Chapter XIII

Damages

1. General considerations

1.1. Liability for breach of contract: contract, tort, restitution

The function of liability for breach of contract is bringing the aggrieved party into the position as if the contract had been performed, at least in so far as it can be achieved with monetary compensation. From this angle, liability is an alternative remedy to claims for performance (which have been analyzed in Chapter XII). Liability also creates an incentive for the promisor to perform his obligations. Liability for breach of contract is part of the law of obligations in private law. Thus, the relationship of liability for breach of contract to tort law, as well as to the law of restitution constitutes structural core issues.

Although liability in tort and liability for breach of contract are tightly linked with the same consequence of paying damages, there are fundamental differences between them in policy and function. This affects the calculation of the sum of damages: while in tort the compensation has to bring the victim into a position as if the wrongdoing had never occurred, in contract damages is to bring the aggrieved party into a position as if the contract had been performed. While the main function of liability in tort is preventing wrongdoing and providing optimal risk allocation between the victim and the tortfeasor, the main function of liability for breach of contract is protecting the trust in promises of others. Furthermore, liability is always the consequence of a breach of duty, but while tort law addresses liability for violation of duties established

Menyhárd, A., Hulmák, M., Balliu, A., Stec, P., Veress, A., Dudás, A., Hlušák, M. (2022) 'Damages' in Veress, E. (ed.) *Contract Law in East Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 419–459. https://doi.org/10.54171/2022.ev.cliece_chapter13

by law, liability for breach of contract is the consequence of the violation of duties undertaken by the parties voluntarily.

These considerations justify two differences in policy. The first is that at least as a main rule, liability for breach of contract should be stricter than that for negligence because the party undertook the obligation voluntarily and – normally – for making a profit on the transaction. This stricter form of liability using *force majeure* or similar doctrines as an excuse instead of negligence is provided by the CISG, the PECL, the DCFR, and the UNIDROIT Principles.

The second is that while in tort the principle of full compensation prevails, the limitation of liability for breach of contract, either statutorily or by the agreement of the parties, is justified by the reason that only risks that could have been calculated and priced by the promisor at the time of contracting should be covered with liability. In some legal systems, the concurrence of claims is ruled out by statutory provision, but this is not an indispensable element of the liability system. If liability for breach of contract and the producer's liability under the European product liability regime are competing claims, the product liability regime should prevail because of its exclusionary nature.[1]

The relationship between liability for breach of contract and restitution seems to be much clearer compared to the relationship between liability in tort and for breach of contract. The contractual basis of the claim normally rules out parallel claims on the grounds of restitution as unjust enrichment. This is often referred to as a doctrine of subsidiarity.

1.2. Limitation of liability and exclusion clauses

A contract is a voluntary exchange of promises that allocates risks between the parties. Liability for breach of contract is a consequence of failing to comply with this promise; it shifts the risk of non-performance to the breaching party. As it is the failure of keeping the promise that triggers and justifies liability, liability should not exceed the limits of the promise; not only in the sense that only the content of the promise is to be enforced but also in the sense that only those risks that had been shifted by the parties to the promisor shall be allocated to him or her.

The main tool of statutory or doctrinal limitation of liability is limiting the liability for breach of contract to foreseeable losses. The foreseeability limit provided by the Hadley v Baxendale precedent became a core part of the liability rule of the CISG, the PECL, the DCFR (III-3:703), and the UNIDROIT Principles.[2]

Clauses excluding or limiting liability for breach of contract are the most important tools of risk allocation for the contracting parties. There are, however, certain statutory limits for enforcing such clauses. Regulatory and judicial restriction of

1 ECJ April 25, 2002 – C-183/00, Maria Victoria González Sánchez v. Medicina Asturiana [2002]; ECJ April 25, 2002 – C-52/00 EC Commission v. French Republic [2002]; ECJ April 25, 2002 – C-154/00 EC Commission v. Hellenic Republic [2002]; ECJ July 5, 2007 – C-327/05 Commission v. Denmark [2007].

2 There are, however, critical approaches as well. See Menyhárd, Mike and Szalai, 2006.

contractual limitation and exclusion of liability for breach of contract has been a general answer in modern legal systems to the abuse of bargaining power. Limitation clauses reaching beyond the acceptable degree in most of the cases appeared in standard contract terms. One of the main arguments in favor of regulatory or judicial restriction on the enforceability of exclusion clauses is that if the party to a contract was allowed to exclude liability for all kinds of breach, it would deprive the contract as a legal instrument of its substance because the contract would actually not create any rights and obligations. As parties draw the boundaries of their obligations, they define their promised performance. From this point of view, exclusion or limitation of liability in commercial transactions may be seen only as a form of the definition of contractual duties, as in general, it is rather difficult to distinguish between exclusion clauses and definition clauses.

1.3. Reduction of loss, substitute transaction

In most cases, the aggrieved party covers its contractual interests by buying the performance with a substitute transaction on the market. In such cases, damages for breach of contract should provide compensation for the costs of the substitute transaction including the difference between the agreed price of the performance and the price of the substitute transaction. Concluding a substitute transaction is not only an opportunity for the aggrieved party but it shall be seen as its duty if such a substitute transaction is available on the market. This obligation can be derived from a direct duty to reduce loss but also from the requirement of good faith and fair dealing, as it is suggested by the PECL and by the UNIDROIT Principles.

1.4. Compensable loss

Damages (in contractual liability) should return the aggrieved party to the position it would have held had contract been performed. Issues, like moral and legal limits on compensable loss, loss of chance, and non-pecuniary damages are inherent parts of liability for breach of contract as well. All the peculiarities of the legal system in these respects are also reflected in liability for breach of contract and often come to the fore in cases of professional negligence, like medical malpractice. Problems of liability vis-à-vis third parties are to be assessed according to the rules and doctrines of tort law.

1.5. Liability for intermediaries

The question arises as to whether, and to what extent the obligor should be liable if the breach of contract was the result of conducts of other persons involved in performing the contract directly or indirectly. In some legal systems, there are specific rules provided for liability for intermediaries engaged by the parties to perform their contractual obligations. In so far as such rules are provided, they may differ according to the qualification of the contract or the extent of any personal nature the obligation might have. If there are no such rules provided, the question is whether such failures fall under, or lie beyond the control of the debtor.

1.6. Gratuitous contracts

The policy of strict liability for breach of contract is driven by the consideration that the party undertook the obligation voluntarily and with the aim of making a profit on the transaction. This policy does not justify strict liability for breaching gratuitous promises. How, and to what extent such promise could constitute an enforceable contract depends on the prevailing concept of contract in the legal system. If, however, the gratuitous contract had been concluded, strict liability is not justified by the underlying policy of liability for breach of contract.

1.7. Specific contracts and professional negligence

Liability for breach of contract depends on the nature of the contract as well. The general rules are mostly modeled after the contract for sale of goods, but the standards the obligor is required to comply with can be different for contracts for services, agency, bailment, or specific professionals like medical health care providers, lawyers, book-keepers, directors of companies, trustees, etc. Some of these specific contracts are addressed by the European legislator which results in the jurisdiction of the Court of Justice of the European Union on certain liability issues.[3] The qualification of the legal relationship of the parties, i.e., whether it is assumed as a contractual or as a non-contractual one, determines the applicable regime, rules, and doctrines to liability issues. This is a central issue e.g., in medical malpractice cases or the context of the liability of directors of companies. The commercial or non-commercial nature of the contract can be an important factor while assessing liability for breach of contract. The assessment can be different in consumer contract cases as well.

2. The Czech Republic

2.1. Liability for breach of contract: contract, tort, restitution

As the majority of other European civil codes, also the current CzeCC (unlike the CzeCC of 1964) distinguishes between liability in tort and liability for breach of a contract. The fundamentals of liability in tort are set out in §§ 2909 – 2912 of the CzeCC and include liability for breach of good morals (*dobré mravy* – § 2909) and breach of a statutory duty (§ 2910).[4] Liability for breach of a contract is regulated separately in § 2913 of the CzeCC.

Although both kinds of liability are regulated together in the same part of the CzeCC,[5] different rules and principles apply to them. For instance, as a rule, tort law requires the liability of the tortfeasor (*škůdce*) to arise a fault in the form of intent or negligence to be present on the part of the tortfeasor. In contrast, liability for breach of contract is construed as strict liability.[6]

3 ECJ March 12, 2002 – C-168/00 Leitner v. TUI Deutschland GmbH & Co. KG [2002].
4 By either interfering with an absolute right of the victim or by breaching a statutory duty enacted to protect a certain right of the victim.
5 In particular, in Book four (Relative Property Rights), Title III (Obligations Arising from Torts).
6 Melzer in Melzer and Tégl, 2018, p. 173.

In contrast, the tortfeasor in breach of a contract can seek to be excused from liability if he or she proves that he or she was temporarily or permanently prevented from fulfilling his or her contractual duty because of an extraordinary, unforeseeable, and insurmountable obstacle that occurred independently of his or her will. However, an obstacle arising from the tortfeasor's personal circumstances or arising when the tortfeasor was already in default of performing his or her contractual duty, or an obstacle which the tortfeasor was contractually required to overcome cannot release him or her from liability.[7]

If the conduct of a tortfeasor breaches a contractual duty and a statutory obligation at the same time, it gives rise to both liability in tort and liability for breach of contract. The aggrieved party is then free to choose under which liability concept he or she will claim the damages incurred.[8]

Unjust enrichment is ruled out under Czech law in cases where a contractual basis for the claim exists. Nevertheless there can be rights arising out of ownership along with contractual claims, e. g., the right to have the thing delivered.

2.2. Limitation of liability and exclusion clauses

Conduct of the contractual party breaching a contractual duty gives rise to liability for damages that are in a *conditio sine qua non* relation with such conduct. However, holding a party liable as being in breach of contract every time damages would not have occurred without his or her conduct would lead to liability of the contracting party every time a contract is not performed. As in other related legal systems, the main tool to avoid this is limiting the liability for breach of contract to foreseeable losses.

There are two main theories in this respect. One is the theory of adequate causation (*adekvátní příčinná souvislost*) and the other is the theory of the protective purpose of the contract (*ochranný účel smlouvy*). While the theory of adequate causation requires that the losses be foreseeable from the perspective of a hypothetical person at the time of the breach of duty, the theory of the protective purpose of the contract requires the losses to be foreseeable from the perspective of the other party to the contract (the tortfeasor, even though objectified to a certain degree) at the time of the conclusion of the contract.[9] In the current case law of the Czech Supreme Court (e.g., Ref. No. 21 Cdo 2124/2020), these theories are used interchangeably or simply at random. However, there are several well-reasoned works in the literature (e.g., Bezouška, Pašek) promoting the theory of the protective purpose of the contract in cases of liability for breach of contract.[10]

The parties can limit their liability under the contract by an exclusion (limitation) clause, e.g., an explicit exclusion of liability as a whole, capping the liability with some amount or extent of damage, or modifying the prerequisites for the liability to

7 CzeCC, § 2913 (2).
8 Supreme Court, Ref. No. 25 Cdo 2968/2018; Melzer and Tégl, 2018, p. 346.
9 Bezouška, 2015a, pp. 763–766.
10 See Bezouška, 2015a, pp. 763–766; Pašek in Petrov et al., 2019, p. 3031.

arise. Parties may also agree on contractual penalties for certain breaches of the contract. This generally excludes damages for the same breach. However, there are some statutory limits as to the validity of such clauses.[11] Any agreement which excludes or limits in advance the liability for damages arising from harm caused to the natural rights of an individual or caused intentionally or because of gross negligence is null and void. The same applies to any agreement precluding or limiting in advance the liability for damages suffered by a weaker party.

2.3. Reduction of loss, substitute transaction

Pursuant to § 2918 of the CzeCC, if damages have been incurred, or if they have increased also as a result of the circumstances attributable to the victim, the tortfeasor's duty to compensate for damages is proportionately reduced. The circumstances attributable to the victims are e.g., the negligent or intentional contribution to some part of the damages, *vis maior,* or materialization of an increased risk of damage occurrence attributable to the victim.[12] This is obviously in compliance with the basic principle of *casus sentit dominus*.

