of the anticipated contract or not? The responses differ from one legal system to another, but the dominant approach is a symmetry of form between the pre-contract and the anticipated contract.[1]

The agreement by which the parties undertake to negotiate to conclude or amend a contract does not constitute a pre-contract because it does not produce an obligation to effectively conclude the contract toward which they are negotiating.[2]

An offer to contract and a pre-contract are distinguished by the following:

— the offer is a unilateral juridical act, while the pre-contract constitutes a genuine contract (a bilateral juridical act),
— the offer lapses in case of death or incapacity of the offeror, should this occur before the offer is accepted (and, depending on the legal system, when the nature of the business or other circumstances so require), while the duties arising from the pre-contract are generally passed on to the heirs;
— the untimely revocation of the offer in the absence of a concluded contract will result in non-contractual liability, while the violation of the pre-contract will result in the applicability of the rules regarding contractual liability,
— if an illegally revoked offer is accepted, the contract is born because the revocation is not able to produce legal effects, and the court will find that this contract is born by the effect of the coexisting and concurring wills of the contracting parties, while in the case of the pre-contract, the court in general can issue a court decision to take the place of the contract, replacing the lack of consent of a party in order to create the anticipated contract.

1.2. Distinction from similar institutions

The pre-contract must be distinguished from similar legal vehicles, specifically the pact of preference, the pact of option, the reservation contract, and framework contracts.

In certain situations, a person may be interested in securing in the present the consent of another person for the conclusion of a certain contract in the future. For this purpose, the methods that can be used are the preference agreement, the option agreement, the reservation contract, and pre-contracts. In order to understand the institution of pre-contracts fully, we must analyze these other legal vehicles as well.

1 Szászy, 1948, p. 209; Vékás, 2019, p. 93.

2 There is a broader category of preparatory contracts that includes the agreements to negotiate, confidentiality or non-disclosure agreements, contracts noting an incomplete arrangement reached through negotiations but that do not give rise to obligations to effectively conclude the envisaged agreement, framework contracts, and conditional contracts.

1.2.1. The preference agreement

The preference agreement is a contract by which one of the parties undertakes to grant preference to the other party as opposed to third parties, if it is decided to conclude a contract (instituting what is sometimes called a right of first refusal). The preference agreement generates a priority right at the conclusion of the contract. Under the preference agreement, the promisor is not obliged to conclude any contract, and the beneficiary is the holder of a right to priority, not of an option, as in the option agreement. For the beneficiary, the preference agreement grants privileged access to a possible but uncertain future contract, similarly to legal rights of pre-emption. In practice it may be employed, for example, in the case of opening a franchise.

1.2.2. The option agreement

The option agreement is a contract by which the parties agree that one of them (the promisor) should remain bound by its own statement of consent, and the other (the beneficiary) should be able, within a given timeframe, to accept or reject that statement of consent regarding the conclusion of a contract. It may be distinguished from the preference agreement by the fact that the preference agreement does not result in obligations for the promisor unless he or she decides in the future to conclude a contract. The option agreement, on the other hand, presupposes a firm commitment from the promisor, only the beneficiary having the freedom to accept or reject the promisor's declaration of consent. In general, the time period for exercising this option is established through the pact itself, but the law can also set maximum limits. The option agreement must contain all the elements of the contract that the parties seek to close so that it can be concluded through a simple acceptance by the beneficiary of the option, without any other expression of will on the part of the promisor. Thus, the promisor has already irrevocably consented to the conclusion of the contract through the option agreement, and the birth of the contract depends exclusively on the will of the beneficiary. For this reason, the right to exercise the option by which the contract arises is an option right. The contract is concluded when the beneficiary exercises the option in the sense of accepting the declaration of consent previously made by the promisor, under the conditions agreed through the agreement.

Both the option agreement and the declaration of acceptance must be concluded in the form provided by law for the contract that the parties seek to conclude. If the beneficiary of the option does not exercise his or her rights arising from the agreement, the option lapses.

The option agreement is more than a simple irrevocable offer made by the promisor, even though it produces similar effects. In reality, it is a contract that grants a specific right to the beneficiary to decide on the fate of the contract. It has been pointed out that the option agreement is a complex juridical act that contains in its mechanism a unilateral act—the offer to conclude the contract—and an ancillary agreement, which is the proposal made by the promisor to keep the offer open for a

specific duration.[3] This opinion has been criticized because the elements of the foreshadowed contract are also accepted by the beneficiary from the moment the option agreement was concluded, although only for the limited purpose of creating an option right and not to create the foreshadowed contract immediately. In practical term, the option agreement creates, in favor of the beneficiary, the right to choose—by a simple manifestation of consent and having already secured the consent of the promisor—the birth of the projected contract. The consent to contract on the part of the beneficiary of the option agreement is formed gradually, in two stages: First, he or she temporarily accepts the offer to contract from the promisor, contingent on a purely optional condition (valid from the creditor's side) of the option between the conclusion or the non-conclusion of the contract. Subsequently, if the beneficiary exercises the option positively, the condition is fulfilled, and the foreshadowed contract is concluded.[4]

In practical terms, the option agreement is the polar opposite of the cancellation clause: In the case of the option agreement, the creation of the contract depends on the will of the beneficiary (the creditor of the unilateral option), while in the case of the cancellation clause, the termination of the contract depends on the will of the creditor of this contractual stipulation.[5]

1.2.3. The reservation contract

A reservation contract is also a specific form of preparatory contract, but distinct from the pre-contract. It is often used in the case of as of yet unconstructed buildings. In return for a deposit, the seller undertakes to reserve a building or part of a building for a buyer. This contract is of a *sui generis* nature as, unlike the pre-contract, it is not based on a precise determination of the immovable or of the price, but involves only provisional indications. The beneficiary is usually entitled to cancel the reservation.

1.2.4. The framework contract

We also must distinguish pre-contracts from framework contracts. A framework contract is a contracting technique whereby the parties agree in advance on certain details of future repetitive contracts. As a consequence, these details are not established for every envisaged contract in turn. The framework contract, however, does not create between the parties in and of itself the actual, specific foreseen contracts, but its content nonetheless has a binding force between the parties. The actual foreseen contracts in general contain a clause that declares that the agreement is based on the existing framework contract between the parties. Unlike the pre-contract, the framework contract does not create an obligation to conclude effectively in the future the envisaged contracts, but only serves to establish some of their elements in advance.

