Contract Law in East Central Europe

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Edited by
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LIST OF ABBREVIATIONS

for the titles of national civil codes and other significant national instruments

CzeCC	The Civil Code of the Czech Republic (*Občanský zákoník*)
HrvLO	The Croatian Law on Obligations (*Zakon o obveznim odnosima*)
HrvCPA	The Consumer Protection Act of Croatia (*Zakon o zaštiti potrošača*)
HunCC	The Civil Code of Hungary (*Polgári Törvénykönyv*)
PolCC	The Civil Code of Poland (*Kodeks cywilny*)
RouCC	The Civil Code of Romania (*Codul civil*)
SrbLO	The Serbian Law on Obligations (*Zakon o obligacionim odnosima*)
SrbCPA	The Consumer Protection Act of Serbia (*Zakon o zaštiti potrošača*)
SvkCC	The Civil Code of Slovakia (*Občiansky zákonník*)
SvkCommC	The Commercial Code of Slovakia (*Obchodný zákonník*)
SvnCO	The Code of Obligations of Slovenia (*Obligacijski zakonik*)
SvnCPA	The Consumer Protection Act of Slovenia (*Zakon o varstvu potrošnikov*)

Chapter I

Development of Contract Law in East Central Europe

by Emőd Veress

1. Contracts in East Central Europe: One Example of A Millenary Presence

Contracts, as instruments by which agreed upon terms for economic exchange are recorded and preserved for later reference by the parties, have a millenary presence in East Central Europe. For example, at *Alburnus Maior*,[1] 25 wax tablets were recovered from an ancient Roman mineshaft between 1786 and 1855. These constituted contractual documents, in which the text of agreements was scratched onto the darkened wax that covered the tablet. The inhabitants of *Alburnus Maior*, a rich mining town, must have hidden these agreements in the mine cavities sometime after 167 AD while fleeing from the Marcomannic-Sarmatian invasion to the south. These wax tablets are called *triptychs* and are peculiar since they contain two copies of the same contractual text. The back side (*verso*) of the first tablet and the front side (*recto*) of the second tablet are latched together and sealed, thus constituting the first copy of the contractual text. The back side of the second tablet and the front side of the third tablet again contain the contractual text, this time without a seal, in a manner that can be read by anyone. The sealed part is only opened in case of a dispute. For example, four of the twenty-five wax carvings recovered were loan contracts. One of these, the first and second panels of a loan contract signed on June 20, 162 (more than 1850 years ago)

1 *Roșia Montană* in Romanian, *Verespatak* in Hungarian, and *Goldbach* in German. The town is found in the historical region of Transylvania, where the Roman town *Alburnus Maior* was located in Antiquity. After 1920, the locality became a part of Romania.

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between the lender Anduenna Batonis and the debtor Julius Alexander, contained the following legible text in Latin:

> '(...) The principal sum of one hundred and forty denarii, together with interest thereon at the rate of 12 percent from this day for the time that the lender may be without it, is demanded by Anduenna Batonis and promised by Julius Alexander to the lender in good money, to be paid to him on the day he demands it, together with the interest described above, at the time he demands it, concluded in Deusara, this 20th day of June, in the year of the consuls Rusticus and Aquilinus (...)'

Julius Alexander, who might have been an entrepreneur of Greek origin who was granted Roman citizenship (based on his name) and is mentioned on several wax tablets, ran a brickworks and was also involved in credit transactions. He also appears on other tablets as a lender and an associate of the local *societas danistariae*, a society that provided loans to miners during the winter. Anduenna Batonis (based on the name again) may have been a settled peregrine of Illyrian origin from the Balkans. The first name Anduenna (Andueia) raises the possibility that the lender might even have been a woman.

No time limit was stipulated in the contract, meaning that the loan amount had to be returned upon request by the creditor. The interest rate of 12% *per annum* corresponded to the interest rate set by imperial law at one percent per month, which was the highest rate of interest allowed. According to Elemér Pólay (1915–1988), a respected researcher on the subject, the contract was probably not based on a loan repayment the debtor had committed to, so the document might be partly fictitious. A smaller amount may have been transferred effectively to the borrower, who contracted for the higher amount, including usurious interest. The way the contract is worded and the fact that it does not refer to the actual transfer of the loan amount support the interpretation, that the contract is 'colored' and is effectively a sham contract. It is just one example that illustrates the contractual phenomenon in its entire complexity from very early periods in the region.

Contracts were used also in the later course of history in specific contexts, but what we today would call contract law has its direct roots in the codifications which began in the early 19th century.

2. Historical background of contemporary contract law in East Central Europe: The codification of private law[2]

The geographic area which forms the subject of our analysis did not yet present the variety of states in existence today at the beginning of the 19th century. East Central Europe was ruled in 1815 by the Kingdom of Prussia, the Empire of Austria, the

2 For a much more detailed analysis, see Veress, 2022a, pp. 167–205, and Veress, 2022b.

Russian Empire, and the Ottoman Empire. The codification of contract law emerged via the adoption of civil codes, which regulated rules on general and specific contracts such as sale, lease, mandate, etc. among other important issues.

The codification process started in the present-day territories of Croatia, Slovenia, and Czechia, which formed parts of the Habsburg Empire. the Austrian Civil Code should have been in force in these territories in 1812. However, parts of Croatia and Slovenia were occupied at the time by the French, under the short-lived designation of the French Illyrian provinces (1809–1814).[3] During this period, the first French governor, Auguste de Marmont introduced the French Civil Code. Nonetheless, for all intents and purposes, the Austrian Civil Code was in force from 1812 in these territories until 1946 (in the case of Croatia and Slovenia) and 1950 (in the case of the Czech Republic).

The first adaptations of western civil codes were adopted in Walachia and Moldova[4] (which were still under Turkish rule) in the second decade of the 19th century. In Moldova in 1817, prince Calimach promulgated the eponymous code of law (*Codul Calimach* or *Codica Țivilă a Moldovei*), a civil code in Greek. The Calimach Code was translated into Romanian in 1833. The code followed Byzantine traditions, but the direct influence of the Austrian Civil Code of 1811 and the French Civil Code of 1804 was also evident. The strong Austrian influence can be explained by the fact that Christian Flechtenmacher (1785–1843), a Saxon from Brașov who had studied in Vienna, played a major role in the drafting of the code, alongside Anania Cuzanos and Andronache Donici. In his work, Flechtenmacher often referred to the works of Franz von Zeiler, a leading figure in Austrian codification. Flechtenmacher was invited to become a lawyer by Prince Calimach and remained in Moldavia for the rest of his life, later receiving the title of boyar. He departed from the Byzantine tradition and marked a rapprochement with the West. This code did not propose a universal synthesis of laws but concentrated exclusively on matters of civil law.[5] It was structured in three parts: rules on persons, rules on things, and rules on both persons and things. In 1818, a code was adopted in Walachia at the initiative of the Phanariote Greek Prince Caragea under the name *Condica lui Caragea* (the Codex of Caragea). The aim of codification was in fact to strengthen legal certainty by unifying old rules and creating new ones. The Codex of Caragea covered civil law, criminal law, and procedural law at the same time i.e. it can be considered a traditional general code without any specialization. Its drafting was mainly the work of the *logothete* (chancellor-general) Nestor and Atanasie Hristopol, who despite having produced a Greek text of literary quality, could not replicate that same quality with the Romanian translation, partly because of the immaturity of the Romanian legal language.

Also, Serbia provided an early example of civil law codification and gained its independence and statehood gradually from under Ottoman rule. After the first (1804–1813) and the second revolution (1815–1830), the Ottoman Empire was obliged

3 Škrubej, 2013, p. 1067. For details, see Petrak, 2019, pp. 344–349.
4 Historical principalities, which now form part of Romania.
5 Demeter, 1985, p. 209.

to recognize the autonomy of Serbia and Miloš Obrenović as the prince. Serbia even adopted a constitution in 1835. Miloš Obrenović commissioned a civil code in 1837 from the lawyer (and poet) Jovan Hadžić. Hadžić studied law in Pest and Vienna, obtaining his doctorate in law in Pest in 1826.[6] He presented the text of the code, which was influenced mainly by the Austrian Civil Code[7] adopted in 1844 under the rule of Aleksandar and was practically an abbreviated version of the Austrian Civil Code.[8] The 1844 Civil Code remained in force until a socialist government emerged in the state, by then part of Yugoslavia.

At the end of the 18th century, Poland was partitioned between Prussia, Russia, and Austria and lost its independence, which resulted in the gradual loss of the Polish legal system and traditions.[9] Several legal systems came to coexist in Polish territory. German, Austrian, French, Russian, and Hungarian laws came to be applied, depending on the given location.

During the 19th century, Hungary possessed a vibrant legal culture deeply rooted in medieval customary law.[10] In 1840, company law and bills of exchange were regulated in a modern manner. Act XV, adopted in the context of the revolution in 1848–1849, provisioned the drafting of a civil code based on abolishing the *aviticitas* (the bound succession and circulation regime of the noble estate) and the submission of the proposal during the next parliamentary session. The codification would have been led by a truly competent jurist, László Szalay. Unfortunately, this could not take place because of the fall of the Revolution; therefore, old customary private laws remained in force until 1853, when the Austrian Civil Code was introduced by octroy (and partly with punitive intent) for a short period between 1853 and 1861.

The codification process continued in the territory of present-day Romania. In 1859, Walachia and Moldova were integrated under the name of the United Principalities and took the name Romania in 1862. It gained independence from the Ottoman Empire only in 1877. A process of modernization was set in motion, characterized by a move away from Byzantine traditions and Turkish influences and the adoption of Western models. Soon after the unification, a new, common civil code was adopted: the *Codul civil*, which also repealed the Calimach and Caragea codes of the two principalities. The Civil Code entered into force on May 1, 1865. This code is essentially a transposition (or a translation) of the French Civil Code of 1804.

In Hungary, the last decades of the 19th century were characterized by an intellectual struggle between the defenders of customary law and the adepts of codification. A Commercial Code (Act XXXVII of 1875) was adopted, which modernized company

6 Hadžić is also the founder of the Matica Srpska, an important cultural-scientific institution still active today.

7 Horváth, 1979, pp. 254–255.

8 It is stated to be the 'fourth' modern codification in Europe (see Stanković, 2014, p. 881). This doesn't seem to be precise. For example, the Austrian Civil Code was implemented in Liechtenstein in 1811 or Moldova in 1817 (a special version of it).

9 Zoll, 2014, p. 126.

10 Van Caenegem, 2004, p. 178.

law and commercial obligations. The source of inspiration was the Common Commercial Code of the German states (*Allgemeine Deutsche Handelsgesetzbuch, ADHGB,* 1861). Several partial projects of a civil code were also presented starting in 1871.[11] By 1900 a complete version was also ready, but the intense intellectual work continued well into the early decades of the 20th century to finalize the text of the code.[12]

The codification process gained a new impetus after the First World War, against the backdrop of the ruling empires of the region disintegrating.

Poland regained its independence in 1918 when it inherited a fragmented legal system. For the unification of the legislation, a Codification Commission was set up which operated until 1939 (and even under German occupation in an underground manner).[13] In the context of civil law, the major achievement of this Commission was the adoption of a new Law on Obligations in 1933 which also regulates contracts. Every rule in it was formulated based on the results of a broad comparative analysis, merging different European traditions to create the best rules.[14] In 1934, a Commercial Code was adopted.[15] In general, the codification efforts were indeed substantial and the work carried out was thorough and of outstanding quality.

For Hungary, which lost the greater part of its territory, the interwar period was a fervent era of codifications, at least with regard to the creation of high quality official projects. The main result was a perfected version of the 1900 project: the 1928 Private Law Bill. It was a complete, complex, high quality civil code[16] That failed to get adopted. There are several reasons why this is, but the Great Depression (1929–1933) is considered the most significant one. Secondly, the strength of the defenders of old customary law should not be underestimated either. Nevertheless, the draft text of this code, including contract law, has been taken up by judicial practice and applied in many cases as a text fixing the content of customary law.

After the First World War, Czechoslovakia was created, incorporating historical Czech territories (Bohemia, Moravia) and territories obtained from Hungary (Slovakia, Subcarpathian Ruthenia). With regards to private law, the ABGB was in force in the Czech parts of the new country while Hungarian law was the law of the land in the Slovakian parts,[17] mostly having a customary character. The proposed unification of private law in the interwar period did not succeed despite the sustained effort to prepare a civil code. That effort started already in 1919 under the supervision of Jan Krčmář (1877–1950) and Emil Svoboda (1878–1948). The first draft was published in 1923 and was also translated into German. The discussions continued in revision committees and the final draft was submitted to the government in 1936, which initiated

11 Nizsalovszky, 1984, p. 111.
12 For details on this specific Hungarian struggle, lasting a century, see Veress, 2022b.
13 Zoll, 2014, p. 127.
14 Zoll, 2014, p. 128.
15 Izdebski, 1996, p. 5.
16 Veress, 2019a, pp. 17–32.
17 Hungarian private law was applicable until 1950, when the Czechoslovak Civil Code entered into force.

legislative procedures in the parliament in 1937.[18] The main model was not the modern German code, but the old Austrian Civil Code because of political reasons. After the Munich Agreement (1938) was signed, Czechoslovakia was forced to cede territories to Germany and the state was dismembered. In 1939, the Protectorate of Bohemia and Moravia became part of the German Reich,[19] while Slovakia formally gained independence albeit as a puppet state of Nazi Germany in reality. Codification was impossible under these circumstances.[20] After 1945, when Czechoslovakia was re-established, codification was only possible in the context of a Soviet-type dictatorship.

The Kingdom of Serbia, Croatia, and Slovenia (from the 1929 Kingdom of Yugoslavia) was a new state created after the First World War. It was formed by the merger of Serbia, which had been independent since 1878, with the territories formerly belonging to the Austro-Hungarian Monarchy (Croatia, Slovenia, Bosnia and Herzegovina, and southern parts of Hungary called Vojvodina) and of Montenegro. This period was characterized by legal particularism, with several parallel legal regimes. In the former Kingdom of Serbia, the Civil Code of 1844, in Slovenia and Croatia, the Austrian Civil Code, in Montenegro, the General Property Code of 1888 and local customary laws were in force at the same time. In Bosnia and Herzegovina, the Austrian Civil Code was also in force, while Hungarian customary law remained in force in the territories gained from the former Kingdom of Hungary.[21] The political aim was to eliminate legal particularism. In the field of civil law, a Codification Committee was set up in 1930, which by 1934 had drawn up a preliminary draft based on the Austrian Civil Code (ABGB). The reason for this was that Austrian law was the closest to existing law and that made organic development possible, creating a common basis for it. Critics, however, argued that there were more modern codes (Germany, Switzerland) and that the choice of model is therefore not correct. The political situation did not allow this codification work to be continued and developed.[22]

In this stage came the Second World War and the establishment of Soviet-type dictatorships shortly after. The role of civil law in general, and contract law in special, changed fundamentally. The works of A. V. Venediktov had a great influence on civil law codification in the region.[23] The civil law of this period was characterized by the following. A break with legal tradition because the new political, economic, and legal order in which civil law had to perform was imposed from the outside: the Soviet Union as a great power and the local servants of Soviet policy reshaped the states of the region as much as possible in the image of the USSR.

18 Falada, 2009, p. 54.
19 In the territories ceded to Germany under the Munich Agreement, the BGB was applicable. During the Protectorate, the ABGB remained in force, but for ethnic Germans living there and who became German citizens, the BGB was applicable. See Falada, 2009, p. 57.
20 Glos, 1985, p. 223.
21 For a detailed analysis on Hungarian private law applicable in the Kingdom of Yugoslavia, see Šarkić, 2020, pp. 176–205.
22 Dudás, 2013, p. 12.
23 Kuklík and Skřejpková, 2019, p. 13.

In some states, new civil codes were adopted while old codes remained in force in others. Nonetheless, the role of classical civil law was greatly reduced and private property was primarily replaced by state and cooperative property, which reduced personal and private property to a secondary, limited role. The legislation of this period was referred to by one author as 'private law without private property.'[24] Special rules on state-owned enterprises formed the core of the legislation. Separate legislation dealt with their role in the planned economy, their control, the contracts concluded by them, their investments, dispute resolution through state arbitration, the public agricultural enterprises, or the cooperatives. Contracts became a tool for fulfilling the requirements of a planned economy. The drastic limitation of private property also reduced the role of contracts between private persons. The individual will of parties was subordinated to the needs of society. Therefore, civil codes and civil legislation declined albeit lingering on in a limited capacity. This limited survival of the civil codes also facilitated the possibility of the subsequent regime change: the main corpus (on state property disguised as socialist property which was controlled by the *nomenklatura*) had to be abolished and the existing subsidiary corpus (on private property) had to be made dominant again.

