| Chapter VII |

Gratuitous Contracts

1. General considerations

1.1. Gratuitous contracts defined

The idea of a gratuitous promise or a gratuitous contract is somewhat suspicious from the perspective of the principles of private law. One of the unwritten but generally accepted principles of the law of contract is that most, if not all, contracts should be *do ut des,* so that all contracts lacking the '*ut des*' provisions are somewhat suspect by definition. That is why most jurisdictions have special rules governing gratuitous acts in general. From requirements of form through *causa* (if it exists in any given legal system) up to the modification of contractual liability rules, and sometimes entailing some kind of government control over such acts (limited to taxation, as the case may be).

The foremost problem connected with gratuitous contracts is their definition. Thus, the main question is what constitutes such a contract and how to distinguish these contracts from other juridical acts having a similar purpose while having a direct or indirect consideration built into the system. A gratuitous contract is one where a party transfers rights, assets, or services to another party without proper consideration. In such a relationship, one of the parties is always a debtor, the other always a creditor with no contractual obligations vis-à-vis the other party arising from this relationship. Some such contracts are styled as always gratuitous; others may or may not be gratuitous depending on the parties' intention. In most if not all legal systems, the principle of contractual freedom allows the parties to create unnamed gratuitous

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contracts, sometimes with surprising side effects, like in the case of Polish musicians distributing their works free of charge. Their sharing economy initiative was blocked by collective rights management organizations, claiming that their activities are illegal. In fact, copyright law contains provisions aimed at the protection of authors. One of these provisions is that certain rights to copyright fees are inalienable and not subject to renunciation. Collective rights management organizations argued that it is illegal to distribute royalty-free music, even if the author so wishes.

1.2. Delimitation from other bilateral juridical acts

Another problem connected with gratuitous contracts is their delimitation from other juridical acts. Let us start with the simplest case: gratuitous contracts and *precarium*. In older literature, *precarium* was defined as a relationship where the client (*precario accipens*) could ask the patron (*precario dans*) to let him use that patron's chattel. The *precario dans* could request the return of said chattel at any time—this differentiated *precarium* from *commodatum* (a gratuitous loan for use). Later *precarium* was defined as a gratuitous relationship arising from the rules of politeness or hospitality. For instance, whenever we are guests at somebody's house, we use our host's furniture, silverware, and sometimes even a room and bed with no overt contractual formality for this. The relationship is therefore purely factual, and in many cases the *accipens* is not protected by law. Some systems maintain *precarium* as part of their civil law. Others have abolished it and, at best, allow the use of the *commodatum* rules by analogy. The limits between *precarium* and gratuitous contracts remain somewhat blurred, and the legal nature of a relationship has to be determined in each case separately.

Gratuitous contracts, as mentioned above, are characterized by a lack of consideration or any reciprocal treatment. However, in many cases that seem *prima facie* gratuitous, there is some kind of 'payment,' either directly or indirectly. This does not mean exactly that the contract stops being gratuitous, but rather that we have to decide if such 'payment' constitutes a consideration or reciprocal treatment. The most basic case is *donatio sub modo*—a donation where the donator obliges the donee to act in a specific way without making anyone a creditor. This does not make the *donatio sub modo* an imperfect obligation. It is the donator and sometimes a public authority who can demand that the donee act as stipulated in the donation contract. In this case there is no creditor-debtor relationship, but there is a way to force the donee to act as specified in the contract. Generally, the courts will be inclined to use the *sub modo* clause to assess various donations with additional burdens placed on the other party.

On the other hand, in some cases it is doubtful whether we really have a gratuitous contract and not some kind of a commercial relationship. For instance, we have no doubts that if, say, MOL, Orlen, or Shell give money to a sports association in exchange for displaying their logo, or change the name of the football stadium to 'ORLEN ARENA,' it is not a donation but a sponsorship contract. Let us now change the setting and assume that a large corporation funds a chair at a university (say, the 'BigBusinessInc Chair of Maritime Studies') or gives a large sum of money to the same

university's law school, asking that the law school change its name to 'BigBusinessInc School of Law' and create a 'BigBusinessInc Scholarship Trust.' Is this a *donatio sub modo* or a sponsorship contract? If some private individual donates a large amount of money to a college and then receives an honorary doctorate in recognition of this support, is it still gratuitous?

Let us look at another example, that of various 'free' services we are often offered, such as e-mail accounts, blog platforms, or access to various other services where there is no direct reciprocal exchange, but there is an indirect prestation borne by the user, like tolerating omnipresent advertising or a consent to access and process personal data. On a purely social plane, users usually do not perceive this as a 'price' they 'pay,' but we still have to find a tool to distinguish such apparently gratuitous acts from others that are genuinely gratuitous.

A more classical problem connected with gratuitous transfers is sale for a symbolic price. For instance, the benefactor of an orphanage transfers the ownership of a new building to the orphanage for a symbolic price of 1 EUR. Should we treat this as a standard sale with all relevant consequences or again as a donation—with all the bells and whistles? And then there enters another classic case: *negotium mixtum cum donatione*, the case where gratuitous and onerous elements are entangled in a single structure. Which factor should prevail?

Last but not least, we will have to mention typical bilateral gratuitous acts like donation of blood, tissues, organs, and genetic material. The peculiarity of these acts is that in some systems they follow standard contractual rules, while in others they are regulated but—at least technically—are not considered as being contractual (they may constitute non-enforceable obligations or quasi-contracts, or other enforceable acts).

1.3. Types of gratuitous acts

The taxonomy of gratuitous acts is complex and does not necessarily conform to the 'one-size-fits-all jurisdictions' formula. The taxonomy proposed here, or so the author hopes, is created in a way that should accommodate at least the majority of jurisdictions covered by this study.

The most basic classification will be according to the nature of the obligation. In group one we would place enforceable contracts classed as gratuitous under the law and with no possibility of transforming them into non-gratuitous contracts. The most obvious example would be a donation and gratuitous loan (*commodatum*).

The second group will consist of contracts that may—or may not—be shaped as gratuitous, depending on the parties' will. This group shall be constituted with two subsections: A and B. Subsection A includes contracts where parties are entirely free to choose between a gratuitous or a non-gratuitous variety and where civil law has no preferences as to the nature of the contract (for instance, in Polish law this could be a financial loan). Subsection B consists of contracts that can be made gratuitous if the parties so desire, while a rule of civil law provides for a presumption that

consideration of some kind will be required (e.g., *mandatum*), unless the parties state clearly that the contract is gratuitous.

The third and last group is constituted by contracts that are juridical acts of an undetermined nature (i.e., where there is a dispute as to the legal nature of the contract). According to various authors, a good example of such a contract is debt forgiveness in Polish law, which, according to various authors, can be a gratuitous act, an act for consideration, or a 'consideration-neutral' act.

Another standard taxonomy can be based on the subject matter of the contract. Using this criterium, we can distinguish between at least three types of gratuitous acts. Contracts for gratuitous transfer of ownership (e.g., donation, or transfer of immovables to the state treasury), contracts for gratuitous lease or use of property or rights (*commodatum*, gratuitous use in Romanian law, or open licensing of intellectual property), and gratuitous contracts for the provision of services and favors. We will find all gratuitous services (including online platforms) and 'sharing economy' initiatives in this latter group. It should be noted that the sharing economy, in its narrow sense, is based on promises, and is not reliant on reciprocal treatment or consideration on behalf of the other party. In this aspect, these form a novel and unexplored group of gratuitous contracts emerging solely by the will of the parties.

Finally, a separate group of gratuitous acts should be mentioned—those that relate to sensitive issues, mostly connected with human life or the right to privacy or self-determination. Examples of such actions are blood or organ donation, acting as an IVF surrogate mother, or donating somebody's corpse for medical purposes. Since these acts relate to a sensitive part of human existence and can be easily abused, many legal systems are reluctant to recognize them as contractual or as enforceable promises. Nonetheless, even the jurisdictions that are reluctant to admit that these are civil law contracts tend to expressly regulate such acts in this way or another since there is no standard method of dealing with the problem: They have to be assessed *de casu ad casum*.

One possible way of dealing with such promises is to consider them null and void as contracts against public policy or *contra bonos mores.* In such a case, the contract (either gratuitous or for consideration) will be invalid. Another possible solution is to make such a contract valid but unenforceable, or to make it an exclusively gratuitous contract. Finally, it would be possible to regulate these acts without mentioning the nature of the agreement. Thus, they can either be considered under public law or under private law or of a deliberately unclear nature.

One good example is the French concept of '*le don de vie,*' the 'gift of life.' Another one is the practice of defining a contractual or semi-contractual relation without using the word 'contract' (agreement, pact, covenant, etc.). A related solution can be found in the Québec Civil Code, where a permit for body transplants is covered under the section on the integrity of the human body, making it a gratuitous (and, in this case, possibly unilateral) juridical act.

1.4. Contractual freedom, formalities, rights, and duties

The validity and contents of a gratuitous contract should be assessed separately in each case. Some of these contracts are regulated in the civil codes of the various jurisdictions, so in these cases only the contents added by the parties need scrutiny as far as the validity of a contract is considered. In the case of unnamed contracts of an apparently gratuitous nature, one has to examine whether the contents of the contract exceed the (usually generous) limits of contractual freedom. This examination is standard practice that does not constitute a specific difference between gratuitous contracts and contracts for consideration.