The idea that if the owner does not take due care to prevent or lower the damages to his property arising out of the unlawful conduct of the tortfeasor, he or she cannot claim the whole amount of damages is in line with the above. This is reflected for example in §§ 2902 and 2903 paragraph 2 of the CzeCC. If a person who is at risk of harm fails to act to prevent such harm in a manner appropriate to the circumstances, he or she must bear all the damages which could have been prevented.

As in other legal systems the prevention of one's own damages, *inter alia*, requires the aggrieved party to cover his or her contractual interests by buying the performance with a substitute transaction on the market. In such cases, the costs of the substitute transaction including the difference between the agreed price of the performance and the price of the substitute transaction should be compensated.[13]

2.4. Compensable loss

Also under Czech law, damages should bring the aggrieved party to the position as if the contract had been performed. Pursuant to § 2952 of the CzeCC, the aggrieved party is entitled to compensation for the actual damages and the loss of profits. The tortfeasor is obliged to compensate the non-pecuniary damages only if the compensation of such damages has been stipulated by the parties to the contract or if the statutory law provides for such compensation.[14]

The compensable damages for breach of the contract also include so-called pure economic loss i.e., damages incurred without harm to any absolute right of a victim (*čistá ekonomická újma*). In case of liability in tort, the pure economic loss is

11 CzeCC, § 2898.
12 Melzer in Melzer and Tégl, 2018, pp. 408–410.
13 Supreme Court, Ref. No. Rv II 728/35.
14 CzeCC, § 2894 (2).

compensable only when the statutory rule that has been breached aims to protect the victim from the occurrence of such a loss.[15] The loss of chance is generally not a form of damage that can be reimbursed under Czech law. Nevertheless, there is a decision of the Constitutional Court, ref. No. IV. ÚS 3416/20, concerning a medical dispute which admits that it would be possible to consider the loss of chance as compensable damage under Czech law. This decision is currently the subject matter of harsh criticism.

Czech law very rarely allows for a third person to claim damages incurred by a breach of a contract to which he or she is not party to. The following conditions must be met for a claim of the third person to arise: 1. the duty has been stipulated also in the interest of the third person; 2. the interest of the third person was evident to the debtor at the time of the conclusion of the contract, and 3. the protection of the third person must be necessary (this condition is not fulfilled if e.g., a third person is entitled to damages for other legal reasons).[16]

2.5. Liability for intermediaries

Another substantial difference between liability in tort and liability for breach of contract is to be found in the so-called liability for the intermediary (*pomocník*). If the debtor under the contract renders performance to his creditor through another person (the intermediary), the debtor is liable to the creditor in the same way as if he or she had performed the contract himself or herself. However, there are some exceptions, e.g., in the case of mandate, if substitution is permitted.[17]

A somewhat different regulation applies to the liability for the intermediary used by a person (principal) during his or her activities in general (this does not include liability vis-à-vis a contractual party for rendering performance under the contract, but instead liability to a third party caused during rendering the performance). Decisive here is whether a principal is using someone who has undertaken to carry out a particular activity independently (independent intermediary) or not (dependent intermediary). In case of a dependent intermediary (such as an employee), the principal is liable for the damages caused by the intermediary as if he or she caused them himself or herself. In the case of the independent intermediary, the principal is not liable. However, if the principal has chosen the intermediary carelessly or exercised inadequate supervision over such an intermediary, the principal is liable as a surety for the fulfillment of the intermediary's duty to provide compensation for damages.[18]

2.6. Gratuitous contracts

The question of whether the rules on strict contractual liability should be applied to the breach of gratuitous contracts is still waiting for a clear answer in the literature and the case law.

15 Melzer in Melzer and Tégl, 2018, p. 173.
16 Pašek in Petrov et al., 2019, p. 3031.
17 CzeCC, § 1935 and § 2434. Also see Melzer in Melzer and Tégl, 2018, pp. 352–354.
18 CzeCC, § 2914. Also see Melzer in Melzer and Tégl, 2018, pp. 352–354.

There are some exceptions. Rules on defective performance do not apply to gratuitous contracts as the obligor is not entitled to any consideration for his or her performance.[19] Accordingly, the obligee should not be able to claim through damages what would be otherwise qualified as rights stemming from defective performance to the extent the damages may be rectified in the same way as a defective performance.[20] The donor is not obliged to pay interest in case of default.

Nevertheless, the regulation of donations provides for the liability of the donor only in cases where some form of fault is present (e.g., if a person knowingly donates a thing belonging to another, and conceals this from the donee, the person is obliged to compensate the resulting damages).

2.7. Specific contracts and professional negligence

In case a contract requires a specific degree of due care to be taken and the party fails in this respect, it is not a question of fault but rather a question of breach of contractual duty (to perform some degree of care). Thus, if such contractual duty is breached, the general concept of strict liability for breach of contract applies. However, depending on regulation, the degree of care can be subjective in some cases.

3. Hungary

3.1. Liability for breach of contract in general

The HunCC (1959) introduced a system of liability where liability for breach of contract and liability in tort created one unitary system. The rules addressing liability in tort were to apply for liability for breach of contract as well. That meant, that liability for breach of contract was a fault-based liability without statutory limitations. The HunCC (2013) changed this system and shifted to a solution where liability in tort and liability for breach of contract create two separate regimes. While liability in tort remained a fault-based liability, liability for a breached contract is now a strict liability, where the obligor shall be exempted from liability only by proving that the breach of contract was caused by a circumstance that was beyond his or her control and was not foreseeable at the time of concluding the contract, and he or she could not be expected to have avoided that circumstance or averted the damage. With this formula, the legislator attempted to bring the system of liability for breach of contract close to the liability system provided in the CISG.

The concept of circumstances 'beyond the control' of a party did not have any precursors in Hungarian contract law, neither in theory nor in practice. It is a legal transplant taken from products for the unification of private law, especially from the CISG, the PECL, the DCFR, and the UPICC. The main goal of the legislator was to express that compliance with the required standard of conduct or duty of care shall

19 CzeCC, § 1914 et seq. See also Šilhán in Hulmák et al., 2014, p. 871.
20 CzeCC, § 1925.

not be a ground for exoneration. The rule establishes strict liability in the sense that the absence of fault shall not constitute sufficient grounds for exoneration. In the context of a contractual relationship, this rule is not about responsibility or about establishing the consequences of wrongful behavior but is solely about risk allocation: the obligor undertook an obligation voluntarily for the agreed price. Thus, the cost of performance shall be borne by the obligor to shift the costs (the risk of non-performance) to where the benefits are. The protection of the reliance on the promise of the obligor also requires such strict liability. The fact that the party found to be in breach of the contract was not able to influence the circumstance resulting in that breach does not qualify as grounds falling beyond the party's control. Circumstances beyond the control of the party are understood in the context of Hungarian contract law as expressing only *force majeure*. Circumstances that the obligor was not able to influence, and which could not be avoided even with the utmost duty of care may still be qualified as falling under the scope of the party's control.[21]

In contrast, the Hungarian legislator introduced a foreseeability limit as the statutory limitation of liability for breach of contract. In case of intentional breach of contract, full compensation must be provided, as damages for breach of contract. In case of negligence, the damage incurred in the subject of the service shall be compensated completely. However, other damage to the assets of the obligee and the loss of profit that occurred as a consequence of the breach of contract shall be compensated to the extent to which the obligee proved that the damage, as a possible consequence of the breach of contract, was foreseeable at the time of concluding the contract.[22]

The basic policy behind this solution is that contracts impose obligations on the parties that they undertook voluntarily, as a result of a bargain. This nature of the contractual obligation justifies strict liability. In contrast, the foreseeability limit is justified by the idea that only risks that could be priced are to be allocated to the parties. The effect of shifting the burden of proof concerning foreseeability at the time of conclusion of contract is an incentive for disclosing unusual or unexpected risks to the other party to bring these under the scope of liability.

For services like agency, medical practice, legal services, advising, etc. specific types of contracts are regulated in the system of nominate contracts. In the context of such contracts, the parties may agree that the obligation of the agent is performing a certain result. If the parties did not agree otherwise, the agent must perform the services while conforming to the standard of required duty of care. Failure of compliance with the required duty of care establishes a breach of contract. From this follows that compliance with the required standard of duty excludes breach of contract and shall not establish liability. With these types of contracts, the obligor shall be exonerated

21 See the interpretation given to the concept of „beyond [their] control'. New Civil Code. Opinions of the Advisory Board to the Supreme Court (§ 142), *Új Ptk. Tanácsadó Testület véleményei. Kúria*, kuria-birosag.hu. Opinion to § 142 of the HunCC.
22 Vékás, 2016, No. 638.

from liability by proving compliance with the required standard of care. This holds true for liability for medical malpractice as well.

The attempt of the legislator to provide a different regime for liability in tort and liability for breach of contract could be undermined if the plaintiff could choose between the two systems. That is why the rules provided in the HunCC erect a Great Wall between the two systems. Under the heading of exclusion of parallel claims for damages, the HunCC provides that the obligee shall enforce his or her claim for damages against the obligor per the rules on liability for damage caused by breach of contract, even if the claim for liability in tort could also be established (the doctrine of *non-cumul*). The majority opinion seems to be that this rule is mandatory. Although the rule is criticized in legal scholarship,[23] *non-cumul* is not a legislative choice but a logical consequence of the separation of the two regimes of liability and a necessary element of the current system of liability.

Product liability is provided in Hungarian private law as a specific form of liability in tort. The interpretation handed down by the CJEU established very clearly that product liability is a case of maximum harmonization in European law. That is, cases falling under the scope of product liability legislation are to be decided according to the rules of product liability. The member state shall not apply any parallel form of liability, even if that would be more favorable to the victim. Thus, the *non-cumul* doctrine of liability provided in the HunCC, in this respect seems not to comply with European law or – at least – the *non-cumul* rule shall not be applicable if contractual claims compete with product liability.

The policy underlying the strict nature of liability for breach of contract does not prevail if the contract is a gift (donation). Thus, the general regime of fault-based liability is to be applied for gratuitous contracts. The party undertaking the performance of service free of charge shall be liable for the damage incurred in the subject of the service if the obligee proved that the obligor caused the damage by an intentional breach of contract, or that he or she failed to disclose a substantial characteristic of the service which was unknown to the obligee. The party undertaking the performance of a service free of charge shall be required to compensate for the damage caused by his or her service to the assets of the obligee. He or she shall be exempted from liability if he or she proves that they were not at fault for breaching the contract.

If the inherent rights of the party were interfered with by the breach of contract, the claim of the aggrieved party for awarding *solatium doloris* (the functional equivalent of non-pecuniary damages) shall be assessed based on liability for breach of contract rather than according to the rules of non-contractual liability.[24] This approach was supported by the argument that claims should not be split into contractual and non-contractual ones if they emerged from the same contractual relationship.

23 Fuglinszky, 2014, p. 217.

24 New Civil Code. Opinions of the Advisory Board to the Supreme Court (§ 2:52), *Új Ptk. Tanácsadó Testület véleményei. Kúria*, kuria-birosag.hu. Opinion to HCC § 2:52 on the prerequisites of awarding *solatium doloris*.

3.2. Self-help

The general duty of good faith and fair dealing as well as the duty to cooperate and the obligation of mitigation and attenuation of damage is imposed on the aggrieved party to a contract as well. Thus, the aggrieved party shall act according to the required standard of conduct to mitigate damages. Thus, he or she is required to undertake any transaction to satisfy his or her contractual interest and, if needed to buy the performance on the market in so far as it is possible. He or she has the right to claim as damages, any (unfavorable) difference between the contractual value and the price of the substitute performance bought or which could have been bought on the market. In case of his or her cancellation or unilateral termination, the obligee may conclude another contract capable of achieving the objective pursued by the initial contract and may claim from the obligor, per the rules on compensation for damages, the reimbursement of any (unfavorable) difference between the value determined in the contract and the one determined in the substitute transaction, as well as the costs arising from the conclusion of the substitute transaction.