The high quality of legal science and the totalitarian regime were not necessarily mutually exclusive. After all, we can draw a parallel with classical Roman jurists as well as the excellent jurists of Justinian who also worked in autocratic empires.[25]

In Czechoslovakia, a radical change of legislation came to the fore right after the seizure of power by the Communist Party. In 1948, a two-year plan of legal codification was adopted, and work on a new civil code started immediately. It was conceived that the new code had to express the will of the working class and would be fundamental for social transformation, especially by the liquidation of bourgeois property relations, the creation of socialist ownership, and the subservience of contract law to the requirements of the planned economy. Besides being a tool for promoting Soviet-type ideologies, the code was intended also to unify the legislations of Czechia and Slovakia. The Codification Commission was subordinated to a political commission and also to the Central Committee of the Communist Party, which assured that the code was in line with Party expectations. As a principle for interpreting the entire legal text, a clause establishing the predominance of social interest over individual interests was included.[26] The code, adopted in 1950 (Act 141 of 1950) was far shorter (570 articles) than its Austrian predecessor (1502 articles).[27] That was also because family law was included in the separate act previously enacted in 1949. Moreover, some parts of ABGB were applicable even later after 1950, e.g. contract on work till the adoption of the Labor Code in 1965. The Civil Code had a provisional character because it also regulated social relationships that the Communist Party could not immediately

24 Vékás, 2013, p. 226.
25 Földi, 2020, p. 27.
26 Article 3 of the code stated that 'Nobody may abuse his civil rights to the detriment of the entire society.'
27 Falada, 2009, p. 59; Kuklík and Skřejpková, 2019, p. 16.

abolish, but that became rapidly obsolete as Czechoslovak society slowly transformed into the Soviet model.[28] In Czechoslovakia, a new Civil Code was adopted in 1964 (Act 40 of 1964). This was also a civil code that declared that civil law must be applied in the context of the socialist social order. The development and protection of socialist ownership were the duty of everyone. In civil law relationships, the code declared, there are obligations not only between the participants (e.g., contracting parties) but toward society as well. This piece of legislation was in force during the Soviet-type dictatorship. Besides the Civil Code, an Economic Code was also enacted in 1964 (Act 109 of 1964)[29], which can be interpreted as a rejection of the Soviet principle of unity of civil law.[30] The Czechoslovak civil codes of 1950 and 1964 implemented important changes, constituting the first socialist codes in East Central Europe. Another two codes adopted in this period, the Hungarian and Polish codes, took a more moderate approach compared to the Czechoslovak codes as if some of the drafters of the codes were attempting to partially rescue the bourgeois past.[31]

In Hungary, codification works commenced in 1953 amidst a relaxation of the dictatorship under prime-minister Imre Nagy, which was interrupted by the 1956 revolution.[32] The very first Hungarian Civil Code, therefore, was adopted during the Soviet-type dictatorship (Act IV of 1959), The principal authors of the draft were Miklós Világhy, Gyula Eörsi, Endre Nizsalovszky, Elemér Pólay, and Béla Kemenes. This code, as mentioned before, did not radically break with the past and also served to preserve the traditional values of civil law, unlike the Czechoslovak code. The presence of the non-communist Nizsalovszky is remarkable.[33] The code was criticized for using concepts and solutions that were linked to a stage of legal development the official line labeled as bygone: the code was described as a late-blooming of civil law following the liberal-capitalist small commodity model. Thus, the legal solutions included in the code would have strengthened the position of economic interest groups considered, or more precisely, desired to be obsolete. However, convinced communists at that time such as Eörsi and Világhy who were also exceptionally talented and highly qualified lawyers possessed strong political influence. They 'could successfully insist that several classical traditions of private law be preserved.'[34] The code represented a radical break for lawyers, as compared to the past: Hungarian private law, based on customary law, was replaced by a much narrower form of written law. Judges had to

28 Glos, 1985, pp. 238–239.
29 Also adopted was the Labor Code in 1965 (Act 65 of 1965) and Code on International Business in 1963 (Act 101 of 1963).
30 Izdebski, 1996, p. 5.
31 'In a crass contradiction to the Czechoslovak code, a strong effort is evident (...) to preserve and maintain the integrity and unity of civil law inside its new confines (after family law has been left out), not merely in the purely scholarly sense, as an academic teaching subject or in juridical textbooks, but as a branch of legislation as well.' Rudzinski, 1965, p. 48.
32 Nizsalovszky, 1984, p. 114.
33 Földi, 2020, p. 27.
34 Földi, 2020, p. 27.

switch from an inductive to a deductive method of interpretation.[35] Ultimately, it was only the Soviet-style dictatorship that was able to finally overcome customary private law. The text of the code entered into force on May 1, 1960, which was later amended in 1967 and 1977.

In Poland, the Soviet-type dictatorship practically inherited all the different pieces of civil law legislation prepared by the interwar Codification Commission, which were adopted before the Second World War (the Law of Obligations in 1933) or after the war. They all reflected a past ideology of freedom and private property. First, the General Provisions of Civil Law were adopted separately; a piece of legislation reflecting Marxist views that formed the ideological base for the interpretation of all other civil law legislation. But this was not enough, the Party wanted a new Civil Code reflecting the ideology of the new times. An ideologically burdened draft was hastily prepared but was never adopted. 'It was so strongly criticized by the legal literature, which despite the lack of academic freedom, limiting the possibility of running the necessary discussions, managed to present the flaws of this draft in such a very clear way, that even the communist government has not decided to adopt this draft.'[36] After the death of Stalin (1953), the stress to adopt a legal text which could erase the previous achievements in codification was eased and a new Codification Committee was set up. From a political point of view, this period was a severe epoch of the political system: following a limited relaxation just after 1956, the regime reverted to a stricter version of itself. Still, when compared to the Stalinist form of politics, even a very small degree of easing made the work of the Codification Committee possible[37], which joined together the distinct pieces of civil law legislation to form a unitary code. The Civil Code was finally adopted in 1964 and had 1088 articles.[38] 'This code could be regarded as the culmination of the work of the pre-war Codification Commission. Almost all essential legal concepts and institutions were taken over from the Law of Obligations from the year 1933 and the post-war decrees.'[39] The result was a more abstract piece of legislation since the political regime of the time preferred looser notions within which they could fill with their desired ideological content. As it was stated, 'this more abstract technical approach was not ideologically neutral. It is easier to fill the rules with contents harvested from the intrusive political ideology if they are more abstract and by this way more flexible and can be easier bent by the means of interpretation.'[40]

In Yugoslavia, during the first phase of the socialist-type government, the Act on the Invalidity of Regulations Adopted before April 6, 1941 and during the Occupation (1946) was adopted. This act practically repealed all previous legislation, such as the Serbian Civil Code from 1844 and the Austrian Civil Code in force in Croatia since

35 Eörsi, 1960, p. 312.
36 Zoll, 2014, p. 129.
37 Zoll, 2014, p. 126.
38 Rudzinski, 1965, p. 48.
39 Zoll, 2014, p. 130.
40 Zoll, 2014, p. 130.

1812, as a manifestation of legal nihilism. A new legal system was to be introduced. However, the old legislation (*stara pravna pravila*) practically remained applicable in all fields where the envisaged new set of rules was not yet introduced, and where the old norms were coherent with new social realities.[41] Civil law was a prominent domain where former legislation survived. For example, in the Socialist Republic of Croatia, the Austrian Civil Code was still applied to segments of family law, inheritance law, real property, and obligations not as positive law but as simple rules theoretically meant to fill any lacunae in the new legislation.[42] Similar was the case of Serbia with the 1844 Civil Code.[43] This continuation of the old law was considered a temporary solution to be adopted only until the new law was enacted. This is why different segments of private law were regulated progressively through new pieces of legislation. The need to abolish the old law resulted in new partial regulations of particular social relations. Creating fragmented norms within different acts was significantly faster than the time-consuming process of drafting a unitary civil code. Therefore, instead of a new and unitary code, the subdivisions of civil law were regulated through different acts in Yugoslavia and the Law on Obligations was adopted in 1978.[44] The results of this legislation were outstanding in terms of quality. The Law on Obligations, having mainly followed the Swiss model, was said to be 'one of the most outstanding products of the liberal socialist legislation of the time, which has shown its merits in the course of its almost forty years of application.'[45] But these new rules did not cover all the fields of a civil code, so it was stated in Croatia that the provisions of the Austrian Civil Code would continue to be applied to donation contracts, neighborhood law, and private easements.[46] We can observe that despite the tradition of a unitary code in Serbia and Croatia, a regulation on separate pieces of legislation was chosen. However, the final but unrealized goal was to create a unitary code at the end of this decades-long period of transition. During the creation of the new legislation, professor Mihailo Konstantinović, who completed his university and doctoral studies in France, played a leading role. The Law on Obligations was even compatible with the capitalist order, being kept in force in former Yugoslav states after the regime change as well (for example, in Croatia until December 31, 2005; in Serbia it is still in force).

In Romania, the Civil Code from 1864 remained in force throughout this period albeit mostly in a secondary role, given the serious limitations on private property. Some efforts were made to create a socialist civil code, but these processes faltered and never came to fruition.

After the collapse of the Soviet-type dictatorships, some of the states abided by civil codes dating from before the Second World War, which were maintained naturally after the departure of communist regimes. The civil codes adopted under the

41 Dudás, 2013, p. 13.
42 Josipović, 2014, p. 111.
43 Dudás, 2013, p. 13.
44 Josipović, 2014, p. 112.
45 Dudás, 2015, p. 79.
46 Josipović, 2014, p. 112.

Soviet-type dictatorship were maintained even after the collapse of these political regimes. The reasons are explained in relation to Poland as follows:

> 'the core of the civil code was however not strongly affected by the time of its origin. (...) After the events of 1989 and the great political and economic transition the code could be maintained without too far-reaching economic legislative intervention. The code was drafted in a way that the parts clearly affected by the communist ideology or adjusted to the communist economic legal system were very easy to delete from the text without infringing the structure of the code. They have formed simply the alien component in the body of the code."[47]

The change was informal: the civil codes rose from under the relative shadow of the Soviet-type dictatorships via the separate regulations of the planned economy, which were now disappearing. Besides the democratic constitutions, civil codes took back their well-deserved place as basic laws of private property and contractual freedom. During the transition period the reform of the civil codes was not of utmost importance; after the regime change, 'civil codes are not the first pieces of legislation to be amended or drafted."[48]

The explanation is simple: a civil code expresses a state of normality. Instead, it was necessary to first create a transition from the Soviet-type property regime to a system based on private property. This required a special set of norms to enact this shift from a planned economy to a market economy. Once this change was achieved, the question of reforming the existing civil code or the implementation of a new one could be raised.

Croatia and Slovenia, having gained their independence, adopted new acts to regulate the traditional domains of civil law. The Czech Republic, Hungary, and Romania adopted new civil codes. Some other states such as Poland, Serbia, and Slovakia also started working on new codes.

In the Czech Republic, after the regime change, a set of modifications were introduced into the 1964 Civil Code in 1990 and 1991. These were necessary for the code to remain functional under the new conditions. The most fundamental reform was achieved by Act 509 of 1991, which changed or amended approximately 80% of the original text.[49] The reform of private law was completed by the adoption of a Commercial Code (Act 513 of 1991). Both above mentioned acts were adopted before the dissolution of Czechoslovakia. This modernization was perceived as being insufficient to since the code's socialist origins and structure rendered it inconsistent and insufficient in the changing environment.[50] Therefore an effort to prepare a new code started right after the regime change (Viktor Knapp) and in 1996, another draft was

47 Zoll, 2014, p. 132.
48 Izdebski, 1996, p. 4. In general, minor changes were sufficient to make those codes, especially the texts from before the Second World War, fully applicable under the new conditions.
49 Dulaková Jakúbeková, 2021, pp. 84–85.
50 Falada, 2009, pp. 63–64.

prepared (František Zoulík). However, these projects were abandoned until the year 2000, when the Ministry of Justice commenced a new project, which was led by Karel Eliáš. Integral drafts were presented in 2007 and 2008 for public discussion. The Czech Republic finally adopted the new Civil Code in 2012, which was officially in force in 2014.[51] For commercial law, a dualist approach was initially continued by the adoption of the 1991 Commercial Code, repealing the 1964 Economic code.[52] However, the Commercial Code of 1991 was replaced by the Civil Code of 2012 too, which introduced a monist approach toward private law.

Hungary adopted a new Civil Code decades after the regime change. Instead of the 1959 Code, Hungary adopted Act V of 2013, which entered into force on March 15, 2014. An original piece of legislation that was built on previous interwar drafts, it preserved the proven elements and also aimed to ensure continuity. It may be said to be 'supermonist' in its nature, as it often regulates legal relations between private individuals (consumers) in a business-like spirit and also includes company law.

Regime change left Romania with two 19th-century codes of substantive law still in force: the Civil Code and the Commercial Code (the latter in a dormant state during the Soviet-type dictatorship).[53] Romania was perceived, thanks to its tradition of formally preserving these pieces of legislation, as having 'at its disposal a civil law infrastructure better adapted to market conditions than that of many states which attempted to completely modernize their law under real socialism.'[54] Paradoxically, civil codes were the norms of normality, as stated above, Romania thus missed its opportunity for faster conversion to a market economy. Having a regulation for normality was useless if the return to the market economy from the Soviet-type system could not be achieved at the right pace because of ideological barriers. The arguments in favor of adopting the French model were their masterful techniques of drafting, their clear, simple, and comprehensible provisions, as well as the avoidance of unnecessary theoretical generalizations and abstractions. the development of society and law in the 20th century has in many respects surpassed the original French code, so the Romanian adaptation (translation) has also somewhat lost its relevance. The modernization of the French Code in its source state was still being carried out together with amendments, judicial practice, and legal literature in continuity with the original Napoleonic Code. Subsequently, Romania, having abandoned its historical traditions, opted to adopt a new code. A new civil code had already been drafted

51 For some elements of the new code see Tichý, 2014, pp. 9–29; Balarin, 2014, pp. 31–39; Hrádek, 2014, pp. 223–232.

52 Izdebski, 1996, p. 12.

53 The code has lost the object of its regulation by the abolition of private property. See Sipos, 2003, pp. 41–43. Following the regime change, the code was applied again. The fate of the Romanian Commercial Code is also interesting for this reason: it would go on to survive its own model (Italy's Commercial Code was repealed during the Second World War, the Italian private law – used as the initial model – making the transition to a monist regulation of civil law through the Civil Code of 1942). The Romanian Commercial Code survived totalitarianism and revived itself after 1989 along with its natural environment, capitalism.

54 Izdebski, 1996, p. 5.

before the Second World War, but its entry into force was prevented by the outbreak of the conflict, the territorial losses suffered by the country, and the establishment of a Soviet-type dictatorship. The issue of codification came back into focus after the regime change, which led to the adoption of Act 287 in 2009 (the new Romanian Civil Code). The code entered into force on October 1, 2011. The sources upon which the new Romanian Civil Code is based are complex: although the legislator partly departed from the classical French model, they also relied heavily on the modern French-language civil code of the Canadian province of Québec (*Code civil du Québec*), which was adopted in 1991 and entered into force on January 1, 1994. Thus, it can be interpreted as a strong modernization of the original French code. Yet, it also referred to the Italian Civil Code and the Draft Common Frame of Reference (DCFR), especially in the book on obligations. The extent to which this new legislation is a product of Romanian legal culture, compared to the previous Civil Code translated from French, remains a matter of debate. One change is that the single-model code has been replaced by a multi-model code. The reform put an end to the dualism between civil and commercial law, achieving thus, at least in principle, the transition from a dualistic system of civil law regulation to a monistic model. Still, to some measure, the differentiation of business law within the Civil Code was preserved because both this new code and other special rules continued to provide for derogations from the general norms in the matter of relations between professionals.[55]

Croatia and Slovenia, after gaining their independence, inherited most of their civil law legislation from the federal legislation of the former Yugoslavia. New civil legislation, based on a modernized concept of the former Yugoslav legislation, was adopted: in the case of Croatia, the Law on Obligations was adopted in 2005; in the case of Slovenia, it was adopted in 2001. We can observe that both states followed the model of separate acts for different civil law segments instead of adopting a unitary civil code.

In Slovakia, which gained its independence in 1993, the 1964 Civil Code of former Czechoslovakia and the 1991 Commercial Code remained in force until this very day. The Civil Code inherited in this way was modified frequently in independent Slovakia and has partially drifted apart from the Czech version (in force until 2014). Recodification efforts are ongoing.

In Poland, the Civil Code from 1964 remains in force albeit with some adjustments. The 1964 text, based on the work of the Codification Commission established before the Second World War, was of high quality and proved fit to serve as a basis for the transition to the market economy. There was no need for its immediate replacement. In 1990, the code was amended but was still 'much closer to the continental tradition of civil codes…'[56] compared to the Czechoslovak code and therefore could be maintained in force. Adopting a new civil code was sometimes also on the agenda. However, Poland modernized its company law, adopting a new Commercial Companies Code

55 Veress, 2017, pp. 27–34; Fegyveresi, 2017, pp. 35–42.
56 Izdebski, 1996, p. 9.

(*Kodeks spółek handlowych*) in 2000. This regulation does not break the monistic nature of civil law, as it regulates companies as civil law entities, but does not create a separate commercial law. As it was stated, the name 'code' was given to it only to ease the resistance from supporters of the old Commercial Code of 1934.[57]

In Serbia, the former Yugoslav Law on Obligations from 1978 is still in force as the basis of contract law. Codification in the form of a unitary civil code is also an issue here.

In short, this is how the legal basis of contract law, analyzed in this present book, was formed.

3. Some remarks on contracts in general

In one of his novels (titled Casanova in Bolzano), the Hungarian writer Sándor Márai wrote: '(...) I contract with you. I am speaking with your mind and your heart at the same time when I offer you a contract, a contract that will be no more vile or noble than the usual bonds and agreements between man and man.' The driving force of contracts is usually reason and economic rationality, but sometimes also the heart (for example, in the case of a contract of gift).

A contract is an agreement between two or more persons to create, modify, or terminate a legal relationship. From a theoretical point of view, we can distinguish contracts in a narrower sense (establishing a legal relationship) and a broader one (modifying and terminating such a legal relationship). A contract is an arrangement to provide services of a specified or definable nature, usually of pecuniary value, which is recognized by the state and the performance of which is facilitated by sanctions.[58] A contract is a bilateral juridical act since it requires the consent of at least two persons (we also have plurilateral contracts as well).

Furthermore, a contract is usually made up of conflicting declarations of intent by parties with 'clashing interests.' However, this is not true for all contracts, as there are contracts where no such poles, and no interests at odds exist. These are contracts of the cooperative type, such as a company contract.

The formation of a contract presupposes the concurrent legal undertaking of at least two persons; it is the meeting of opposing parties with separate interests that creates the legal effect known as a bond.[59]

The contracting parties are, at least in legal terms, free, in a state of legal equality and, at least before the conclusion of the contract, none of them is subjected to the other. Behind the contractual wills, there is interest, or the desire to satisfy needs, but there is also an economic necessity, which means that in a given order of production and exchange, certain contracts cannot be avoided. In a market economy, based

57 Radwański, 2009a, p. 137.
58 Vékás, 2016, 18.
59 Kelemen, 1941, p. 18.

essentially on commodity-money relations, the contract plays a key role in the organization of economic relations and even in the securing and shaping of social order.[60]

The contract is the most common source of an obligation taken as a legal relationship: most obligations arise from a contract. The contract must be per the mandatory rules of law, public policy, and good morals.