However, a collision between *ius cogens* and the parties' intentions may sometimes be found in quite unexpected places. A good example of this is the dispute mentioned above between artists and collective rights management organizations regarding the legality of licensing royalty-free music. Another is the problem of the validity of donations and other juridical acts concluded *mortis causa*. In many countries, courts are reluctant to consider such contracts valid, owing to the general view that these are used mainly to circumvent inheritance rules. There is thus no need for a donation *mortis causa,* as there exists the possibility of drafting a last will containing a *legatum* or *legatum per vindicationem.* Other legal systems adopt a more flexible approach. Sometimes the parties try to adapt a foreign law construct to the needs of a legal system that does not practice—nor particularly approves of—such constructs. The classical case would be an attempt to create an Anglo-Saxon trust to provide money to friends or simply people in need in a civil law jurisdiction.

Let us proceed now to the requirements of form. Since we are dealing with gratuitous acts here, the law in most cases requires the parties to conclude the act in a specific form stipulated by the law. In the case of gratuitous property transfers, a notarized deed or application of a seal of authentication by some authority may be required to have a valid contract. This ironclad rule is sometimes contrary to common sense. Imagine Santa Claus visiting a notary each Christmas Eve to make Christmas gifts valid and enforceable! That is why most legal systems consider informal donations, where the donee has obtained possession of the gift concomitantly with the act of donation, as being valid. There is of course a sound explanation for this. Formalities have a triple effect. The first one is evidentiary: Proof is produced of a gratuitous contract. The scope of the disposition contained within can be easily decoded from a notarized copy. The second is the protection of the person transferring his or her property without consideration. The requirement of a trusted instrumenting officer (a notary) and the solemn form of the act give the transferor time to carefully consider his or her actions. Finally, the third reason for formalities is the protection of third parties (such as creditors) and of the public interest in taxation and supervision of property transfers. Rules protecting good faith acquisition are often lifted, and the possibility of exercising *actio Pauliana* is more readily permitted in case of gratuitous transfers. Sometimes passing of the possession from one party to another is required to make the contract valid. Surprisingly, however, there are almost no formalities in the case of other categories of gratuitous acts. It is enough to click a box to obtain

a valid Linux license or free online advice. The reason for this is relatively simple: The nature of intellectual property assets is that licensing them does not diminish copyright or patent right holders' 'ownership.' It only allows other persons to use the intellectual property products within the limits set out in the license. So, contrary to gratuitous transfers, there is little risk that an inexperienced or reckless donor will lose his or her property against his or her true intention. Jurisdictions that know the concept of *causa* will use it as an additional tool of protecting the debtor against reckless or forced transfers. If there is no visible *causa donandi*, the contract is null and void.

Contracts concluded for some form of consideration are, as a rule, not unilaterally revocable. The right to rescind or unilaterally cancel a contract may arise in exceptional circumstances, such as mistake, essential error, or breach of contract by another party. There may be a statutory provision permitting withdrawal from the contract. A contractual provision permitting unilateral withdrawal may also be stipulated. In the case of gratuitous contracts, these standard options are often supplemented by the additional right to revoke the act, and again, there is no standard way of proceeding in these cases. For instance, in the case of gratuitous transfers of property, it may be possible to revoke the donation due to gross (egregious) ingratitude on the part of the donee, or, when after making a promise to donate, the donor becomes insolvent. On the other hand, this revocation is not possible e.g., in the case of gratuitous transfer of real property to public entities in Polish law.

In the case of other gratuitous acts, there is no automatic right to revoke. Still, the debtor may, e.g., demand the premature return of property (*commodatum*) or terminate the relationship by withdrawing the consent to use intellectual property (cf. the 'Malawi' case in the Polish section of this chapter). The right to revoke or terminate the contract is a protective measure against abuse of someone's generosity by the other party.

Another characteristic trait of gratuitous contracts is a different balance of contractual rights and duties than found in contracts concluded for some form of consideration. The general idea is that a person diminishing his or her estate for the benefit of another for no consideration should not have the same duties as someone who obtains a reciprocal treatment. This balancing of scales can be manifested, e.g., by the lesser standard of duty of care or, in some cases, the limited liability for defects of the object transferred or leased for no consideration (by legal waiver of warranty or of a similar concept of contractual or even of a legal guarantee).

Interestingly, limited liability does not constitute a standard feature of gratuitous contracts. It is embedded by provision of law in some of the named contracts but cannot be taken for granted in each and every case. For instance, it is embedded by the Polish Civil Code as far as donations and gratuitous loans are concerned, but it is not to be implied in the case of other gratuitous contracts.

Reciprocally, the position of the person who obtains something without consideration vis-à-vis another party seems to be weaker, at least as far as the limitations mentioned above of contractual liability or the right to revoke or withdraw consent are

concerned. At the same time, a person acquiring title or a right for no consideration is not protected if such a gratuitous act infringes on the rights of third parties. In such cases, e.g., creditors of the donor can seize the donated property using *actio Pauliana* or a similar tool. If a successor in title acquired that title without consideration from another party, which in turn acquired it through deceptive activities, that successor in title may be forced to relinquish his or her rights.

To sum up, gratuitous contracts come in all possible flavors and colors, and it is sometimes hard to find a common core even within one legal system—and that is something that almost all legal procedures have in common.

2. The Czech Republic

2.1. Definition and delimitation from other bilateral acts

There is no clear or universal definition of gratuitous contracts to be found in either Czech case law or legal literature. A determination of whether there is a legally binding gratuitous contract (as opposed to a mere social favor, or act of kindness) as well as whether a contract is in its substance gratuitous, for consideration, or in part both can never be made with complete certainty, as these are not exact categories. The interpretation of the manifestation of the will of the parties is the key to determining this aspect, invariably on a case-by-case basis.

While drawing a line between a gratuitous contract and a mere social favor (*společenská úsluha*), it is of utmost importance to determine whether the parties' intention was to actually create a legally binding relationship, or if they had no intention whatsoever of binding each other with a legal obligation.[1]

In the case of contracts for consideration (i.e., synallagmatic contracts), both parties are creditor and debtor of each other at the same time. That is not the case with gratuitous contracts, where one of the parties provides a performance to the other party without an intention to acquire any reciprocal consideration. In the case of donation agreements, this attitude can be also called an intention to donate (*animus donandi*). Whether there is an intention to donate, partially to donate, or a completely different intention is again a matter of the interpretation of the manifestation of will in any particular contract.[2]

The same principle applies regarding the *donatio sub modo*, when a command or condition is stipulated by the donor, or in case of other performances required from the enriched party under a *prima facie* gratuitous contract. In all these cases it is also fundamental to thoroughly interpret the manifestation of will of the parties concerned. For instance, the Supreme Court of the Czech Republic has repeatedly concluded in cases of *donatio sub modo* that if, and to the extent to which, the

1 Kasík and Bednář in Hulmák et al., 2014, p. 1. This approach is also reflected in CzeCC, § 2055 (2).

2 Janoušek in Petrov et al., 2019, p. 2239.

performance of a pecuniary value according to the command of the donor is intended to result in the direct pecuniary benefit of that donor (or a third person designated by that donor in the contract), we do not actually deal with a contract of donation but with some kind of a contract for consideration or a mixed donation.[3] To the extent of the performance of a pecuniary value, the *animus donandi* is not present. If the performance is not intended to bring the donor any direct pecuniary benefit but nevertheless the donor receives some, it does not change the nature of the contract as gratuitous, as the *animus donandi* remains unaffected.[4]

When assessing whether the contract is gratuitous, for consideration, or partially both, the intention of the parties is not always correctly reflected in the decision-making practice of the Czech courts. For example, the Supreme Court assessed a contract under which an owner of the apartment undertook to provide it to the other party for temporary use for a symbolic monthly consideration of CZK 1 as being a lease agreement (a contract for consideration). It is apparent that the intention of the parties here was hardly to have the performance of the owner be provided for any kind of an actual consideration.[5]

2.2. Differences from contracts for consideration

It must be stressed that the answer to the question whether the contract is gratuitous or for consideration is of utmost importance, as different rules apply to some extent. Since there is a considerable number of examples of different rules applying to gratuitous contracts and contracts for consideration, only few of them will be presented here.

First, claims due to defective performance may in general arise only in the case of contracts for consideration and not in the case of gratuitous contracts.[6]

Second, there is a special rule for interpreting the manifestation of will applicable only to gratuitous contracts regulated under § 1747 of the CzeCC: '*If a contract is gratuitous, a debtor is presumed to have intended to bind himself less rather than more*.'

Third, the existence of some kind of a consideration in the contract is in several cases a precondition for the legal protection of the one acquiring the property in good faith. One example is the acquisition of the right of ownership from someone else than a true owner of the property, i.e., from a person who did not have title (*nabytí od neoprávněného*). In the case of acquisition of a property registered in a public property register, from a person not having title (even though he or she is enrolled as the real

3 Supreme Court Ref. No. 29 ICdo 102/2019 and Ref. No. 22 Cdo 5236/2016.

4 If an oil company provides money to a hospital to help mitigate the consequences of an earthquake while agreeing that their name will be published between the donors, and if such an act consequently leads to higher incomes of this oil company due to its customers perceiving such an act of generosity very positively, it does not seem that the intention here was to actually acquire any consideration in return—thus, the contract should still be considered as being gratuitous and not for consideration.