3.3. Penalty and liquidated damages

Penalty in Hungarian contract law is a secondary obligation. Under a penalty clause stipulated in the contract, the obligor shall pay a certain sum of money in case he or she failed to perform the contract or his or her performance is not in conformity with the contract for reasons attributable to him or her (default penalty). The payment of penalty does not relieve the party of his or her obligation to perform, because the obligor shall be entitled to enforce payment for those of his or her damages exceeding the default penalty as well as other rights resulting from breach of contract. The obligee shall be entitled – per the relevant regulations – to demand compensation for damages caused by the breach of contract, even if he or she has not enforced the claim for default penalty. In commercial contracting practice parties usually try to standardize the compensation the obligor has to pay in case of breach of contract, in an attempt to make their obligations foreseeable and to pre-estimate all the damages the obligee may suffer in case of a breach. Penalty is not suitable for this purpose because it is one-sided: it relieves the obligee from the burden of proving the loss he or she suffered as far as the penalty extends, but in certain jurisdictions, it would not limit the obligations of the obligor. If penalty in a legal system fixes only a minimum amount to be paid in case of breach but does not set the maximum (as in Hungarian law) it is not suitable for standardizing damages and providing proper allocation of risks. Liquidated damages clauses are certainly the most reasonable and optimal way of risk allocation in commercial relationships: they make the risks of the obligor, as well as the recovery of the obligee more predictable and help to avoid the costs of a later dispute emerging from the uncertainties inherent to the necessity of proving the loss of the aggrieved party.

Penalty clauses have a double function: they provide lump sum compensation to the aggrieved party, and they also provide a repressive sanction in case of breach of contract even in absence of damage to force the party to perform, if breach would be

more efficient for him or her. In case of ambiguity, courts may tend to qualify agreed remedies as a penalty, which is the regulated form of agreed remedies, but liquidated damages and securities are also enforceable based on freedom of contract. Atypical securities (guarantees of performance) are enforceable in Hungarian law as well. Even the penalty itself may be seen as a special type (and regulated form) of security. In these legal systems, making distinctions and the qualification of the agreed remedies is also required, as rules covering contractual penalty (e.g., the discretionary power of the court to reduce the penalty) are not necessarily applicable to atypical remedies agreed between the parties, and liquidated damages clauses shall also – in general – be covered by the regulation of liability for breach of contract, instead of that for penalties.

Not only the inconsistency in making a distinction between penalty clauses and independent securities suggests that discrediting penalty clauses may not be convincing and reasonable. Authors often stress the advantages of penalty clauses which may serve three important and advantageous functions. Firstly, the punitive element may serve as insurance provided by the promisor in favor of the aggrieved party. Secondly, penalty clauses often convey information about the reliability of the promisor. Thirdly, in most cases penalties can be restated as bonuses: rejecting enforcement of penalty clauses provides incentives to simply re-draft identical contracts with bonuses.

3.4. Exclusion and limitation of liability

The HunCC rests on the principle of freedom of contract. The parties are, however, not entirely free to exclude or limit liability for breach of contract. Enforceability of such stipulations is, in line with other European jurisdictions, limited in Hungarian contract law. Limiting or excluding liability for damage caused by intentional breach of contract, as well as liability for the breach of contract causing personal injury (harm to human life, physical integrity, and health) shall be null and void.

Regulatory and judicial restriction of contractual limitation and exclusion of liability for breach of contract has been a general answer in modern legal systems to abuse of bargaining power. Limitation clauses reaching beyond the acceptable degree in most of the cases appeared in standard contract terms. This might be the reason why the answer to legal systems was generally two-fold. One of the answers, provided by the courts and later also legislation was disclaiming exclusion clauses, the other was the control of standard contract terms. One of the main arguments in favor of regulatory or judicial restrictions on the enforceability of exclusion clauses in the case law is that if the party to a contract was allowed to exclude liability for all kinds of breaches, the contract would lose its substance and would not create an enforceable obligation. The thought of treating some clauses as a kind of core of the contract and assessing them differently – under the aspect of exemption clauses – as opposed to other terms and conditions, has also appeared in Hungarian court practice. The case law seems to consider that the seller is liable for the thing sold being fit for purpose and suitable for proper (normal) use even if it has been sold at a reduced price, because of its lower quality.

One of the main problems with regulatory restriction of exemption clauses is that it prevents contracting parties from defining the scope of their liability and adjusting it to the agreed price of their performance. Fixing the limits of liability may be seen as one form of defining the rights and duties of the parties, thus, defining the contractual performance. If the parties agree on the contractual price with regard to the scope of the liability of the obligor, intervention into the contractual relationship by widening the scope of liability as compared to the limits of liability stipulated by the parties upsets the balance of contractual rights and obligations. If parties are contracting from relatively equal bargaining positions – as it is assumed in commercial transactions – and there is no ground for invalidity because of duress, mistake, abuse of standard contract terms or contractual power, etc. it does not seem to be reasonable to limit party autonomy and freedom of contract in such a far reaching way, provided that it is not contrary to public policy (as in cases of exclusion of liability for personal injury or consequences of intentional breach, etc.). Risk allocation may be the most important aspect of establishing contractual rights and obligations. As parties draw the boundaries of their obligations, they define their promised performance. From this point of view, exclusion or limitation of liability in commercial transactions may be seen only as a form of defining contractual duties as in general it is very hard to distinguish exclusion clauses from definition clauses.

To a certain extent, Hungarian case law seems to accept the definitive character of a clause as defense. Hungarian court practice seems to construe the rule concerning limitation of liability restrictively, for it differs between exclusion clauses and clauses defining what must be treated as a breach of contract on the one hand and clauses defining the rights and obligations of the parties and the main subject matter of the contract on the other hand. Clauses defining what shall or – from the point of view of the applicability of remedies – shall not be deemed as a defect of performance are not to be qualified as exemption clauses. Such rules are to apply not only for liability but for limiting or excluding all other remedies for breach of contract as well.

3.5. Liability for agents and other intermediaries

Parties may employ other persons to exercise their rights and perform their obligations. The party employing another person to perform an obligation or to exercise a right shall be liable for the conduct of the person deployed in the same way as if he or she had acted himself or herself. If the obligor was not permitted to discharge the obligation by way of another person, then he or she shall be liable for any damage that would not have occurred if this person had not been deployed. The concept of a vicarious agent is to be interpreted in a very wide way. E.g., the shop which sold spare parts, that were later built into the object of a contract for work on goods shall be deemed a vicarious agent of the contractor. To provide a recourse action against the employed person, as long as the obligation is enforceable against the party, the obligor may enforce his or her rights against the vicarious agent arising from the vicarious agent's breach of contract for as long as he or she is required to be liable toward the obligee.

The *non-cumul* rule of liability for breach of contract does not exclude the claims of the obligee directly against the intermediary or agent based on tort.

4. Poland

Damages constitute a pecuniary compensation for loss. As a general rule, the creditor has a choice between a claim for performance or a claim for damages. Sometimes creditors' rights are restricted to damages only, for instance, if performance will be impossible or too onerous for the debtor. In some cases, it will be possible to claim performance and damages at the same time, for instance, if the delay in delivery has caused additional expenses on the creditor's side.

Loss is usually defined as an unfavorable difference in the creditor's assets when comparing their state before and after tort or breach of contract has occurred. This is a simple method, and from the procedural point of view – a theoretical simplification of what often is a complex procedure involving court-appointed expert appraisers.

As a general rule,[25] the creditor can sue for both an actual loss *(damnum emergens)* and lost profits *(lucrum cessans)*. The actual loss is easier to calculate, because we are dealing with facts, and are usually able to do the maths. Lost profits are a little bit trickier because we are dealing with hypothetical gains not achieved because of the loss incurred. The losses in these cases relate to the – more or less uncertain – gains the creditor would have achieved had the contract been performed as agreed. So, in this case, we are making a prediction with the use of available data. If it is not possible to calculate the exact amount of the damages the court may, at its discretion, order the payment of the sum it sees fit (*ius moderandi*).[26] Compensation for moral (non-pecuniary) losses (*krzywda*) is awarded discretionally by the judge and only in certain specified cases of tort.

According to Article 363 § 2 of the PolCC, while calculating the damages the court should take into account actual prices for the date of the judgment. The damages awarded should allow the aggrieved party to acquire a similar object or service. Generally, the court will calculate the damages using the market value of an object.[27]

The debtor is liable only for the normal consequences of his or her actions.[28] So, one of the important parts of the process will be to establish if the loss incurred by the debtor is within the bounds of 'normal' consequences of non-performance or incomplete performance of any given contract. For instance, if the debtor fails to deliver a new car to a transport company, the normal loss in these circumstances would be the cost of renting another car. The fact that they did not win the 'Company

25 PolCC, Article 361 § 2.
26 Polish Code of Civil Procedure, Article 322.
27 Czachórski et al., 2004, 104–105.
28 PolCC, Article 261 § 1.

with the best new car of the year' award of 10.000 EUR is not a normal consequence of non-performance.

Damages can sometimes be limited by the law. In some cases, they will be limited only to so-called negative contractual interest (*ujemny interes umowny)* i.e., the costs incurred by the party expecting to have the promise fulfilled. For instance, in the case of a pre-contract (*umowa przedwstępna, pactum de contrahendo*), when the counterparty fails to conclude the final contract, the party may claim reimbursement of costs incurred because of his or her expectations to enter into the final contract.[29]

Another case when damages can be limited by the virtue of law is *compensation lucri cum damno,* i.e., the case when damages are diminished by other gains connected with the loss.

According to article 471 of the PolCC the debtor is liable for non-performance or incomplete performance of the contract unless the non-performance or the incomplete performance arose from circumstances beyond his or her control. This rule is generally understood as a reversal of the standard rule of evidence that it is the claimant who has to prove that the debtor is liable. It is justified by the fact, that it is usually the debtor who can prove with ease that non-performance was caused by external circumstances. This is true in particular regarding the liability of proxies and intermediaries. Regardless of the reversal of the burden of proof, it is due diligence that sets out the limits of liability.[30] If the debtor concluded a contract in his or her professional capacity (e.g., as a lawyer, doctor, entrepreneur, etc.) the level of due diligence should be commensurate with the professional character of his or her actions.

As a general rule, the debtor may employ intermediaries unless it is specified otherwise in the contract or if the nature of a contract would exclude performance by way of another (e.g., a contract with a painter requires the artist to paint with his or her own hand). If the debtor employs an intermediary, he or she is liable for that intermediary's actions as if they were his or her own.[31] This is generally understood as a strict liability rule. Even proof that the debtor has chosen the intermediary with utmost care and diligence does not exclude his or her liability for non-performance.

It is possible to modify statutory rules of liability by contractual provisions.[32] The parties are free to extend or to limit, and even to exclude liability for non-performance or incomplete performance. The only limit to this is the rule that the parties cannot exclude liability for intentional harm. It is also possible to exclude or limit liability for intermediaries.[33]

Penalty clauses can also be treated as contractual modifications of damages. The penalties in their original form constitute a lump sum compensation detached from any real loss. The creditor cannot claim damages over the amount of penalties. If we

29 PolCC, Article 390.
30 PolCC, Article 472.
31 PolCC, Article 474.
32 PolCC, Article 473.
33 Śmieja, 2011.

can assess the range of potential losses and if we are aware that calculating the exact amount may be excessively difficult or too costly, penalties are a good option: the parties minimize contractual risks. Another option is to modify the general rule and allow the debtor to sue for damages exceeding the penalty. This option is better for the creditor, although still a way of lowering contractual risks.

Statutory modifications of liability for damages can also be found in the PolCC in the case of specific nominate contracts. A good example is the rules of liability for defective goods (regarding sales contracts).[34]

5. Romania

5.1. Overview

As a general principle, the creditor is entitled to damages to compensate the debtor for the damage caused to him by the debtor, which is the direct and necessary consequence of the unjustified or, as the case may be, culpable non-performance of the obligation.[35] The original obligation undergoes a transformation: the original claim is replaced by another claim, namely the right to (compensatory) damages. In this sense, in the system of the Romanian Civil code, damages can be of two kinds.