The theory of contracts is based on the principle of freedom of contract: parties are free to conclude contracts. It is the intent of the contracting parties that creates the contract (their free will, private autonomy, and individual self-determination). Since the contract expresses the intent of the parties, it is in line with the interests of the contracting parties, which indicates that individual interest is the main driving force of the economy. Individual interests, asserted through contracts, lead to the overall development of society and the economy.

The principle of contractual freedom expresses that a person can decide whether to enter into a contract (freedom to choose a contract, freedom to contract) and, if so, with whom (freedom to choose a contracting partner) and with what contractual content (freedom to shape the content of the contract, freedom of content).[61] The freedom of the parties to amend or terminate a contract already concluded by mutual agreement is also freedom of the parties. In the case of freedom to choose the content, the legislators start from the premise that 'the participants of the legal relationships are generally capable of asserting and defending their interests in their contractual relations and that private law should therefore intervene only to the less extent possible.'[62] In general, contract law uses default rules that allow freedom of content to flourish. Mandatory rules are used when the legislator wants to direct social relations in a certain direction.

As stated,

> 'substantive law, by recognizing the capacity of persons to contract and by endowing their contracts with the legally essential property of enforceability, enables the human faculty of contracting to legislate. This is private autonomy, individual self-government, so widespread in private law, whereby the subjects of the law themselves create the law applicable to the relations of life which are not compulsorily regulated by law, or to the details of those relations which are not so delimited by the law.'[63]

In this conception, the contract is itself law and the conclusion of the contract is legislation, yet based on this right 'only' a private norm, i.e., a specific legal rule applicable only between the parties, is created. 'The legal order, when it confers law-making power on the private power by authorizing and institutionalizing individual autonomy, divides the power to legislate between the public sovereign and the

60 Vékás, 2016, p. 23.
61 Vékás, 2016, pp. 38–39.
62 Vékás, 2016, p. 39.
63 Kelemen, 1941, p. 8.

private.'[64] A contrary view was adopted by Gusztáv Szászy-Schwarz, who clarified that 'the contract does not constitute the law itself, but makes definite the content of the law left undecided by the legislature.'[65]

Civil law in a market economy is the law of private autonomy, which rests on three pillars. First, the full recognition and protection of private property; second, the principle of freedom of contract; and third, the freedom of association. In the socialist system of economic governance experienced by the states which form the object of research in this book, state-owned enterprises pursued the objectives of state economic governance and planning through their contracts. In that context, freedom of contract could not be applied, because the contract was a tool to direct the economy and subject state property into conformity with economic planning.[66]

The principle of freedom of contract is formulated by the civil codes in the region as the general possibility to conclude any contract and to determine its content within the limits set forth by law, public order, and good morals. It is clear that freedom of contract has not been and can never be unlimited. The state would cease to exist as a lawgiver if it granted its subjects unlimited freedom of contract, for the consequence would be that all private rules of law would be made by the parties through contracts, in which case there would no longer be any generally binding rules of conduct. That such a situation would obviously be contrary to the concept of law and would ultimately mean the disintegration of the legal order itself is beyond doubt. It is a conceptual characteristic of law to set limits to the arbitrariness of individuals, and it is therefore logically impossible to turn private engagements into wild tyrants of legal life with unlimited freedom of contract. Law is postulative in its essence and content; it determines what must be, and private will can only be the source of law as long as it is itself at its service.[67]

Obligations which arise from the exercise of private autonomy cannot be contrary to the spirit and principles of the legal order, either as to their object, content, purpose, or nature. This prohibition may be expressed by the legal order in two ways: 1. general value judgments that also set limits to individual autonomy, 2. the establishment of mandatory rules. The limits to contractual freedom are both general value judgments: public morality on the one hand (in some states also a general public order), and the mandatory rule on the other hand. In this context, public morality is a general rule which provides a solution for exceptional cases 'in which one of the parties takes advantage of the possibility offered by a dispositive rule in an unacceptable manner,' and therefore 'the court may remedy the resulting flagrant disturbance of the desirable balance between the parties.'[68]

A significant part of private law rules on contracts is constituted by default rules (permitting derogation, i.e., the parties can lay down the rules; only in the absence

64 Kelemen, 1941, p. 21.
65 Szászy-Schwarz, 1912, p. 21.
66 Vékás, 2016, p. 38.
67 Kelemen, 1941, pp. 21–22.
68 Vékás, 2016, p. 47.

of a decision by the parties is the law applied). Freedom of contract is limited only by mandatory law, public policy, and morality. The valid conclusion of a contract generally requires the expression of an identical will; special formal requirements are exceptional (this is referred to as the principle of consensualism).

4. Alterations in the world of contracts

However, contracts have undergone a fundamental transformation from the classical liberal principles correctly maintained in civil law. The economic and social role of the state and the economy itself has changed fundamentally, which has affected the area of contracts. New contracting principles have emerged (adhesion contracts, compulsory contracting) such that the state increasingly regulates certain contracts by means of a series of mandatory rules, constantly restricting private autonomy to protect the weaker party by invoking this principle.

New contractual phenomena include contracts of adhesion. The content of some contracts is predetermined by one contracting party, and the other party's rights are limited to their decision on whether to accept or reject the contract. The content of such a contract is not negotiated. For example, the contract may take a blank form. Examples include insurance contracts, banking contracts, or even simple mobile phone subscriptions. The emergence and proliferation of adhesion contracts facilitate and speed up the contracting process, yet since the content of the contract is always determined by the economically stronger party, the potential for abuse is obvious. This gave rise to a new set of rules trying to balance the use of adhesion contracts.

Another example of a new contracting type is the forced contract (compulsory contracting), i.e., cases where there is an obligation to conclude a contract. In these contracts, not only is the content of the contract predetermined, but the obligor lacks even the 'yes' or 'no' option: the contract is mandatory and the obligation to conclude it is imposed under some form of penalty by law. A typical example is compulsory insurance (compulsory car insurance or compulsory insurance for attorneys and auditors).

A third phenomenon that cannot be disregarded is the increasing role of mandatory rules and formal requirements in contract law. The classical liberal view is that in contract law, mandatory rules are exceptional because they restrict freedom of contract. However, the share of mandatory rules has also increased in civil law codes or in other rules that also regulate contracts, and the field of private autonomy has shrunk as a result of their expansion. Some contracts (such as flat tenancies for living purposes) have been regulated in great detail by means of mandatory rules (mainly to protect the tenant). This special legal protection is necessary because the tenant is perceived as being in a weaker contractual position than the landlord, both in terms of his or her financial situation and options. Thus, the parties' will at the time of the conclusion of the contract cannot extend to those issues which the law has decided in advance employing mandatory rules, and the possibility of negotiation

and agreement can only concern the design of some contractual elements like rental, duration of the lease, etc.

Finally, consumer protection law grew in importance after the collapse of Soviet-type dictatorships in East Central Europe. In the second half of the 20th century, a set of rules protecting consumers in the context of contracts was outlined and continuously developed until today. The East Central European states adopted such rules mainly in the framework of harmonizing their legal systems according to European Union norms.[69] Consumer contracts are also governed by a set of specific rules, the rationale of which is to protect the consumer as a weaker participant in contractual relations. In such cases, the mandatory rules may be 'claudicatory' – allowing no derogation to the detriment of the consumer – yet allowing the parties to agree freely on clauses that are more restrictive for the business.

The proliferation of mandatory rules in the field of contract law 'undoubtedly reflects the social recognition that the legal relations between parties who are economically unequal are not suited to being settled by individual self-government, because the weaker party, as a result of the economic pressure which the stronger party can exert, usually lacks the unconditional freedom of choice' which is an indispensable condition for dispositive regulation.[70]

Contract law is significantly affected by restrictions introduced by legislation in other fields. Thus, competition law restricts contractual freedom by penalizing agreements (cartels) to the detriment of competition.

Administrative contracts constitute a controversial category, but their existence has been recognized. Those who recognize the existence of administrative contracts consider, for example, that concession contracts or public contracts constitute a specific type of contract. The characteristics of administrative contracts are as follows: these contracts are governed at least partially by public (constitutional, administrative, financial, fiscal) law rules; at least one of the parties is a public authority; the contract is intended to achieve a public interest, a public objective, or a public service; unlike the classical contractual model, the parties are not necessarily in a purely equal relationship, and the contract may also contain an element of power or subordination, such as normative (regulatory) clauses which may be unilaterally modified by the contracting public authority; the contracting public authority may impose public law penalties (e.g., fines for infringement) on the other party for breaching of the contract; disputes relating to the contract must be resolved according to the special rules of administrative adjudication. The grey area between public and private law where administrative contracts are formed poses a challenge for legal science, but mandatory rules certainly play a dominant role in the regulation of these contracts.

69 From the states analyzed in the present book, Serbia in not a member of the European Union, but its legislation is greatly influenced by EU law because Serbia is a candidate state since 2012 and the accession negotiations, which started in 2014, are ongoing in a complicated political context.

70 Kelemen, 1941, p. 18.

As a consequence of the analyzed phenomenon, the principle of contractual freedom remains important, even with a significant increase in the number of exceptions and limitations. Exceptions, such as adhesion contracts, need to be properly regulated (obviously without unduly hindering economic circulation) to protect genuine contractual freedom.

These developments also affect contract law in the region. However, it is undeniable that, from a legal point of view, contracts continue to be an important aspect of social interaction. It is through contracts that the various dynamic aspects of society are realized: the circulation of goods and services, and the realization of private and business interests.

5. Comparative law of contracts in East Central Europe

The research project upon which the present book expounds aims to compare the contract laws in force in 8 different states, according to 14 selected topics. The states and their legal systems to be analyzed are the Czech Republic, Hungary, Poland, Romania, Serbia, Croatia, Slovenia, and Slovakia. The laws of Serbia, Croatia, and Slovenia are analyzed together. Such an approach is justifiable by the fact that these three jurisdictions share a common legal heritage, stemming from the former Yugoslav Law on Obligations from 1978 as shown before. In Serbia, the former federal law is still in force with slight adjustments. In Croatia and Slovenia, new laws were adopted in 2005 and 2001 respectively, but for the most part, they follow the structure, logic, and content of the former Federal Law on Obligations. Therefore, the particular legal solutions in Serbia, Croatia, and Slovenia show a great deal of similarity and are even verbatim identical in many parts.

The topics reflect selected problems, but also provide an overview of applicable contract law: negotiation and formation of contracts, pre-contracts, interpretation of contracts, faults of will (mistake, deceit, duress, *laesio enormis*), illegal and immoral contracts, gratuitous contracts, forms of contracts, unfair contract terms, contracts for the benefit of third parties, frustrated contracts, legislative or judiciary modification of contracts, claims of performance, damages, unilateral termination and, finally, assignment.

We see this book as the first attempt at a comparative effort. The scientific work must continue to deepen and further refine the present research and extend it to new topics. We plan to keep this book up to date through new editions when the status of our research, legislative developments, or important court decisions requires it. Our intention is to provide a useful tool to practitioners, researchers, or Ph.D. students that helps them understand the generalities and specificities of the contract law phenomenon in East Central Europe. In a parallel project, the usefulness of which is underlined by the present endeavor, we will try to strengthen the quality of English as a common legal language in this region which facilitates communication between scientists and legal practitioners. There is an urgent need to standardize mutual

English terminology because the accuracy of legal communications requires it. Such a terminological project is in preparation under the auspices of the University of Miskolc (Hungary).

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| Chapter II |

Formation of Contracts

1. General considerations

1.1. The notion of contract

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

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

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

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

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

From our perspective the following areas should be covered:

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

1.2. Parties and capacity

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

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

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

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

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

1.3. Offer and acceptance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.4. Negotiations and bargaining

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

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

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

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

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

1.5. Auction and tender

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

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

1 Halsbury's Laws of England (online).

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

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

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

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

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

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

1.6. E-contracting

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

2. The Czech Republic

2.1. The notion of contract

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

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

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

2.2. Formation of contract

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

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

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

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

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

2.2.1. Offer and acceptance

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

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

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

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

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

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

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

2.2.2. Special methods of concluding the contract

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

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

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

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

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

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

3. Hungary

3.1. The concept and content of the contract

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

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

27 CzeCC, § 1732 (2).

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

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

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

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

3.2. Offer and acceptance

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

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

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

3.3. Auction and tender

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

3.4. Non-compliance with formal requirements

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

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

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

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

3.5. Standard contractual terms

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

35 HunCC, § 6:7.

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

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

3.6. Culpa in contrahendo

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

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

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

3.7. Technological development and contracts

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

3.8. E-contracting

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

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

4. Poland

4.1. Introductory remarks

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

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

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

37 PolCC, Article 72 § 1.

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

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

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

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

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

4.2 Offer and acceptance

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

41 PolCC, Article 66 § 1.

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

43 PolCC, Article 68^2.

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

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

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

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

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

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

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

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

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

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

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

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

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

48 PolCC, Article 68.

49 PolCC, Article 68^1 § 1.

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

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

4.3. Auction and tender

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

4.3.1. Auction

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

4.3.2. Tender

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

4.3.3. Common provisions for auctions and tenders

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

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

4.4. Negotiations

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

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

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

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

5. Romania

5.1. Pre-contractual negotiations

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

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

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

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

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

55 According to the PolCC, Article 473 § 2.

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

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

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

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

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

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

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

5.2. The offer to contract

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

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

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

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

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

60 Veress, 2020, pp. 36–37.

5.3. The acceptance

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

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

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

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

6. Serbia, Croatia, Slovenia

6.1. Offer and acceptance

6.1.1. Serbia

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6.1.2. Croatia

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

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

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

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

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

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

6.1.3. Slovenia

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

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

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

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

6.2. Negotiations and bargaining

6.2.1. Serbia

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

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

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

6.2.2. Croatia

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

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

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

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

6.2.3. Slovenia

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

6.3. Auction and tender

6.3.1. Serbia

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

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

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

6.3.2. Croatia

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

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

6.3.3. Slovenia

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

7. Slovakia

7.1. On civil law contracts in general

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

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

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

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

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

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

7.2. Offer and acceptance

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

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

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

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

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

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

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

7.3. Negotiations for the conclusion of the contract

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

7.4. Public offer to conclude a contract

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

170 Ďurica, 2016a, p. 1125.

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

7.5. Public commercial tender

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

8. Concluding remarks

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

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

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

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

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

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

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

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

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

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Chapter III

Pre-Contracts

1. General considerations

1.1. The concept of pre-contract

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

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

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

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

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

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

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

1.2. Distinction from similar institutions

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

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

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

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

1.2.1. The preference agreement

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

1.2.2. The option agreement

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

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

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

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

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

1.2.3. The reservation contract

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

1.2.4. The framework contract

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

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

1.3. The unilateral pre-contract

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

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

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

1.4. The bilateral pre-contract

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

1.5. Enforcement of pre-contracts

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

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

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

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

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

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

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

2. The Czech Republic

3.1. Overview

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

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

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

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

3.2. Content

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

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

3.3. Form

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

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

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

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

3.4. Distinction between pre-contracts and similar institutions

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

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

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

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

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

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

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

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

3.5. Enforcement of pre-contracts and time limits

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

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

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

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

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

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

3.6. Pre-contracts on the sale of real estate

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

3. Hungary

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Poland

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

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

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

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

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

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

39 PolCC, Article 118.

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Romania

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

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

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

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

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

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

52 For more on this agreement see Goldiszewicz, 2013.

53 RouCC, Article 1670.

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

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

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

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

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

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

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

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

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

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

6. Serbia, Croatia, Slovenia

6.1. Serbia

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

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

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

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

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

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

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

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

6.2. Croatia

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

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

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

6.3. Slovenia

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

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

7. Slovakia

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8. Concluding remarks

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

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

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

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

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

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

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

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

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| Chapter IV |

Interpretation

1. General considerations

1.1. Contracting will, its manifestation, and the content of the contract

Interpretation is a method of establishing the content of normative texts. Contracts create norms, as they are intended to create rights and obligations between the contracting parties. Interpretation or construction of the contract is an entirely different process from the interpretation of law. Freedom of contract in a market economy has the function of transposing market mechanisms into legal ones. From the market paradigm it follows that transactions shall be valid only if they have been entered into by the parties on a voluntary and informed basis. The main consequence of market failures is invalidity, which is addressed in other chapters.

While assessing consent (*consensus ad idem*), a subjective or an objective approach can be applied. In the subjective approach the question is whether there was consent according to the actual will of the parties ('will theory') while in the objective one, the question is how a reasonable person in the position of the parties could have understood the declaration of the parties ('declaration theory'). According to the will theory, the source of the consent is the will, while according to the declaration theory it is the recorded declaration.

Promoting private autonomy and voluntariness would suggest that a contract shall be assessed as the 'meeting of minds.' That is, the contract as mutual consent of the parties shall reflect the will of the parties, and it is the parties' contracting will that

Menyhárd, A., Hulmák, M., Balliu, A., Stępkowski, Ł., Veress, E., Dudás, A., Hlušák, M. (2022) 'Interpretation' in Veress, E. (ed.) *Contract Law in East Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 109–136. https://doi.org/10.54171/2022.ev.cliece_chapter4

constitutes the content of the contract.[1] This premise suggests that it is the will theory that should prevail in construing the content of the contract. A further consequence of the will theory is strong legitimacy of the enforcement of the contract: The contract is binding because the promise is binding, but it is binding only within the limits of the voluntary promise.

The problem with will theory is that it shifts the risks of unilateral mistake, failures in expressing the will, or misunderstanding onto the other party. Most often it is also impossible to assess or prove the actual will of the party. Reducing those risks by the parties is not impossible but normally would result in high transaction costs. Avoiding those uncertainties and the high transaction costs they involve justifies shifting the focus from the will of the parties to the manifestation of that will. According to the 'declaration theory,' it is the manifestation of the parties' will that should determine the content of the contract rather than the actual will of the parties. Declaration theory shifts the risks of unilateral mistake, failures in expressing the will, or misunderstanding onto the party expressing its contracting will. This seems reasonable insofar as it is the party expressing the will who can reduce such risks at lower transaction costs and favors protecting reliance rather than autonomy. The problem with this, however, is that it makes the contract a meeting of declarations rather than a meeting of minds. This pushes the function of the contract as the manifestation of private autonomy and as a social relationship into the background while emphasizing the protection of reliance. The strong form of declaration theory is sometimes referred by its critics as 'fly on the wall theory,' because 'the test is not what the other party would have thought but how things would have appeared to the reasonable fly on the wall.'[2] This criticism is not correct if the court assessed what the other party should have thought while interpreting the declaration.