5 Supreme Court Ref. No. 26 Cdo 1809/2018.

6 CzeCC, § 1914; Šilhán in Hulmák et al., 2014, p. 871.

owner in such a register), the acquiror in good faith (who acted trusting that the state shown in the register corresponds to the actual state of the title) is protected vis-à-vis the actual owner only, and only if the acquisition occurred for consideration.[7] Another example is the relative ineffectiveness of a juridical act (*relativní neúčinnost*), where the preconditions required for a successful motion for avoidance are much stricter in the case of a contract for consideration than in the case of a gratuitous contract. For instance, the creditor may invoke the relative ineffectiveness of a gratuitous contract if it was concluded in the last two years without any need to prove that the acquiror has been aware of the debtor's intention to impair satisfaction of the creditors' claims (while such proof is *conditio sine qua non* for a successful motion for avoidance in case of the contracts for consideration).[8]

What both cases mentioned in the previous paragraph have in common is that they concern not just an interest of the parties to the contract, but also an interest of a third party (e.g., in case of the acquisition of the ownership from a person without title, with the interest of the owner of the property; and in the case of the relative ineffectiveness of the contract, with the interest of the creditor whose claim has been impaired). Thus, when making an assessment whether the contract is gratuitous or for consideration, while (as described above) the conclusion in this respect has substantial legal consequences for the position of a third party, the question arises whether we should assess the existence of a consideration only according to the will of the parties to the contract as described in Subsection 2.1. above (the subjective perspective), or whether we should rather consider the existence of a consideration from an outside point of view (the objective perspective). For example, if a person without title (a non-owner) sells a house for 1/100 of its market value but both parties are in unity that such price is appropriate, the contract will be assessed in compliance with the party's intention as a contract for consideration (a contract of sale and purchase) and the acquiror will be protected vis-à-vis the actual owner (a third person). If, however, we assess such an agreement from an objective perspective, it is not hard to say that the contract is actually gratuitous, as the consideration is egregiously low.

In Czech legal literature and case law, the conclusion is that whenever we deal only with an internal relationship of the parties to the contract, we should give priority to the subjective perspective, while in cases where the interests of a third party must also be considered, we should give priority to the objective perspective.[9] Such was, e.g., the case that constituted the subject matter of the decision of the Supreme Court of the Czech Republic Ref. No. 22 Cdo 2769/2018, where the court concluded that if the donor transfers a real property right registered in the Land Register, while establishing for himself with another contract a reserved right of life estate (*výměnek,*

7 See § 984 of the CzeCC. Existence of some kind of a consideration is relevant also in case of the acquisition from a non-entitled person of a property not registered in a public registry, since the acquiror has a much lower burden of proof as regards the circumstances of the acquisition—see §§ 1109–1113 of the CzeCC.

8 Compare CzeCC, § 591 to § 590.

9 Tégl, 2013, pp. 28–33. See also decision of the Supreme Court Ref. No. 22 Cdo 2769/2018.

Ausgedinge in German), the donation contract should be assessed for the purposes of the acquisition from a person without title as being for consideration, and thus the acquiror should be protected vis-à-vis the actual owner of the real property.

2.3. Types of contracts

Czech law distinguishes between contracts with a mandatorily gratuitous nature and contracts that may either be gratuitous or for consideration, according to the will of the contracting parties. The first group consists of donation, *precarium* (*výprosa*), and *commodatum* (*výpůjčka*). Czech law perceives the *precarium* not as a mere social favor, as might be the case for some other jurisdictions, but as a fully-fledged contract with all legal consequences arising out of it.[10] The second group consists of, e.g., the gratuitous loan (*zápůjčka*), mandate (*příkaz*), deposit (*úschova*), and license agreement (*licenční smlouva*). In case of some of these contracts, it can be argued that even if no direct price was agreed, there is still something that could arguably be understood as being a consideration, for example, the obligation of the mandator to reimburse the mandatary for the costs reasonably incurred during the performance of the mandate. The parties are also free to agree on other innominate gratuitous contracts than those that are provided for by the CzeCC, unless such an agreement would be in breach of some mandatory rule or not in compliance with some other legal limits (e.g., good practices etc.).[11]

The contracts for blood or organ donation, surrogacy, etc. would likely be null and void under Czech law on the grounds of a breach of public order. For instance, blood or organ donation is regulated by law in such a way that the donor and the recipient both give their consent to a medical facility, not to one another. The recipient (donee) is then chosen according to a specific process in compliance with the principles of medical urgency and the equality of the awaiting recipients, not according to the autonomy of will of the donor and the recipient.[12]

2.4. Validity and form

Regarding the validity and the form of the gratuitous contracts, there are generally no distinctions made from other contracts, and thus we fully refer to Chapters V, VI, and VIII.

As for the form of the contract, it is sufficient to say that the principle of informality applies, meaning that the parties are free to choose any form, unless the law requires a specific form for the contract. It should be noted here that a requirement of a specific form in case of the gratuitous contracts can bear a special purpose compared to the contracts for consideration. This constitutes an alerting function, as the requirement of a specific form serves to protect the donor from rash and premature decisions.

10 Hubková in Petrov et al., 2019, p. 2373.
11 CzeCC, § 1746 (2).
12 Act No. 285/2002 Coll., on Transplantation, as amended.

A written instrument is required, for example, in case of donation agreements transferring property rights over assets registered in a public register (such as a land register) or in case the donated asset is not transferred simultaneously with the conclusion of the donation agreement (the latter case actually having an alerting function). While non-compliance with the formal requirements would lead in the first case to the contract being null and void, in the second case it would only be voidable.[13]

3. Hungary

3.1. General rules

In Hungarian contract law, a contract can emerge from a gratuitous promise according to the general rules for the conclusion of a contract. Gratuitous contracts may also stem from offer and acceptance. Thus, the promisor is obliged to perform the promise, and if he or she failed to do so, the general remedies for breach of contract are available for the promisee with certain corrections. There is a rebuttable presumption, established by the statutory rule provided in § 6:61 of the HunCC, according to which if an obligation to perform services has been stipulated in the contract, an obligation to provide performance of a consideration shall be implied in the agreement of the parties. On the grounds of freedom of contract, the parties are free to agree that no consideration shall be provided and conclude a gratuitous contract even if the rules covering the type of contract require consideration.

3.2. Specific rules

The underlying policy of providing different rules for gratuitous promises and transactions with an exchange of values is that there is no expectation of profit on the side of the promisor and no costs incurred on the side of the promisee. Thus, the risks imposed on the promisor should be lower than they normally would be, i.e., according to the rules modelled on market transactions.

Gratuitous contracts are voidable on the grounds of mistake, deceit, or duress (*vis, metus*) even if the other party could not have been aware of these circumstances[14] which is a precondition of avoidance on such grounds according to the general rules. Thus, for gratuitous contracts it is the will theory of contract that prevails, in contrast to the general rules driven by the declaration (statement of consent) theory.

The main rule of liability for breach of contract establishes strict liability, as the party shall be exempted from liability only by proving that the breach of contract was caused by a circumstance that fell beyond his control and was not foreseeable at the time the contract was concluded, and he or she could not be expected to have

13 Janoušek in Petrov et al., 2019, p. 2235.
14 HunCC, § 6:93.

avoided that circumstance or averted the damage caused.[15] Liability for breach of a gratuitous contract is, however, not strict but fault-based as the main rule. If someone undertook an obligation to perform without any consideration, he or she shall be liable for the damage incurred in the subject of the service if the obligee proves that he or she caused the damage by an intentional breach of contract or failed to provide information on a substantial characteristic of the service that was unknown to the obligee. As to consequential losses, the obligor shall be required to compensate for the damage caused by his service to the assets of the obligee. He shall be exempted from liability if he proves that he was not at fault.[16]

3.3. The gift as a specific contract

The gift (or donation) is addressed as a specific named contract in the HunCC (§§ 235–237). Under a gift contract, the obligor shall transfer the ownership of a thing free of charge. The rules applicable to gifting a thing also apply accordingly to undertaking obligations for the gratuitous transfer of rights or claims. If the subject of the contract is real estate, the contract shall be included in a written instrument. Otherwise, there are no specific formal requirements as to the validity of the contract.

As a specific rule of hardship, the obligor may refuse to perform the contract if he or she proves that after the conclusion of the contract, a substantial change has arisen in his or her own economic circumstances or in his or her relationship with the recipient, due to which the performance of the contract cannot be expected of him. The obligor also has the right to reclaim the gift after performing the contract, provided that it exceeded the customary value for gifts of the same kind, on the basis of changes of circumstances, if such changes justify it on the grounds specified in the Hungarian Civil Code. Those grounds are set out as follows.

The obligor shall have the right to reclaim the gift after performance if, due to changes that occurred following the conclusion of the contract, it is necessary for his own subsistence, provided that returning the gift does not compromise the subsistence of the recipient. The recipient shall not be required to return the gift if he or she properly ensures the subsistence of the obligor via an annuity or maintenance in kind. In the context of the duty to provide maintenance according to the rules of family law, the question arose in practice whether the enforcement of the recovery claim is a precondition for the application of the rules covering the duty to provide maintenance, i.e., that the gift may be reclaimed in order to maintain the donor's livelihood only by a donor for whom there is no other person liable for maintenance. The court practice settled this question in the negative, because the right to recover the gift and the right to maintenance under family law are independent personal rights of the donor, the exercise of which depend on his discretion and choice.[17]

15 HunCC, § 6:142.
16 HunCC, § 6:147.
17 Supreme Court Resolution No. PK 77.

The gift may also be returned if the recipient or his or her relative living in the same household commits a serious violation of law against the donor or his or her close relatives. In such case, the donor may reclaim the gift, or may claim the value that replaced the gift. Reclaiming shall not be permitted if the gift or the value that replaced the gift was no longer available when the violation of law was committed or if the donor forgave the injury; it shall be considered as granting forgiveness or waiving the right to reclaim if the donor does not reclaim the gift for a longer period of time without an appropriate reason.