— Damages for late performance are equivalent to the loss suffered by the creditor because of the failure to execute the obligation in time. Damages for late performance may be cumulated with performance in kind (voluntary or enforced) or with compensatory damages.
— Compensatory damages are the equivalent of the loss that the creditor suffers because of total or partial non-performance of the obligation. The award of compensatory damages replaces all or part of the performance originally owed by the debtor with another claim, that of payment of damages. It has been rightly pointed out that compensatory damages 'do not amount to a novation of the previous obligation which the court would have established without the will of the parties; damages are due by virtue of the original obligation itself, they constitute the subsidiary object, by way of sanction, of the performance of that obligation.'[36]

Damages are awarded based on the rules of contractual liability.[37] Every person must perform the obligations he or she has contracted for, which follows the principle of the binding force of the contract. Where, without justification, he or she fails to fulfill this duty, he or she shall be liable for the damage caused to the counterparty and is obliged to make good that damage per the law. The following constitute grounds for

34 PolCC, Article 556 et seq.
35 RouCC, Article 1530.
36 Popescu and Anca, 1968, p. 319.
37 RouCC, Articles 1350–1356 and 1530–1548.

exemption from liability for non-performance of the contract: *force majeure,* a fortuitous event, the action or omission of the victim or a third party, and the exercise of a right that is not unreasonable (not abusive).[38] Compared to tortuous liability, contractual liability is of a special nature and will apply whenever damage has been caused by non-performance or improper performance of a contract (the doctrine of *non-cumul*).[39]

5.2. Conditions for contractual liability

To incur contractual civil liability, the following four general conditions for liability must be conjunctively met: a wrongful (i.e., illegal) act (any action or omission) by the debtor (breach of contract), which resulted in damage occurring, a causal link between the wrongful act and the damage, and the culpability of the debtor. In addition to these general conditions, there are two special conjunctive conditions for contractual liability: the debtor must be in default, and there must be no agreement not to be held liable (non-liability clause).

5.2.1. Wrongful act of the debtor (breach of contract)

The wrongful act – in matters of contractual liability – consists of the non-performance, improper performance, or late performance of duties arising from a contract.

Unless the parties agree otherwise, the debtor shall be liable for damages caused by the fault of the person he or she uses to perform any contractual obligations. This is the contractual liability for the actions of another.[40] The essential feature of this form of liability is that the contracting party will be liable for third parties he or she involved in the performance of the contractual obligation if the conduct of these persons breaches the duties arising from the contract.

5.2.2. Damage

Damage is the loss suffered by the creditor (the obligee) of the contractual obligation breached. Damage may be pecuniary or non-pecuniary. If there is no damage, the conditions for contractual liability are not met.

In matters of contractual liability, the creditor is entitled to total compensation for the damage he or she has suffered because of non-performance. The damage includes the loss actually suffered (*damnum emergens*) by the creditor and the benefit which he or she is deprived of (*lucrum cessans*). In determining the extent of the loss, due account shall also be taken of the expenses which the creditor has incurred, within a reasonable limit, to avoid or mitigate the loss.

The damage must be certain. Future damages are taken into account when they are certain (will definitely occur). Damage that would be caused by the loss of an opportunity to obtain an advantage may be compensated in proportion to the

38 See for details RouCC, Articles 1351–1354, also applicable to contractual liability.
39 Veress, 2020, pp. 219–220.
40 RouCC, Article 1519.

likelihood of obtaining that advantage, taking into account the circumstances and the specific situation of the creditor. The court shall determine the amount of the damage, which cannot be determined with certainty.

Very importantly, in the area of contractual liability, there is a specific condition relating to damage: foreseeability. The debtor is liable only for damage that he or she foresaw or could have foreseen as a result of non-performance at the time the contract was concluded unless the non-performance is intentional or because of gross negligence on his part. Even in the latter cases, damages only cover the direct and necessary consequence of non-performance. The requirement of foreseeability of damage is intended to create a fair balance between the risks assumed by each contracting party. It would not be fair for the contractual debtor to be liable for unforeseeable, unusual, exceptional damage. It is possible to conclude the contract and fix the contract price with full knowledge of the risks assumed. If there are specific risks, then the contracting party must inform the counterparty of these risks, who will be able to make an informed decision on the conclusion of the contract or the contractual conditions. Liability for foreseeable damage is justified, but for unforeseeable damage, such liability would be unfair in the contractual field.

Another situation to be considered is where the damage is imputable to the creditor. If the creditor, by his or her culpable action or omission, has contributed to the damage occurring, the liability of the debtor will be reduced accordingly. This rule also applies when the loss or damage is partly caused by an event for which the creditor bears the risk. The debtor shall not be liable to pay compensation for the damage that the creditor could have avoided with minimum care.[41]

Proof of non-performance does not relieve the creditor of the burden of proving the existence and the amount of any damage suffered unless otherwise provided by law or by the agreement of the parties, e.g., where the parties assess the damage in advance by way of a penalty clause. Even where the parties in a penalty clause predetermine the extent of the damage, the existence of the damage must be proven.

The creditor may not claim both performance in kind of the obligation and payment of the damages unless the damages have been stipulated for non-performance at a fixed time or place. In the latter cases, the creditor may claim both performance of the principal obligation and payment of damages unless he or she has waived this right or accepted the performance without reservation.

The amount of damages can be determined (assessed) by legal, judicial, and conventional means.

— The legal assessment of damages can be found primarily where the object of the obligation is to give a sum of money. In the case of an obligation to pay a sum of money, this can always be enforced in kind, so the question of damages arises if the debtor is late with a payment.

41 Daghie, 2016, pp. 33–41.

If a sum of money is not paid when due, the creditor shall be entitled to damages for late payment, from the due date until the time of payment, in the amount agreed by the parties or, failing that, in the amount prescribed by law, without having to prove any damage.[42] In practice, this constitutes a presumption of damage. In this case, the debtor is not entitled to prove that the damage suffered by the creditor as a result of late payment could be any less than the agreed upon or legally prescribed amount. If, before the due date, the debtor owes more interest than what the statutory interest rate would allow, the default damages shall be due at the statutory rate applicable before the due date. If no default interest higher than the statutory interest is due, the creditor is entitled, in addition to the statutory interest, to damages for full compensation of the loss incurred.

However, Government Ordinance No. 13/2011 on Statutory Interest and Penalty Interest for Pecuniary Obligations also has important rules in this field. Statutory penalty interest applies if the parties have not included a penalty clause in the contract. The statutory penalty interest rate is set at the reference interest rate of the Romanian National Bank plus four percentage points. In juridical acts not arising from the operation of a profit-making enterprise, this statutory interest rate is reduced by 20%. However, in relations between professionals and between professionals and contracting authorities, the statutory penalty interest is set at the reference interest rate plus eight percentage points.

Romanian law also contains rules on damages for late performance in other obligations than payment of money.[43] In the case of obligations other than those for the payment of a sum of money, late performance always entitles the debtor to damages equal to the statutory interest calculated from the date on which the debtor is in default on the money equivalent of the obligation unless a penalty clause has been stipulated or the creditor can prove a greater loss caused by the delay in performance. When it is late with a performance of another obligation than the payment of money, the debtor is not *ex lege* in default, so it must be previously and formally notified to request damages.

- The judge may undertake a judicial assessment of damages. The rules of judicial assessment are as follows: 1. the damage must be fully compensated and must include both the actual loss suffered and any lost benefit; 2. non-pecuniary damage must also be compensated; 3. the debtor is liable only for foreseeable damages unless non-performance is intentional or because of gross negligence; 4. the debtor shall not be liable for damages which the creditor could have avoided with a minimum of diligence.
- In practice, conventional assessment of damages has a central role. Conventional assessment is possible before the occurrence of the damage through a penalty clause and after the occurrence of the damage by means of an agreement between the contracting parties.

42 RouCC, Article 1535.
43 RouCC, Article 1536.

The penalty clause is an agreement by which the parties stipulate that the debtor is obliged to provide a certain performance in the event of non-performance of the principal obligation and lieu thereof or for defective performance of the obligation. The penalty clause is generally regarded as an ancillary clause in a contract and is subject to all the validity requirements of agreements. [44] The penalty clause also fulfills a security function: the prospect of having to pay penalties in the event of a breach of contract leads the debtor to perform his or her obligations;[45] the clause has a preventive role and, if necessary, a remedial and punitive role as well. [46]

In the event of non-performance, the creditor may request either performance in kind of the main obligation or the application of the penalty clause. The debtor, on the other hand, cannot discharge his or her obligation by simply offering the agreed penalty. The penalty clause might be combined with performance in kind if it was provided for defective performance of the obligation (e.g., late delivery).

Government Ordinance No. 13/2011 on Statutory Interest and Penalty Interest for Pecuniary Obligations sets limits to contractual freedom in cases of penalty clauses for late payment. In juridical acts not arising from the operation of a profit-making enterprise, the contractual penalty interest may not exceed the corresponding statutory interest by more than 50% *per annum*. Any clause which contravenes these provisions is deemed null and void. The sanction is severe: in such a case, the creditor shall forfeit the right to claim statutory interest entirely. *Per a contrario*, in relations between professionals, the penalty interest may be set freely, the maximum limit being determined by good morals.

In general, the creditor may request enforcement of the penalty clause without having to prove the extent of the loss. The advantage of the penalty clause is that the parties anticipate the damage caused by the debtor, and the creditor does not have to prove separately the amount of the damage suffered. The acceptance of a penalty clause in the contract by the debtor is a declaration of honesty: he will perform the obligation because he accepts to pay the penalty clause in case of non-performance. We consider that the creditor cannot claim more compensation than the penalty clause under Romanian law in general. The exception is where the debtor is liable for unforeseeable damage, i.e., where non-performance is intentional or because of gross negligence. The penalty may not be claimed when the performance of the obligation has become impossible through no fault of the debtor.

The amount of the penalty determined by agreement cannot generally be reduced by the court, except in the following two situations: 1. the principal obligation has been performed in part, and such performance has benefited the creditor; 2. the penalty is manifestly excessive in relation to the loss which the parties could have foreseen when the contract was concluded. The penalty thus reduced must, however,

44 High Court of Cassation and Justice, Commercial Section, Decision No. 1143 of February 18, 2005.
45 Sanilevici, 1976, p. 333.
46 See also High Court of Cassation and Justice, Civil Section II, Decision No. 785 of May 4, 2017.

in all cases still exceed the principal obligation. Any stipulation to the contrary shall be deemed unwritten.

The RouCC does not allow the judge to increase the penalty set by the parties in the corresponding clause (even if it would be derisory), and any increase is also not permitted if the penalty clause, set according to foreseeable losses at the moment the contract was concluded, is much lower than the actual loss suffered by the creditor.

In contrast, as we have pointed out, if the debtor is also liable for unforeseeable damage (in the case of willful non-performance or where non-performance is because of gross negligence, per Article 1533 of the RouCC), the creditor is entitled, in our opinion, to claim, in addition to the penalty clause, damages in the amount necessary to cover the entire damage created. We justify this approach by arguing that the parties' understanding, as expressed in the penalty clause, was only concerned with foreseeable damage, for which the debtor is usually liable. However, this genuine limitation of liability by means of the penalty clause no longer benefits the debtor who caused the damage intentionally or through gross negligence and is therefore also liable for unforeseeable damage: he or she will pay both the amount contained in the penalty clause and the difference between the actual value of the damage caused by non-performance or defective performance of the contract. Moreover, the law does not allow the exclusion or limitation, by agreements or unilateral acts, of liability for material damage caused to another person by an act committed with intent or gross negligence.[47]

5.2.3. Culpability

Under the Romanian rules of contractual liability, the debtor is obliged to compensate for damage caused intentionally or negligently. The fault of the debtor of a contractual obligation is presumed by the mere fact of non-performance.[48] The debtor may avoid his or her own liability if he or she proves that there is neither intent nor fault on his or her part. Thus, the burden of proof of any fault in the non-performance of the contract is reversed by the norm, in that the law exempts the plaintiff from having to provide such proof, leaving the defendant debtor with the burden of proving that non-performance of the contract is not imputable to him or her but is because of extraneous causes beyond his or her control.[49] In the case of an obligation to refrain from a given conduct (*non-facere*), however, the creditor will have to prove a breach of contract.[50]

It has also been pointed out in the legal literature that in the case of a presumption of guilt, a distinction must be made between obligations of result and obligations of conduct. The presumption of fault applies only to obligations of result because, in the case of obligations of conduct, the debtor's fault must be demonstrated by the creditor

47 RouCC, Article 1355.
48 RouCC, Articles 1547–1548.
49 Bucharest Court of Appeals, Civil Section IV, Decision No. 149/2006, published in Paraschiv, 2010, p. 32.
50 Veress, 2020, p. 227.

to obtain a judgment requiring that debtor compensate the damage caused by the failure to perform the obligations properly.[51] In other words, the creditor, to obtain damages, must prove that the debtor neglected to undertake the necessary effort to seek the intended consequence.