Legal systems normally attempt to strike a balance between protecting reliance and contracting will. Thus, they mostly follow a rule that seeks a compromise between will theory and declaration theory. Interpretation (or construction) is tightly linked not only with invalidity due to mistake but also with the existence of the contract. If the declarations met but the wills of the parties did not, the question is not the existence of the contract but its invalidity on the grounds of mistake.

Offer and acceptance are to be interpreted not only based upon the terms of the contract but also by deciding whether the parties intended to create a legally binding promise. If the substance of the contract remains undetermined as the result of interpretation—because the substantive content of offer and acceptance proved not to be identifiable—there is no contract concluded.[3] In the 'Haaksjöringsköd' case, where

1 Kronman, 1981, pp. 404–423, 404, 422.

2 Spencer, 1973, pp. 108–113.

3 Raffles v. Wichelhaus (1864). Referring to this judgment, Oliver Wendell Holmes commented regarding the interpretation rule of the common law that 'the law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct.' Holmes, 1991, p. 199.

the parties' contracting will as well as its manifestation established mutual consent but with different contents because the will and its manifestation differed in the same way for the parties, a German court solved the problem by employing the doctrine of mutual mistake.[4]

An example of the combination of will theory and declaration theory as well as an optimal compromise is provided in the interpretation rule of the CISG. According to Article 8 of the CISG, statements and other conduct of a party are to be interpreted according to his or her intent where the other party knew or could not have been unaware what that intent was. If this is not applicable, statements and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case, including the negotiations, any practices that the parties have established between themselves, usages, and any subsequent conduct of the parties. The PECL (Article 5:101), the DCFR (II-8:101), and the UNIDROIT Principles (Article 4.1) also provide a kind of combination, but with a stronger emphasis on the will of the parties than the CISG.

1.2. Implied terms and supplementary interpretation (Ergänzende Vertragsauslegung): Gap-filling by interpretation

Contracts are never complete. Although the parties may try to take into consideration and address all future risks in the contract, addressing remote risks results in rather high transaction costs. That is why allocating the risks of unforeseen contingencies is the task of substantive law. One of the methods for this is filling the gaps of the contract with terms never stipulated by the parties but imposed on them by the court, statute, or custom. In English law the method of this gap-filling is establishing 'implied' terms as part of the contract. Impossibility of performance or frustration of purpose also may be derived from implied terms. Courts in continental Europe can reach the same result by deriving rights and obligations from the general clauses of private law (e.g., from the requirement of good faith and fair dealing), as German court practice does by the application of *Treu und Glauben*. It is assumed that such general clauses, as elements of substantive law, are the content of the contracts concluded by the parties even if they did not refer to them. Thus, they can be the source of contractual rights and obligations as well. With supplementary interpretation, courts are to establish the hypothetical contracting will of the parties, in which process economic rationality can also play an important role.[5]

4 Flume, 1965, pp. 461.
5 Schäfer and Ott, 2005, p. 429.

1.3. Interpretation of standard contract terms: The contra proferentem rule

Standardizing the contracting process and the terms of the contract was a logical and necessary consequence of the mass production and mass distribution of products and services. Contracting with preliminary drafted standard contract terms has been a reaction to the challenges of mass economy driven by technological development. The benefits of reducing transaction costs and increasing the efficiency of transactions obviously justify the use of standard contract terms, but they also involve considerable risks of abuse of bargaining power. One protective measure—beyond the control of the contracting process and the substantive control of unfair terms—applied by the courts has been an interpretation rule. According to this interpretation rule, if there is ambiguity as to the content of the standard contract term according to the general principles of interpretation of the contract, the term shall be construed against the party who proposed it. This is the doctrine of *in dubio contra proferentem*. The contra proferentem rule has become part of European contract law. Article 5.103 of the PECL provides that where there is doubt about the meaning of a contractual term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred.[6] Article 5 of Directive 13/1993 on Unfair Terms in Consumer Contracts explicitly provides that where there is doubt about the meaning of a term, the interpretation most favorable to the consumer shall prevail.

1.4. Merger clauses

Parties often agree upon different forms of merger clauses or 'entire agreement' clauses in order to restrict the content of their contract to the written document they signed. With such clauses the parties exclude earlier negotiations, potential parallel documents or oral agreements, etc. from the content of the contract. Legal systems seem to accept the validity of such clauses, although they do not allow a strict interpretation and such clauses do not prevent the courts from gap-filling by interpretation or with implied terms.[7]

1.5. Smart contracts

Technological developments have opened the possibility of concluding contracts via computer programs, raising issues not only in the case of 'smart contracts' created via communication between various software and hardware components, but also regarding the forms of communication widely used in everyday commercial practice. Rules of interpretation in private law are designed to address communication with ordinary language (either oral or written) and conduct. It seems to be a challenge for legal systems to adopt rules of interpretation to such new forms of communication.[8]

6 Article 4.6. of the UNIDROIT Principles and II-8:103 of the DCFR provide for a similar solution.
7 Cordero-Moss in Cordero-Moss, 2011, pp. 353–355.
8 Cannarsa, 2018, pp. 773–785.

2. The Czech Republic

2.1. Overview

As in other legal systems, the Czech legislator attempts to strike a balance between protecting reliance and contracting will, thus adopting rules seeking a compromise between will theory and declaration theory. The general rules for the interpretation of any juridical act including contracts are concentrated in §§ 555–558 of the CzeCC. It is apparent that these rules were primarily inspired by the preceding interpretation rules contained in the CzeCommC[9] and by the model rules contained in the DCFR.[10]

2.2. Contracts are to be assessed in accordance with their content

Pursuant to § 555 (1) of the CzeCC, any juridical act must be assessed according to its content. This rule is rather propaedeutic and quite obvious, as every juridical act can be grasped and understood only after interpreting it (according to the actual or declared will of a person or the parties). It can even be questioned whether such rule is needed in statutory law. However, the reason for including this rule in the CzeCC was likely to avoid repeating the erroneous historical practice of Czech judges who wrongfully used to assess juridical acts, including contracts, not according to their content but rather according to the name given to the manifestation of will[11] (for example, if the content showed that the juridical act represented a donation contract, yet the parties called it a purchase agreement, the judge wrongfully assessed it as a purchase agreement).

2.3. Priority of the empirical interpretation over the normative one

Under Czech law, emphasis is primarily placed on the actual will of a party. Pursuant to § 556 of the CzeCC, what is expressed by words or otherwise is interpreted according to the actual intention of the party. This approach is also called empirical interpretation, where the interpretational aim is to find the actual will of the party, as opposed to normative interpretation, where the aim is to find the normative (hypothetical or assumed) will of the acting person.[12] In both cases, what is actually relevant is the actual or normative will present at the time of the conclusion of the juridical act. A later manifestation of a will (such as a subsequent practice of the parties) can be relevant only insofar as it can be used to interpret the actual or normative will of a party at the time of the conclusion of a juridical act.[13]

Therefore, as the first step, the judge should try to identify the actual will of a party. An actual will can be derived from an express statement by the party as to a

9 Act No. 513/1991 Coll., the Commercial Code, as amended.
10 Explanatory memorandum on the Czech Civil Code.
11 Melzer in Melzer and Tégl, 2014, pp. 578–579.
12 Melzer in Melzer and Tégl, 2014, p. 588.
13 Melzer in Melzer and Tégl, 2014, pp. 594–595. See also e.g., Handlar in Lavický et al., 2014, p. 1989, or the Supreme court, Ref. No. 26 Cdo 303/2004.

certain interpretational issue, the purpose a party was seeking to achieve by concluding the contract, or any other circumstances proving an actual will.[14]

On the other hand, the Czech legislator is strongly concerned with protecting the legal certainty and good faith of an addressee of a manifestation of will. Thus, the actual will (intention) of a party is relevant only if the counterparty (addressee) was aware or must have known of such a will (intention).[15] An addressee must have known of an actual will if it was recognizable from all the circumstances accompanying its manifestation.[16] A general rule is that what an addressee can recognize (and thus whether he could have known about the acting parties' actual will) is assessed from the perspective of an average person, which can be modified in case a person has expertise in a relevant field.[17]

2.4. Normative interpretation

If the actual will (intention) of a party cannot be ascertained, the manifestation of will is to be interpreted according to the understanding that a reasonable person of the same kind as the counterparty would have had in the same circumstances.[18] Thus, what the judge should be concerned with in this case is not the actual will of a party, but the normative (hypothetical or assumed) one.

There are many directives that should be followed under Czech law while searching for the normative will of a party. Since their enumeration is not exhaustive, only some of them will be presented here. First, in case there are any doubts as to the meaning of the manifestation of will, it must be interpreted reasonably. Unreasonableness (illogical or non-coherent consequences) cannot be considered to be desired by a party as humans are, at least for the purposes of legal regulation, assumed to be rational creatures. Second, the purpose a reasonable person could have been seeking to achieve by performing a juridical act (i.e., a contract) must be considered.[19]

Third, there is the *favor negotii* interpretational rule. That is, if there are two interpretational options, with one leading to the invalidity of the juridical act and the other to maintaining its validity, the interpreter must choose the option maintaining validity. Fourth, a juridical act (e.g., contract) must be interpreted with regard to the principle of fairness. In other words, while giving a meaning to the manifestation of will, it must be assumed that both the party and the addressee were given a due account of the interest of the other party. Fifth, the interpreter should consider all the relevant circumstances preceding the juridical act (negotiations of the parties, correspondence, minutes of the meetings etc.). Sixth, a systematic view of the juridical act must be taken into deliberation (e.g., division of headings, chapters, articles).[20]

14 Melzer in Melzer and Tégl, 2014, pp. 600–604.
15 Section 556 (1) of the CzeCC. See also e.g., the Supreme court, Ref. No. 23 Cdo 505/2018.
16 Handlar in Lavický et al., 2014, p. 1989.
17 CzeCC, §§ 4 and 5.
18 CzeCC, § 556 (1).
19 Melzer in Melzer and Tégl, 2014, pp. 607–615.
20 Melzer in Melzer and Tégl, 2014, pp. 607–615.

Seventh, there is a *contra proferentem* rule, which is generally set out in § 557 of the CzeCC and applies to all contracts unless there is a special regulation.[21] Pursuant to this section ('If a term is used that allows various interpretations, in the case of doubt it is to be interpreted to the detriment of the person who used the term first'). The *contra proferentem* rule is regulated separately in § 1812 (1) of the CzeCC for business-to-consumer contracts. The wording of this section is more or less the same as the wording of Article 5 of Directive 13/1993 on Unfair Terms in Consumer Contracts ('If the contents of a contract allow different interpretations, the interpretation most favorable to the consumer prevails').

2.5. Gap-filling by interpretation

There is a long and consistent decision-making practice of the Czech general courts (including the Supreme Court) concluding that the interpretation of a juridical act is only concerned with finding out its content and can never substitute, change, or supplement the content of a juridical act.[22] This has been the position of the Czech general courts under the CzeCC adopted in 1964, and it prevails also as regards the present CzeCC. This position of courts effectively prevents any gap-filling interpretation of contracts and other juridical acts in Czech law.

Nevertheless, there are some academics who are of the view that a gap-filling interpretation is allowed under Czech law, e.g., Melzer, who derives this possibility from § 545 of the CzeCC: 'Juridical acts produce legal consequences expressed in them, as well as legal consequences arising from a statute, good morals, usages and regular dealings of parties.'[23] These views are presently in the minority. However, discussions of this matter in expert circles are continuing, and it cannot be excluded that the Czech general courts will eventually reconsider the possibility of the gap-filling interpretation.

2.6. Merger clauses

There is actually no case law by the Czech general courts relating to merger clauses, even though such clauses are making their way into contractual practice in the Czech Republic. There are many questions relating to merger clauses. For instance, it is not clear whether such clauses can prevent the court from concluding that there is an additional implicit agreement of the parties. What is even more problematic are the agreements of the parties that exclude or modify statutory interpretational rules of the contracts. The parties could, for example, modify the rule of § 556 of the CzeCC putting priority on the actual will of the party over the normative will in such a way that only normative will should be relevant. Is such an agreement valid or invalid on the grounds of interfering with public order or some mandatory statutory rule? In

21 Melzer in Melzer and Tégl, 2014, pp. 607–615.

22 See e.g., the Supreme Court, Ref. No. 32 Cdo 939/2018, 1 Odon 110/1998, 32 Cdo 4318/2015, 21 Cdo 5281/2016 and 21 Cdo 5302/2016.

23 Melzer in Melzer and Tégl, 2014, p 489.

the literature, not much attention has been given to these questions. An exception is Kotásek, who finds merger clauses valid and enforceable even in case of a stipulation modifying the statutory interpretation rules.[24]

2.7. Smart contracts

Since the concept of smart contracts and other similar concepts are quite new and work on the CzeCC had proceeded long before smart contracts became an issue, there are no specific rules of interpretation designated for them. Thus, the general interpretation rules applied to standard contracts would apply to the extent that the nature of the smart contract and other similar concepts allows. Moreover, the interpretation of such contracts has not yet been addressed by Czech general courts, nor are there any significant works of Czech legal literature on the matter.

3. Hungary

3.1. The role of declaration theory and objective interpretation

As contracts are concluded via mutual consent of the parties, assessment is to be made according to the general rule of interpretation of juridical acts, whether the declarations of the parties were intended to create legal obligation, and if so, according to what content. That is, communication between the parties has to be interpreted by the addressee on the basis of the presumed intent of the party making the statement and of the circumstances of the case, and in accordance with the generally accepted meaning of words.[25] Thus, the decisive factor is not the intent of the party or the parties, but rather how the expression of the intent was to be understood by the other party, having regard to the preliminary communication of the parties and all the relevant circumstances of the case. An actual 'meeting of the minds' is not required for making legally binding promises. With this solution Hungarian private law shifts the focus to the declaration theory rather than the will theory. The policy behind this solution is protecting reliance and the interests of third parties.[26] A waiver or a release of rights shall be made by express juridical act. Such juridical acts shall not be interpreted broadly; that is, for such declaration there should not be a content established that goes beyond the literal meaning of the words. For example, if the parties in a lease contract agreed upon a list of grounds for terminating the contract in case of breach, this shall not be construed as excluding the right to ordinary termination provided by statutory law.[27] Similarly, if the party does not exercise or enforce a right, this passive conduct shall not be construed as a waiver of that right.[28]

24 Kotásek, 2016, pp. 725–732.
25 HunCC, § 6:8 (1) to (2).
26 Vékás, 2016, No. 236.
27 Supreme Court, BH 2014. 108.
28 Supreme Court, BH 2004. 236.

The policy of opting for the declaration theory in juridical acts concluded for consideration does not, however, justify such a shift in gratuitous contract, where reliance in particular is perhaps less significant. That is why for gratuitous contracts it is the will theory that prevails, and the actual intent of the obligor shall be established.[29]

3.2. Gap-filling by general clauses

The content of the contract shall be established via construction of the juridical acts of the parties, but contractual terms may be implied by different legal techniques as well. General clauses like the requirement of good faith and fair dealing, the purpose of the contract, or customs and practices may be sources of the content of the contract even if the parties did not refer to them. Customs agreed upon and established by the parties in their earlier business relationships shall also enter the content of the contract. Customs regularly applied in general in the relevant business sector by parties to contracts of a similar nature shall, however, not become a content of the contract if this would be unjustified considering the relationship of the parties. The parties are free to agree that such customs and practice are not to be implied as the content of their contract.

Agreement upon the content of the contract (even as to essential elements) may even be implied. It is therefore possible to consider that a contract has been concluded where the parties have performed the contract even in part or have otherwise behaved in such a way that it may be inferred that the contract is regarded as concluded. This interpretation suggests that if the parties consider themselves clearly and unequivocally bound, the contract may be found to have been concluded even if the parties have not otherwise expressly agreed on an essential element. Thus, for example, if the parties do not expressly agree on the price at the time of the conclusion of the contract, but agree that the supplier should start production regardless of this because the customer will take delivery of the product, this constitutes, according to the case law, a mutual tacit acceptance of the market price known at the time of the conclusion of the contract, proportionate to the service in question.[30] Individual contract terms and declarations must be interpreted in accordance with the contract as a whole.[31]

3.3. The 'contra proferentem' rule

Specific rules also implement the *in dubio contra proferentem* doctrine in Hungarian private law as a general rule applicable to business relations. Thus, if the content of the standard contract term or the content of any other contract term not negotiated individually cannot be established clearly by applying general provisions on the interpretation of juridical acts and the rule provided for interpretation of contracts,

29 Vékás, 2016, No. 237.
30 HunCC, § 6:63 (3).
31 HunCC, § 6:86 (1).

the interpretation that is more advantageous for the party contracting with the counterparty applying the term shall be adopted. For contracts between consumers and undertakings, this rule shall apply to the interpretation of any of the contract terms, i.e., also those that had been individually negotiated.[32]

3.4. Merger clauses

As far as defining the rights and obligations of the parties is concerned, merger clauses are to be held as valid and enforceable between the parties. As provided in § 6:87 of the HunCC, if a written contract contains a provision according to which the contract contains all terms agreed on by the parties, previous agreements not included in the written contract shall become ineffective. Previous juridical acts made by the parties may be taken into consideration when interpreting the contract. From this follows that in case of stipulating such an agreement, prior negotiations, representations, undertakings, and agreements may not be held as part of the contract.[33] On the other hand, if there are *lacunae* in the contract to be filled with construction of the contract, such clauses could not prevent the judge from interpreting the contract—according to the general rules of interpretation—as it had to be understood by the other party. Thus, the contract can be—and is to be—interpreted in the light of the previous statements, representations, and undertakings of the parties. The question whether certain previously agreed specifications are to be held as parts of the parties' contractual obligations is to be answered according to the result of the interpretation. If the Entire Agreement clause is to be interpreted as excluding the application of these specifications, they are not to be held as part of the contract, although they may be implied by the court as gap-filling terms, referencing them being permitted, e.g., as usual standards of quality in commerce. If that is not the case, these specifications may be referred to in the course of constructing the parties' assumed and expressed contracting will, as the parties may not restrict the courts in applying and interpreting the rules on construction of contracts as they are provided in the HunCC.