The donor also shall have the right to reclaim the gift or to claim the value that replaced the gift if the assumption that was known by the contracting parties upon the conclusion of the contract and based on which the gift was granted has subsequently been definitively frustrated, and in the absence of this assumption the gift would not have been provided (e.g., the donor thought himself the father of the donee and this turned out not to be the case). The gift or the value substituted for the gift may be recovered on the grounds of frustrated expectation if it can be established that the donor was motivated to make the gift by an assumption concerning a substantive circumstance, and that without this assumption the gift would not have been made beyond reasonable doubt. The burden of proof in this respect rests on the donor. The gift cannot be recovered or the value substituted for the gift cannot be claimed if the failure of the assumption on which the gift was based was caused by the donor's wrongful conduct.[18] A gift may be recovered on the grounds of frustrated expectations only if such expectations on which the gift was based have been clearly communicated by the donor in a manner recognizable beyond doubt by the donee.[19] A spouse who has himself frustrated the durability of the marriage cannot reclaim the gift on the grounds that his or her expectations as to the durability of the marriage have been frustrated.[20]

4. Poland

There is no specific legal definition of gratuitous contract in Polish law. Legal literature knows gratuitous acts as a broader category and gratuitous contracts as a subset thereof. Gratuitous acts are those where a party gives something and does not receive anything in return. Technically it is possible to construct a non-contractual, unilateral gratuitous act (other than a last will and testament), but in the literature, all known examples are in fact of a contractual nature. This distinction in the literature is nothing more than an echo of one of the peculiarities of the PolCC: the division of its General Part into two separate titles, the General Part proper (containing the law of persons, juridical acts, the statute of limitations, etc.) and the General Part of

18 Supreme Court Resolution No. PK 76.
19 Supreme Court, BH 2008 No. 149.
20 Supreme Court, BH 2010 No. 67.

the Law of Obligations (contracts, torts and other non-contractual obligations, liability for non-performance, etc.). Gratuitous acts or contracts have their place in the syllabi of both General Part courses, and that is how they appear in the textbooks, so this division has no specific legal consequences. Technically, transfer of property *mortis causa* is gratuitous but is not usually listed as an example of a gratuitous non-contractual act. There are also consensual and gratuitous juridical acts that are not considered as pertaining to civil law, for instance, a donation of organs or blood, which cannot constitute a valid contract because their material objects are treated as *res extra commercium*. Generally, in the case of gratuitous transfers of assets, a typical legal cause (*causa*) for the transfer must be identified. For these juridical acts the existence of a *causa donandi* (i.e., 'I give to gratify one who is dear to me') is a prerequisite for the validity of a contract. It should be noted, however, that this is just a textbook opinion. In modern debates about property transfers, many scholars hold the view that *causa* is nothing but a theoretical construct with no practical meaning.

There are several possible classifications of gratuitous contracts. There are contracts for the gratuitous transfer of property (e.g., donation, transfer of real property to a public entity, etc.) and gratuitous uses [*commodatum*, permission to gratuitously use property, so-called lease-free leaseholds (*dzierżawa bezczynszowa*), open licenses, etc.]. Another classification depends on the existence of the possibility of constructing a contract as a gratuitous one. So, in the first instance, there are those contracts that are always gratuitous (donation, museum loan of artwork, and *commodatum*). The second tier in this classification is formed by contracts that the parties can shape as gratuitous or non-gratuitous. For instance, this is true for loans, a contract for life annuity, or suretyship. Some contracts can be gratuitous, but there is a presumption that one of the parties works for a fee (e.g., mandate). Finally, there are named contracts that are always for consideration (which thus cannot ever be gratuitous), e.g., sale, agency, commission sale, leasing, and transport agreements. Most of them are concluded by businesses in the course of their activities.

Gratuitous contracts have intrinsic peculiarities that make them a separate group, such as:

— the formalities connected with the valid formation of the contract,
— the person who delivers without a reciprocal treatment usually has lesser duties than someone who is paid in exchange for assets and services,
— the person who obtains assets for free benefits from fewer protections than someone who gives a consideration.

Formalities are not always compulsory for the validity of gratuitous contracts. They exist in two particular cases: donation and *commodatum*. In the case of donation, the donor's offer has to be contained in a notarized, written instrument. Otherwise, the contract shall be null and void. However, there is no requirement as to the form for the acceptance of a donation. This rule aims to protect donors from making hasty decisions. However, if the donor performs without fulfilling the formal requirements, the contract becomes valid. This exception applies only to money and other

movable (or, as the case may be, fungible) assets: Nobody expects you to go to the notary on Christmas Eve just to have a deed drafted allowing you to give presents to your family.

In the case of *commodatum*, a different rule applies. According to the majority view, this particular contract is concluded at the moment when possession passes to the user (beneficiary). Again—since this is a gratuitous contract—the intention of the *commodum dans* (the debtor) must be clear.

As far as duties of the debtors are concerned, the general rule is that their duties are limited by law. This is certainly true for limitations of the liability for defects of an object. The debtor is liable for the defects he or she knew of and of which he or she did not inform the other party. In the case of other gratuitous contracts, this exclusion or limitation of liability is not that ostensible but can be inferred from the general rules on the voluntary execution of contracts. In the case of donation, the donor may revoke the contract before transferring the assets if his or her financial status becomes precarious. If the donee commits an act of gross ingratitude (*rażąca niewdzięczność*) the donor may also revoke the donation.

The creditor in the above-mentioned cases has fewer rights, at least as far as liability for defects is concerned. He or she is also less well protected. If the other party invokes an essential error, the gratuitous contract is null and void. The *actio Pauliana* raised against an acquirer of a right from an insolvent debtor is always admissible if the acquisition was a gratuitous one. The presumption that entries into the Land Register are always valid does not apply in favor of a person who acquires a real right over immovable property gratuitously.

As mentioned above, simple acts of hospitality (*precarium*) are not considered gratuitous contracts but only factual relationships. The only rule that deals with the position of a person in such a relationship is Article 436 of the PolCC, which excludes the strict liability of a driver for harm caused to a hitchhiker transported out of hospitality in the car.

Donation *mortis causa* of one's own body for medical purposes concerns *res extra commercium*, so is not considered a contractual relationship at all, although it is regulated by law.[21] The same is valid for donations of organs for transplants and of blood, which are called honorary acts. There is a peculiar discrepancy between law and practice in the case of sperm and ova donors. Although these may only be donated, private fertility clinics pay so-called 'honorary' donors a lump sum compensation up to 400 EUR (in the case of men) and up to 1000 EUR (in the case of women). This way, the rules are circumvented, although no payment for a service in the strict sense occurs.

21 Admissibility of a *mortis causa* donation is moot in Polish law. The problem is purely theoretical now, because the same function can be performed more effectively by a *legatum per vindicationem*.

5. Romania

Romanian law regulates several types of gratuitous contracts. In order to avoid overburdening this section, we will focus on two of these: the gift and the *commodatum*. We wish to highlight the specifics of the regulation contained in the Romanian Civil Code.

A gift is a solemn, unilateral, and gratuitous contract whereby, with the intention of gratification, one party, called the donor, irrevocably disposes of an asset in favor of the other party, called the donee, without the intention of receiving anything in return.[22] The donation reduces the donor's assets, as the donor provides a pecuniary benefit to another person free of charge without being obliged to do so in advance, and the donee accepts this benefit. The legal definition of a gift should be supplemented to the effect that not only property but also a right *in rem* or a claim may be the object of a gift. The intention to make a gift (*animus donandi*) is the purpose for which the gift is made. It justifies the increase of one estate to the detriment of another and, along with the specific intent to gratify the donee without the expectation of any consideration, is the cause of the gift.

The performance of a natural obligation (a non-enforceable or imperfect obligation, *naturalis obligatio*), such as the payment of a prescribed debt, is not a liberality, being based on a (once) existing obligation, even if the coercive force of the State cannot be brought to bear in order to fulfill it. Similarly, the reparation of damage caused cannot be considered a gift in cases where the conditions of civil liability would otherwise not be met. Prizes, gifts, or rewards offered by professionals to their clients for advertising purposes are not subject to the rules on gifts, as they are not made *animus donandi*. Moreso, because of the advertising obligations to which the sponsored person commits himself, they can easily be considered contracts for consideration.[23]

A donation is a solemn (formal) contract. Under penalty of being considered null and void, the donation must be concluded by an authentic instrument.[24] This requirement has a dual function:

— to draw the donor's attention to the fact that he or she is committing himself or herself to a gratuitous transfer of assets and is to receive no consideration in return, the formality being associated with the specific contractual content to ensure the seriousness of the donor's intention,
— the need to protect the donor's will against defects of consent and in particular against deceit, the most common defect in consent in this area.

22 RouCC, Article 985.
23 Deak, 2001, p. 119.
24 RouCC, Article 1011 (1).

However, it is important to stress that indirect donations, disguised donations, and manual gifts are not subject to this formal requirement.[25]

(a) Indirect donations are those contracts without any consideration, whereby a person is gratified indirectly, for example, by waiving a right, remitting a debt, stipulating for another, or paying the debt of another, if the cause of the act is to gratify the beneficiary (*animus donandi*). Romanian law does not require the solemn, authentic form of the contract in such cases.

(b) Disguised donation is a form of donation concealed under the guise of a contract for consideration, most commonly a contract of sale. The public deed is a contract of sale, but the secret deed is a donation (simulated by total disguise of the desired juridical act). The practical interest in accomplishing the simulation may vary. For example, gifts are subject to reduction if they affect the reserved portion of the heirs, while sale is not subject to this legal regime, so the appearance of sale absolves the donee from reduction. The simulated gift is in principle valid if it complies with the conditions of substantive validity for gifts. Given the secret nature of the concealed juridical act, the solemn formal requirement is incompatible with this character. Thus, compliance with the conditions of validity of the apparent act (consensual contract of sale) is sufficient, and the secret act is not subject to the solemnity specific to the donation. If the disguised gift infringes their rights, the heirs become third parties to this act and may bring an action in simulation to establish the real legal nature of the secret act (this being a gift) and, if successful, may then request the application of the rules on the reduction of excessive gifts to the detriment of their reserved portions.