5.2.4. Default of the debtor

If the debtor fails to comply with a time limit for contractual performance, he or she is, in fact, in default. However, to be in default in a legal sense, the debtor must also be put formally in default. The debtor's default signifies the moment from which the debtor is also legally in failure with the performance of the obligation. This moment may be determined by law (in cases where the debtor is in default *ope legis*), by contractual provision (when the debtor agrees to be considered in default by the mere fact of exceeding the date performance was due), or by the creditor's manifestation of his or her will, framed in a call for performance by notice to the debtor, indicating that the time limit for performance has been exceeded. The law links certain specific effects to this moment.

The default may take place either by written notice by the creditor requesting the debtor to perform the obligation or by an action addressed to the court by which the creditor seeks enforcement. The written notice must provide the debtor an (additional) period of time for performance, taking into account the nature of the obligation and the circumstances. If the notice does not grant such a period, the debtor may perform the obligation within a reasonable time calculated from the day of service of the notice. Thus, a default notice is a means of protecting the debtor.

The debtor is automatically considered to be in default if it has been stipulated in the contract that the mere expiry of the time limit for enforcement produces such an effect.

The debtor shall also be in default *ope legis*, in the specific cases provided for by the RouCC, when: 1. the obligation could not have been performed usefully until a certain time had elapsed, which the debtor allowed to pass, or when he or she did not perform it immediately although there was urgency; 2. the debtor has, by his or her act, made it impossible to perform the obligation in kind or when he or she has breached an obligation to refrain from an action (*non-facere*); 3. the debtor has demonstrated to the creditor a clear intention not to perform the obligation or, in the case of an obligation of successive performance, repeatedly refused or neglected to perform the obligation; 4. an obligation to pay a sum of money, undertaken in the course of a business activity, has not been performed (an atavistic rule left over from the former dualist Romanian private law, previously a norm in commercial law).[52]

The debtor is not in default if he or she has made an offer of performance when due, but the creditor has refused to take it without a legitimate reason.

51 Pop, 2018, p. 48.

52 Veress, 2020, pp. 228–230. The rules on *ope legis* default are also applicable for tortuous liability.

5.2.5. Absence of a non-liability clause

It is possible to conclude agreements before the damage occurs, whereby the debtor's liability is excluded, and the debtor is exonerated from paying damages. Such a contractual clause is only valid if the non-performance of the contract is considered to be because of slight negligence. If the debtor is exonerated from liability for intentional or grossly negligent non-performance, then the clause is null and void. It is also possible to limit the debtor's liability but within the same limits. In this respect, the RouCC provides that liability for material damages caused to another person by an intentional or grossly negligent act cannot be excluded or limited by unilateral agreements or acts.[53]

Clauses which exclude liability for damages caused to the victim's property through mere carelessness or negligence are valid. Liability for damage caused to physical or mental integrity or health may be waived or reduced only per the law. A statement of acceptance of the risk of injury shall not of itself constitute a waiver of the victim's right to compensation.

As regards notices concerning liability (such as those by which hoteliers waive liability for damages caused by theft on the premises), a notice which excludes or limits contractual liability, whether or not it is made known to the public, has no effect unless the person invoking it proves that the person who sustained the damage was aware of the existence of the notice at the time when the contract was concluded.

6. Serbia, Croatia, Slovenia

6.1. Serbia

According to the Serbian legal literature contractual liability arises in relation to different situations traditionally called 'infringement of contractual discipline.' It may consist of either a failure to perform a contractual obligation, a default on performance, or defective performance.[54] The term itself implies that only the infringement of contractual obligations leads to the emergence of contractual liability. Though in most cases a breach of contract is indeed what triggers contractual liability, it should be interpreted more broadly. The basic dividing line between liability in torts and contractual liability is that the latter presupposes a pre-existing obligational relationship between the parties, most often a contract but not necessarily, whereby tortuous liability arises between parties, between whom there is no pre-existing obligational relationship. Thus, the rules of contractual liability apply to omissions or defects of the performance of a pre-existing obligational relationship of any kind.[55] This conclusion is supported by the fact that the consequences of breaches of contract, aside from the repudiation of the contract because of non-performance, are not regulated

53 RouCC, Article 1355.
54 Dudaš in Pajtić, Radovanović and Dudaš, 2018, p. 563.
55 Dudaš in Pajtić, Radovanović and Dudaš, 2018, p. 563.

in the part of the SrbLO pertaining to the general rules of contract law, but in the part containing rules on the legal effects of obligational relationships.

The law first declares that a creditor in an obligational relationship is entitled to request performance of the debtor's obligation, whereby the latter is obliged to perform in good faith according to the content of the obligation relationship established.[56] This is in line with one of the general principles of the SrbLO prescribing that the parties to obligational relationships are obliged to perform their obligations and bear any liability for non-performance.[57] In addition, the law specifies the consequences of the breach of contractual discipline: if the debtor failed to perform, or is in default with the performance, the creditor is entitled to request compensation for damages caused as a consequence of non-performance or default.[58] These two rules determine the relationship between specific performance and contractual liability. Namely, the creditor is not required to request specific performance to gain a right to request compensation under the rules of contractual liability. The latter emerges independently whether he or she requested a specific performance or not.[59] This applies also to a debtor to whom the creditor granted an additional appropriate time period for performance, according to the rules on repudiation of the contract because of non-performance.[60] The debtor is liable even for the non-culpable partial or complete impossibility of the performance if such impossibility occurred after default in performance for which he or she is culpable.[61] However, the debtor shall be exonerated from liability for non-performance if he or she proves that the object of the obligation would have in any case been destroyed accidentally even if the debtor had performed on time.[62] This is also a case of the application of the rule of *perpetuatio obligationis*, according to which not even a non-culpable impossibility of performance releases the debtor from performance if he or she is in default.

The SrbLO specifies that the debtor may be exonerated from liability for non-performance if he or she proves that the omission of – or default in – performance is attributable to a cause that emerged after the conclusion of the contract and that he or she could not prevent, avert or avoid this cause.[63] The SrbLO, however, omitted to define clearly the nature of contractual liability, that is whether it is fault-based or a form of strict liability.[64] That gave rise to differing opinions in the literature. The reason for these disparate opinions lies in the fact that the law states *force majeure* as being the only possible ground for the debtor's exoneration from liability, whereas in other contexts the legal consequences depend on the debtor's fault in one form or

56 SrbLO, Article 262 (1).
57 SrbLO, Article 17.
58 SrbLO, Article 262 (2).
59 Karanikić Mirić, 2013, p. 50.
60 SrbLO, Article 262 (3).
61 SrbLO, Article 262 (4).
62 SrbLO, Article 262 (5).
63 SrbLO, Article 263.
64 Karanikić Mirić, 2013, p. 45.

another. Some assert, thus, that contractual liability under Serbian law is fault-based, whereby the standard of care is very strictly set, but it seems to have more merits to construe it as a form of strict liability.[65]

Since a contract is the product of the parties' disposition, they are in principle free to devise their own set of rules of contractual liability. These may be more strict or lenient than the statutory regime, but in both cases, they are subject to certain restrictions. On the one hand, the law enables the parties to establish the debtor's liability for cases of breach of contractual discipline for which according to the statutory regime otherwise he or she would not be liable.[66] This is the legal ground for the so-called *force majeure* clauses whereby the parties may extend their contractual liability even for events that lie beyond their control.[67] However, the SrbLO limits this freedom of disposition of the parties: such clauses shall not be applied, if they are contrary to the principle of good faith and fair dealing.[68] In contrast, the SrbLO enables the parties to exclude or mitigate their contractual liability by their contract. However, they may not exclude in advance their liability for a breach of contract caused intentionally or by gross negligence.[69] In this regard, the law sets out a further restrictions. The court shall – upon the request of the interested party – declare null and void a clause in the contract on the limitation of liability, stipulated even for ordinary negligence if it finds that such a clause was a result of the debtor's monopolistic position or inequality between the bargaining positions of the parties in any other way.[70] In addition, the SrbLO permits the parties to determine, by contract, the maximum amount of the compensation to be paid, should liability arise, unless it is disproportionate to the damage effectively suffered, or when a different rule is provided for by statute.[71] Without a clause on the limitation of the amount of compensation, the creditor is entitled to full compensation for damages endured, if the debtor caused the impossibility of the performance intentionally or with gross negligence.[72]

Concerning the scope of contractual liability, the SrbLO envisages certain limitations that are not applicable to tortuous liability. It prescribes, namely, that the creditor is entitled to compensation for such direct loss and lost profits that the debtor should have foreseen at the time of the formation of the contract as a possible consequence of a breach of contract, in the light of facts that he or she was or should have been aware of.[73] However, the foreseeability of damage does not limit the scope of liability, if the debtor acted in deceit, or caused the breach of the contract intentionally or by gross negligence.[74] The other limiting factor of contractual liability is the potential

65 Karanikić Mirić, 2013, p. 45.
66 SrbLO, Article 264 (1).
67 Jankovec in Perović, 1995, p. 601.
68 SrbLO, Article 264 (2).
69 SrbLO, Article 265 (1).
70 SrbLO, Article 265 (2).
71 SrbLO, Article 265 (3).
72 SrbLO, Article 265 (4).
73 SrbLO, Article 266 (1).
74 SrbLO, Article 266 (2).

gain of the creditor. It is not unimaginable that the breach of contract may yield some benefit for the creditor. In such a case, the law mandates the court to take into account the benefits gained by the creditor in reasonable consideration when determining the amount of compensation.[75] Furthermore, the creditor must take all reasonable actions necessary for alleviating the damage caused by the breach of the contract. If the creditor failed to do so, the debtor is entitled to a proportionate reduction of his or her liability.[76] The SrbLO prescribes the appropriate application of these rules to the performance of obligations emerging from sources other than contracts unless differently provided by statute for the given class of obligational relationships.[77] Keeping in mind that the SrbLO contains detailed rules on the scope of tortuous liability, the application of the rules on the scope of contractual liability may be extended to other obligational relationships arising from juridical acts, but not to the ones arising from torts.[78]

Aside from the potential gain of the creditor from the breach of the contract, another element that may reduce the scope of the debtor's liability is the creditor's fault. The law, namely, prescribes that if the emergence of the damage, or its scope, or the deterioration of the debtor's position is attributable to the fault of the creditor or any other person for whom he or she bears responsibility, any compensation shall be reduced proportionately.[79] During the existence of the obligational relationship, the cooperation of the parties is rather frequently required. Supporting this idea, the law prescribes that if a party is obliged to notify the other party about circumstances relevant to their mutual relationship, he or she shall be liable for the damage the other party sustains if he or she has not been notified in due time.[80] Finally, the SrbLO prescribes that concerning all issues not regulated by the rules on contractual liability, the rules on tortuous liability shall apply.[81]

There are disparate rules on liability for torts and contractual liability. In this regard, it is important to analyze the relation between the two liability regimes if a particular case triggers the application of both, which can often happen. The SrbLO does not have a rule explicitly specifying which regime of liability is to be applied in their concurrence. This would not constitute an issue of greater relevance if the particular rules of the two regimes of liability would lead to identical legal consequences. But they clearly do not. There are many points on which the two legal regimes show discrepancies, but three require special attention.

Firstly, the scope of compensation according to the rules of tortuous liability is not limited by the foreseeability of the damage, whereby such limitation according to the rules of contractual liability exists.[82]

75 SrbLO, Article 266 (3).
76 SrbLO, Article 266 (4).
77 SrbLO, Article 266 (5).
78 Karanikić Mirić, 2013, p. 53.
79 SrbLO, Article 267.
80 SrbLO, Article 268.
81 SrbLO, Article 269.
82 Dudaš in Pajtić, Radovanović and Dudaš, 2018, p. 568.