3 Lulă, 1998, p. 43.
4 Veress, 2020, pp. 67–68.
5 Veress, 2020, p. 67.

1.3. The unilateral pre-contract

The unilateral pre-contract is distinguished from the option agreement by the fact that the promisor of the contract is obliged to conclude the anticipated contract under the conditions set forth by the unilateral pre-contract: First he or she agreed to the pre-contract, and later a new consent must be granted for the creation of the anticipated contract. The option agreement operates and gives rise to the contract through the unilateral manifestation of the will of the beneficiary, the consent of the debtor having already been granted in advance through the option agreement.

The unilateral pre-contract is useful when one of the parties is undecided on whether to conclude a contract but wants to preserve for itself the definitive consent of the other party for a certain period. Basically, the unilateral pre-contract is a separate agreement from the anticipated contract.

At the same time, the option agreement presupposes a firm and final manifestation of consent on the part of the promisor that remains contingent—in terms of the formation of the anticipated contract—on the exercise of the option created by the agreement on behalf of the beneficiary. In the case of a unilateral pre-contract, the promisor does not make a final consent available to the beneficiary, which could lead to the formation of the contract by simple acceptance by the beneficiary, as in the case of the option agreement.[6] Let us suppose the beneficiary of the unilateral pre-contract exercises his or her option arising from the unilateral pre-contract. In that case, the anticipated contract is not born, as in the case of the option agreement. Instead, a new declaration of consent is needed from the contract's promisor for the effective conclusion of the anticipated contract.

1.4. The bilateral pre-contract

The bilateral pre-contract—in the context of which both parties are firmly committed to conclude the anticipated contract in the future—is of particular interest in the event that the parties are currently unable to conclude the desired contract but want to ensure its future conclusion. This is the most frequent form of pre-contract.

1.5. Enforcement of pre-contracts

The fundamental question is how to enforce a pre-contract. Of course, in case of non-performance of a pre-contract, the beneficiary is entitled to damages for the loss resulting from the non-occurrence of the envisaged contract.[7] However, the most efficient sanction for the promisor's refusal to conclude the anticipated contract is the possibility of the court, at the request of the party that has fulfilled its own obligations, rendering a decision that substitutes the consent of the reticent counterparty to the promised contract. In practical terms, in this case, the court creates the envisaged agreement based on the anticipatory clauses of the pre-contract.[8] Therefore it is

6 Chirică, 2017, p. 203.
7 Kötz, 2017, p. 34.
8 Vékás, 2019, p. 93.

essential that the content of the pre-contract[9] be sufficiently specific to render such a judgement.

In order to analyze the problem, we can take the example of a bilateral pre-contract for the sale of an asset. The bilateral pre-contract of sale is an agreement that gives rise to a relative right of the promisor-buyer, correlated with an obligation of the promisor-seller to conclude a contract of sale and at some future moment sell a particular asset. Also, due to the bilateral character of the agreement, the promisor-seller has the right to claim the performance of the pre-contract.

In cases when the sale is not of a real nature (the transfer of title occurs without it being contingent on the concomitant delivery of the good), pre-contracts can be enforced more effectively. In this case, when one of the parties who has concluded a bilateral pre-contract of sale unjustifiably refuses to conclude the anticipated contract, the other party may request a court decision to take the place of the contract.

However, the problem is more complicated if a sale is regulated as a real contract in a legal system. In this case, the sale must be accompanied by the delivery of the good (*traditio*), a voluntary transfer of possession, in order to transfer ownership. Different approaches are possible:

— the pre-contracts of sale are not used in practice because the court cannot state a decision to take the place of a contract, since the decision in question can replace the consent of the promisor at the conclusion of the contract but cannot replace the delivery of the thing; therefore, the pre-contract lacks relevance in the case of such sales,
— pre-contracts of sale are effective only in a limited way; for example, the enforcement of the pre-contract is possible when the thing is already in the possession of the beneficiary, and the promisor refuses to conclude the contract. In this specific situation, the court may issue a decision to replace the contract.
— The law provides for full use of such agreements.

2. The Czech Republic

3.1. Overview

Pre-contracts (*smlouva o smlouvě budoucí*) are regulated in §§ 1785–1788 of the CzeCC. Due to analogy, the regulation is also applicable to a certain extent to cases where an obligation to conclude a contract is imposed directly by law or results from another legally binding reason.[10] The regulation is not mandatory and may be derogated from by an agreement of the parties.

The pre-contract is relatively often concluded in a situation where parties assume the obligation to conclude the contract, but nevertheless there is no agreement on

9 Kötz, 2017, p. 34.
10 Supreme Court Ref. No. 33 Cdo 1109/2018.

the entire content of that contract. That is very often the case where such agreement depends on future circumstances, e.g., the erection of a building, its official handover, and the registration of each flat in the Land Register. Moreover, pre-contracts are often required by mortgage banks. Deciding to grant a loan to a purchaser, the banks want both parties to commit to concluding a contract of sale in the future.

3.2. Content

A pre-contract must contain an obligation to conclude the envisaged contract in the future. The content of the future contract must be defined at least in general terms. The juridical act does not require an explicit agreement on time limits, as they are laid down in subsidiary provisions. However, usually time limits are specifically set by the parties. The juridical act does not require precise consensus on the entire content of the future contract. It is enough to identify the main contractual obligations of the parties, as these are very often essential to the particular type of contract.

Pre-contracts may be concluded as a unilaterally binding contract or as a mutually binding contract. Pre-contracts may be in favor of third party as well.[11]

3.3. Form

The law does not generally prescribe any formal requirements for pre-contracts. Exceptionally, one may find some formal requirements laid down due to the relationship of the parties, e.g., in pre-contracts between a company represented by its sole shareholder and this sole shareholder as a natural person under § 13 of the Czech Act on Corporations.

However, in the legal literature it is generally recognized that the reason why the form is required for the future contract may be relevant to the pre-contract as well.[12] Typically, this is the case when the given form is intended to warn the contractual parties against a significant or onerous obligation. Therefore, it is accepted that a pre-contract that envisages a future contract dealing with rights *in rem* over real estate must also be included in a written instrument.[13]

A similar approach is applied to other statutory requirements concerning the future contract. For example, the intention to sign certain kinds of contracts must be published in advance by municipalities and regions. Some contracts made by public bodies must be registered. The reason for such requirements, e.g., control of public funds, relates to pre-contracts as well; therefore, both requirements are also applicable to such pre-contracts, even though such a rule is not explicitly provided for. Recently, the Supreme Court (see decision Ref. No. 33 Cdo 72/2021) rejected such an approach, due to the absence of a formal requirement in the law. The court concluded that pre-contracts do not require any special form. The form of pre-contracts shall not be inferred from the requirements for a future contract.