(c) The manual gift, as a simplified and frequently encountered variety of gift, is a real contract. It does not require the authentic form but comes into existence through the physical transmission of a tangible asset. Movable tangible property with a value of up to 25,000 RON (approximatively 5,000 EUR) may be the subject of a manual gift except in the cases provided for by law. A manual gift is concluded by the parties' agreement, accompanied by the concomitant transmission of the asset from the possession of the donor to that of the donee. Transmission of possession does not necessarily imply a physical movement of the asset but may be implicit (such as when the asset is abandoned by the donor to the use of the donee).[26] Being a real contract, a manual gift is incompatible with a promise of future donation, such a promise being null and void.[27]

Under Romanian law, the cause (*causa*) is the reason that leads each party to conclude the contract. The cause must exist and be lawful, and may not be *contra bonos mores*. An unlawful or immoral cause shall render the contract null and void if it is common (i.e., known) to the parties or, if not, if the other party knew of it or, according to the circumstances, ought to have known of it. The lack of cause, unlike under

25 Veress and Székely, 2020, pp. 158–159.
26 Deak, 2001, p. 150.
27 Malaurie, 2010, p. 211.

the general rules, also renders the gift null and void because Article 985 of the RouCC expressly provides for the special cause with which this contract may be concluded.

The principle of irrevocability of donations is enshrined in law, in the sense that clauses that allow the donor to revoke it by his sole will render the donation invalid.[28] The rule, as specified in paragraph (2) of the same Article, results in donations under such circumstances being considered null and void. The irrevocability of the gift contributes to the security of the circulation of assets.[29]

Thus, a contract of donation is null and void if it:

— is subject to a condition whose fulfillment depends solely on the will of the donor (a potestative condition),
— requires the donee to pay debts that the donor may incur in the future, if the maximum amount is not specified in the donation contract[30]
— gives the donor the right to unilaterally terminate the contract,
— allows the donor to dispose of the donated asset in the future, even if the donor dies without having disposed of the asset. If the right of disposal concerns only part of the property donated, the nullity applies only to that part.

This list is illustrative, as the same sanction applies to clauses that lead to the unilateral revocability of the contract of donation. In principle, based on the principle of the binding force of contracts, all contracts are irrevocable. However, donation is subject to a stricter regime (i.e., irrevocability of the second degree).[31] Irrevocability in the case of donation has been raised to the level of an absolute condition of validity: In the general case, a unilateral termination clause can be inserted in the contract, whereas donation is generally considered incompatible with such a clause.

However, a clause providing for conventional return of the donated property is valid. The contract may provide for the return of the property gifted, either in the event that the donee predeceases the donor or in the event that both the donee and his descendants predecease the donor (explicit resolutory condition) according to Article 1016 (1) of the RouCC. The reason why the legislator allows the conventional return clause is that the donation is *intuitu personae*. The predecease of the donee or the predecease of both the donee and his descendants may lead to the loss of this character, which is why the conventional return clause is valid.

Unlike the general legal regime applicable to gifts, which is characterized by irrevocability, gifts between spouses are essentially revocable. The law provides that any donation concluded between spouses is revocable, but only during the marriage.[32] Such a revocation does not need to be justified,[33] as it is a discretionary (*ad nutum*)

28 RouCC, Article 1015 (1).
29 Deak, 2001, p. 132.
30 Otherwise, the donor could indirectly revoke the donation, rendering the contract meaningless. However, the assumption of payment of a specific debt is valid.
31 Veress and Székely, 2020, pp. 162–163.
32 RouCC, Article 1031.
33 Supreme Tribunal, civil decision No. 659/1988, Revista Română de Drept No. 1/1989, p. 66.

right and constitutes an exception to the general principle of the binding force of contracts. A gift between spouses becomes irrevocable by divorce or by the death of the donor. The reasons for this regulation lie in the specific relationship between spouses. One spouse donates property to the other spouse, often considering the status of the donee as a spouse, and if this status is jeopardized by a change in the relationship between the parties, there must be a possibility of revoking the donation. Revocation of the gift may even be tacit. For example, the donor spouse makes a will leaving the donated property to a third party. The right to revoke the gift need not be stipulated in the deed of donation and cannot be removed by a clause to the contrary.[34] The gift between spouses derogates not only from the irrevocability of the second degree, which is specific to the contract of donation, but also from irrevocability of the first degree, which characterizes contracts in general. As the gift between spouses is essentially revocable, the clauses prohibited in the donation contracts analyzed above, such as the potestative condition or the obligation to pay future unspecified debts or the reservation of the right in favor of the donor to dispose of the donated property in the future, are valid in this particular case.

The donation can be revoked for ingratitude and for unjustified non-performance of the tasks to which the donor has committed the donee if the donation is stipulated *sub modo*.[35] The two cases of revocation do not contravene the principle of irrevocability of donations, nor are they exceptions to this principle since the grounds for revocation do not depend on the will of the donor.[36] Regarding the mode of operation, revocation for ingratitude and failure to perform duties must be invoked by the donor or his or her successors in title, not being applicable *ope legis*.[37]

The donation may be revoked for ingratitude in the following cases:[38]

— if the donee has made an attempt on the life of the donor or of a person close to him or, knowing that others intend to make such an attempt, has not notified him,
— if the donee is guilty of criminal acts, cruelty, or serious insults toward the donor,
— if the donee unreasonably refuses to provide food to the donor in need, within the limit of the current value of the property donated, taking into account the condition of the property at the time of the donation.

As has been established in the case law, mere disputes between the parties cannot lead to the revocation of the donation, as the facts do not have the seriousness required by the law.[39]

34 Deak, 2001, p. 137.
35 RouCC, Article 1020.
36 Deak, 2001, p. 164.
37 RouCC, Article 1021.
38 RouCC, Article 1023; for procedural conditions, see Veress and Székely, 2020, pp. 166–167.
39 In this sense, see Bucharest Tribunal, 5th Civil Section, decision No. 1102/A/2007, published in Nica, 2011, pp. 115–117.

The *donatio sub modo*, to the extent of the charge imposed on the donee, becomes a contract for consideration. If the donee does not perform the task that he or she has undertaken, the donor or his successors in title may request either performance of the task or revocation of the donation.[40] If the obligation has been stipulated in favor of a third party, the latter may only request the performance of the obligation. The donee is bound to perform the charge only up to the value of the donated property, updated to the date on which the charge should have been performed.[41]

In order to distinguish a *donatio sub modo* from a maintenance contract, it is necessary to analyze the value of the maintenance and the intention of the parties to make and receive a donation. If the entire value of the property was to be paid by the defendants through the provision of maintenance, the predominant obligation being that of maintenance, it has been held in case law that a maintenance contract was concluded between the parties, since the purpose of the parties was to provide maintenance for life, not to make a gift.[42]

The second typical gratuitous contract in Romania is the loan for use (*commodatum*). The loan for use is a gratuitous contract whereby one party, called the lender, temporarily cedes use of a movable or immovable property item to the other party, called the borrower, with the obligation to return the item. The borrower is bound to guard and preserve the borrowed property with the prudence and diligence of a good owner.

The borrower may use the borrowed property only in accordance with the purpose for which it was borrowed as determined by the contract or, failing that, according to the nature of the property. He may not allow a third party to use it without the prior approval of the lender.

The borrower is liable for the loss of the borrowed property when it is caused by *force majeure*, which the borrower could have avoided by using his own property or when, being able to save only one of the two properties, he preferred his own.

The borrower shall bear the costs he incurred in using the property. However, the borrower is entitled to be reimbursed for expenses for necessary works on the property item that could not have been foreseen at the time of the conclusion of the contract, where the lender, having been given prior notice, did not object to the work being carried out, or where—because of the urgency of the work—he could not be given notice in good time.

If several persons have jointly borrowed the same property item, they are jointly and severally liable to the lender.

A lender who, at the time of the conclusion of the contract, was aware of hidden defects in the borrowed property and who did not warn the borrower of them is liable for the loss suffered by the borrower as a result. Under no circumstances may the

40 RouCC, Article 1027; for procedural conditions, see Veress and Székely, 2020, pp. 167–168.
41 RouCC, Article 1028.
42 Bucharest Court of Appeals, 9th Civil and Intellectual Property Section, decision No. 46/R/2009, published in Nica, 2011, pp. 108–109.

borrower invoke a right of retention in respect of obligations that would arise for the lender.

According to the case law of the Romanian High Court of Cassation and Justice, the lender may not take back the borrowed item before the agreed term has expired or, in the absence of an agreement, before he has returned to the purpose for which he borrowed it,[43] i.e., the purpose for which the property was lent has been achieved. The borrower is obliged to return the asset on expiry of the agreed term or, in the absence of a term, after using the asset according to the agreement. If the time limit is not agreed upon and either the contract does not provide for the use for which the property was lent or the use is of a permanent nature, the borrower is obliged to return the property at the lender's request. An interesting regulation is related to the early return of the asset. The lender may request the asset's return before the due time in three situations: when he himself has an urgent and unforeseen need for the good, when the borrower dies, or when he breaches his obligations.[44]

The Romanian Civil Code states that the loan for use is an enforceable title with regard to the obligation to return of the asset if it is concluded in authentic form or by written instrument with a certified date, in the event of termination by the death of the borrower or by the expiry of the term. This means that the lender does not have to seek the help of the court and obtain a court order, but under the contract may apply to the bailiff to repossess the property.