Secondly, though there are different standpoints present in the literature,[83] the one which has the most merit, is that which limits the compensation for moral damages only to tortuous liability. Contractual liability should therefore not comprise compensation for moral damages.[84]

Finally, the limitation periods differ depending on whether the claim of the plaintiff is qualified as a claim for compensation according to the rules of tortuous liability or a to the rules of contractual liability.[85] It seems evident, therefore, that it is of utmost importance to determine which regime of liability shall be applied if the conditions of the application of both are satisfied. The majority opinion in the literature is that the court will *ex officio* apply the liability regime, which is more favorable to the aggrieved party, the plaintiff, but in doing so, the rules of one regime of liability exclude the application of the other. This means that the court may not choose specific rules from both regimes and apply them in combination but instead has to opt for one regime in its entirety, which, when applied excludes the other.[86]

A lenient regime of contractual liability is envisaged for some specific gratuitous contracts if there is any liability at all. The SrbLO, first and foremost, limits the application of the rules on material and legal defects only to contracts concluded for consideration.[87] As for specific contracts, for example, in case of a gratuitous loan, the lender is not liable for the damage accrued in relation to a defect in the object of the loan, except in the case when he or she knew of the defect and failed to notify the borrower.[88] If a contract of deposit is gratuitous, the depositary must safekeep the object of the deposit applying a lower standard of duty of care; with the standard that he or she demonstrates in safekeeping his or her own property.[89]

The contractual penalty (or stipulated penalty – Lat. *stipulatio poenae*) has great importance in relation to contractual liability. As the aforementioned rules indicate, a contract being the parties' juridical act, it seems logical that they are entitled to devise a mechanism for redressing any damage caused by its breach. A very practical method for doing this is the stipulated penalty, which, in the form of liquidated damages, compensates a party to a contract in the case of the counterparty's breach of contract. Under the SrbLO, a clause on stipulated penalty may be agreed upon by the parties either for the case of non-performance or for default in performance. Its object is usually an obligation to pay a certain amount of money to the other party, but it may also be a proprietary gain of any kind.[90] Since the stipulated penalty may be agreed upon either for non-performance or default in performance, the law states that if its nature is not specified by the contract, it shall be considered that it has

83 Jankovec, 1993, pp. 30–37.
84 Karanikić Mirić, 2013, p. 53.
85 Dudaš in Pajtić, Radovanović and Dudaš, 2018, p. 570.
86 Dudaš in Pajtić, Radovanović and Dudaš, 2018, p. 573.
87 SrbLO, Article 121 (1) and (2).
88 SrbLO, Article 561 (1).
89 SrbLO, Article 714 (1).
90 SrbLO, Article 270 (1).

been stipulated for the case of default in performance.[91] However, a major restriction is imposed by the SrbLO in terms of the scope of its application: it may not be stipulated for pecuniary obligations.[92] It may be stipulated either in a total amount or in a percentage of the value of the claim, for each day of default, or in any other way by parties' choice.[93] The law however states that the agreement on the stipulated penalty must be concluded in the same form as the main contract if a statutory form is prescribed for the contract.[94] This is another example of the application of the principle of parallelism of forms in Serbian contract law.[95] The law unambiguously declares the accessory nature of the stipulated penalty: the parties' agreement on stipulated penalty shares the legal fate of the secured claim, as the law puts it somewhat poetically.[96] In addition, it specifically prescribes that the agreement on the stipulated penalty loses its legal effect if non-performance or the default in performance is attributable to a cause for which the debtor could not be held liable.[97] The accessory nature of the contractual penalty however knows one exception, developed by case law, and supported by the literature. This is the so-called irregular contractual penalty, which is concluded without a basic claim it could be an accessory to. Although the law does not regulate irregular contractual penalty explicitly the majority opinion in the literature is that it should be considered valid, since it is not contrary to the general limitations of the principle of freedom of contract.[98]

The creditor's rights depend on whether the penalty has been instituted for the case of non-performance or for a default in performance. In the former case, should the debtor fail to perform, the creditor is entitled to request either the performance of the contractual obligation or the payment of the penalty.[99] The creditor forfeits the right to request performance if he or she requested the penalty.[100] In contrast, a stipulated penalty does not institute the right of the debtor to withdraw from the contract by simply paying the sum of the penalty to the creditor, unless that was the intention of the parties when they agreed on the penalty.[101] When the penalty has been instituted for the case of delay in performance, the creditor is entitled to cumulate the penalty with the claim for performance.[102] The law establishes the relationship between the accepting debtor's performance and the claim for the payment of penalty due for cases of default in performance. If the creditor accepts the performance, he or she forfeits the right to request the payment of penalty instituted for a delay in

91 SrbLO, Article 270 (2).
92 SrbLO, Article 270 (3).
93 SrbLO, Article 271 (1).
94 SrbLO, Article 271 (2).
95 Radovanović, 2017, p. 36.; Hiber and Živković, 2015, pp. 416–417.
96 SrbLO, Article 272 (1).
97 SrbLO, Article 272 (2).
98 Pajtić in Pajtić, Radovanović and Dudaš, 2018, p. 82.
99 SrbLO, Article 273 (1).
100 SrbLO, Article 273 (2).
101 SrbLO, Article 273 (3).
102 SrbLO, Article 273 (4).

performance, unless he or she has immediately notified the debtor that he or she reserves the right to request the penalty.[103]

The interest of the debtor is protected by the rule prescribing that the court shall – upon his or her request – reduce the amount of the penalty if it is found to be grossly excessive in relation to the value and relevance of the object of the debtor's contractual obligation.[104]

The stipulated penalty, as its name implies, has a certain punitive element, deviating from the basic logic of civil law liability, which aims to restore or compensate for loss, but not to punish. The punitive element of the stipulated penalty appears in a broader sense in relation to the rule according to which the creditor may collect the amount of the stipulated penalty even if he or she did not, in fact, suffer any meaningful loss because of the non-performance or default in performance.[105] This is a major advantage for the creditor, since in the case of breach of contract he or she does not need to prove that the damage has actually been sustained, but simply requests the payment of the penalty. The creditor will regularly do so if the actual damage is lower than the amount of the penalty.[106] However, if the actual damage is higher than the amount of the penalty, the creditor is entitled to request the difference between the actual damage and the amount of the penalty to obtain full compensation.[107] For the compensation for this difference, the rules of contractual liability apply, which means that the creditor needs to prove the extent of the actual loss exceeding the amount of the penalty.[108] Finally, the law determines the relationship between stipulated and statutory penalties. Sometimes, though not very often, a statute may oblige the debtor in specific transactions to pay the creditor a certain amount of penalty in case of non-performance or default in performance. If in such a case a contractual penalty is also stipulated, the creditor may not cumulate the statutory and the contractual penalty, unless the statute prescribing the penalty allows such cumulation.[109]

The functional equivalent of stipulated penalty for pecuniary obligations is the default interest, provided the creditor accepts the interest in lieu of claiming damages on the grounds of contractual liability. It is payable by any debtor in a pecuniary obligation, not only those arising from contract, but it has the greatest significance in relation to contractual obligations. The SrbLO prescribes the duty to pay default interest in case of a debtor's pecuniary obligation, but it is regulated in detail by a special statute.[110] This special statute is the Act on Default Interest adopted in 2012. According to this act, the default interest is 8% *per annum*, added to the reference interest rate of the Serbian National Bank. The SrbLO specifies that the contractual

103 SrbLO, Article 273 (5).
104 SrbLO, Article 274.
105 SrbLO, Article 275 (1).
106 Jankovec in Perović, 1995, p. 638.
107 SrbLO, Article 275 (1).
108 Jankovec in Perović, 1995, p. 638.
109 SrbLO, Article 276.
110 SrbLO, Article 277 (1).

interest is to be applied even after the debtor is in default if it is higher than the default interest.[111] However, this can rarely if ever happen, since the contractual interest rate is set at a much lower level than the default interest rate. Similarly to contractual penalty, the creditor may claim default interest even if he or she did not sustain any actual damage because of default, or the actual damage is lower than the amount of the default interest.[112] If the damage is higher than the default interest, the creditor is entitled to request the difference to achieve full compensation.[113] Finally, the SrbLO tackles the issue of the so-called *anatocism*, which is the obligation to pay compound interest. It specifies that default interest cannot be calculated on due, but unpaid contractual or default interest, just as on any other periodical pecuniary obligations unless otherwise provided for by statute.[114] However, a default interest can be claimed for unpaid interest accrued from the day when the claim for its payment has been filed with a court.[115] The default interest is also calculated on periodical pecuniary obligations from the day when a claim for their payment has been lodged.[116]

6.2. Croatia

In the HrvLO, in comparison to the former federal law, the rules on contractual liability[117] have been removed from the part pertaining to the general effects of obligational relationships to the part comprising rules on contract law, among the general legal effects of the conclusion of a contract. Though this may imply that contractual liability emerges only for the breach of contract, the literature highlights that it may arise in relation to the performance of any pre-existing obligational relationship.[118] Concerning the content of the rules of contractual liability, the HrvLO corresponds almost verbatim to the rules of the SrbLO. However, there is one discrepancy of great significance. Namely, regarding the scope of contractual liability, the HrvLO explicitly states that the creditor is entitled not only to compensation for accrued damage and lost profits but to fair compensation for moral damage as well.[119] The literature stresses that the introduction of contractual liability for moral damage into the HrvLO was in line with recent developments in civil law, especially taking into account the Principles of the European Contract Law edited by professor Ole Lando.[120] Concerning the rules on contractual penalty,[121] the HrvLO shows no major differences in comparison to the rules of the SrbLO. A lenient contractual liability regime is applicable

111 SrbLO, Article 277 (2).
112 SrbLO, Article 278 (1).
113 SrbLO, Article 278 (2).
114 SrbLO, Article 279 (1).
115 SrbLO, Article 279 (2).
116 SrbLO, Article 279 (3).
117 HrvLO, Articles 342–349.
118 Gorenc in Gorenc, 2014, p. 548.
119 HrvLO, Article 346 (1).
120 Gorenc in Gorenc, 2014, p. 557.
121 HrvLO, Articles 350–356.

to gratuitous loans[122] and deposits.[123] The HrvLO also links the liability for material and legal defects to contracts concluded for consideration. In relation to contracts for donation the HrvLO explicitly excludes it,[124] whereas, in case of a loan for use, such liability is envisaged more leniently than the general rules.[125]

The rules on contractual and default interest have been, however, removed from the part pertaining to rights and obligations arising from an obligational relationship, where they had been regulated in the former federal law. A new chapter on pecuniary obligations has been created in the HrvLO, where the rules on contractual and default interest are now found.[126] In addition, there is no special statute on default interest, as in Serbia, instead, all the rules are contained in the HrvLO. Aside from the different regulatory method and systematization of the rules on default interest, the HrvLO has some rules that represent novelties in comparison to the former federal law. First, the law differentiates the default interest rate depending on whether the pecuniary claim arose from a commercial contract (or from a contract between a business organization and an entity governed by public law) on the one hand, and all other transactions, on the other. In the former case, the interest rate is 8% plus the average interest rate of the Croatian National Bank effective in the past semi-annual period, while it is 5% plus the average interest rate in the latter.[127] The other major novelty is the possibility of the parties deviating by their consent from the statutory rules on default interest. The former federal law considered the rules on default interest as being mandatory, and the effective Serbian law still does so, thereby not allowing parties to deviate from it, regardless of the nature of the transaction.[128] The HrvLO specifies, namely, that in commercial contracts and contracts between a business organization and an entity governed by public law, the parties may agree on a different rate of the default interest, but only according to the rules on the limitation on contractual interest rate.[129] These rules specify, that in commercial transactions, as well as in transactions between business organizations and entities governed by public law, the parties can stipulate the rate of contractual interest, but it may in no case be higher than the rate of the default interest increased by 50%. However, if the derogation from the statutory rules on default interest runs contrary to the principle of good faith and fair dealing, causes an obvious inequality between the rights and the obligations of the parties, especially in the light of commercial practices and the nature of the object of the obligation, the stipulation shall be considered null and void.[130] In determining whether the stipulation shall be considered null and void, it shall be relevant if

122 HrvLO, Article 503 (2).
123 HrvLO, Article 727 (1).
124 HrvLO, Article 483.
125 HrvLO, Article 516.
126 HrvLO, Articles 29–31.
127 HrvLO, Article 29 (2).
128 Slakoper in Gorenc, 2014, p. 75.
129 HrvLO, Article 29 (3).
130 HrvLO, Article 29 (4).

there were legitimate reasons for the derogation from the statutory rate of the default interest.[131]

6.3. Slovenia

Unlike the HrvLO, the SvnCO retained the rules on contractual liability[132] and stipulated penalty[133] in the part pertaining to the general rules of obligations, within the rules on creditor's right and debtor's obligations, as was the case in the former federal law. There are no discrepancies to be found in the wording of these rules when comparing Slovenian and Serbian law, except for the one rule relating to the element of foreseeability of damage. According to the SvnCO, namely, the scope of the debtor's liability is limited to the actual damage and lost profit that he or she should have foreseen at the moment of the breach of contract,[134] whereas the SrbLO, just as the former federal law, binds the requirement of foreseeability to the moment of conclusion of the contract. This change in the rule has been criticized in the literature, since it shifts the distribution of contractual risks without a legitimate reason, and opens the door for fraudulent conduct by the parties.[135] Similarly to Serbian and Croatian law, the SvnCO also envisages a lenient regime of contractual liability in gratuitous contracts, for instance in relation to the scope of application of the liability for material and legal defects,[136] the contract for donation,[137] the contract of loan,[138] the contract of deposit.[139]

As for default interest, the SvnCO regulates this subject matter in the part pertaining to pecuniary obligations,[140] thus in terms of the systematization of these rules, it departs from the solution adopted in the former federal law that regulated default interest in the part pertaining to the rights and obligations arising from an obligational relationship. Concerning the content of the rules, two major discrepancies may be identified, when compared with the SrbLO in effect.