11 Supreme Court Ref. No. 33 Odo 824/2005.
12 Hulmák in Hulmák et al., 2014, p. 284; Vančurová in Petrov et al., 2019, p. 1856; Melzer in Melzer and Tégl, 2014, p. 631.
13 CzeCC, § 560.

3.4. Distinction between pre-contracts and similar institutions

In the legal literature authors often deal with differences between pre-contracts and framework contracts, option agreements, or agreements to be completed in the future.[14]

The option agreement under Czech law is interpreted as a right to unilaterally establish a contractual relationship (or to extend a former such relationship).[15] This right very often has a ground in a former agreement between the parties (a contractual option), but it can also be created unilaterally by one party (e.g., in the form of an irrevocable offer by which consent to the final contract is also expressed). The option contained in the contract regularly takes the form of a potestative suspensive condition. Reverse sale and reverse purchase are both based on a similar principle.[16]

In contrast to a pre-contract, here the content of the envisaged obligation is completely and finally agreed to in advance by one of the parties (i.e., the party does not oblige himself or herself to grant another consent to any juridical act but instead accepts that such obligations become binding on himself or herself by the simple manifestation of the corresponding consent by the other party). The obliged party is thus not bound to conclude the contract in the future and thus to express his or her consent again, as this has been already expressed. The force of the contract or its conclusion shall depend only on the as yet unexpressed consent of the entitled counterparty. The contract (or the offer) may set time limits after the expiry of which the option lapses. Therefore, it is obvious that the option does not demand any determination of the contract by court or replacement of the will of a reticent party.

Nevertheless, there is a certain similarity to pre-contracts. There is a certain period between the time when the option is granted and when it is performed. As in the case of pre-contracts, circumstances may change significantly in the meantime. In Austria rules on the change of circumstances relevant to pre-contracts are applied with respect to options due to analogy.[17] Such a solution could be discussed in the Czech Republic as well.

As far as framework contracts are concerned, these regularly set out the rules for future contracts but do not oblige the parties to conclude them. However, they can contain offers or a pre-contract.

The law distinguishes between pre-contracts and agreements to be completed in the future.[18] Contrary to the pre-contract, the contract in the latter case is concluded. Nevertheless, the parties at the same time agreed that it is yet to be completed, e.g., by a separate agreement, a third party, or the court. The contract does not enter into force without such completion. For example, a contract by which the parties agree

14 Hulmák in Hulmák, et al., 2014, p. 282; Vančurová in Petrov et al., 2019, p. 1856.
15 Supreme Court Ref. No. Rv I 1306/22.
16 CzeCC, §§ 2139 and 2135.
17 According to Gruber in Kletečka, Schauer et al., 2022, § 936 (5); Austrian Supreme Court, Ref. No. 1 Ob 585/94.
18 CzeCC, § 1748 et seq.

to the assignment of shares in a company but leave setting the price to a third party auditor constitutes an agreement to be completed in the future.

3.5. Enforcement of pre-contracts and time limits

Enforcement of rights arising from pre-contract requires a due notice sent to the obliged party to conclude a contract in conformity with the pre-contract. The notice must be delivered in the agreed time limit, otherwise within one year. The notice may take the form of an offer or an invitation to make an offer. Delay on the notice causes the right to conclude the future contract to lapse.[19]

The obliged party shall conclude the contract without undue delay after the notice. If the party does not fulfill its obligation, the entitled party may ask the agreed third party or the court to determine the content of the contract. The entitled party may also seize the court with an action when the third party does not determine the content of the contract within an appropriate time or refuses to do so entirely. The limitation period for determining the contractual content is set by law to one year, starting when the future contract should have been concluded.[20]

The court may replace the consent of the parties and determine the content of the contract itself. The content determined in this way may not deviate from any content agreed to in the pre-contract.[21] The court must respect the purpose of the contract, which stems from the proposals made by the parties and must also take into account all circumstances under which the pre-contract was concluded. Rights and duties must be determined in a fair way.

The consent of the parties is replaced at the moment the judicial decision enters into force. There are no special rules concerning contracts that do not lead to the transfer of title. The contract must be performed and ownership transferred later on. A problem may arise in real contracts, where the delivery of a corporeal asset is a condition for the formation of the contract itself.[22] Such is the case in the Czech legal system for loans (*zápůjčka*, Ger. *Darlehen*) and *commodatum* (*výpůjčka*, Ger. *Leihe*). Nevertheless, as similar contracts can be concluded as purely consensual, in practice no perceptible problems arise.

In connection with the regulation of pre-contracts, the CzeCC lays down special provisions on the change of circumstances. Provided the change of circumstances is decisive for the conclusion of the pre-contract and is so significant that it would be unreasonable to require the obligee to conclude the envisaged contract in the future, the obligation to conclude such a contract is deemed to be rescinded. The obliged party has to notify the change to the entitled one. Any delay in notification leads only to the right to claim damages.[23]

19 CzeCC, § 1788 (1).
20 CzeCC, § 634.
21 Vančurová in Petrov et al., 2019, p. 1859; Hrnčiřík in Svoboda et al., 2021, p. 780.
22 According to Hulmák in Hulmák, 2022, § 1785.
23 CzeCC, § 1788 (2).

3.6. Pre-contracts on the sale of real estate

The CzeCC does not lay down any special rules on pre-contracts dealing with real estate; general rules apply. The pre-contract does not have to adhere to any special requirements set forth for deeds under §8 of the Act on the Land Register (e.g., on specification of real estate).[24] The future contract or the judicial decision replacing it, however, has to adhere to such special requirements. After the future contract or the judgement enters into force, any of the parties may register rights *in rem* in the Land Register.

3. Hungary

Hungarian law systematically treats the pre-contract (*előszerződés*) within the framework of the obligation to conclude a contract.[25] The reason giving rise to the obligation to conclude a contract may be the law, but instead it may also be an agreement binding the parties. A pre-contract is an obligation voluntarily entered into by the parties, the essence of which is that they undertake to conclude a contract in the future under the terms and conditions set out in advance. In the preliminary contract, the parties must specify the essential terms of the contract, failing which the preliminary contract is not concluded. [26] The rules of the future contract shall apply *mutatis mutandis* to the content of the pre-contract.