3.5. Smart contracts

There are no specific rules provided for smart contracts in Hungarian law, nor for contracts concluded in e-commerce. This means that communication between the parties performed via electronic tools or even by using software and hardware implementations shall fall under the application of the same rules as provided for interpretation of contracts.

32 HunCC, § 6:86 (2).

33 This is suggested in context of Hungarian private law as well by Kisfaludi. Kisfaludi, 1995, pp. 3–7.

4. Poland

The current PolCC devotes a single Article to the issue of interpreting statements of intent (*oświadczenia woli*) and contracts that result from those statements of intent.[34]

That Article, namely Article 65 of the PolCC, reads as follows:

> 'Article 65
> § 1 A statement of intent ought to be interpreted in such a way as required by the principles of social coexistence and established customs in view of the circumstances wherein such a statement was made.
> § 2 As regards contracts, rather than confine oneself to the literal wording of a contract, one should examine what was the unanimous intent of the parties and the purpose of the contract.'

Save where there would be express rules to the contrary, the rule on interpretation of statements of intent in § 1 above is applicable to any statements of intent, those contained in contracts included. The rule in § 2 might be thought to apply only to contracts, although it would follow from the case law that it is not the case. Article 65 of the PolCC applies regardless of the identity or status of the parties and without regard to whether they are professionals engaging in business or not.[35] On the whole, while rather brief, the above Article has generated over 730 reported decisions by the

34 Last wills are subject to a separate rule in Article 948 of the PolCC. See also below on specific rules on contracts that go beyond the general position of Article 65 of the PolCC. Insofar as autonomous juridical acts falling within the scope of Polish employment and labor law (such as employer bylaws, internal pay regulations, and juridical acts made in the scope of collective bargaining) may constitute statements of intent subject to Article 65 of the PolCC, then that rule, by virtue of Article 300 of the Polish Labor Code (*Kodeks pracy*), may 'exceptionally' and 'with extreme caution' be applicable *mutatis mutandis* to them (judgment of the Supreme Court of July 26, 2011, case Ref. No. I PK 27/11, reported in Wolters Kluwer's LEX, No. 1001277). However, collective bargaining agreements (*układy zbiorowe pracy*) are subject to a separate rule in Article 241^6 of the Polish Labor Code. In the context of fiscal proceedings in Poland, Article 65 of the PolCC is superseded for tax authorities by a special rule in Article 199a of the Act of August 29, 1997—Tax Ordinance (*Ordynacja podatkowa*), which reads in §§ 1 and 2 that a tax authority that makes a finding on the contents of a juridical act (*czynność prawna*) shall take account of the unanimous intent of the parties and the purpose of the juridical act, and not only the literal wording of the statements of intent made by the parties to that juridical act. Where in order to conceal the making of a juridical act another juridical act was made, fiscal effects are to be determined according to the concealed juridical act. A further specific rule is found in Article 15 (5) of the Act of September 11, 2015, on Insurance and Reinsurance (*Ustawa o działalności ubezpieczeniowej i reasekuracyjnej z dnia 11 września 2015 r.*), which provides that the terms and conditions of the insurance contract, the standard terms and conditions of insurance, and other contractual templates that are worded equivocally shall be interpreted in favor of the policy-holder, insurer, or the beneficiary of the insurance contract.

35 Judgment of the Supreme Court of November 10, 2016, case Ref. No. IV CSK 78/16, reported in Wolters Kluwer's LEX, No. 2153442.

Polish Supreme Court (*Sąd Najwyższy*) alone as of the time of writing in November 2021, admittedly making the issue of interpretation a vigorous exercise in judicial interpretation. Among the additional rules inferred from Article 65 of the PolCC by the Supreme Court is a rule that a contract that would be null and void when interpreted normally may be interpreted differently to make it valid, even if that would be equivalent to varying the contents of a given statement of intent (a conversion, *konwersja*),[36] albeit any attempt at ensuring the effectiveness of a contract must not distort the genuine intent of the parties, despite the general directive to salvage the contract whenever possible (*favor contractus*).[37] Should there be a number of possible interpretations, unanimous intent of the parties should be prioritized over the literal wording of the contract.[38] The parties themselves may introduce clauses on the issue of interpretation in the contract itself.[39]

Unanimous intent of the parties and the purpose of the contract may be inferred from the conduct of the parties subsequent to the creation of a given obligation,[40] including the manner of performing a contract.[41] It is possible in the context of Article 65 § 2 of the PolCC that the result of construction by way of interpretation might differ from the meaning that follows from the rules of language taken alone.[42] However, the position of the Polish Supreme Court on the permissible degree to which legal interpretation may legitimately depart from the actual wording of a contract appears to differ from decision to decision, making this a contentious issue. There have been views to the effect that the genuine wording of the contract subordinated to the rules of language is a primary basis of interpretation, that interpretation should be grounded in objective factors (while taking account of the unanimous intent of the parties and the purpose of the contract),[43] and that where a statement is made in writing, the meaning of the statement is to be discerned by interpreting the text thereof,[44] but also to the effect that the subjective interpretation of a contract is the

36 See orders of the Supreme Court of February 11 and June 19, 2020, case Ref. Nos I UK 109/19 and I UK 246/19, reported in Wolters Kluwer's LEX, Nos 3221454 and 3213566. There are views in the legal literature that conversion is not a question of interpretation and thus not within the scope of Article 65 of the PolCC, which apparently does not impede the Supreme Court from applying it (according to Bławat, 2019).

37 Order of the Supreme Court of May 29, 2020, case Ref. No. IV CSK 524/19, reported in Wolters Kluwer's LEX, No. 3223580.

38 Judgment of the Supreme Court of June 30, 2020, case Ref. No. III CSK 357/17, reported in Wolters Kluwer's LEX, No. 3063106.

39 On this issue in the context of Polish law, see Strugała, 2020.

40 Order of the Supreme Court of July 8, 2020, case Ref. No. I CSK 553/19, reported in Wolters Kluwer's LEX, No. 3051728.

41 Judgment of the Supreme Court of November 18, 2016, case Ref. No. I CSK 802/15, reported in Wolters Kluwer's LEX, No. 2182269.

42 Judgment of the Supreme Court of July 20, 2020, case Ref. No. I CSK 131/19, reported in Wolters Kluwer's LEX, No. 3080390.

43 Judgment of the Supreme Court of April 27, 2021, case Ref. No. II CSKP 98/21, reported in Wolters Kluwer's LEX, No. 3229476.

44 Judgment of the Supreme Court of November 27, 2020, case Ref. No. III CSK 100/18, reported in Wolters Kluwer's LEX, No. 3115570.

primary means of interpretation, and that the genuine intent of the parties is binding.[45] The latter view adds that the text is not the only ground for interpretation of the statements contained therein. It is necessary to examine the intent of the parties, the purpose that they envisage (that purpose being required to be intended by one party and known to the other, even if it was not agreed among the parties), considering also the circumstances accompanying the making of a statement of intent. According to that view, even where there is a meaning of a statement of intent unequivocally established pursuant to the rules of language, the court is not free from taking account of other interpretative directives in the process of construction.[46] The middle ground to those views, occupied by most of the case law, appears to be that there is a combined approach to interpretation (*kombinowana metoda wykładni*),[47] with three 'levels' of interpreting a contract. The first of those is the literal wording of the contract, the second is making a finding on the contents of the statements of intent pursuant to Article 65 § 1 of the PolCC, and the third is the ascertainment of the meaning of the statements of intent thus made, while referring to the unanimous intent of the parties and the purpose of the contract.[48]

The purpose of the contract referred to in Article 65 § 2 of the PolCC is, according to the Supreme Court, set by the function of a given juridical act within the framework of the relations between the parties, and is at the same time individualized, relevant to a specific contract, and known to both parties. While such a purpose need not be expressly set out in the contract itself and may be discerned on the basis of circumstances accompanying the conclusion of an act in law, the 'purpose of a contract' may be defined as the intention of the parties as regards the legal effects that are to occur in relation to the conclusion of a contract.[49] Any statement of intent is subject to interpretation pursuant to the rules in Article 65 of the PolCC, including those that are

45 Order of the Supreme Court of May 19, 2020, case Ref. No. II PK 108/19, reported in Wolters Kluwer's LEX, No. 3161377. However, the statement of reasons thereto does admit that a written document is supposed to be interpreted on the basis of its text.

46 Judgment of the Supreme Court of February 24, 2021, case Ref. No. III CSKP 60/21, reported in Wolters Kluwer's LEX, No. 3123442.

47 On Article 65 of the PolCC, see Safjan in Pietrzykowski, 2020.

48 Judgment of the Supreme Court of April 29, 2016, case Ref. No. I CSK 306/15, reported in Wolters Kluwer's LEX, No. 2032362. It might be added here that, beyond the ambit of substantive civil law and from a procedural point of view, a civil court seised of a contractual dispute between the parties that have concluded a contract (which is not oral) is quite likely going to form conclusions on the matter based on the text of the contract, rather than attempting to embark on the exercise of examining probable or possible intent of the parties, due to the fact that a contract with discernible contents counts as evidence—specifically, evidence of the fact that a party has made such a statement [according to Article 245 of the Polish Code of Civil Procedure (*Kodeks postępowania cywilnego*)]. Thus, any party contesting the fact that they have made their statement as framed in the contract would have to prove it (according to Article 253 of the PolCC), making any significant departure from the genuine wording of the contract significantly unlikely, or at least not likely provable under normal circumstances.

49 Judgment of the Supreme Court of October 13, 2020, case Ref. No. II PK 12/19, reported in Wolters Kluwer's LEX, No. 3080094.

prima facie unequivocal and clear.[50] The 'purpose' referred to in Article 65 § 2 of the PolCC also mandates an assumption that the parties had some purpose in mind (that there was purposefulness in what they had done), and thus that they have behaved rationally when framing a contract.[51] Again, while it is not apparent from Article 65 §§ 1 and 2 of the PolCC, the Supreme Court held that the rule on purpose as a tool for interpretation applies not only to contracts, but also generally to all statements of intent—including unilateral statements of intent such as the grant of a mandate, i.e., a power of attorney (*pełnomocnictwo*).[52]

Furthermore, while such a detailed rule, which is at times referred to as the rule of *contra proferentem*,[53] plainly does not follow from the wording of Article 65 of the PolCC, § 2 of that text included, the Supreme Court also held that where one of the parties is the sole author of the wording of a contract, the interpretation of the terms and conditions of that contract should aim to find how those terms and conditions ought to be understood by the party who was not the author of the contract and who attempts with due diligence to carry out interpretation thereof, with that interpretation aimed at recreating the intent of their counterpart who was the author of the contract. Where that would be the case, and where there would be interpretative doubts that cannot be removed by the general directives on the interpretation of the statements of intent, those doubts ought to be resolved to the detriment of the party who framed the text giving rise to them, and that party ought to bear the risk of unclarity of the wording of the contract.[54] However, especially where there are business relations and highly detailed contracts whose contents are known to the parties involved, the interpretation of a contract may not obviate the genuinely expressed contents of a contract and lead to conclusions that are plainly contrary to the contract itself, and it also cannot serve to either supplement the contract with terms dispensed with by a party that would be advantageous to that party, or to remove any terms unfavorable thereof that were only noticed as such by that party *ex post facto*.[55] Article 65 of the PolCC (according to the case law) is fully applicable to contracts that are concluded in various forms, including that of a notarial deed (*akt notarialny*) drafted by a (civil law) notary (*notariusz*). According to the Supreme Court, a contract drafted in the form of a notarial deed should be subject to particularly detailed scrutiny as to

50 Judgment of the Supreme Court of January 21, 2021, case Ref. No. I CSKP 23/21, reported in Wolters Kluwer's LEX, No. 3108592.
51 Judgment of the Supreme Court of January 21, 2021, case Ref. No. III CSKP 148/21, reported in Wolters Kluwer's LEX, No. 3108582.
52 Judgment of the Supreme Court of November 25, 2016, case Ref. No. V CSK 83/16, reported in Wolters Kluwer's LEX, No. 2182666; resolution (*uchwała*) of the Supreme Court of September 11, 1997, case Ref. No. III CZP 39/97, reported in OSNC 1997/12/191.
53 For an analysis of this rule in the context of the the PolCC, see Gorzko, 2019.
54 Judgment of the Supreme Court of January 21, 2021, case Ref. No. III CSKP 80/21, reported in Wolters Kluwer's LEX, No. 3108594.
55 Judgment of the Supreme Court of July 15, 2021, case Ref. No. I CSKP 90/21, reported in Wolters Kluwer's LEX, No. 3207650.

whether it genuinely reflects the intent of the parties and not the attempts at framing it that originate from the notary.[56]

While the PolCC is silent on the general approach to interpretation of contracts beyond Article 65 of the PolCC, there are certain specific rules on interpretation either in the PolCC itself or in other statutes that might influence the application of Article 65 of the PolCC. In the main, those rules are aimed at protecting consumers, who are deemed to be the 'weaker' party to a contract. Pursuant to Article 385 § 2 of the PolCC, where there is a contractual form or template (*wzorzec umowny*) supplementing a contract (e.g., standard terms and conditions used by one of the parties), such a template should be framed unequivocally and in an understandable manner. Any terms and conditions not so framed are to be interpreted in favor of the consumer. In addition, where the terms and conditions of a contract concluded with a consumer include a power of the other party to make a binding interpretation of the contract, such a term is in case of doubt a prohibited term that does not bind the consumer.[57] Beyond the PolCC, the Act of October 7, 1999 (*Ustawa z dnia 7 października 1999 r. o języku polskim*) provides in Article 8 (1a) that where a contract concluded with a consumer or a contract concluded in the scope of employment law is framed in a bilingual or a multilingual version, the Polish version shall constitute the basis for interpreting such contracts when a person who provides work or a consumer is a citizen of the Republic of Poland. Beyond Polish law itself, where there is a link to European Union law (and there usually is one in the context of contractual disputes with consumers, pursuant to the applicable directives[58] or other EU norms), a court seised of a contractual dispute over a term that may be unfair should ensure the effectiveness of applicable EU law and the relevance of the case law of the CJEU, even *ex officio*.[59] In the context of contractual disputes with consumers this includes *inter alia* using interpretative techniques to safeguard the rights of those consumers.[60]

56 Judgment of the Supreme Court of December 10, 2019, case Ref. No. IV CSK 420/18, reported in Wolters Kluwer's LEX, No. 2772593.

57 PolCC, Article 385^3 § 9. There is a rule in Article 385^1 § 1 PolCC that the prohibition of unfair terms shall not apply to terms setting out the principal obligations to be performed by the parties, including price or remuneration, so long as they are worded clearly.

58 See e.g., Directive 2011/83/EU of the European Parliament and of the Council of October 25, 2011, on Consumer Rights, OJ L 304, 22.11.2011, pp. 64–88, as amended, and Council Directive 93/13/EEC of April 5, 1993, on Unfair Terms in Consumer Contracts, OJ L 095, 21.4.1993, p. 29, as amended.

59 Subject to the case law of the CJEU. See e.g., judgment of the Court (Third Chamber) of March 11, 2020, C-511/17 Györgyné Lintner v. UniCredit Bank Hungary Zrt., EU:C:2020:188, operative part.

60 See also resolution of the Supreme Court of July 13, 2006, case Ref. No. III SZP 3/06, reported in OSNP 2007/1-2/35, wherein the court notes that this duty of safeguarding the effectiveness of EU law in general and consumer directives in particular includes the duty of the court seised to break with the usual means of interpretation that come from the period before the pro-consumer community law rules came into force in the Polish legal system.

5. Romania

5.1. General context

The interpretation of a contract is the operation of determining the concrete and specific content of the terms of the contract by establishing the parties' intention. Interpretation gives meaning to contractual terms that require clarification.[61] The rules of interpretation laid down by law assist the judge, the parties, or third persons in determining the legal meaning of contractual provisions. If a contract is clear, it must simply be applied, including by the judge. Nevertheless, in many cases a contract contains obscure, ambiguous, or contradictory clauses.

Qualification of the contract is a form of interpretation that consists of placing the contract in one of the nominate contractual forms or establishing the innominate character of the contract, with all the consequences that follow from this operation.[62] The qualification of the contract determines the legal rules applicable to the contract. In the qualification of a contract, it is not the name given to the act by the parties that is decisive, but the essence of its content.[63]

The RouCC contains rules[64] for interpreting contracts that are discussed below. The rules of interpretation are grouped into general rules, such as the priority of the real will of the parties, the rule on systematic interpretation, and a set of rules of interpretation in the case of doubtful clauses. The RouCC also sets subsidiary rules of interpretation that are applicable when the general rules do not lead to a result and the contract remains unclear.

The rules of interpretation of the contract are sometimes described as advice or guidelines for interpretation, expressed by default rules. Another view, conversely, is that the rules of interpretation have a mandatory legal character and, in consequence, that disregard of these rules by the judge constitutes grounds for an appeal against the judgment. I consider that in the Romanian context, the second view is the correct one.[65]

5.2. General rules of contract interpretation

The general rules of contract interpretation apply with priority compared to subsidiary rules of interpretation. These techniques may be employed concurrently in order to achieve the intended result. These general rules of interpretation are as follows:[66]

— Literal interpretation: An analysis of the intention stated in terms of the contract is necessary, but in many cases, insufficient.

61 Roppo, 2011, p. 439.
62 Veress, 2020, p. 108.
63 Laday, 1928, p. 140.
64 RouCC, Articles 1266–1269.
65 Cosmovici, 1996, p. 158.
66 Veress, 2020, pp. 108–110.