If no time limit for restitution has been stipulated, the long-term *commodatum* shall constitute an enforceable title only if the use for which the property was lent is not provided for or if the intended use is of a permanent nature.[45]

6. Serbia, Croatia, Slovenia

6.1. Serbia

The SrbLO does not regulate the donation contract (*ugovor o poklonu*) as a nominate contract, though it has statutory rules on this type of contract still applicable though no longer in force. This sentence surely sounds striking and demands clarification. The Kingdom of Serbs, Croats, and Slovenes, later known as the Kingdom of Yugoslavia (the 'First Yugoslavia') between the two world wars in general retained the civil law rules that were in force in the parts of the territory of the Kingdom that before the First World War belonged to different legal systems. This means that six different legal systems remained in force in the territory of the Kingdom, which differed greatly. This state is usually denoted in the literature as *legal particularism*.[46] This meant that in the part of the Kingdom of Yugoslavia that belonged to the Kingdom of Serbia

43 Commercial Section, decision No. 873 of February 27, 2007.
44 RouCC, Article 2156.
45 RouCC, Article 2157.
46 Nikolić, 2013, p. 90.

before the war, the 1844 Civil Code for the Principality of Serbia remained in force (in other parts, for instance, the Austrian Civil Code, the Montenegrin General Property Code, or the Hungarian statutes and case law prevailed). One of the first objectives of the new socialist Yugoslavia (the 'Second Yugoslavia') in the aftermath of the Second World War was to abolish the state of legal particularism that had existed for more than three decades. In this pursuit a statute was adopted as early as 1946 repealing all sources of law extant prior to April 6, 1941 (when Yugoslavia lost its sovereignty over its territory), and invalidated all norms adopted by foreign regimes after that date until the end of the Second World War. As the legislature obviously knew that such a dramatic legislative intervention would create a legal lacuna of unprecedented magnitude, it thus allowed the courts to apply the rules from the sources of repealed law if the new state had not regulated the given legal issue by its own acts. The sources of law themselves could no longer be applied since they were repealed, but the rules contained within them could. This was the doctrine of the so-called 'old legal rules' (*stara pravna pravila*).[47] In time, the new state adopted statutes and the legal lacunae gradually shrank. Only few legal issues still exist to which the 'old legal rules' could be applied, and more precisely, are still being applied even today. One of them is the donation contract, to which, not being regulated by the SrbLO, the rules of the 1844 Civil Code for the Principality of Serbia are still being applied.[48] Similar is the case of the loan for use, the *commodatum* (*ugovor o posluzi*). It is not regulated in the Law on Obligations; hence the rules of the 1844 Civil Code apply.

A donation contract creates enforceable obligations only if it is concluded in written form.[49] However, if a non-formal, thus non-binding, oral promise of donation is performed, the donor may not reclaim the object of the donation.[50] The donation is revocable in two cases: if the donor becomes impoverished or the donee demonstrates egregious ingratitude.[51] The donation contract has two essential elements: the object of the donation and the *animus donandi*.[52] The *animus donandi* is not presumed, but must unambiguously follow from the content of the contract or the circumstances of the given case.[53] As for the loan for use, the 1844 Civil Code does not prescribe any formal requirement explicitly.[54] The literature acknowledges that it is traditionally considered a real contract, and in many legal orders still is.[55] In Serbian law it should be considered a consensual contract.[56]

47 Nikolić, 2013, p. 97.
48 See for instance the decision of the Belgrade Appellate Court No. 3762/2011, which applied §567. of the 1844 Civil Code on the claim for the revocation of donation. Dudás, 2013, p. 16.
49 1844 Civil Code, §564.
50 1844 Civil Code, §566.
51 1844 Civil Code, §567.
52 Perović, 1986, p. 611.
53 Perović, 1986, p. 614.
54 1844 Civil Code, §582–592.
55 Perović, 1986, p. 695.
56 Perović, 1986, p. 696.

The SrbLO enables the parties to choose between contract types that are gratuitous or for consideration regarding the same performance. If the parties fail to determine explicitly the nature of their contract, in some cases a legal presumption operates according to which the contract is either for consideration or is gratuitous, depending on the case. The most important in this context is the loan contract (*ugovor o zajmu*). According to the SrbLO, if there is no explicit clause in the contract, it shall be considered gratuitous, that is without pecuniary interest being agreed, if the parties are natural persons, and for consideration if the contract is considered commercial.[57] Similarly, the contract on deposit (*ugovor o ostavi*) is also devised as gratuitous, but the parties may stipulate a payment obligation for the depositor. The for-consideration character of the contract is presumed if the depositary is professionally engaged in this activity or the payment obligation of the depositor may be implied from the circumstance of the case.[58] Conversely, the contract of mandate (*ugovor o nalogu*) is presumed to be for consideration, unless the parties agreed otherwise or the gratuitous nature of the contract is implied by the nature of their transaction.[59] Similarly, the commission agency contract (*ugovor o komisionu*) and the contract on settlement of mutual claims are presumed to be for consideration.[60] The other contract types envisaged by the SrbLO are considered as being concluded for consideration, but there is no reason that the parties may not agree otherwise, that is, stipulate the gratuitous nature of their contract by mutual agreement.

As for ancillary juridical acts and dispositions of the parties, there are some in relation to which the SrbLO does not specify whether they are for consideration or gratuitous. These are for instance the pledge (*ugovor o zalozi*) whereby the security is provided by a third party,[61] or surety (*ugovor o jemstvu*).[62] Neither is the gratuitous or for-consideration nature of the transfer of contract explicitly specified in the SrbLO. In other cases, the SrbLO explicitly regulates the nature of the transaction. For instance it implies that assignment (*ustupanje potraživanja*) may be either gratuitous or for consideration, with different consequences in terms of the scope of liability of the assignor.[63] Conversely, the SrbLO does not imply anything in this regard, but the underlying contract for the assumption of debt (*preuzimanje duga*) can be either

57 SrbLO, Article 558.
58 SrbLO, Article 720.
59 SrbLO, Article 749 (3).
60 SrbLO, Article 771 (2) and Article 1093 (1).
61 The literature points out that a contract on pledge concluded with a third party is in principle gratuitous, but due to its function of security it bears the application of some institutions of law relating contracts for consideration (such as warranty for defects, for example). Therefore, whether the pledge provided by a third party is intended as a gratuitous act toward the debtor, or the third party expects a sort of remuneration is to be assessed on case-by-case basis. See. Živković in Hiber and Živković, 2015, p. 78.
62 Similarly, the cause of providing suretyship to the debtor may be either the surety's intention of generosity or his or her expectation to receive a consideration. See Hiber in Hiber and Živković, 2015, p. 324.
63 SrbLO, Article 442.

gratuitous or for consideration.[64] The same conclusion can be reached in relation to assumption of performance (*preuzimanje ispunjenja*)[65] and joinder of debt (*pristupanje dugu*)[66] as well. Though the SrbLO does not specify this explicitly, debt release[67] and performance by a third party with the consent of the debtor are also considered gratuitous transactions.

The SrbLO has some general rules applicable to all gratuitous transactions. For instance, it provides that an unlawful cause (*causa*) always renders the gratuitous contract invalid, regardless whether the other party knew or should have known of it.[68] In gratuitous contracts error concerning a decisive cause for contracting is considered essential,[69] a gratuitous contract may always be avoided for deceit caused by a third party regardless of whether the counterparty knew or should had known thereof,[70] ambiguous terms in a gratuitous contract shall be construed to the benefit of the obligor,[71] etc. In addition, some legal institutions are simply not applicable to gratuitous contracts since they lack the element of consideration. These are the warranties for legal and material defects, the exception of non-performance (*exceptio non adimpleti contractus*), revocation of the contract due to non-performance, termination of the contract due to impossibility of one party's performance, and *laesio enormis*.[72] For some legal norms instituted in relation to the general effects of contracts, the law clearly does not state that the contract must be bilateral or a consideration must be provided for performance, but they may be applied only in such cases since the reciprocity of the parties' obligations is their key element. These are the *clausula rebus sic stantibus* and the prohibition of usury. Finally, *actio Pauliana* may be exercised under more lenient conditions if the debtor disposed of his or her assets by gratuitous transactions,[73] whereby the SrbLO explicitly states that refusal to accept an inheritance is considered a gratuitous transaction.[74]

The issue of whether a transaction is gratuitous or for consideration also comes to the surface in other fields of civil law. Thus, the Serbian Family Act provides that in case of divorce or dissolution of marriage, donations made between the spouses during the existence of the common household are not subject to restitution, except for those donations whose value is disproportionate to the value of the spouses' jointly

64 Stanković in Perović, 1995, p. 847.
65 Cigoj, 2003, p. 363.
66 The reasons for joining the debt may be numerous, but they are external to the cause of the transaction, not having any legal effect on the legal relationship between the new debtor and the creditor. See Karanikić Mirić, 2017, p. 161.
67 Stanković in Perović, 1995, p. 753
68 SrbLO, Article 53 (3).
69 SrbLO, Article 62.
70 SrbLO, Article 65 (4).
71 SrbLO, Article 101.
72 SrbLO, Articles 121 (1), 122 (1), 124 (1), 137 (1) and 139 (1).
73 SrbLO, Article 281 (1).
74 SrbLO, Article 281 (2).

owned property.[75] Similarly, according to the Act on Inheritance the gratuitous transactions of the decedent are subject to restitution, or they will be imputed upon the value of the inheritance, if by them the reserved portion of the heirs over the estate is infringed.[76]

6.2. Croatia

Until the adoption of the HrvLO in 2005, the former federal law remained in force, which did not regulate the donation contract. Just as in Serbia, this legal lacuna had been filled by relying on the 'old legal rules' doctrine. However, in contrast to Serbia, the Croatian courts applied the rules of the Austrian Civil Code from 1811 (§938–956),[77] which was in force in Croatia from 1853 until the Second World War.[78] By the adoption of the HrvLO in 2005, the need for applying the Austrian Civil Code by relying on the 'old legal rules' doctrine eventually disappeared, since the new HrvLO explicitly regulated the donation contract.[79]