As such, there is no formal requirement for a pre-contract, but Hungarian law adheres to the principle of formal symmetry: The pre-contract must be concluded in the form prescribed for the envisaged contract. In other words, if the written or authentic form of the contract to be concluded is required by law, the preliminary contract must also respect that form.[27] However, it is generally accepted that only the formal requirements for validity are required. For example, in the case of a preliminary contract for the sale of an immovable, the pre-contract must be concluded in writing, but the documentary requirements envisaged by the law for the final contract (notarial form or countersignature by an attorney at law) are not required for the pre-contract. In other cases where there are no formal requirements, the pre-contract is also not required to have a specific form. For example, a valid pre-contract for the rental of an immovable can be concluded orally.[28]

A pre-contract creates an obligation to conclude a contract. If the time limit for the conclusion of the final contract set in the preliminary contract has elapsed and the party has granted the counterparty a grace period for the conclusion of the contract that has also elapsed without result, the preliminary contract may be terminated.[29]

24 Act No. 256/2013 Coll.
25 HunCC, § 6:73.
26 EBH 2011. 2416.
27 BDT 2002. 653.
28 BH 2006. 193.
29 BH 2004. 501.

Breach of a preliminary contract shall render the party in breach liable to pay damages in the same way as would a party who breached any other type of contract if the conditions for such liability are fulfilled.

If the parties are in breach of the pre-contract, the court may, on the application of either party, create the contract undertaken in accordance with the essential contractual terms determined by the parties. The contract shall take effect on the date on which the court decision becomes final.[30] The court has no power to create a contract with a content different from that previously agreed to by the parties.

A claim for the conclusion of a final contract on the basis of a pre-contract becomes time-barred according to the general rules.[31] No specific provisions could be identified under this aspect. In the case of immovables, the courts stated correctly that registration in the Land Registry on the basis of a pre-contract is not possible, and the submitted pre-contract will also not take precedence in rank (in the order of submission to the Land Register).[32]

Hungarian law does not regulate unilateral pre-contractual agreements. In the case law it has been established that an agreement under which only one party is under an obligation to conclude a contract and the other party is unilaterally entitled to decide whether or not to conclude the contract on the basis of the offer is not a pre-contract.[33] This does not mean that such a prerogative cannot be established by an agreement, just that its qualification is not that of a pre-contract but rather of a contract that gives birth to an option right. For example, the courts have considered the agreement of the parties as being a pre-contract, and not an option agreement, in cases where the seller did not recognize the right of the buyers to buy the shares in the future, but the parties expressed their intention to sell and buy the shares under certain conditions by a certain date, and they secured this agreement with a pledge (*arrha*).[34]

In judicial practice, it has been argued that the only way to determine whether a contract is a pre-contract or a definitive contract is to interpret the parties' declarations. This has been particularly pronounced where the parties have recorded several agreements in one instrument. In such a case, each contract must be assessed separately according to its content. It is possible that some parts of a contract may constitute a pre-contract and other provisions a contract.[35]

What is regulated by Hungarian law is the refusal to conclude the promised contract. In other words, the HunCC allows the parties to refuse to enter into the promised contract under certain conditions, thus effectively terminating the preliminary contract. This may happen when:

30 BH 2002. 481.
31 BH 2012. 290.
32 EBH 2012. K. 22.
33 BDT 2008. 1780.
34 BH 2004. 474.
35 BDT 2008. 1720.

— as a result of a circumstance arising after the conclusion of the pre-contract, performance of the pre-contract on unchanged terms would be contrary to the party's essential legal interests,
— the possibility of a change of circumstances was not foreseeable at the time of the conclusion of the pre-contract,
— the change in circumstances was not caused by that party, and
— the change in circumstances is not within that party's normal business risk.

The above conditions are cumulative (conjunctive). It can be observed that this is a specific case of the *clausula rebus sic stantibus*.[36] In the case law, it was concluded that the fact that the seller's successors inhabit the property does not constitute a ground for refusing to conclude the promised contract if this circumstance already existed at the time of the conclusion of the pre-contract and their predecessor undertook to vacate the property with this knowledge.[37]

4. Poland

When 'pre-contracts' are taken to mean contracts that precede the formation of another contract, Polish law recognizes pre-contracts (*umowy przedwstępne*, in the singular: *umowa przedwstępna*) in the PolCC at Articles 389 §§ 1–2 and Article 390 §§ 1–3. However, if one refers to a pre-contract as a contract that precludes a party from entering into a comparable agreement with someone else,[38] the PolCC does not explicitly set out any such duty of preclusion. It might be noted here that the PolCC is rather succinct on the issue of pre-contracts, and the matter at hand has already generated a substantial body of case law.

Pursuant to Article 389 § 1 of the PolCC, a contract whereby one or both of the parties undertake to conclude a specific agreement ought to specify the material terms of the agreement thus promised (*umowa przyrzeczona*). This rule enshrines a statutory definition of a pre-contract pursuant to the PolCC. Thus, any other agreements that do not designate a subsequent promised agreement are not pre-contracts pursuant to the PolCC.

According to Article 389 § 2 of the PolCC, where a time limit during which the promised contract is to be concluded was not set, it should be concluded at an appropriate time set by the party entitled to claim the conclusion of the promised contract. Where both parties are entitled to claim the conclusion of the promised contract and they have set different time limits, the parties shall be bound by the time limit set by that party that had made an appropriate statement earlier.

36 Vékás, 2019, p. 94. The HunCC imposes the same conditions for the judicial amendment of a contract (HunCC, 6:192. §).
37 BH 2013. 481.
38 Garner, 2009, p. 372.

Article 390 § 1 of the PolCC provides that if a party obliged to conclude a promised contract evades its conclusion, the other party may claim any damages incurred by the fact that it relied on the conclusion of the promised contract. The parties may specify the extent of damages in the pre-contract in a different manner. Article 390 § 2 of the PolCC adds that if, however, a pre-contract would meet the requirements on which the validity of the promised contract would have depended, in particular those as regards the form of conclusion, the entitled party may submit a claim for conclusion of the promised contract. Finally, according to Article 390 § 3 of the PolCC, claims arising out of a pre-contract shall be subject to a statute of limitations of one year from the day on which the promised contract was to be concluded. Where a court dismisses the claim for the conclusion of the promised contract, any claims arising from the pre-contract shall be subjected to a statute of limitations of one year from the day on which the decision of the court became final.