— Priority given to the real (internal) will of the parties over literal interpretation: Contracts are interpreted according to the parties' concurring will and not according to the literal meaning of the terms. The RouCC enunciates two principles in this context: On the one hand, it is not the intention of one party that is to be sought, but the common intention of the contracting parties, which is sometimes illusory; on the other hand, the rule condemns literalism: The spirit must prevail over the letter.[67] If a person invokes a conflict between the stated will and the internal will of the parties, he must prove the real, internal will. In practice, there is a presumption of full correspondence between the declared will and the real, internal will of the parties, a presumption that can be overturned by the person who invokes the real will in his or her favor.

According to the case law, interpretation of the contract involves determining and qualifying its content and its clauses to establish the parties' rights and obligations. If the parties' will is clearly expressed, there is no question of interpretation, which is necessary only where there is a discrepancy between the real will and the declared will of the parties, where the terms are equivocal, confusing, or contradictory, or where the contract is incomplete. Therefore, if the common intention of the parties declared in the notarial deed was to conclude a contract of transfer of ownership in exchange for a price and also for maintenance of the sellers, the main obligation of the acquirer being to pay the price, the legal relationship is subject to the rules concerning contracts of sale.[68]

— Global interpretation: In determining the intention to contract, account will be taken, among other things, of the purpose of the contract, the negotiations between the parties, their established practices, and their conduct after the conclusion of the contract. Doubtful terms shall be interpreted considering, *inter alia,* the nature of the contract, the circumstances in which it was concluded, the interpretation previously given by the parties, the meaning generally given to the terms and expressions in question, and customary usage.
— Systematic interpretation: The terms of the contract are interpreted by reference to each other, each clause giving the meaning that follows from the contract as a whole. It has been—correctly—pointed out that interpretation cannot be achieved by splitting up the clauses of the juridical act but only by examining the juridical act in its entirety.[69]
— Functional interpretation: Clauses that may have more than one meaning are to be interpreted in the sense that best suits the nature and purpose of the contract. For example, the clause in a concession contract relating to the obligation of the concessionaire to hand over the concession free of all encumbrances refers to legal obligations affecting the land, for example, mortgage, liens,

67 Malaurie, Aynès and Stoffel-Munck, 2009, p. 414.
68 Supreme Court of Justice, Civil and Intellectual Property Section, Decision No. 1753/2003.
69 Cosmovici, 1996, p. 157.

easements, and superficies, but not to the removal of temporary constructions, trees, or underground pipes whose existence was known to the concessionaire when the contract was concluded.[70]

— Useful or conservative interpretation: Clauses are interpreted in the sense in which they produce effects and not in the sense that prevents any effects from being produced (*actus interpretandus est potius ut valeat quam ut pereat*). Interpretation should be in favor of the validity of the contract (*favor validatis*). A contract with doubtful terms must be interpreted in such a way that it does not contain contradictions and produces effects.[71]
— The contract only refers to what the parties have agreed to contract for, regardless how general the terms used may be. This criterion is restrictive: The contract covers only what the parties have actually agreed to include in the contract, even if the general terms used would justify a broader content.[72]
— Clauses intended to exemplify or remove any doubt as to the application of the contract to a particular case do not restrict its application to other cases not expressly provided for.

5.3. Subsidiary rules of interpretation

Subsidiary rules of interpretation apply only where the previously discussed methods of interpretation do not lead to a result, hence the subsidiary nature of these rules of interpretation. In practice, subsidiary rules of interpretation apply the principle *in dubio pro reo* in matters of interpretation.[73]

— If, after the application of the main rules of interpretation, the contract remains unclear, it is to be interpreted in favor of the person who is bound (in favor of the debtor). As an exception, in the RouCC, a special rule of interpretation is included in the norms regulating the sales contract: Doubtful terms in a contract of sale shall be interpreted in favor of the buyer, without prejudice to the rules applicable to consumer contracts and contracts of adhesion.[74]
— Stipulations in contracts of adhesion[75] are interpreted against the party who proposed them (*interpretatio contra stipulatorem* or *interpretatio contra proferentem*), i.e., they can be interpreted against both the creditor and the debtor, depending on which party imposes the terms of the contract of adhesion. Compared with the subsidiary rule of interpretation set out above, this rule is of a special nature and therefore has priority when interpreting a contract of

70 Supreme Court of Justice, Commercial Section, Decision No. 1467/2000, published in Dreptul No. 7/2001, p. 215.
71 Laday, 1928, p. 142.
72 Cosmovici, 1996, p. 157.
73 Veress, 2020, p. 111.
74 RouCC, Article 1671.
75 A contract is an adhesion contract when its essential terms are imposed or drafted by one of the parties for it or as a result of its instructions, the other party having only to accept them as such (RouCC, Article 1175).

> adhesion. Any obscure expression in the contract's text must be interpreted to the detriment of the party who drew up the document because that party was in a position to circumscribe its interest by clear and precise wording.[76]

These subsidiary rules of interpretation should not be confused with the rule of interpretation laid down in Article 77 of the Consumer Code (Law No 296 of 2004), which provides that in the event of doubt as to the interpretation of certain contractual terms, they are to be interpreted in favor of the consumer. Article 77 of the Consumer Code is a special, mandatory rule in comparison to the provisions of the RouCC and is also the main rule of interpretation for consumer contracts.

6. Serbia, Croatia, Slovenia

6.1. Serbia

Regarding the relation between the will theory and the declaration theory, Serbian law in the context of interpretation of contracts accepts the latter as the general rule. The SrbLO, namely, prescribes that the terms of a contract should be applied as they are formulated.[77] However, it further states that in the interpretation of ambiguous clauses of a contract one should not abide by the literal meaning of the words used, but rather that the common intention of the parties should be determined and the ambiguous terms construed in a meaning that is in accordance with the principles of the law of obligations established by the same statute.[78] The requirement to identify the common intention of the parties in relation to the meaning of the terms regarding which the parties have different interpretation should therefore be filtered through the principles of the law of obligations. This means that the ambiguous words used in the contract should be given a meaning that is supported by the principles of the law on obligations. In the literature this method is called the subjective-objective interpretation of contracts.[79]

The aforementioned are general rules of interpretation of contracts, since their scope of application comprises all contracts. In addition, there are two special rules applicable only to certain types of contracts.

First, the SrbLO prescribes that if a contract is concluded in a content printed out in advance or if it has been prepared and presented in any other way by one party to the counterparty, the ambiguous terms of the contract shall be interpreted to the benefit of the latter.[80] The common feature of both cases specified by the SrbLO is that the contract is drafted and proffered by one party.[81] This rule of the interpretation is

76 Predoviciu and Ney, 1925, p. 271.
77 SrbLO, Article 99 (1).
78 SrbLO, Article 99 (2).
79 Stojanović in Perović, 1995, p. 210.
80 SrbLO, Article 100.
81 Đurđević, 2013, p. 325.

also known as the rule of *contra proferentem* or *contra stipulatorem*, the aim of which is to protect the party having a weaker bargaining position in contrast to the other party with a stronger bargaining position, which thus proposed or drafted the contract.[82] In such case the ambiguous terms shall be construed against the interest of that party. This rule of the SrbLO has a general scope of application: It is applied to all contracts of adhesion, including commercial contracts concluded in this way.[83] A similar rule of *contra proferentem* is contained in the Consumer Protection Act,[84] the scope of application of which, as a matter of fact, is limited to consumer contracts.[85]

Second, the SrbLO offers guiding rules for the interpretation of a contract when the ambiguity affects the equivalence of mutual obligations. In this sense, it prescribes that the ambiguous terms of a gratuitous contract shall be given a meaning that is less onerous to the debtor, whereby in contracts for consideration ambiguous terms shall be construed in such a way as to establish the equivalence of mutual obligations.[86]

The SrbLO envisages a sort of statutory merger clause, titled a 'presumption of the completeness of the instrument.' It specifies that if a contract is concluded in a special form, either according to the requirements of a statute or according to the will of the parties, only the clauses contained in the document shall apply.[87] This rule, however, contains two exceptions that shall be explained in the chapter pertaining to the formal requisites of a contract.

In terms of the entity entitled to interpret the ambiguous terms of a contract, in order to discern their true meaning, it goes without saying that the task of interpretation (construction) is delegated to the courts. The interpretation of a contract is evidently necessary only when there is a dispute between the parties concerning the true meaning of a clause or a term in that contract. When the parties do not have differing understandings of contractual terms, the court may not impose on them the interpretation it sees fit. Neither can it imply a meaning that is not in line with the common intention of the parties.[88] The SrbLO, however, left open the possibility for the parties to designate a third party who will be called upon to construct the contract should the parties have different understanding of the meaning and effect of its terms.[89] The right of the parties to nominate a third party who will be tasked to dissolve their dispute on the meaning of certain terms of the contract is in line with the principle of freedom of contract and the requirement of the SrbLO that the parties ought to make efforts to settle all disputes by amicable means.[90] The parties are barred from initiating litigation or other dispute resolution procedures until the third

82 Stojanović in Perović, 1995, p. 211.
83 Karanikić Mirić, 2012, pp. 220–221.
84 SrbCPA, Article 41.
85 Đurđević, 2013, p. 332.
86 SrbLO, Article 101.
87 SrbLO, Article 71 (1).
88 Stojanović in Perović, 1995, p. 205.
89 SrbLO, Article 102 (1).
90 Stojanović in Perović, 1995, p. 213.

party gives an interpretation of the contract. If the third party refuses to interpret the contract, the parties may initiate a dispute resolution procedure without having obtained the third party's interpretation.[91]

6.2. Croatia

The HrvLO provides verbatim the same rules on the interpretation of contracts as the SrbLO. These rules, in the same wording, pertain to the application of a contract in its literal meaning, interpretation of ambiguous terms in general, interpretation of contracts of adhesion, interpretation of gratuitous contracts and contracts for consideration, and interpretation by a third party.[92] The newer Croatian legal literature also classifies these rules into general and special rules of interpretation of contract. In terms of the general rules, it qualifies the method of interpretation set out by the law as a subjective-objective method of interpretation.[93] The statutory rule on the presumption of the completeness of the document containing the parties' agreement from the former federal law has also been retained in the HrvLO.[94]

In a way similar to its Serbian counterpart, the Croatian Consumer Protection Act also contains a *contra proferentem* rule on behalf of the consumer,[95] with the exception of the procedures initiated for the protection of consumers' collective interests.[96]

6.3. Slovenia

As in the case of the HrvLO, the norms of the SvnCO pertinent to the rules on the interpretation of contracts have not diverged from the former federal law either. The rules on the interpretation of contracts in their literal meaning, the general rule pertaining to the interpretation of ambiguous terms of a contract, the special rules on the interpretation of contracts of adhesion and on the interpretation of gratuitous contracts and contracts for consideration, as well as on the interpretation of the contract by a third party, are the same, indeed verbatim, as in the SrbLO.[97] Likewise, the SvnCO also took over from the former federal law the statutory presumption of the completeness of the instrument in which the contract has been recorded, with the same two exceptions.[98]

Concerning the interpretation of ambiguous terms of the contract, the newer Slovenian legal literature points out that the instruction that they are to be construed in the light of the principles of the law of obligations has a normative function: The

91 SrbLO, Article 102 (2).
92 HrvLO, Articles 319–321.
93 Gorenc in Gorenc, 2014, pp. 509–510; Tomljenović et al. in Baaij, Macgregor and Cabrelli, 2020, 88.
94 HrvLO, Article 291 (1).
95 HrvCPA, Article 58 (1).
96 HrvCPA, Article 58 (2).
97 SvnCO, Articles 82–85.
98 SvnCO, Article 56 (1).

court should interpret the ambiguous terms in a way that enables a reasonable and fair distribution of contractual risks.[99]

As in Serbia and Croatia, the *contra proferentem* rule has also literally been transposed from Directive 93/13/EC into the Slovenian Consumer Protection Act.[100]

7. Slovakia

The rules for the interpretation of juridical acts as declarations of intent [*výklad právnych úkonov (prejavov vôle)*] in Slovakia are regulated under two separate norms: The SvkCommC regulates these rules for the area of commercial relations and the SvkCC for the area of other civil law relations. In both cases, it is true that if the expression of will (and the contract, as the case may be), is so vague and incomprehensible that its content cannot be discerned by way of interpretation, then the juridical act is invalid under § 37 (1) of the SvkCC.

As for non-commercial civil relations, according to § 35 (2) of the SvkCC, '[j]uridical acts expressed in words must be interpreted not only according to their linguistic expression, but especially also according to the will of the person who performed the juridical act, if this will does not conflict with the linguistic expression.' This wording could suggest that in civil law relations, the so-called will theory or subjective interpretation prevails, as the juridical act is to be interpreted especially according to the will of the person concluding it. On the other hand, the legal literature[101] is of the opinion that if it is an addressed juridical act, the good faith of the addressee must also be protected, which also follows from § 35 (3) of the SvkCC on the interpretation of implied juridical acts. This opinion also appears in the case law.[102] The correctness of this conclusion, in our opinion, is confirmed, e.g., by the legal regulation of mistake, which is based precisely on the discrepancy between the will itself and its manifestation, the declaration of intent. If the will theory were to apply limitlessly, then this regulation would be unnecessary.

However, it may be questioned whether the common intent of the parties should be taken into account if it differs from the linguistic expression, the very wording of the written contract. The case law is generally of the opinion that on the basis of § 35 (2) of the SvkCC, the wording must always be given priority, which follows from the formulation 'if this will does not conflict with the linguistic expression.' The case law thus finds that '[i]f an agreement included in the contract is so unambiguous that its wording does not allow for different interpretations, there is no reason for the court to permit evidence of the interpretation of the will of the persons acting,

99 Možina and Vlahek, 2019, p. 100.
100 SvnCPA, Article 22 (5).
101 Mitterpachová, 2019; Mazák, 2010, p. 121.
102 Supreme Court of the Slovak Republic, case No. 2 Cdo 281/2005, ZSP 54/2006.

even if one of the parties requests it.'[103] This conclusion is also taken over in the legal literature.[104]

The case law is also of the opinion that based on the interpretation according to § 35 (2) of the SvkCC, it is not possible to supplement, change, or even replace the declaration of intent already made.[105]

With regard to tacit acts, it must first be ascertained whether this is really a declaration of intent.[106] According to § 35 (1) of the SvkCC, although a juridical act may be performed other than explicitly, such implied behavior must not raise doubts as to what the person acting wanted to express, i.e., that he or she wanted to express his or her intent (will) and to perform the juridical act. Only when these doubts are not there can an interpretation of such an implied declaration of intent be made. The rules of this interpretation are set out in § 35 (3) of the SvkCC, according to which '[j]uridical acts expressed in ways other than in words shall be interpreted according to what the manner of their expression usually means. In doing so, the will of the person who performed the juridical act shall be taken into account and the good faith of the person to whom the juridical act was addressed shall be protected.'

The SvkCommC contains special rules of interpretation for the area of commercial relations. Pursuant to § 266 thereof, '[a] declaration of intent is interpreted according to the intention of the acting person if that intention was known or must have been known to the party to whom the declaration of intent is addressed' (1). If the declaration of intent cannot be interpreted in this way, 'it is interpreted according to the meaning that would normally be attached to it by a person in the position of the person the declaration of intent was addressed to' (2). Thus, for the purposes of (1), will theory shall apply only if the addressee knew or must have known the intention of the person acting. If he or she did not know it nor could have known it, then the rule of (2)—that is, the declaration theory (i.e., the theory that is based on the objectified meaning of the declaration of intent)—applies.

According to (3), in both cases, that is, the application of the will theory under (1) and the application of the declaration theory under (2), due account shall be taken of all circumstances relating to the declaration of intent, including pre-contractual negotiations and practices as well as the subsequent conduct of the parties, insofar as the nature of the case allows it.

The above-mentioned commercial law rules of interpretation are understood in the literature[107] in such a way that the meaning of the declaration of intent determined on the basis of these interpretation rules takes precedence over the linguistic wording of the declaration.

Section 266 of the SvkCommC also expressly provides that '[a] declaration of intent that contains a term that allows for a different interpretation shall, in case of doubt,

103 Supreme Court of the Slovak Republic, case No. 4 Obo 66/2002, ZSP 81/2003.
104 Fekete, 2018.
105 Supreme Court of the Slovak Republic, case No. 4 Cdo 9/2008.
106 R 88/1954 civil.
107 Ovečková, 2017.

be interpreted to the detriment of the party who was the first to use that term in the proceedings.' This rule of interpretation is not explicitly established in the SvkCC, but the literature[108] and also case law apply it to non-commercial relations as well.[109] The SvkCommC further stipulates that '[t]erms used in business relations shall be interpreted in accordance with the meaning that is generally attached to them in such relations.'[110]

In the area of consumer relations, the interpretation rule states that '[i]n case of doubt about the content of consumer contracts, the interpretation that is more favorable for the consumer applies.'[111]

In addition to the above-mentioned rules and even without explicit regulation, some other rules of interpretation are generally allowed, such as interpretation in favor of the validity of the juridical act (*in favor negotii/contractus*)[112] or interpretation in favor of the debtor, i.e., interpretation that the debtor wanted to commit himself or herself to less, and not to more (*in favor libertatis/debitoris*).[113]

8. Concluding remarks

8.1. Consent and interpretation

Interpretation is the process of establishing the content of the contract. The content of the contract determines the rights and obligations as extant between the parties and—as it is stressed in the Romanian report—is the basis of the qualification of the contract for public authorities including courts. It may seem to be self-evident today that from this point of view the content of the contract should be the decisive factor rather than what the contract is called or how it is qualified by the parties. This was, however, the result of development of law as it has been presented in the report on the law of the Czech Republic.

The issue arose as to whether the rules regarding interpretation in the Civil Codes are of a mandatory or a non-mandatory nature. This question has been explicitly raised by the Romanian literature and considered in the Czech report as well. As to the general rules of interpretation, it seems clear that such rules are of a mandatory nature. The case of merger clauses is a bit more difficult, however. Stipulating merger clauses is accepted as valid and enforceable in all the relevant jurisdictions. Merger clauses are addressed by specific statutory rules in Serbian, Croatian, Slovenian, and Hungarian law. Enforceability of merger clauses seems to be clear to the extent that the courts should not imply the communication of the parties as the part of the contract if the parties agreed that it is not the part of their contract. However, such

108 Mitterpachová, 2019; Fekete, 2018.
109 Constitutional Court of the Slovak Republic, case No. I. ÚS 243/07, ZSP 62/2008.
110 SvkCommC § 266 (2) *in fine*.
111 SvkCommC § 54 (2) and § 266 (5).
112 Mitterpachová, 2019; Fekete, 2018; Ovečková, 2017.
113 Mitterpachová, 2019.

clauses do not seem to prevent the court from referring to the communications of the parties while interpreting the contract in the Czech Republic and in Hungary.