Firstly, the rate of the default interest is fixed by the SvnCO itself, just as in the HrvLO. However, unlike the norms of the HrvLO, the reference rate set by the Slovenian National Bank is not a variable element of the rate of the default interest under Slovenian law. The SvnCO sets a rate of the default interest at 8% *per annum* unless otherwise specified by a separate statute.[141] Based on this statutory ground the legislature enacted a separate Act on Default Interest in 2007, which sets the rate at 8% plus the interest rate applied by the European Central Bank for main refinancing

131 HrvLO, Article 29 (5).
132 SvnCO, Articles 239–246.
133 SvnCO, Articles 247–254.
134 SvnCO, Article 243 (1).
135 Možina and Vlahek, 2019, pp. 28–29.
136 SvnCO, Article 100 (1) and (2).
137 SvnCO, Article 537.
138 SvnCO, Article 573 (2).
139 SvnCO, Article 731 (1).
140 SvnCO, Articles 378–381.
141 SvnCO, Article 378 (2).

operations (applicable for the previous six-month period). The total rate of the default interest is published by the minister for finance in the Slovenian Official Gazette.[142]

Secondly, the parties to a contract can stipulate a higher or a lower default interest rate than the one specified by the SvnCO.[143] The literature considers the freedom to agree on different default interest rate as being part of the principle of freedom of contract,[144] hence the statutory rules on default interest should be applied only if the parties have not agreed otherwise.[145]

7. Slovakia

7.1. Overview

The issue of damages (*náhrada škody*) for breach of contract is extremely complicated in Slovak law. It is necessary to distinguish whether the breach relates to a commercial or non-commercial contract. In non-commercial relations, the SvkCC generally does not distinguish between damage caused by breach of contract and damage caused by breach of a non-contractual obligation.[146] In both cases, the same legal regulation applies; thus, damage caused by breach of contract is treated in the same way as damage caused by tort. The situation is slightly different in commercial relations: the regulations of liability for damage contained in § 373 et seq. of the SvkCommC apply primarily only to damage caused by the breach of an obligation, but through § 757 of the SvkCommC, this regulation applies *mutatis mutandis* to damage caused by a breach of the SvkCommC. However, if the breach is a breach of another law, different than the SvkCommC (or the Act on Protection of Competition), compensation for damage will be governed by the SvkCC,[147] which – as mentioned above – does not distinguish between damage caused by breach of contract and damage caused by tort.

7.2. Culpability

In non-commercial relations, liability for damage caused by breach of contract is based on presumed fault (*zavinenie*). Thus, according to § 420 (3) of SvkCC, the debtor may be exempted from liability if he or she proves that he or she did not cause the damage. By contrast, in commercial relations, liability for damage is conceived objectively without fault, i.e., as strict liability; the debtor can therefore only be exonerated from liability if he or she proves the existence of circumstances precluding liability.[148]

142 SvnCO, Article 2.
143 SvnCO, Article 379.
144 SvnCO, Article 2.
145 Plavšak in Plavšak, 2021, p. 38.7.3.
146 Novotná, 2018, p. 106. According to Csach, 2009c.
147 Supreme Court of the Slovak Republic, case No. 3 M Cdo 40/2012. Ďurica, 2016b, p. 1614.
148 SvkCommC, §§ 373 and 374.

7.3. Foreseeability

In commercial relationships, § 379 of the SvkCommC applies in the event of breach of contract, according to which no compensation is payable for 'damage in excess of that which the obliged party foresaw at the time of the creation of the contractual relationship as a possible consequence of the breach of its obligation or which could have been foreseen in the light of the facts which at that time the obliged party knew or ought to have known in the exercise of ordinary care.'[149]

In contrast, the SvkCC governing primarily non-commercial relationships contains no such limitation. The foreseeability (*predvídateľnosť*) of damage in non-commercial relations is therefore only relevant in connection with the issue of fault since damage is not considered to be caused by a fault if it was neither foreseeable in general nor foreseeable by the tortfeasor. However, unlike in commercial relationships, foreseeability relates – from the time perspective – to the moment of the breach of contract, not to the moment of its conclusion.

7.4. Clauses excluding or limiting the liability

As regards the possibility to exclude or limit liability in advance, in non-commercial relationships it is held that neither the exclusion nor the limitation of liability can be agreed to in advance. This is argued in particular by reference to § 574 (2) of the SvkCC, according to which an agreement 'by which someone waives rights that may arise only in the future' is invalid.[150] In contrast, a limited, restricted application of the aforementioned provision is being argued for in the literature.[151]

In commercial relations, the resolution of this issue is primarily based on the mandatory § 386 (1) of the SvkCommC ('The right to compensation cannot be waived before the breach of the obligation from which the damage may arise.') and the dispositive nature of § 379 of the SvkCommC, according to which the parties may regulate the scope of compensation for damages differently. Therefore, the prevailing view is that the parties may contractually adjust the scope of damages (limit their amount), but they cannot agree on an effective exclusion of liability before the breach of contract.[152] The literature also allows for limitation of liability, for example, through an agreement to extend the circumstances precluding liability or to base liability on fault.[153] However, there are also opinions that *ex ante* limitation of damages is not permissible even in commercial relations.[154]

In contrast, in both commercial and non-commercial relations, the law expressly allows for the stipulation of a contractual penalty. According to § 545 of the SvkCC (which is also applicable in non-commercial relations), the creditor is 'not entitled to claim compensation for damage caused by the breach of an obligation to which the

149 For details see Csach, 2009b.
150 Števček, 2008.
151 Dulak, 2011; Števček, 2019.
152 Ďurica, 2016b, p. 1272; Ovečková, 2017; Ušiaková, 2016.
153 Ovečková, 2017.
154 Števček, 2008.

contractual penalty applies, unless the parties' agreement on the contractual penalty implies otherwise.' The contractual penalty agreement thus excludes the creditor's claim for compensation for damages caused by the breach of an obligation secured by a contractual penalty.[155] The contractual penalty may thus constitute a permissible means of limiting the amount of damages. However, if the purpose of the contractual penalty agreement was to circumvent mandatory provisions on the impossibility of waiving a right in advance,[156] then such an agreement would be null and void under § 39 of the SvkCC for circumvention of the law.

7.5. Reduction of loss. Substitute transaction

In both commercial and non-commercial relationships, the creditor is obliged to take measures to reduce the extent of the loss. According to § 417 (1) of the SvkCC 'the one, to whom damage is threatened, is obliged to act to avert it in a manner appropriate to the circumstances of the threat.' At the same time, according to § 441 of the SvkCC '[i]f the damage was also caused by the fault of the aggrieved party, he shall bear the damage proportionately; if the damage was caused solely by his fault, he shall bear it himself.'

In commercial relations, this obligation to take measures to reduce the extent is more explicit. Under the SvkCommC, the aggrieved party is not entitled to compensation for that part of the damage which is caused by his or her failure to comply with an obligation laid down by legislation enacted for the purpose of preventing the occurrence of damage or limiting its extent.[157] At the same time, according to the law, the person threatened with damage is 'obliged, taking into account the circumstances of the case, to take the measures necessary to avert the damage or to mitigate it. The obliged person is not obliged to compensate for damage caused by the aggrieved party's failure to fulfill this obligation.'[158] According to § 385 of the SvkCommC '[i] f the aggrieved party has withdrawn from the contract because of breach of the other party's contractual obligation, he shall not be entitled to compensation for the damage caused by his failure to take timely advantage of the opportunity to conclude a substitute contract for the purpose which the contract from which the aggrieved party has withdrawn was intended to serve.'

7.6. Compensable loss

In Slovak law, in principle, only property damage is compensable. Non-pecuniary damage is compensated only in cases provided for by law. At present, the right to compensation for non-pecuniary damage caused by a breach of contract is allowed only quite exceptionally, e.g., in the case of a tour contract. A special case of compensation for non-pecuniary damage in non-commercial relations is a situation where

155 Ovečková, 2011, p. 216.
156 SvkCommC, § 386 (1); SvkCC, § 574 (2).
157 SvkCommC, § 383.
158 SvkCommC, § 384 (1).

the debtor breaches its obligations arising from liability for defects and the creditor successfully asserts them in court. In such a case, the creditor is entitled to appropriate financial compensation.[159]

As regards the possibility for the court to reduce the damages, this possibility exists only in non-commercial relationships,[160] but not in commercial relationships.[161]

7.7. Liability for intermediaries

In both commercial and non-commercial relationships, the debtor is liable for breach of contract regardless of whether he or she intended to perform the obligations under the contract himself or herself, or through a third party. In commercial relations, this conclusion follows directly from § 331 of the SvkCommC, according to which '[i]f the debtor performs his obligation with the help of another person, he is liable as if he had performed the obligation himself unless this Act provides otherwise.' The SvkCC does not contain such an express rule for contractual obligations, but it does contain a general rule according to which 'damage is caused by a legal person or a natural person when it was caused in the course of their activity by those whom they used for that activity. Such persons shall not themselves be liable for damage so caused under this Act; their liability under labor law shall not be affected thereby.'[162] A special regulation is contained in the rules of the contract of mandate [*príkazná zmluva*], where, according to § 726 of the SvkCC, if the mandator has allowed the agent to be appointed by the mandatary or if such an agent was indispensable, the mandatary is liable only for fault in the choice of the agent.

7.8. Gratuitous contracts

Slovak law does not distinguish between gratuitous contracts and contracts for consideration from the point of view of damages for breach of contract. Even the breach of a gratuitous contract may give rise to a claim for damages.

8. Concluding remarks

8.1. Strict liability for breach of contract

As a tendency, liability for breach of contract is – contrasted to the fault-based system of liability in tort – a regime of strict liability. There is a possibility for the party breaching the contract to be exonerated from liability, but the room for exoneration is rather narrow. That is why liability for breach of contract is strict in the grammatical sense. Although narrowing the opportunity for exoneration is provided with somewhat different solutions, the trend of making strong distinctions between liability in tort

159 SvkCC, § 509 (2).
160 SvkCC, § 450.
161 SvkCommC, § 386 (2).
162 SvkCC, § 420 (2).

and liability for breach of contract is clear. Liability for breach of contract is getting further and further away from the thought of fault and the concept of wrongfulness tort law is based on. Therefore, liability regimes become increasingly complex. The most complex regime seems to be the Slovakian one, where a distinction is to be made between commercial and non-commercial contracts. Therefore of this division, in non-commercial relationships liability in tort and liability for breach of contract are addressed in the same, fault-based regime, while a specific regime is provided for breach of commercial contracts making such liability a strict one. In other jurisdictions, the main dividing line is between tort and contract. This, however, does not necessarily mean that there are different rules to apply for establishing liability. In the Czech Republic, Romania, Serbia, Croatia, and Slovenia, the same rules are to be applied for contractual and non-contractual liability, as far as the basis of liability is concerned. In these jurisdictions, the main differences between contractual and non-contractual liability are the foreseeability limit as to liability for breach of contract, the compensability of non-pecuniary damage, and the limitation period. This does not mean, however, that fault is to be assessed the same way in the context of contractual and non-contractual liability. Courts are tending to shift the level of required conduct to a higher standard in cases of contractual liability. The burden of proof as to fault – as a precondition of liability – is generally reversed.