On the issue of statutes of limitation and according to the Polish Supreme Court (*Sąd Najwyższy*), 'claims arising out of a pre-contract' consist of claims in the scope of the relationship borne out of that pre-contract, which include a claim for the conclusion of the promised contract and a claim for damages incurred by the fact that one of the parties relied on the conclusion of the promised contract, as well as claims by a party to a pre-contract founded on earnest money (*zadatek*) or a contractual penalty (*kara umowna*). However, according to the Supreme Court, claims for the return of a sum paid in advance as consideration pursuant to the promised contract do not remain in the scope of pre-contract but are subject to the rules on unjust enrichment (*bezpodstawne wzbogacenie*), specifically those on undue payments (*świadczenia nienależne*). This being the case, those claims are to be subject to the general statute of limitations,[39] and not the one-year period set forth at Article 390 § 3 of the PolCC. The Supreme Court added that such a claim may be subject to an assignment (*przelew*).[40] While it is not readily apparent from the PolCC itself, the Supreme Court has held that it is also possible to conclude a pre-contract for concluding a subsequent pre-contract,[41] for which the parties may elect not to designate the material terms but rather confine themselves to agreeing upon a way of specifying the object of the promised contract in the future, even as late as at the very moment that concluding the promised contract would become due,[42] and that a pre-contract is not a 'mutual contract' (literally:

39 PolCC, Article 118.

40 Resolution (*uchwała*) of the Polish Supreme Court of March 8, 2007, case Ref. No. III CZP 3/07, reported in OSNC 2008/2/15.

41 Judgment of the Supreme Court of October 28, 2010, case Ref. No. II CSK 219/10, reported in OSNC 2011/6/73.

42 Judgment of the Supreme Court of February 6, 2018, case Ref. No. IV CSK 72/17, reported in Wolters Kluwer's LEX, No. 2510949.

umowa wzajemna).[43] It was further held that a pre-contract is not confined to any given area of law, as it may be concluded in the scope of the law on obligations, as well as those of property law, the law on inheritance, copyright law, or patent law,[44] that a pre-contract might be concluded as a security for a different contract pursuant to the rule on the freedom of contracts;[45] and that a grant of a power of attorney by a party to a pre-contract before the expiry of the relevant statute of limitations, with that power of attorney being irrevocable and including a power to conclude the promised contract after the expiry of that statute of limitations, is prohibited.[46] A pre-contract that does not contain a material term for the promised contract (e.g., the price for a contract of sale), even by providing grounds for arriving at such material terms, shall be null and void.[47] Pursuant to Polish law, it is possible to conclude a pre-contract to the benefit of a third party.[48]

An agreement to negotiate, while not necessarily being a pre-contract, might refer to a future contract that is supposed to be negotiated. Such an agreement is implicitly referred to in Article 72^1 § 1 of the PolCC, wherein it is conceded that the parties 'may stipulate otherwise' as regards confidentiality of negotiation; the possibility to conclude such a preliminary agreement is possible pursuant to the freedom of contract applicable to the parties.

Outside the PolCC and pre-contracts governed by it—and while any such contracts are not necessarily at the same time (or may not even later become) pre-contracts in the scope of Articles 389 and 390 of the PolCC—it is not inconceivable that the parties conclude a contract referring to their future agreements, framing that contract however they would desire, while remaining within the framework of Article 353^1 of the PolCC. Some such contracts are expressly recognized in the case

43 Judgment of the Supreme Court of February 25, 2016, case Ref. No. III CSK 136/15, reported in Wolters Kluwer's LEX No. 2023159. In other words, a pre-contract is not an example of a class of agreements recognized by Polish law whereunder the parties oblige themselves in such a manner that consideration rendered by a party unto the other party is an equivalent of the consideration by that other party (according to Article 487 § 2 of the PolCC). A contract that is a mutual contract is subject to specific rules applicable only to those agreements (according to 487–497 of the PolCC).

44 Judgment of the Supreme Court of February 21, 2013, case Ref. No. IV CSK 463/12, reported in Wolters Kluwer's LEX No. 1311811.

45 PolCC, Article 353^1. Judgment of the Supreme Court of October 12, 2011, case Ref. No. II CSK 690/10, reported in M.Pr.Bank. 2012/6/24–29.

46 Judgment of the Supreme Court of February 18, 2011, case Ref. No. I CSK 358/10, reported in Wolters Kluwer's LEX, No. 846029.

47 Judgment of the Supreme Court of September 16, 2010, case Ref. No. III CSK 289/09, reported in Wolters Kluwer's LEX, No. 686636.

48 Judgment of the Supreme Court of October 15, 2009, case Ref. No. I CSK 84/09, reported in OSNC 2010/4/60.

law, e.g., a framework contract (*umowa ramowa*)[49] or an option agreement (*umowa opcji*).[50] The former might entail a general rule on concluding future contracts, albeit not necessarily by expressly designating their features, while the latter could be a self-standing definitive contract pursuant to which a party might unilaterally request further specific performance in the future from the other. As those types of agreements are not expressly provided for in the PolCC, they are likely to vary as to their contents from case to case. As a specific type of contract that refers to a future agreement (yet one that in my view is decidedly not a pre-contract pursuant to the PolCC[51]), Polish law also provides for a 'developer's agreement' (in the original Polish: *umowa deweloperska*), with said contract expressly governed by a separate statute (the Act of September 16, 2011, on Safeguarding the Rights of Buyers of a Flat or a Single-Family House (*Ustawa z dnia 16 września 2011 r. o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego*), whose objects include the rights and duties of the parties that erect housing (the housing developer and the buyer).[52]

5. Romania

The RouCC contains general rules on pre-contracts, and special complementary rules on pre-contracts of sale.

The pre-contract must contain all those clauses of the promised contract without which the parties would not be able to perform the promise. In the absence of a stipulation to the contrary, the sums paid under a promise of sale constitute an advance on the agreed price.[53] The subject matter of the contract must be specific, correct, and legally determined. If the prospective party has only an incomplete or an imperfectly drafted pre-contract, he or she cannot apply for a judgment in lieu of contract.

The pre-contract is subject to the principle of consensualism, even if the promised contract is a solemn one. The High Court of Cassation and Justice concluded that the authentic form of a pre-contract is not mandatory when concluding a promise of sale of an immovable, in order to pronounce a judgment in lieu of an authentic juridical

49 Judgment of the Supreme Court of March 29, 2017, case Ref. No. I CSK 395/16, reported in Wolters Kluwer's LEX, No. 2329466. A framework agreement is also a feature of Polish law on public procurement (see Article 311 of the Act of September 11, 2019—the Law on Public Procurement). For an approach to framework agreements from the point of view of pre-contracts see Krajewski, 2002, Chap. VI § 2, and Article 389 of the PolCC, according to Osajda 2020, § 44.

50 Judgment of the Supreme Court of May 5, 2016, case Ref. No. II CSK 470/15, reported in Wolters Kluwer's LEX, No. 2071202. An options contract is also mentioned in passing in the above rules on public procurement (see e.g., Article 441 of that law). For more on this contract see e.g., Jakubiec, 2010, pp. 12–19.