The HrvLO contains detailed rules on the donation contract (*ugovor o darovanju*). The donation contract in Croatian law is primarily a consensual contract,[80] meaning that the parties may choose any form they find appropriate. Written form is provided for by law in cases of a donation contract concerning real estate.[81] However, a donation contract without the actual delivery of the object of donation, as with a *mortis causa* donation, must be concluded as a notarial deed or private deed later authenticated by the notary (*solemnization*).[82] Donation without actual delivery means that the object of the donation has not been handed over to the donee at the time of the conclusion of the contract.[83] Hence, the general rule on the consensual nature of donation applies only to cases where the handing over of the object of the donation takes place concomitantly with the conclusion of the contract. Otherwise, the contract is formal. If the donee received a movable asset as an object of donation before the contract is concluded, it shall be construed as his or her consent to the donation, unless he or she declines the donation in the deadline set by the donor.[84] The HrvLO explicitly excludes the application of the rules on the warranty for legal and material defects, except in the case when the donor intentionally failed to inform the donee of the existence of a defect.[85] The donor may withdraw from the donation at any time until the performance becomes due if his or her financial situation deteriorated to the extent that it endangers his or her own subsistence or makes impossible the performance of his

75 Serbian Family Act, Article 190.
76 Law on Inheritance, Articles 42, 48–56. See Đurđević, 2012a, pp. 215–218.
77 Slakoper in Gorenc, 2014, p. 815.
78 Nikšić in Josipović, 2014, p. 135.
79 HrvLO, Articles 479–498.
80 Slakoper in Gorenc, 2014, p. 823.
81 HrvLO, Article 482 (1).
82 HrvLO, Article 482 (2), Article 491.
83 Slakoper in Gorenc, 2014, p. 823.
84 HrvLO, Article 481 (1).
85 HrvLO, Article 483.

or her maintenance obligations.[86] Concerning revocation of donation, the possible grounds for revocation are the deterioration of the donor's financial situation or the egregious ingratitude of the donee.[87] Both cases are regulated in detail in the HrvLO.

In addition to donation, the HrvLO specifically regulates the *commodatum* (*ugovor o posudbi*) or loan for use, which is the other classic contract type not regulated by the former federal law. It is defined clearly as a gratuitous contract.[88] The HrvLO does not specify any formal prerequisites of *commodatum*, from which the literature infers that it is a consensual contract.[89] As in the Serbian, so in Croatian law the loan contract (*ugovor o zajmu*) may be gratuitous or an act for consideration. A presumption of the latter situation exists in commercial contracts.[90] As for the contract of deposit (*ugovor o ostavi*), the HrvLO also defines it as gratuitous, except in cases where the depositary conducts this activity as his or her profession.[91] The solutions adopted in relation to mandate (*ugovor o nalogu*) and the commission agency contract (*ugovor o komisiji*)[92] are also the same as in the SrbLO.

The nature of some dispositions of the creditor over the claim are explicitly regulated in the rules pertaining to donation. Release from debt (*oprost duga*) and performance of the debt by a third party with the consent of the debtor (*isplata duga uz dužnikovu saglasnost*) are also explicitly considered donation by the HrvLO.[93] However, renunciation of inheritance, renunciation of a right before it is acquired or a right that is disputable, performance of a moral (natural) obligation, or transfer of a good or a right to another party with intention to require something in return shall not be considered donations.[94] The literature emphasizes that assumption of performance (*preuzimanje ispunjenja*) of the debt could also be considered a donation.[95]

The HrvLO, just like the SrbLO, retained from the former federal law those rules by which different legal consequences emerge depending on whether a transaction is gratuitous or for consideration. Thus, an illicit cause renders a gratuitous contract null and void, regardless of whether the counterparty did not know or should have known thereof;[96] in a gratuitous contract a false assumption about the decisive cause that led to the commitment is considered an essential mistake;[97] a gratuitous contract may be avoided due to deceit caused by a third party regardless of whether the counterparty knew or should have known thereof at the time of the conclusion of

86 HrvLO, Article 492.
87 HrvLO, Articles 492 and 493.
88 HrvLO, Article 509.
89 Momčinović in Gorenc, 2014, p. 862.
90 HrvLO, Article 500.
91 HrvLO, Article 733.
92 HrvLO, Article 763 (2); Article 785 (2).
93 HrvLO, Article 479 (2).
94 HrvLO, Article 479 (3).
95 Slakoper in Gorenc, 2014, p. 819.
96 HrvLO, Article 273 (3).
97 HrvLO, Article 281.

contract;[98] ambiguous terms in a gratuitous contract should be interpreted in favor of the obligor,[99] etc. Similarly, the liability for legal and material defects, objection of non-performance, repudiation due to non-performance, *clausula rebus sic stantibus*, termination of the contract due to impossibility of one party's obligation, and *laesio enormis* are applicable only to bilateral contracts (i.e., concluded for consideration), but not to gratuitous contracts. The rules on usury have been moved from the part pertaining to special legal effects of bilateral contracts into the part comprising rules on annulment, but it goes without saying that usury is conceptually irreconcilable with gratuitous contracts. The rules on *actio Pauliana*, just as in the SrbLO, differentiate the legal regime applicable depending thereon, if the transaction of the debtor is gratuitous or for consideration.[100]

Unlike the SrbLO, the HrvLO does not contain special rules on the revocation of a donation between spouses in case of dissolution of the marriage; hence, the general rules of the HrvLO on the revocation of donation apply.[101] However, regarding the rules of inheritance, if the reserved portion of an heir is infringed by gratuitous dispositions of the decedent, they are subject to restitution or shall be imputed upon the share of the donee.[102]

6.3. Slovenia

In a way similar to Croatia, the donation contract was not regulated by Slovenian law until the adoption of the SvnCO in 2001. Until then the former federal law on obligations was in force, which, as already mentioned, did not regulate the donation contract. The consequence of that was that until 2001 a former source of law (the Austrian Civil Code, abbreviated from the German as ABGB) was being applied to legal issues arising in relation to donation contracts[103] according to the 'old legal rules' doctrine. The rules of the SvnCO on the donation contract[104] terminated the application of the 'old legal rules' relating to this contract type.

The SvnCO in principle provides a similar legal solution concerning the form of the donation contract (*darilna pogodba*) as the HrvLO. It provides that if the object of donation is not immediately handed over to the donee, the donation contract must be concluded in written form.[105] If the formal requirement is not observed, the donee may not request the enforcement of the donation in court.[106] The promise of donation not manifested in the prescribed form is therefore an unenforceable or natural obligation (*obligatio naturalis*).[107] However, the literature points out that if the donor hands

98 HrvLO, Article 284 (4).
99 HrvLO, Article 320 (1).
100 HrvLO, Article 67 (3).
101 Hrabar, 2021, pp. 476–477.
102 Croatian Law on Inheritance, Articles 71, 77–84.
103 Vlahek in Možina and Vlahek, 2019, p. 147.
104 SvnCO, Articles 533–556.
105 SvnCO, Article 538 (1).
106 SvnCO, Article 538 (2).
107 Možina and Vlahek, 2019, p. 66.

over the object of the donation later on, this remedies the defect of form, according to the general rule pertaining to the validation of a contract with formal defects.[108] From this rule follows that if the object of the donation is handed over to the donee at the same time as the contract is formed, the parties may conclude the contract in any form.[109] Special requirements of form are provided for *mortis causa* donation: It must be concluded in the form of a notarial deed that needs to be handed over to the donee.[110] In terms of revocation of the donation, the SvnCO, besides the grounds known to the HrvLO—economic distress of the donor[111] and egregious ingratitude of the donee[112]—also provides a third one: A donor without any children at the moment the contract is concluded may revoke the donation for reason of the birth of a child that occurred later on.[113]

The *commodatum* (*posodbena pogodba*) is also regulated in the SvnCO,[114] by which the application of the rules of ABGB,[115] based on the doctrine of 'old legal rules,' ceased. The SvnCO does not prescribe any specific form for this contract type.

A loan contract (*posojilna pogodba*) may be gratuitous or for consideration. The gratuitous nature of the loan is presumed except in commercial contracts, which are in turn presumed to be for consideration unless otherwise agreed.[116] Concerning the contract of deposit (*shranjevalna pogodba*), the contract of mandate (*pogodba o naročilu*), and the commission agency contract (*komisijska pogodba*),[117] the SvnCO has not departed from the solutions of the former federal law.