Although it has been emphasized in the report for Serbia, Croatia, and Slovenia, the principles of interpretation elaborated in other country reports also support as a general conclusion that courts are prevented from giving an interpretation to the contract that would not comply with the understanding of any of the parties. That is, the court shall not 'hand down' a contract to the parties that neither of them ever desired to be bound by.

As to smart contracts, there are neither specific rules nor doctrines applied in the relevant jurisdictions.

8.2. Will, declaration, and consent

The relevant jurisdictions try to strike a balance between will theory and the declaration theory. This means that the will of the parties and their mutual understanding of their juridical acts are relevant when establishing the content of the contract. Although neither will theory nor declaration theory becomes an exclusionary regime, they are to be seen as the two extreme ends of a spectrum on which each legal system positions itself. The position of Hungarian law on this spectrum is closer to the declaration theory. The other relevant jurisdictions put greater emphasis rather on seeking the will of the parties while protecting the reliance interests of the addressee by the general principles of contract law.

At least in theory, establishing the 'meeting of the minds' via seeking the parties' actual will seems to be the dominant approach. There are, however, complex tests, elaborated on different levels, applied for interpretation already in this general context. The most sophisticated approach seems to be the Romanian one, where there are eight principal rules of interpretation: literal interpretation; priority to the actual will of the parties over literal interpretation; relevance of further factors like practice or customs as between the parties, the purpose of the contract, post-contractual conduct of the parties, and negotiations; systemic interpretation; functional interpretation; useful or conservative interpretation, which is in favor of giving legal effect to the contract (*favor validatis*); and that the contract covers only what the parties agreed for and the interpretation shall not go beyond the context of the contract. Also, Polish law gives priority to the intent of the parties over literal interpretation. In a way similar to Romanian law, in the context of Polish law there are distinct levels or tiers of interpretation: The first tier is the literal wording, the second is the intent of the parties, and the third is the meaning of the statements of the parties. As a further factor, the purpose of the contract is also relevant. The principle of prioritizing the interpretation that keeps the contract valid also holds for the Polish law.

According to Czech law, as a first step, the actual will of the parties shall be identified, but only insofar as the addressee was or should have been aware of this actual will. This is to be amended by the requirement of reasonable interpretation, which implies considering the purpose of the contract as well as its consistency. The *favor negotii* doctrine also prevails in Czech law. That is, if there are two alternative

interpretations but one of them results in invalidity, the interpretation that salvages the contract as a valid agreement is to be chosen. Interpretation shall also be driven by the principle of fairness. That is, it is to be assumed that the parties mutually had regard to their interests. Systemic interpretation is also a relevant element of the doctrines addressing interpretation of contract in Czech law and courts also take into account all the relevant communications of the parties. The will theory or subjective interpretation is the main method of interpretation in the law of Slovakia, which is to be applied with regard to the principle of good faith. Thus, primarily the common intent of the parties is to be established, and if this does not comply with the linguistic expression, then the established will of the parties prevails. In Slovakian doctrines of interpretation, the *favor negotii* is also applied. The Serbian, Croatian, and Slovenian laws in principle accept the theory of declaration as a general rule, since they proclaim that the contractual stipulations shall be performed as they are formulated, but the theory of will is also of great legal relevance. Insofar as the content of the communications between the parties is unclear, the common intent of the parties should be established without being bound to the literal meaning of the words used in the contract. If there is still ambiguity remaining, the content that complies with the general principles of the law of obligations should be established (the so-called 'subjective-objective' interpretation). Hungarian law, on the other hand, focuses on how the addressee should have understood the expression of the will of the other party. With this solution, Hungarian law shifts to the declaration theory by putting an emphasis on the protection of the legitimate reliance of the addressee on the promise of the other party who expressed its contracting will.

8.3. Specific rules and doctrines

Beyond the general rules, there are supplementary or subsidiary rules and doctrines stemming from statutory law, but also doctrines developed in the literature. The *contra proferentem* rule provided for consumer contracts by the Unfair Contract Terms Directive is a general doctrine in all of the relevant jurisdictions that is applicable to business-to-business relations as well, if the contract had been concluded on the basis of standard contract terms. In some of the relevant jurisdictions (Romania, Slovakia, Serbia, Croatia, Slovenia) there is a principle that in case of ambiguity, the contract shall be interpreted in favor of the debtor. In other jurisdictions a similar principle is (also, as the case may be) applied for the benefit of consumers (Poland, Romania, Serbia, Croatia, Slovenia).

8.4. Gap-filling by interpretation

The internal logic of private law should support the idea that general clauses are applicable in contractual relationships as well and that they could be the source of contractual rights and obligations. It seems, however, that courts in Eastern Europe are quite reluctant to use general clauses to amend the contract or to fill the gaps in the agreement of the parties. This gap-filling mechanism could, however, be supported by legal literature (e.g., in the Czech Republic).

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| Chapter V |

Mistake, Deceit, Duress, *Laesio Enormis*

1. General considerations

One of the preconditions of the conclusion of a contract is that the parties' contractual intent is formed freely. The free formation of contractual intent on the one hand means that the parties have a proper understanding of the facts relevant for the conclusion of the contract at the time when it is being entered into. In some cases, the contracting party is not aware that his or her comprehension of the facts underlying the conclusion of the contract may be flawed. Such a misapprehension may be a result of his or her own failure to ascertain the true facts, but it may also be caused by a counterparty or a third party, with the result of the party agreeing to terms that he or she otherwise would not have had agreed to. The former situation is called a mistake, the latter deceit. On the other hand, illicit influence on the contracting party may be exercised in order to compel him or her to conclude a contract under terms he or she would not have agreed to otherwise. These situations are usually referred to as duress, whereby the contracting party is perfectly aware that the declaration of his or her consent is not in line with his or her true intention, but, overpowered by fear, he or she chooses to conclude a contract that otherwise would not have been concluded or that would have been concluded under different terms. Duress vitiates a contract because, so to say, the contracting party must choose 'between two evils': He or she needs to opt between accepting a disadvantageous

Dudás, A., Hulmák, M., Zimnioková, M., Menyhárd, A., Stec, P., Veress, E., Hlušák, M. (2022) 'Mistake, Deceit, Duress, *Laesio Enormis*' in Veress, E. (ed.) *Contract Law in East Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 137–173. https://doi.org/10.54171/2022.ev.cliece_chapter5

offer and the risk of declining it.[1] Despite these differences, the common denominator of mistake, deceit, and duress is that they all compromise the process of free formation of contractual intent.

Beside mistake, deceit, and duress, this chapter also deals with the issue of validity of contracts in which there is a meaningful inequality between the values of the performance and the counter-performance at the time of their conclusion. Due to its rather different names and legal attributes in different legal orders the author proposes using the Latin expression *laesio enormis* as a common legal expression for this situation. Since *laesio enormis* is in many European jurisdictions, in one way or the other, founded on the mistake of a contracting party regarding the true value of his or her performance or the counterparty's counter-performance, it seems logical to treat it in this chapter.

The legal notion of mistake is based on a false assumption by at least one of the contracting parties about the facts and circumstances usually taken into account when one deliberates whether to conclude a certain contract at all, and if so, under what terms. However, not all assumptions and expectations of the parties that later prove to be unfounded constitute mistake in the legal sense. Mistake exists if the misapprehension relates to a circumstance qualified as essential, though legal orders differ on defining what 'essential' actually means. In this respect the question whether a mistaken motive is considered essential and triggers the legal consequence of voidability of contract gains special relevance. Beside essentiality, it is usually required that the mistaken party would have not concluded the contract had he or she been aware of the true circumstances.[2] However, the mistaken party's right to avoid the contract is in most legal orders negligent-dependent: He or she may not avoid the contract for just any misapprehension, but only for those that had occurred in spite of the fact that the he or she acted with due diligence in ascertaining the true state of circumstances. In this sense, the general rule is that mistake must be inexcusable.[3] Finally, since the counterparty regularly acts in good faith, the mistaken party is usually required to compensate him or her for the damage caused by the avoidance of the contract.

Some legal orders introduce additional conditions for avoiding the contract on grounds of mistake. For instance, in addition to the requirement of being essential, the mistake may have to be recognizable to the counterparty; under the circumstances of the case, it must have been obvious to the counterparty that the party entered into the contract under a misapprehension of essential facts.[4] A special case of mistake is present when the counterparty caused the mistake, though not deliberately, but simply negligently or even in perfect innocence,[5] by proffering false or incomplete information to the party, thereby inadvertently inducing the later misapprehension. The idea that mistake is only legally relevant when induced by the other party gained foothold especially in English law, embodied in the notion of misrepresentation. English law,

1 Kötz, 2017, p. 185.
2 (Von) Bar and Clive, 2009, p. 465.
3 (Von) Bar and Clive, 2009, p. 464.
4 Kötz, 2017, p. 165.
5 Kötz, 2017, p. 164.

namely, had no general rules on avoiding contracts for mistake well into the nineteenth century.[6] A contract could have been avoided only if the other party made untrue statements relying on which the other party entered into the contract. Common law was far less influenced by the intention theory than was civil law, hence the accent is more on causing the mistake than on the mistake caused.[7] The requirement of recognizability in some civil law jurisdictions and the notion of misrepresentation in common law blurs the dividing line between mistake and deceit to some extent.

Mistake, however, exists only when the misapprehension of facts by either or both parties is not so profound as to hinder the meeting of minds of the parties altogether. Even though a mistaken party erred concerning some facts, a minimal consent has to be reached in order to have a contract concluded, which the mistaken party may avoid if the mistake is essential. If, however, the mistake is so profound that it vitiates consent, the parties are in a misunderstanding and the contract does not emerge at all. Such contract is deemed to be non-existent, and consequently the rules of invalidity (usually in the form of avoidance being permitted) apply. Some legal orders explicitly regulate misunderstanding as a cause of non-existence or invalidity of contract, while others do not, but the legal doctrine or the case law reaches a similar conclusion.

Deceit is a mistake that is induced or caused, a mistake qualified by the imputable conduct of another person. That person may be the counterparty or a third party. Since here the mistake is not self-induced but caused by another person, legal orders usually allow the avoidance of the contract even when the mistake is not essential.[8] Still, it must be substantial, meaning that the mistaken party would not have concluded the contract or would have done so under different terms had he or she been aware of the true circumstances. If the deceit is caused by a third party, in most jurisdictions the contract may be avoided only if the counterparty knew or should have been aware of the deceit caused by a third party and therefore acted in bad faith.[9] If the counterparty acted in good faith, the contract prevails, while the mistaken party has a claim for damages against the third party.

A key question is whether the counterparty's inaction or silence may represent deceit. The majority of legal systems admits that it may, if there was a pre-contractual duty of the counterparty to disclose essential information.[10] Such a duty of disclosure may stem from statutory regulations or from the principle of good faith and fair dealing. Conversely, English law traditionally does not accept a general duty of pre-contractual disclosure.[11]

Duress is the most serious assault on the parties' freedom of contract. It excludes the free formation of the contractual intent of the party under its influence.[12] Thus most

6 Zweigert and Kötz, 1998, p. 419.
7 Zweigert and Kötz, 1998, p. 420.
8 (Von) Bar and Clive, 2009, p. 495.
9 Kötz, 2017, p. 182.
10 Kötz, 2017, p. 176.
11 Treitel and Peel, 2011, pp. 9–123.
12 (Von) Bar and Clive, 2009, p. 503.

jurisdictions allow the avoidance of a contract on the grounds of duress, regardless of whether it came from the counterparty or from a third party.[13] The act by which duress is caused need not necessarily be unlawful. In most European jurisdictions the requirements of duress are met if the threat is caused by lawful but illegitimate means.[14] The laws of some countries explicitly distinguish a threat (*vis compulsiva*) from coercion (*vis absoluta*), whereby the latter regularly triggers non-existence of the contract.[15]

There are two possible approaches to the legal definition of *laesio enormis*. One is to construe it as a subtype of mistake of either party concerning the true value of his or her performance or the counter-performance. The other considers the requirement of equality between the value of performance and counter-performance an issue of public interest. The legal consequence of the former view is the right of the aggrieved party to avoid the contract, more precisely a special case of mistake applicable to contracts concluded for consideration. The latter, however, considers even non-intentional deviation from the requirement of approximate equality between the values of performance and counter-performance an issue of public order, and hence its infringement leads to a special form of nullity of the contract. The other dimension of *laesio enormis* is related to the criteria whereby it is to be determined whether the contract infringes the principle of equivalence between performance and counter-performance[16]—that is, when is the disproportion significant enough to justify the intervention of the law in the consent of the parties? In some legal systems, for instance in Austria and France, the inequality between performance and counter-performance becomes legally relevant when it oversteps a precise mathematical threshold: in Austria 1/2, in France 7/12.[17] Traditionally this approach is called *laesio ultra dimidium pars*. The other approach does not rely on any precise mathematic threshold but rather on a legal standard allowing the judge to assess the impact and relevance of the inequality in the light of circumstances of the given case. This approach is usually known as *laesio enormis* (in the strict sense).[18]

2. The Czech Republic

2.1. Mistake

Mistake arises when there is a discrepancy between the subjective image formed by a party and objective reality.[19] If both parties knew of each other's true intent, this true intent is relevant—it is not a mistake at all, because *falsa demonstratio non*

13 Kötz, 2017, p. 189.
14 (Von) Bar and Clive, 2009, p. 505.
15 Zimmermann, 1996, pp. 660–661.
16 Zweigert and Kötz, 1998, p. 329.
17 (Von) Bar and Clive, 2009, p. 513.
18 Zimmermann, 1996, p. 269.
19 Melzer in Melzer and Tégl, 2014, p. 755.

nocet.[20] For a mistake to be legally relevant, additional preconditions must be met. The party must have been misled by the counterparty, which holds if his mistake originates in the activities of that counterparty. It is not significant what the activity is or what its merit is, nor is it important whether the counterparty was aware that its actions were the cause of the party's mistake (but if the party's mistake occurred as a result of trickery, it will constitute deceit under § 584 (2) of the CzeCC—see below). The party's inaction can also be considered a conduct by which the counterparty caused the former's mistake if the party was obliged to behave in such manner in connection with performance.[21]

Moreover, mistake must be excusable. A mistake is not excusable if it is caused mainly by the party himself or herself, either by participation in a common mistake or by not acting with the ordinary care and caution that may be required by the circumstances of the case.[22]

Czech law explicitly regulates essential and non-essential mistake, and special provisions cover deceit and mistake induced by the third party. The CzeCC also recognizes so-called mistake in transmission (*omyl v přenosu*). Provisions on mistake also apply to cases of expression of will altered due to the means used by the person who performed the act or other circumstances having occurred during transmission or carriage.[23]

Special regulations on mistake may be found in the case of settlement. The validity of a settlement shall remain unaffected by a mistake in what was contentious or doubtful between the parties unless a party employed trickery to cause the mistake.[24]

Mistake can take place in the writing or in any numbers; however, such mistake does not prejudice the validity of a juridical act if its meaning is undoubted.[25]

2.1.1. Essential mistake

Essential mistake[26] concerns a decisive circumstance or a secondary circumstance that the parties have declared decisive.[27]

The decisive circumstance concerns the so-called *essentialia negotii* of the juridical act. The term decisive circumstance includes a mistake in the type of juridical act (*error in negotio*), a mistake in the identity of the object (*error in corpore*), a mistake in the decisive characteristic of the object (*error in qualitate*), and a mistake in the addressee (*error in personam*).

20 CzeCC, § 555 (1).
21 Handlar in Lavický et al., 2014, p. 2105.
22 Handlar in Lavický et al., 2014, p. 2107.
23 CzeCC, § 571.
24 CzeCC, § 1904.
25 CzeCC, § 578.
26 CzeCC, § 583.
27 Melzer in Melzer and Tégl, 2014, pp. 757–758.

A secondary circumstance concerns mainly the characteristics of objects and persons that do not belong in the decisive circumstance category, and also every arrangement that directly or indirectly regulates the duty to perform.

To qualify a mistake as essential, the assumption is that knowing the true state of affairs, the juridical act would not have been concluded at all.

A special case is the so-called double-sided mistake where both parties are mistaken. In such a case, it is necessary to examine whether it is a mere *falsa demonstratio non nocet*, or whether the juridical act exists at all (if there is even a meeting of minds between the parties).

The consequence of an essential mistake is that the juridical act is voidable[28] (*relativní neplatnost*). Also, a party who has caused a juridical act to be invalid shall compensate the other party for the resulting damage.[29]

2.1.2. Non-essential mistake

A non-essential mistake should be understood as a mistake in a secondary circumstance that neither party has declared decisive.[30] The consequence of a non-essential mistake is merely a right to claim appropriate compensation from the person who caused that mistake.[31] It is important to distinguish between an appropriate compensation and a compensation for damages.

A right to appropriate compensation constitutes a right of the misled participant to obtain a certain performance that would compensate him or her for the loss caused by the fact that he or she acted in mistake. The nature and amount of such compensation should therefore be based on the subject matter of the juridical act and compensate the difference between what was agreed and what would probably have been agreed had the mistake not occurred.[32] Also, the right to appropriate compensation is not a right arising from a defective performance.

2.1.3. Mistake in the motive

The motive (*causa proxima*) is the idea that was decisive for the party when making a certain expression of will.[33]

Generally, a mistake pertaining to the motive is not legally relevant. There are, however, a few exceptions: When mistake in the motive results from deceit, when the motive has been explicitly made part of a juridical act, or when the mistake is an *error in personam* or such mistake is a mistake by a testator.[34]

28 CzeCC, § 583 and § 586.
29 CzeCC, § 579 (2).
30 CzeCC, § 584 (1).
31 CzeCC, § 584 (1).
32 Handlar in Lavický et al., 2014, p. 2114.
33 Melzer in Melzer and Tégl, 2014, p. 763.
34 CzeCC, § 1531. Melzer in Melzer and Tégl, 2014, p. 764.