51 This I find pursuant to the judgment of the Supreme Court of July 25, 2013, case Ref. No. II CSK 575/12, reported in Wolters Kluwer's LEX No. 1385870.

52 For more on this agreement see Goldiszewicz, 2013.

53 RouCC, Article 1670.

act.[54] Of course, in order to prove the existence of the agreement, it is useful to draw up a written instrument. If the value of the promised contract is more than 250 lei, the existence and content of the promise cannot be proven by witnesses.[55]

Breach of the pre-contract raises the question of contractual liability. First, in the event of non-performance of the promise, the beneficiary is entitled to damages. Second, the law creates the possibility that in the event of non-performance of the promise, the court may issue a judgment in lieu of a contract, superseding the will of the party refusing to conclude the promised contract. In this respect, with reference to all pre-contracts, the RouCC states that where the promisor refuses to conclude the promised contract, the court, at the request of the party who has fulfilled his or her own obligations, may render a judgment in lieu of a contract, whenever the nature of the contract allows and the requirements of the law for its validity are met.[56] With specific reference to the promise of sale (pre-contract of sale), the law creates the possibility of requesting a judgment in lieu of a contract when one of the parties that concluded a bilateral promise of sale unjustifiably refuses to conclude the promised contract, and all other conditions for validity are met.[57] The legal text is applicable to both the bilateral promise of sale and the unilateral promise of sale or purchase, as the case may be.

Consequently, the conditions for a judgment in lieu of a contract are as follows:

— there must be a refusal on the part of the promisor to enter into the promised contract,
— the refusal must be unjustified,
— there must be a request to that effect addressed to the court,
— the party making the request has previously fulfilled all its own obligations under the contract,
— the nature of the contract permits substitution of consent (for example, in matters of sale, it is not possible to render a judgment in lieu of a contract if the sale concerns future assets),
— the (substantive) requirements set forth by law for the validity of the promised contract are fulfilled.

According to the courts, where the promisor-seller has promised to sell the entire property even though he or she is not the sole owner, the promise of sale cannot be enforced in kind in the form of a court judgment in lieu of a contract of sale for the entire property without the agreement of the other co-owners.[58]

54 High Court of Cassation and Justice, Decision No. 23/2017 for the resolution of legal problems, Monitorul Oficial No. 365 of May 17, 2017.
55 Romanian Code of Civil Procedure, Article 309 (2).
56 These provisions do not apply to a promise to conclude a real contract unless the law provides otherwise, but under Romanian law the contract of sale is not a real contract.
57 RouCC, Article 1669.
58 High Court of Cassation and Justice, Decision No. 12/2015 for the resolution of an appeal in the interest of the law, Monitorul Oficial, No. 678 of September 7, 2015.

Interpreting *a contrario* the requirement of an unjustified refusal, the High Court of Cassation and Justice held that the party who refused the conclusion of the promised contract may not request in court a judgment in lieu of a contract if the counterparty's refusal to conclude it is justified, and it is therefore inherent in this type of action for the court to examine the (un)justified nature of the refusal. Thus, if one, several, or all of the conditions of validity of the future contract are not satisfied and the refusal to conclude the contract is justified on the basis of that impediment, the refusal to conclude the contract of sale is justified, and the action on that point cannot be admitted.[59]

Under Romanian law, an action for a judgment in lieu of a contract shall become time-barred 6 months after the date on which the promised contract should have been concluded.

The normal way to terminate the pre-contract is fulfillment of the obligations, i.e., voluntary performance: the conclusion of the promised contract. The pre-contract may also be terminated by rescission or enforcement, which in this area takes the special form of a judgment in lieu of a contract as analyzed above.

In the case of a unilateral promise to purchase a specific individual asset, there is also a special case of extinction. If, before the promise has been executed, its creditor (the owner, who has an option to sell the asset) disposes of the property or establishes a real right over it, the promisor's obligation is deemed to be extinguished.[60] If the creditor of the purchase obligation alienates or encumbers the property, he in effect renounces his right, so that this approach on the part of the legislator is perfectly justified.

6. Serbia, Croatia, Slovenia

6.1. Serbia

Under the SrbLO the conditions of validity for a pre-contract (*predugovor*) are rather strict. The applicable norms define pre-contract as an agreement of the parties by which they undertake to conclude the main contract.[61] This rule can produce the false impression that Serbian contract law adopted the most liberal concept of pre-contract as merely an 'agreement to agree.' However, if one reads on, from the subsequent rules a different conclusion seems to emerge. First, the law prescribes that a pre-contract is valid only if it is concluded in the very same form as the contract it envisages, provided that the formal requisites of the main contract are considered one of the conditions of its validity.[62] This means that the principle of the so-called parallelism of formalities (the symmetry of form) applies to pre-contracts

59 High Court of Cassation and Justice, II Civil Section, Decision No. 2411 of November 24, 2015.
60 RouCC, Article 1669 (3).
61 SrbLO, Article 45 (1).
62 SrbLO, Article 45 (2).

as well.[63] The requirement of the parallelism of form for pre-contracts has gained special relevance in relation to pre-contracts for the sale of real estate, which are subject to strict formal requisites. The well-established practice of courts is that a pre-contract for the sale of real estate that is not concluded in the form prescribed for the contract it envisages is not valid, and the object of the parties' performance provided under such a pre-contract is subject to restitution according to the rules of unjustified enrichment.[64]

Second, binding obligations from a pre-contract arise only if it contains all the essential elements of the contract it envisages.[65] By concluding a pre-contract the parties leave only non-essential elements to be agreed upon in the promised contract, where the dispositive rules of the SrbLO apply. This is the restrictive element of the rules on pre-contracts that most limits their scope of application. The pre-contract, namely, takes over the function of the contract it envisages, because it fixes the essential elements of the contract, though binding obligations come into existence only when the main contract is concluded.[66] The purpose of the pre-contract is therefore to fix the essential elements of the future contract and allow the parties to trigger the emergence of binding obligations by concluding the future contract with a simple declaration of contractual intent. The wording used in the law ('parties undertake to conclude the main contract') supports the conclusion that the right to request the conclusion of the main contract may be established on behalf of both or only one of the parties (bilateral and unilateral pre-contract).[67]

The subsequent sections in the SrbLO are in line with the notion of pre-contract adopted in Serbian contract law. They specify, namely, that upon the request of the entitled party the court shall order the counterparty to conclude the promised contract within the time limit determined by the court.[68] The consequences of any non-compliance with the pre-contract differ if the obligation to conclude the promised contract is unilateral or bilateral. In the former case, the entitled party triggers the formation of the main contract unilaterally by his or her statement. In the latter case, however, the cooperation of the counterparty is required to effect the conclusion of the main contract. Lacking that, upon the entitled party's request, the courts' decision substitutes the main contract according to the terms laid down in the pre-contract.[69] However, the entitled party may request the conclusion of the main contract in 6 months from the expiry of a time period fixed by the pre-contract or from the day when the main contract, according to its nature and the circumstances of the transaction,