Regarding securities, such as pledge and suretyship, assignment, assumption of debt, assumption of performance, and joinder of debt, the SvnCO maintained the rules from the former federal law. Regarding release of debt (*odpust dolga*), the SvnCO explicitly states that it shall be considered a donation contract if the debtor so consents.[118] However, if the right stipulated does not have a corresponding debtor or it has not been ceded to a third party, the release of such right shall not be considered a donation contract.[119]

Regarding the special rules applicable to gratuitous contracts, the SvnCO does not differ from the solutions of the SrbLO and the HrvLO. These are the relevance of an illicit cause[120] and mistake regarding cause in gratuitous contracts,[121] the impact of

108 SvnCO, Article 52. See Možina and Vlahek, 2019, p. 66.
109 Možina and Vlahek, 2019, p. 65.
110 SvnCO, Article 545.
111 SvnCO, Article 539.
112 SvnCO, Article 540.
113 SvnCO, Article 541.
114 SvnCO, Articles 549–586.
115 Vlahek in Možina and Vlahek, 2019, p. 208.
116 SvnCO, Article 570.
117 SvnCO, Articles 737, 778, and 779.
118 SvnCO, Article 533 (2).
119 SvnCO, Article 533 (3).
120 SvnCO, Article 40 (3).
121 SvnCO, Article 47.

deceit caused by a third party regardless of the good faith of the counterparty,[122] and the interpretation of ambiguous terms in favor of the obligor.[123] Rules on the special legal effects of bilateral contracts are not applicable to gratuitous contracts, and the rules on *actio Pauliana* likewise differentiate gratuitous contracts from contracts for consideration.[124]

As in the SrbLO, the differentiation between gratuitous contracts and contracts for consideration surfaces in other branches of civil law in Slovenia as well. The Slovenian Family Act prescribes the obligation to return gifts in case of dissolution of marriage,[125] while the Inheritance Act prescribes the restitution of gifts or imputation of their value over the inheritance if the reserved portion of certain heirs to the inheritance is infringed.[126]

7. Slovakia

In Slovak legal literature, obligations and contracts are divided into those for consideration and those without consideration depending on whether the party performing the juridical act demands some consideration from the other party,[127] or 'whether consideration is provided for a certain counter-performance.'[128] The literature sometimes equates the criterion of whether a contract is for consideration or not with the mutuality (reciprocity) of obligations, with the decisive criterion being whether 'the economic benefit is provided by only one party or is provided by both parties to one-another.'[129]

We believe that the division of obligations (contracts) into those for consideration and those without it should depend on whether the party providing the other party with the performance receives or is to receive a certain economic benefit for this performance. The question is the extent to which this economic benefit must have real and not just symbolic value. The Constitutional Court of the Slovak Republic assessed the transfer of real estate for a symbolic price of SKK 1 (EUR 0.033) as a purchase, not as a donation (III. ÚS 412/2016). However, the Constitutional Court took into account that it was a contract between parents and a daughter and that in this symbolic purchase price the parents 'took into account the long-term and dedicated care by [the daughter], which is in line with morality and the purchase contract in question; therefore, it cannot be considered a gratuitous juridical act.'

122 SvnCO, Article 47 (4).
123 SvnCO, Article 84.
124 SvnCO, Article 256 (3).
125 Slovenian Family Act, Article 110.
126 Slovenian Inheritance Act, Articles 46–58.
127 Dulaková Jakúbeková et al., 2011, p. 125.
128 Vojčík, 2018, p. 88.
129 Kirstová, 2018, p. 44.

In this context, Slovak legal literature also admits the existence of the so-called mixed contracts (*negotium mixtum cum donatione*), although the meaning of such contracts is rather blurred and understood differently. It is argued, for example, that these are contracts for 'a consideration that is lower than the value of the performance for which the consideration is due,'[130] or that it is a contract that shows 'signs of the purchase contract, as well as the gift contract.'[131] There is no deeper reasoning in the legal literature. However, we believe that the division of the contract into a part corresponding to the purchase contract and a part corresponding to the gift contract is not quite possible when providing performance for consideration. Therefore, in our opinion, the starting point should be the idea of the indivisibility of the contract (unless the performance itself can be divided). Each contract should therefore qualify as either being for consideration or being gratuitous, depending on whether or not the consideration corresponds to a performance of only insignificant value. In the first case, the contract could be qualified as gratuitous and in the second as for consideration. However, we do not preclude certain special circumstances from being taken into account, such as those mentioned in the decision of the Constitutional Court.

The question is whether the issue of the contract being qualified as for consideration or gratuitous concerns only the relationship between the creditor and the debtor, or whether the contract can be referred to as being for consideration even if the other party does not provide any consideration for the performance rendered by the other party, but consideration is provided to that other party by a third party. We do not rule out that even in such a former case we could talk about the contract for consideration.

The vast majority of so-called typical obligations (*typické, pomenované*) set out in the SvkCC or in the Slovakian Commercial Code are for consideration. Gratuitous obligations are rather the exception. Such gratuitous obligations can be further subdivided into obligatory gratuitous obligations and optional gratuitous obligations, depending on whether the agreement on a contract being for consideration precludes the concluded contract from being considered a contract of a given type (obligatory gratuitous obligations) or whether, even though such an agreement is part of the contract, it shall still be a given type of contract (optional gratuitous obligations).

The obligatory gratuitous obligations regulated in the SvkCC include, in principle, only donation (*darovanie*, § 628 et seq.) and *commodatum* (*výpožička*, § 659 et seq.). It is not possible to agree on consideration for these contracts, as this would constitute a different contractual type. In the case of a donation contract, it would actually be a purchase or exchange contract, and in the case of *commodatum* it would be a lease agreement. According to the Slovakian Commercial Code, a contract for the deposit of a good (*zmluva o uložení veci*) is obligatorily gratuitous (§ 516 et seq.).

Optionally gratuitous obligations regulated in the SvkCC include the order contract (*príkazná zmluva*, § 724 et seq.), the contract on custody of a thing (*zmluva o úschove*,

130 Dulaková Jakúbeková et al., 2011, p. 125.
131 Vojčík, 2018, p. 88.

§ 747 et seq.), and the pension contract (*zmluva o dôchodku*, § 842 et seq.). However, in the case of an order contract, it should be added that some of its subtypes are obligatorily for consideration, such as a contract on arrangement for a matter (*zmluva o obstaraní veci*) pursuant to § 733 or a contract for the procurement of a sale of a thing (*zmluva o obstaraní predaja veci*) pursuant to § 737. According to the legal literature, a loan contract (*zmluva o pôžičke*) is an optionally gratuitous contract, i.e., it can be concluded either for consideration or without it, depending on whether interest or the fulfillment of a larger quantity or better quality has been agreed on.[132] As far as the credit contract is concerned, given that the interest agreement is among its essential components, the literature considers this contract always to be for consideration.[133]

The division of contracts into those for consideration and those without it is of relatively limited importance in Slovak law:

— Liability for defects of a thing is applicable only in the case of contracts for consideration (§ 499 of the SvkCC). In the case of gratuitous contracts, there is no liability for defects, although the existence of defects may lead to other consequences, e.g., to the donee's right to return the gift (§ 629 of the SvkCC).
— Gratuitous performances by the decedent—according to § 484 of the SvkCC—must be imputed over the share from the estate of the heir who benefited from them, *ope legis*.
— According to § 729 of the SvkCC, '[i]f the party ordered suffers damage during the execution of the order only by accident, she may claim compensation only if she has undertaken to execute the order free of charge.'

As far as the donation of a human organ, human tissue, or human cells is concerned, such donation is not a civil law relationship because human organs, tissues, or cells cannot ordinarily be the subject of civil law relations.[134]

8. Conclusions

There is no doubt that in each of the Central European legal systems under consideration, gratuitous contracts are an exception to the general rule that civil law acts are for consideration. Gratuitous contracts are either named or unnamed contracts, with the contractual freedom being fully in force here.

What is somewhat surprising is that there is little to no discussion of the validity of gratuitous acts. It seems that the search for *animus donandi* or *causa donandi* is nothing more than a relic, a remnants of the ways older generations of lawyers tended to think about gifts without consideration. The general opinion that standard rules of consent and formation of contract are sufficient seems to prevail.

132 Pagáč in Števček et al., 2019; Fekete, 2015.
133 Ovečková, 2017.
134 Dulaková Jakúbeková et al., 2011.

There is also a common pattern as far as the typology of gratuitous contracts is concerned. Generally, donation (gift) and *commodatum* (gratuitous loan for use) are recognized as the two contracts strongly anchored in the system that are never for consideration. There is a plethora of specific named contracts that can be shaped either as onerous or gratuitous ones. There are no clear patterns here, and the decision whether the contract can be shaped by the parties as gratuitous depends largely on the arbitrary decisions of the lawmaker. Except for sale, which is by its very nature a transfer of property for a fixed price, the only legal system that knows any named contracts that have to be for consideration seems to be that of Poland. Of course, it would be possible for the parties to conclude a similar unnamed contract and shape it as a gratuitous one. The relevance of such contracts seems to be minuscule—there is no discernible literature or case law for such contracts.

There seems to be no identifiable pattern as far as formalities are concerned. Some systems require written or even notarized deeds as a prerequisite for a gratuitous transfer of (immovable) assets, while others follow the general 'no-particular-formalities' rule. It seems that the former legal systems think it necessary to have some sort of cooling-off period for a person transferring property without consideration, thus justifying the formalities. However, even in these jurisdictions there are no particular formalities regarding other gratuitous acts.

Another common feature shared by almost all legal systems under analysis is that the person who gives something without consideration has lesser duties than a person who gets something in exchange from the other party. The range of possibilities is rather wide, from the eased possibility of invoking error and mistake to limitations of liability for the delivery of defective goods. The rationale for this is that the donor who gives something for free should not bear additional burdens connected with his or her generosity. On the other hand, the person who obtains something without consideration is less protected than a person who had to deliver something in exchange, and again, the rationale for this is quite natural: If you receive something free of charge, eventual loss of the gift will not be as burdensome as losing something you paid for.

The last, and perhaps the most interesting conclusion is connected with the revocation of donations. Most jurisdictions permit it in one way or another. However, the circumstances in which revocation is possible differ significantly. In some jurisdictions it is permitted if the donor becomes insolvent or if the donee commits an act of egregious ingratitude. In such cases it is usually irrelevant if there is some other special relationship between the parties. Other legal systems limit revocation to relationships between certain groups of persons in close relations (e.g., spouses) and regulate the return of mutual gifts after dissolution of the marriage. These differences are interesting also from the socio-legal point of view, because they tell us more about the principles underlying social structures envisioned by the lawmaker.

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