In Hungary and Poland, the difference between tort as a fault-based liability regime contrasted to the strict liability for breach of contract is reflected in different rules of exoneration from liability. The same is the case in Romania, where culpability is interpreted with a similar result. All three jurisdictions allow exoneration from liability only if the party that breached the contract can prove that the ground for the breach fell beyond his or her control. With such a solution, the relevant jurisdictions are converging to international legislative and soft-law products of unification of law, such as the CISG, the UNIDROIT Principles, the DCFR, and the PECL. Liability for breach of contract is strict liability in Czech law as well. Similar conclusions can be drawn as to Serbian law, while the issue there is controversial. Hungarian and Romanian law seem to explicitly rule out the right of the creditor to choose between contractual and non-contractual titles: if the claim can be based on a breach of contract, the obligee is prevented from claiming damages on a non-contractual basis.

8.2. The foreseeability limit

Liability for breach of contract is limited in the relevant jurisdictions. In Polish and Czech laws, the main tool of liability is provided by doctrines of causation. In other jurisdictions, liability is limited to losses that could have been foreseen by the debtor. In Romanian, Hungarian, Serbian, Croatian, and Slovenian law there is a statutory limit: liability of the party for breach of contract is limited to the losses that might have been foreseen at the time of concluding the contract as a possible consequence of the breach. This limitation shall not protect the party who breached the contract intentionally or by gross negligence with the difference that in Hungary this exception is provided only for intentional breach of contract. Again, the most complex

picture is shown by Slovakian law. In commercial relationships, liability is limited to losses that might have been foreseen at the time of concluding the contract. In a non-commercial relationship, there is no such limit to be applied but liability shall not be established for losses that might not have been foreseen by the tortfeasor at the time of wrongdoing (that is, the breach).

Thus, the law creates incentives for the parties to disclose their specific business risks to the counterparty at the time of contracting to shift such risks, going beyond the ordinary ones, to that counterparty.

8.3. Compensating non-pecuniary loss

If the party caused damage by breach of contract, such damage may occur as a non-pecuniary loss. The relevant jurisdictions tend to exclude awarding non-pecuniary damages in the context of the liability for breach of contract and limit this opportunity to liability in tort (except in the case of travel contracts). This is mentioned as one of the main differences between liability for breach of contract and liability in tort. Croatia, Romania, and Hungary are exceptions. In Hungarian contract law, the claim for awarding the functional equivalent of non-pecuniary damages (*solatium doloris*) shall be assessed according to the rules covering liability for breach of contract if interference with inherent rights of the party occurred via a breach of contract.

8.4. Gratuitous contracts

Although gratuitous contracts are enforceable, liability for breach of gratuitous contracts may be reduced compared to transactions for consideration. This reduced liability is provided either on the level of defining contractual obligations (Serbia, Croatia, Slovenia, the Czech Republic) or by establishing a lower level of required standards of conduct (Hungary). There is no difference between liability for breach of gratuitous and onerous contracts in Slovakian and Polish law.

8.5. Penalty and liquidated damages

Agreed remedies play an important role in allocating contractual risks as well as in creating incentives for performance. Penalty is an accepted, agreed upon remedy in the jurisdictions addressed by the research. There are two fundamental functions of penalty: it provides a lump sum compensation and also increases the cost of breach of contract for the obligor. By increasing the cost of breach of contract the enforceability of penalty supports the principle of performance in kind. In general, the relevant jurisdictions attempt to construe penalty to be capable of performing both functions. Penalty has a punitive character in so far as there is no need to prove actual loss to enforce it in the relevant jurisdictions. The main difference lies, however, in, whether the loss exceeding penalty can be compensated or not. In some of the relevant jurisdictions, the loss exceeding the penalty shall not be compensated, except in Romanian law in so far as the obligor was liable for unforeseeable loss as well. The exceptions are Hungary, Serbia, Croatia, and Slovenia where the part of the loss exceeding the penalty and suffered by the aggrieved party shall be compensated according to the

rules of liability for breach of contract. Thus, while in most jurisdictions, penalty functions as a lump sum compensation, which brings it close to liquidated damages, in Hungarian law it is a punishment. If the parties want to standardize damages under Hungarian law, they have to implement a liquidated damages clause in the contract.

8.6. Exclusion clauses

As a main rule, the parties are free to allocate contractual risks and to limit their liability for breach of contract. In all the relevant jurisdictions, however, there are limits on the enforceability of such clauses. Liability for intentional breach of contract or gross negligence cannot be excluded. In Slovakian law, limitation or exclusion of liability is not permitted in non-commercial relationships at all, while in commercial relationships the parties seem to be allowed to limit liability, although this doctrine is challenged. In Czech law, in addition, limitation of liability is not allowed for loss suffered by a weaker party.

8.7. Liability for intermediaries

The relevant jurisdictions are consistent in that in the context of liability for breach of contract, the obligor shall be liable for the intermediary employed for rendering performance as if he himself (she herself) had performed. In Hungarian law the liability is stricter if performing via an intermediary was itself a breach of the contract; in such cases, the obligor shall be liable for all the losses that would not have occurred if such obligor had performed personally.

References

Bezouška, P (2015a) 'Ochranný účel smlouvy jako prostředek omezení příčinné souvislosti, aneb je stále důležitá předvídatelnost škody?' [The Protective Purpose of the Contract as a Means of Limiting Causation, or Is Foreseeability of Damage Still Important?], *Právní rozhledy,* Vol. 23, No. 22, pp. 763–766.

Csach, K (2009b) 'Predvídateľnosť vzniku škody a jej význam (nielen) v obchodnom práve' [Predictability of Damage Occurrence and Its Importance (Not Only) in Commercial Law] in Bejček, J (ed.) *Historie obchodněprávních institutů,* Brno: Masarykova univerzita, pp. 119–136.

Csach, K (2009c) 'Zmluva je mŕtva. Nech žije delikt? (náčrt nečakanej budúcnosti)' [The Contract is Dead. Long Live Tort? (Sketch of an Unexpected Future)] in Husár, J (ed.) *Súčasnosť a perspektívy právnej regulácie obchodných zmlúv II*. Košice: Univerzita P J Šafárika, pp. 1–9.

Czachórski, W, Brzozowski, A, Safjan, M, Skowrońska-Bocian, E (2004) *Zobowiązania. Zarys wykładu* [Commitments. Outline of the Lecture], Lexis Nexis.

Daghie, N (2016) 'Câteva considerații asupra dispozițiilor art. 1534 din noul Cod civil, aplicație particulară a bunei-credințe' [Some Considerations on the Rules of Art. 1534 of the New Civil Code, a Particular Application of Good Faith], *Dreptul*, No. 11, pp. 33–41.

Dulak, A (2011) 'Niekoľko poznámok k zmluvnej limitácii náhrady škody' [A Few Notes on the Contractual Limitation of Damages], *Bulletin slovenskej advokácie*, Vol. 17, Nos 1–2, pp. 28-30.

Ďurica, M (2016b) 'Komentár k § 366' [Commentary on § 366] in Patakyová, M et al. *Obchodný zákonník. Komentár* 5th, Bratislava: C. H. Beck.

Fuglinszky, Á (2014) 'Risks and Side Effects: Five Questions on the "New" Hungarian Tort Law', *ELTE Law Journal*, No. 2, pp. 199–221.

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

Hiber, D and Živković, M (2015) *Obezbeđenje i učvršćenje potraživanja* [Securing and Reinforcing of Claims], Beograd: Centar za izdavaštvo i informisanje Pravnog fakulteta Univerziteta u Beogradu.

Jankovec, I (1993) *Ugovorna odgovornost* [Contractual Liability], Beograd: Poslovna politika.

Karanikić Mirić, M (2013) *Objektivna odgovornost za štetu* [Strict Liability for Damage], Beograd: Centar za izdavaštvo i informisanje Pravnog fakulteta u Beogradu.

Melzer, F and Tégl, P (eds) (2018) *Občanský zákoník – velký komentář. § 2894–3081* [Civil Code – Great Commentary. § 2894–3081] Vol. IX, 1st, Praha: Leges.

Menyhárd, A, Mike, K and Szalai, Á (2006) 'Hadley and the Rule of Foreseeability Under Court's Error and Uncertainty', *SIDE* [The Italian Society of Law and Economics] Working Paper No. 5.

Možina, D and Vlahek, A (2019) *Contract Law in Slovenia*, Alphen aan den Rijn: Wolters Kluwer.

New Civil Code. Opinions of the Advisory Board to the Supreme Court (§ 2:52), *Új Ptk. Tanácsadó Testület véleményei. Kúria*, kuria-birosag.hu.

New Civil Code. Opinions of the Advisory Board to the Supreme Court (§ 142), *Új Ptk. Tanácsadó Testület véleményei. Kúria*, kuria-birosag.hu.

Novotná, M (2018) in Jurčová, M et al. *Jednotný systém nesplnenia a prostriedkov nápravy. Návrh komcepcie a pravidiel (ustanovení) budúcej právnej úpravy* [Uniform System of Default and Remedies. Draft Concept and Rules (Provisions) of Future Legislation], Praha: Leges.

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

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

Paraschiv, M (2010) *Prezumțiile în materie civilă. Prezumțiile legale relative. Practică judiciară* [Presumptions in Matters of Civil Law. Relative Legal Presumptions. Case Law], București: Hamangiu.

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

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

Plavšak, N (ed.) (2021) *Komentar splošnega dela Obligacijskega zakonika* [Commentary of the General Part of the Law on Obligations], (electronic edition updated in 2021) Tax-Fin-Lex.

Pop, L (2018) 'Evoluții și mutații paradigmatice în hermeneutica obligațiilor civile de la Marea Unire până astăzi' [Evolutions and Mutations of Paradigm in the Hermeneutics of Civil Law Obligations from the Great Unification and until Today], *Dreptul*, No. 11, pp. 9–53.

Popescu, T R and Anca, P P (1968) *Teoria generală a obligațiilor* [General Theory of Obligations], București: Editura Științifică.

Radovanović, S (2017) *Akcesornost ugovorne kazne u srpskom pravu* [The Accessory Nature of Stipulated Penalty in Serbian Law], Novi Sad: Centar za izdvačku delatnost Pravnog fakulteta u Novom Sadu.

Sanilevici, R (1976) *Drept civil. Teoria generală a obligațiilor* [Civil Law. General Theory of Obligations], Iași: Universitatea Al. I. Cuza – Facultatea de Drept.

Šilhán, J (2014) '§ 1914 (Řádné a vadné plnění)' [§ 1914 (Proper and Defective Performance)] in Hulmák, M et al. *Občanský zákoník V Závazkové právo. Obecná část (§ 1721–2054)* 1st, Praha: C. H. Beck.

Śmieja, A (2011) 'Umowna modyfikacja zasad odpowiedzialności kontraktowej' [Contractual Modification of Contractual Liability Rules], *IUSTITIA*, Vol. 3, No. 5, pp. 117–125.

Števček, M (2008) 'Limitácia náhrady škody – pohľad (rýdzo) civilistický' [Limitation of Damages – A (Purely) Civil View], *Notitiae*, No. 1, https://www.epi.sk.

Števček, M (2019) in Števček, M et al. *Občiansky zákonník. Komentár* [Civil Code. Comment], Vol. I, 2nd Praha: C. H. Beck (online).

Ušiaková, L (2016) 'Komentár k § 386' [Commentary on § 386] in Mamojka, M et al. *Obchodný zákonník. Veľký komentár*, Bratislava: Eurokódex (online).

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

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