63 The principle of parallelism of forms means that ancillary contracts must be concluded in the same form as the main contract. Perović, 1986, p. 490.
64 See for example the decisions of the Supreme Court of Serbia No. Rev. 471/96, Rev. 3104/2004 or Rev. 942/2017.
65 SrbLO, Article 45 (3).
66 Draškić in Perović, 1995, p. 108.
67 Draškić in Perović, 1995, p. 107.
68 SrbLO, Article 45 (4).
69 Draškić in Perović, 1995, p. 108.

should have been concluded, if no deadline was specified in the pre-contract.[70] This time period is considered preclusive: Upon its expiry the pre-contract's legal effect ceases.[71] Finally, the law specifies that the pre-contract does not mandate the conclusion of the main contract if the circumstances have changed in the meantime to such an extent that it may be presumed that the parties would not have concluded the pre-contract had the new circumstances existed at the time of its conclusion.[72] The literature is of the opinion that this rule represents a special application of the general principle of *clausula rebus sic stantibus* to pre-contracts.[73]

Neither the pact of preference nor the option agreement are explicitly regulated in the SrbLO. However, it may be stated that both can be validly concluded, since they do not infringe on the general limitations of the freedom of contract. As for the option agreement, the literature points out that it is widely used in commercial practice and acknowledged by the case law.[74] The Preliminary Draft of the future Civil Code of Serbia[75] envisages explicit rules on the option agreement. It specifies that parties may by contract determine the terms of their future contract and enable one of them to conclude it by his or her unilateral manifestation of consent (the option contract or, simply, option).[76] If the parties failed to set a deadline for the exercise of the right of option and no time limit is prescribed by statute for this purpose, nor have the parties subsequently agreed thereupon, the deadline shall be determined by the court, taking into account the circumstances of the case and any applicable usages.[77]

6.2. Croatia

Concerning the notion and effects of a pre-contract (*predugovor*), the HrvLO provides verbatim the same rules as the Serbian Law on Obligations.[78]

The HrvLO does not know of the pact of preference. Neither does it regulate the option agreement.[79] However, the literature is of the opinion that such contracts should be valid, since according to the general principle of freedom of contract parties are free to devise any contractual arrangement having the legal effect of a preliminary contract.[80]

70 SrbLO, Article 45 (5).
71 Draškić in Perović, 1995, p. 108.
72 SrbLO, Article 45 (6).
73 Draškić in Perović, 1995, p. 109.
74 Slijepčević, 2013, p. 114.
75 *Prednacrt Građanskog Zakonika Republike Srbije* [Preliminary Draft of the Civil Code of the Republic of Serbia] https://www.mpravde.gov.rs/files/NACRT.pdf.
76 Preliminary Draft of the Civil Code of the Republic of Serbia, Article 189 (1).
77 Preliminary Draft of the Civil Code of the Republic of Serbia, Article 189 (2).
78 HrvLO, Article 268.
79 Slakoper and Štajfer, 2007, p. 62.
80 Slakoper and Štajfer, 2007, pp. 73–74.

6.3. Slovenia

In a similar way to the HrvLO, the SvnCO has not departed from the rules on pre-contract (*predpogodba*) devised by the former federal law on obligations. They correspond literally to the rules in the SrbLO.[81]

Likewise, the SvnCO does not explicitly regulate the pact of preference or the option agreement. The case law, however, clearly considers option agreements as being valid. It differentiates the option agreement from the main contract, since the first creates only a right to affect unilaterally the conclusion of the envisaged contract, whereby the rights and obligations of the parties emerge only by the main contract coming into existence. In addition, the case law lucidly differentiates the option agreement from the pre-contract: While the pre-contract creates enforceable rights, the option agreement does not. The pre-contract is a real commitment that is enforceable, whereas an option agreement means only the possibility of concluding a contract. The beneficiary of the option may achieve the conclusion of the contract by simple statement, but he or she cannot be forced to conclude it. Therefore, the option debtor does not have a claim against the option beneficiary for concluding the contract, and the option beneficiary does not even need such protection, as the creation of the main contract occurs with his or her unilateral statement.[82] The literature also acknowledges the validity of the option agreement.[83]

7. Slovakia

In Slovak law the pre-contract (*pactum de contrahendo*), or—more precisely—the contract for the conclusion of a future contract (*zmluva o uzavretí budúcej zmluvy*), is regulated expressly, as this contract is widely used, especially for the sale of future real estate (immovables). Slovakian legislation does not limit contracts in any way, the future conclusion of which may be the subject of another 'contract for the conclusion of a future contract' (pre-contract), which means that it is possible to agree on the conclusion of any contract in the future.

A pre-contract is a bilateral juridical act, the essence of which consists in the fact that the parties first conclude a pre-contract and then, at a specified time and after having met the agreed-upon conditions, conclude the other contract upon whose conclusion they agreed under the pre-contract. This characteristic distinguishes pre-contracts from other similar mechanisms, such as a proposal to contract (i.e., a unilateral juridical act), an option agreement (where one party is left to initiate the obligations of the other party by its own unilateral act and at its own discretion, without the need to conclude a separate contract),[84] or the preparatory contract (*pactum praeparatorium*)

81 SloCO, Article 20.
82 See for example the Decision of the Higher Court in Maribor No. VSM sklep I Cpg 526/2012.
83 Juhart, 2004, pp. 1103–1109; Samec Berghaus, 2006, pp. 85–99.
84 Dulakova Jakúbeková, 2007.

regulated expressly in § 50b of the SvkCC (i.e., the binding contract by which the parties agreed that the content of the contract shall be partially supplemented later, provided that they have undoubtedly indicated that the contract is to be valid, even if no agreement has been reached on the remainder of the content).

The pre-contract is not uniformly regulated in Slovak law, as there are two separate regulations, one for commercial relations and the other for other civil law relations. For the area of commercial relations, the pre-contract is regulated by § 289 of the SvkCommC, and for the area of other civil law (non-commercial) relations by § 50a of the SvkCC.

In both cases, the contract must be recorded in writing and may be agreed as unilaterally or as bilaterally binding.[85] The SvkCC requires that the parties to the contract agree on all the substantive elements of the future contract. In commercial law relations, it is sufficient that the subject of performance be determined only in general terms. In both cases, it is necessary to specify the period within which the future contract is to be concluded.

The consequences of a breach of the obligation to conclude a future contract are slightly different depending on whether the matter is civil or commercial.

According to the SvkCC, 'if no contract is concluded by the agreed time, it is possible to demand in court within one year that the declaration of intent be replaced by a court decision. The right to damages is not affected.' This means that if a party breaches its obligation to conclude a future contract with the requisites agreed, the counterparty as plaintiff may sue that party (as defendant) in court, asking the court to oblige the defendant to conclude the contract, with a final judgment replacing the defendant's act of concluding the contract. However, the judgment does not replace an act of the plaintiff, so for example, for the purposes of proceedings before the Immovable Registry, both a valid judgment and an act of concluding a contract by the plaintiff must be submitted.[86] It also follows from the wording of the law that, in addition to an action for fulfillment of the obligation to conclude a future contract, the applicant may also claim compensation for the damage caused by the delay. However, in our opinion, the law does not give an explicit answer to the question whether the party concerned may, instead of concluding a contract, claim damages to the extent of a positive contractual interest, but it seems that the literature allows such a claim.

The one-year period within which conclusion of the contract or damages may be claimed in court shall run from the expiry of the agreed-upon period within which the future contract was to be concluded. There is no consensus in the literature as to whether this period is a limitation period (*premlčacia lehota*)[87] or a preclusion period (*prekluzívna, prepadná lehota*).[88] If it were a limitation period, the court would deal with its expiration only on the defendant's objection, not *ex officio*.

85 Fekete, 2018; Mazák, 2010, p. 183; Števček, 2019.
86 According to Kirstová, 2018, p. 51.
87 Števček, 2019.
88 Fekete, 2018; Mazák, 2010, p. 183.

The consequences of a breach of the pre-contract are regulated similarly in the SvkCommC, albeit with small differences. In the first place, the SvkCommC clearly stipulates that if one party refuses to enter into a contract, the other party may seek either a determination of the content of the future contract by court decision or, alternatively, damages caused by a breach of the pre-contract. If a party decides to seek a determination of the content of the future contract by a court, then he or she can only claim damages in parallel if the party has unjustifiably refused to negotiate the conclusion of the contract. In such a case, however, he or she can only claim compensation for the damage caused by the delay.

The SvkCommC explicitly allows the parties to agree that if the future contract is not concluded in time, they can ask a third party, not a court, to determine its content.

Regarding the issue of a real sales contract concluded for the future (i.e., a contract in which not only consent—declarations of intent—of the parties but also the exchange of the good that is the object of the sale is required), it can be deduced from the wording of the law that the law does not permit pre-contracts for the conclusion of such future real sales contracts, since the party may only demand that the declaration of consent be replaced by a court decision, but not the material transfer of a good. Nevertheless, it seems that this issue has never been addressed in judicial practice, as future real sales contracts are very rare.

The principle of *rebus sic stantibus* applies in civil law relations. The SvkCC provides that the obligation to conclude a contract in the future lapses if the circumstances on the basis of which the parties concluded the pre-contract have changed to such an extent that it is not possible to justly require the future contract to be concluded.

8. Concluding remarks

Precontracts represent an interesting phenomenon in all of the analyzed jurisdictions, even if the intensity of their use is not the same (for example, quite high in Romania, relatively low in Hungary).

Regarding the content of the pre-contract, in general it must contain all the essential elements of the envisaged contract. Otherwise, it is much more of a partial agreement, which is not apt to be directly enforced or is not fit to create a contract in and of itself. Of course, not all elements of the future contract must be detailed. However, in the cases of Hungary, Poland, Romania, or Slovakia, if all the essential terms of the future contract are not determined, this leads in practical terms to the non-conclusion of the pre-contract. Similarly, in Serbia, Croatia, and Slovenia, binding obligations from a pre-contract arise only if it contains all essential elements of the planned contract. However, we have to make mention of the fact that in the case of Slovakia, where a dualist (civil-commercial) regulation of obligations is in force, in the case of commercial pre-contracts much more general terms are accepted than in the case of civil pre-contracts. Of course, the monist systems of obligations

that do not differentiate between civil and commercial pre-contracts apply the same standards for pre-contracts between non-professionals or professionals (businesses). In establishing the conditions of the contract envisaged in the future, the pre-contract must be in concordance with the mandatory legal rules governing the prospective contract.

We must note that the Hungarian legal system does not recognize unilateral pre-contracts as such; instead, these are qualified as agreements giving rise to option rights. In other jurisdictions, the option right and unilateral pre-contract are deemed to be distinct types. The option right is a much more intensive tool; because it does not require any future collaboration from the side of the debtor, the creditor can unilaterally decide the fate of the contract itself. The unilateral pre-contract is a promise to conclude a future contract if the other party so requires, but the envisaged contract must be effectively concluded, and therefore a new manifestation of intent is necessary from the debtor.

The form of the pre-contract constitutes a sensitive question: Is there a need for symmetry in form between the pre-contract and the promised contract to be concluded in the future? For example, in the Czech Republic and Hungary, for the sale of immovables a written form of the agreement is required, and this condition is also mandatory in the case of pre-contracts. In Romania, where the transfer of immovables is subject to more restrictive formalities (notarial authentic form), there have been decades-long debates on the necessity of this symmetry, but the dominant view, sanctioned also by the High Court of Cassation and Justice, is that the pre-contract does not require the notarial authentic form. In Serbia, Croatia, and Slovenia, the pre-contract must be concluded in the very same form as the main contract.

The other party can refuse the conclusion of the promised contract if there are changes in circumstances (the Czech Republic, Hungary, Serbia, Croatia, Slovenia, Slovakia) or the refusal is justified (Romania). If there is no ground of refusal, this is practically a breach of the pre-contract that entitles the creditor to claim damages.

Another issue apt for comparison is the enforcement of pre-contracts. All analyzed legal systems permit the enforcement of the pre-contract by the court, which is entitled, if possible, to create the promised contract even against the intent of the defendant, but in doing so, the judge must respect the elements of the contract created by the parties in the pre-contract.

Regarding the time limits within which the court may be asked to create the envisaged contract, two approaches are possible. For example, some countries set specific rules (one must address the court within 6 months from the moment the conclusion of the promised contract is due in Romania, Serbia, Croatia, and Slovenia, or within one year in Poland and Slovakia), whereas other jurisdictions apply the general rules and terms of prescription (Hungary). The time limit can be one of limitation or of preclusion, depending on the legal system. In Slovakia, the legal nature of the one-year term itself is disputed.

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