2.2. Deceit

Deceit is a special kind of mistake regulated under § 584 (2) of the CzeCC. Deceit is the situation in which the other participant deliberately misrepresents reality by presenting something nonexistent as existing, by presenting something that exists as nonexistent, or by disguising an existing fact.[35] Such an induced mistake is legally relevant even if it concerns a secondary circumstance or is a mistake in the motive. However, there must be a causal link between the deceit and the assessed juridical act.

Such mistake occurs if it has been actively caused by the other party or if an already existing mistake is consciously exploited by the other party.[36] Whether a mistake is excusable or not should not be relevant here.[37]

The consequence of a deceit is that the juridical act is voidable.[38] A person who used deceit must always compensate the resulting harm.[39]

A mistake can be also induced by a third party. This is not the case when a person acts on behalf of the party in connection with the conclusion of a juridical act (e.g., as a representative).[40]

Where a party acted as a result of a mistake induced by a third party, the juridical act concluded is valid. However, if the counterparty with respect to whom the juridical act was made was involved in the act of the third party, or knew or at least must have known thereof, such a counterparty is also considered the originator of the mistake.[41]

Some authors believe that knowledge of a third party's action is sufficient for the counterparty to be considered to have misled the party. There is no need for the counterparty to know that the party was misled.[42] Others disagree, saying that the counterparty must know not only about the third party's action but also about the fact that the party was misled.[43]

2.3. Duress

Duress can take two forms—coercion (*vis absoluta*) or threat (*vis compulsiva*).
Coercion is characterized by the use of physical force to enforce certain juridical actions. In such cases, the juridical act is non-existent, as the will of the acting party is entirely absent.[44]

Threat is a situation in which a person is forced to conclude a juridical act under a threat of physical or mental violence inducing a justified concern given the relevance and likelihood of danger as well as the personal characteristics of the person being

35 Supreme Court Ref. No. 26 Cdo 2828/2000.
36 Melzer in Melzer and Tégl, 2014, p. 768.
37 Handlar in Lavický et al., 2014, p. 2115.
38 CzeCC, § 584 (2). Melzer in Melzer and Tégl, 2014, p. 769; Beran in Petrov et al., 2019, p. 648; Handlar in Lavický et al., 2014, p. 2115.
39 CzeCC, § 587 (2).
40 Handlar in Lavický et al., 2014, p. 2117.
41 CzeCC, § 585.
42 Beran in Petrov et al., 2019, p. 648.
43 Melzer in Melzer and Tégl, 2014, p. 767; Handlar in Lavický et al., 2014, p. 2118.
44 CzeCC, § 551.

threatened.[45] In these cases the conceptual characteristics of juridical acts are fulfilled, therefore the juridical act exists. The will of the party, however, is vitiated.

A threat can be aimed not only toward a party, but also a third party if there is a connection between him and the acting party.

A threat is wrongful when:

— the threatened conduct is itself unlawful,
— an unlawful purpose is pursued by the threat (even if the threatened conduct itself is lawful),
— there is an illegal relationship between the purpose and means used to achieve it.[46]

The wording of § 587 of the CzeCC does not distinguish according to whom the threat of physical or mental violence issues from, so it may also originate from third parties. However, the consequences may differ according to whether the counterparty must have known that the party's will was affected or not. According to other authors, in the case of a threat by a third party, it is not decisive whether the counterparty knew about the threat.[47]

There must be a causal link between the threat and the assessed juridical act.

While in the case of coercion, the juridical act is non-existent,[48] in the case of threat it is only voidable.[49] A person who issued the threat shall always compensate the resulting harm.[50]

2.4. Laesio enormis

The situation in which the parties undertake to provide each other with a mutual performance and the performance provided by one party is grossly disproportionate to the performance provided by the counterparty, and where the disproportion results from a fact that the other party knew or was required to know, is called *laesio enormis*.

Laesio enormis cannot be applied to cases of acquisition at a commodity exchange, in the course of trading with an investment instrument under another statute, at an auction or in a manner equivalent to a public auction, or to cases of betting or gaming, settlement, or novation, if they were concluded fairly. Applicability to aleatory contracts is excluded as well.[51]

Also, it is not applicable if the reason for the disproportion between mutual performances is based on a special relationship between the parties, especially if the aggrieved party intended to perform partly for consideration and partly gratuitously,

45 CzeCC, § 587.
46 Melzer in Melzer and Tégl, 2014, p. 780.
47 Handlar in Lavický et al., 2022, p. 1893; Melzer in Melzer and Tégl, 2014, p. 782; Beran in Petrov et al., 2019, 652.
48 CzeCC, § 551.
49 CzeCC, § 586 and § 587.
50 CzeCC, § 587 (2).
51 CzeCC, § 1793 (2) and § 2757.

or where the extent of the disproportion can no longer be determined,[52] or the aggrieved party has expressly waived the right to invoke *laesio enormis* and declared that it accepted the performance at an exceptional price based on its sentimental value, or consented to a disproportionate price although he or she was, or must have been aware, of the actual value of the performance.[53]

Regarding the disproportion, it must be a gross disproportion, unequivocal and obvious to all. As the CzeCC does not state any specific threshold, it is necessary to assess every single case differently. However, the general rule (considering historical and foreign regulation as well as the special regulation in § 2185 (1) of the CzeCC) is that *laesio enormis* exists if the performance is at least twice as valuable as the consideration received in return.

The condition of gross disproportion needs to be assessed using as a reference date the time the contract was concluded based on the usual price applicable at that time. In the case of a pre-contract, the condition of disproportion is assessed considering the time of the conclusion of the pre-contract, not the time of conclusion of the future contract.[54]

In the case of *laesio enormis*, the aggrieved party may request the court to cancel the contract. The counterparty may choose (*alternativa facultas*) to uphold the contract by supplementing the performance by an amount of money to restore the equivalence, having regard to the usual price at the time and place at which the contract was concluded.[55] An entrepreneur who concluded a contract in the course of his business is not entitled to request that the contract be cancelled.[56]

The aggrieved party's unilateral appeal by the other party is not sufficient; it is necessary to seek protection through the court proceeding. The contract is then cancelled with *ex tunc* effect. The right to request that the contract be cancelled and the original state restored is extinguished if not asserted within one year from concluding the contract.[57]

3. Hungary

Mistake,[58] deceit,[59] duress,[60] and *laesio enormis*[61] address defects of consent and are covered by some rather flexible rules in Hungarian contract law. They are built upon open concepts and allow a wide freedom of maneuver to the judge for interpretation

52 CzeCC, § 1794 (1).
53 CzeCC, § 1794 (2).
54 Janoušek in Petrov et al., 2019, p. 1868.
55 CzeCC, § 1793 (1).
56 CzeCC, § 1797.
57 CzeCC, § 1795.
58 HunCC, § 6:90.
59 HunCC, § 6:91.
60 HunCC, § 6:91.
61 HunCC, § 6:98.

and for allocating contractual risks between the parties. Rules covering enforceability of the contract due to mistake in Hungarian contract law do not simply protect the free will of the party but also allocate the risks of information asymmetry. Duty of disclosure as a positive obligation is balanced with the required standard of conduct imposed on the aggrieved party. Thus, failure to disclose relevant circumstances may establish misrepresentation. The aggrieved party, however, also has an obligation to take the steps that are generally expected in order to acquire the relevant information under the given circumstances. The party who should have recognized his or her mistake or undertook the risk of being mistaken shall not be able to avoid the contract. Thus, the open rule of duty of disclosure is confronted with the open rule of required standard of conduct, resulting in the allocation of any risk posed by asymmetric information, by way of the judgment. As a result, mistakes constitute grounds for voidability only when they are excusable.

The difference between a mistake and misrepresentation (or deceit) in Hungarian contract law is a very slight one. The courts quite often fail to distinguish between them and address mistake and deceit as overlapping categories.[62] Both mistake and deceit are assumed to be caused by the other party, either actively or by an omission of duty of disclosure. Voidability as a legal consequence is also the same. The difference is that while deceit is a fraudulent conduct, mistake does not presuppose that the counterparty caused the information asymmetry deliberately.[63] Moreover, in case of deceit, the aggrieved party shall be entitled to avoid the contract even if he or she was negligent in controlling the information provided by the other party.[64] Thus, excusability is not a precondition of voidability in case of deceit. If, however, the aggrieved party relied upon the statement of the counterparty without any grounds, he or she is prevented from avoiding the contract due to deceit.[65]

Mistake makes the contract voidable if it is related to a substantial circumstance at the time of concluding the contract, provided that the mistake was caused or could have been recognized by the other party. The circumstances that may be relevant or substantial for a mistake are not specified. Thus, all kinds of qualities of the object of the contract, the parties, or circumstances of the case may make the contract voidable on this ground. The mistake concerns a substantial circumstance such that the party would not have concluded the contract or would have concluded the contract with a different content had he or she been aware of it. If, upon concluding the contract, the parties shared the same erroneous assumption on a substantial issue, either of them may avoid the contract.

62 Supreme Court, Pfv. VI. 22.708/1997/7; Supreme Court, Pfv. V. 21.839/1995/2. Menyhárd, 2000, p. 186.

63 This difference was relevant in the regime of the HunCC (1959) insofar as in the case of deceit the value being returned could have been awarded to the state. In absence of such specific sanction, in the HunCC (2013) the distinction between mistake and deceit is of a far lesser importance in practice.

64 Supreme Court, Legf. Bír. Pf.I. 20.047/1971; Supreme Court, Gfv. IV. 32.297/1996/4.

65 Supreme Court, Gfv. IV. 32.297/1996/4.

In this system, deceit is a mistake capable of influencing the party's contractual will that was caused deliberately. If the party was deliberately misled or maintained in his or her mistake by the other party, he or she has the right to avoid the contract. If deceit was committed by a third party, this may also render the contract voidable, provided that one of the parties was or should have been aware of it.

If the parties settled their dispute arising from an obligation by mutual concession, or if one of the parties unilaterally concedes some of his claim, such a settlement cannot be avoided on the grounds of mistake concerning a circumstance that was disputed between the parties or that they considered uncertain.[66] A gratuitous contract shall be voidable on the grounds of mistake (erroneous assumption), misrepresentation by a third party, or duress, if the other contracting party was unable to recognize these circumstances.[67]

If the party has been induced to conclude a contract by the other party by way of duress, he or she may avoid the contract. Duress is defined as an unlawful threat, where unlawfulness is an open concept, drawing the limits of permitted (tolerated) pressure on the other party. The open character of this solution brings this concept closer to the legal nature of general clauses: It is to be decided by the court whether the pressure falls within the limits of lawful conduct or goes beyond it. In this way the court provides the content of the legal norm. Yielding to duress must be done in order to prevent financial, moral, or physical harm against the aggrieved party or his or her close relative[68] in the case of failure to conclude the contract demanded by the other party. Duress results in voidability only if it was capable of influencing the consent of the aggrieved party; a causal link is required between the anticipated harm and the decision of the aggrieved party. If the aggrieved party concluded the contract in a state of necessity, such a state is a ground for establishing duress only[69] if it was created by the other party or if it was created by a third person and the other party was or should have been aware of it.

Commercial pressure does not establish duress, although the boundaries of duress and commercial pressure are somewhat unclear. Duress results in voidability only if it exceeds the limits of accepted commercial pressure. For example, putting the party under pressure through a potential prosecution constitutes duress if its basis is a crime committed by the party or by one of his or her relatives, but threatening a party with a civil lawsuit constitutes lawful commercial pressure if it is a legal step for enforcing a claim against the party. If duress was committed by a third party against an aggrieved party, it makes the contract voidable if the counterparty knew or ought to have known of it. The concept of economic duress has not been developed in Hungarian contract law theory or practice so far.

Control of the value of performances via *laesio enormis* is addressed on a two-line track in Hungarian contract law. One of these tracks is the extended concept of usury,

66 HunCC, § 6:27.
67 HunCC, § 6:93.
68 Supreme Court, Pfv. II. 20.399/1998/3.
69 Supreme Court, Gf. II. 30.057/1994/5.

which was transposed from criminal law to private law. In the traditional Hungarian private law of the pre-World War II period, if gross disparity of the performances resulted from abusing the other party's distress, necessity, lack of judgement, inexperience, or improvidence, the contract was null and void. This concept of usury followed the German pattern of *Wucher*. The HunCC (1959) maintained this concept, which has been preserved by the HunCC (2013) as well. Thus, if, by abusing the party's situation, the counterparty has stipulated grossly disproportionate benefits upon the conclusion of the contract, the contract shall be null and void. The usurious character of the contract and, as the result of this, its nullity is to be established if the excessive benefit was stipulated while exploiting the situation of the aggrieved party. Abuse is a deliberate act that presupposes that the counterparty is aware of the circumstances of the aggrieved party that make the latter vulnerable and make the exploitation possible. The HunCC does not specify the circumstances whose exploitation could be the basis for declaring the contract null and void; all kinds of circumstances that make such an exploitation possible could be relevant. From the notion of exploitation (abuse), it follows that there must be a causal link between the egregiously disproportionate advantage and the activity of the party accused of wrongdoing. According to the case law, one may speak of exploitation only when the counterparty is aware of the situation of the aggrieved party and stipulates a grossly disproportionate advantage based on this information. Exploitation presupposes a conscious act, so the courts have found that simple knowledge of the situation of the aggrieved party not to be enough to establish usury. The problem is that in many cases that are relevant at first sight, such as contracts for a loan with a very high interest rate, the debtors and the creditors do not even meet, so it cannot be said that the creditors would know anything about the situation of the debtor. Normally it is not in the interest of the debtor to draw the creditor's attention to his desperate situation. As the case law insists, exploitation has a subjective element of fraudulent behavior based on actual knowledge, so this approach is rather restrictive.[70]

The other track is the result of development during the post-World-War-II era. After World War II, the concept of usury proved unsuited to addressing the claims for restitution submitted by families who lost their property due to measures taken by national socialist governments. As the oppressive legislation threatened to deprive them of their property, they were forced to sell their assets at egregiously low prices, well below what in normal circumstances would have been the market price.[71] This was an indirect duress. Hungarian courts, instead of establishing a 'collective threat' as constituting duress, turned to the concept of usury and established an irrebuttable presumption of exploitation, simply on the ground of the gross disparity of the value of performances, provided that the aggrieved party had not attempted gratuitous transfer of ownership.[72] This concept of 'objective' usury has been maintained as a

70 Menyhárd in Filó, 2016, pp. 225–252.
71 Weiss, 1969, p. 268; Beck, 1948, pp. 294–296.
72 Weiss, 1969, p. 271.

rule of *laesio enormis* making the contract voidable in the HunCC (1959) and the HunCC (2013). According to this rule, if there is a gross disproportion between the value of the mutual performances upon the conclusion of the contract, without an intention by one of the parties to give a gift to the other, the aggrieved party has the right to avoid the contract. If the aggrieved party was able to recognize the gross disproportionality or undertook its risk, he or she may not avoid the contract. The parties may exclude this right in the contract provided that the contract was not concluded between a consumer and a professional.

The difference between usury[73] and *laesio enormis*[74] lies in the abuse of the position that qualifies *laesio enormis* as usury and makes the contract null and void instead of being voidable.

4. Poland

In Polish law, mistake, duress, and deceit are treated as defects of declarations of will, exploitation (*laesio enormis*) conversely as a violation of the principles of contractual freedom. This difference is purely formal, because originally in the Code of Obligations (an act that was largely incorporated into the PolCC) *laesio enormis* was a defect in the manifestation of will. Currently, Polish lawyers have adopted the so-called 'normative theory of defects in manifestations of will' according to which only those irregularities of the decision-making process that the legislator has explicitly called defects are defects in declarations of will. For this reason, *laesio enormis* is now considered an irregularity of a different kind: a contractual imbalance.[75]

A mistake[76] is understood as a misconception of the actual state of affairs. It must concern the content of the juridical act (rights and obligations of the parties). A mistake cannot be invoked if it concerns only the motives for which a party concluded the contract, for example, an investment in a certain good in the mistaken belief that its value would increase. Moreover, the error must be essential, i.e., such that if the person making the declaration had known the actual state of affairs and had evaluated matters reasonably, he would not have made such a declaration of will.[77]

There is a dispute in the literature and case law as to whether a simple material error justifies invoking a mistake. Such are situations, e.g., when as a result of an error the price was understated by 100 times, or the mistake concerned the currency (e.g., Australian or Canadian instead of US dollars). The traditional view, accepted in the case law, is that in such a case we are dealing with a material error. Some scholars, however, believe that such a mistake means that the agreement was not

73 HunCC, § 6:97.
74 HunCC, § 6:98.
75 Popiołek, 2020, Commentary to Article 388 PolCC, at 1.
76 PolCC, Article 84.
77 Radwański and Gutowski, 2019, pp. 504–505.

concluded at all, because there were no two unanimous statements of consent by the parties.[78] Another moot item is the possibility of invoking a mistake as to the law currently in force. Although the principle of *ignorantia iuris nocet* is still valid, both courts and the literature seem to agree that the doctrine of mistake constitutes an exception to this maxim in order to protect the unaware party.[79]

Distortion of the content of a manifestation of consent by a messenger is considered equivalent to a mistake. The messenger merely transfers another person's declaration of will and reproduces it. This rule shall apply to human messengers as well as to distortions caused by machines and computer programs.

When a declaration of will is made to the other party, a mistake can be invoked if, in addition, at least one of the following conditions is met:

- the other party caused the error, even if unwittingly (for example: the seller is convinced that he or she sells a Rubens painting as a result of expert opinion, while the work of art turns out to be a forgery),
- the counterparty knew about the mistake of the party but did not rectify it (e.g., in the case of the painting from the previous example, the seller knows that it is not a Rubens and the buyer is convinced that he or she is buying an original), or
- the other party could have easily noticed the mistake (e.g., a professional art dealer who, when selling a reproduction of the Mona Lisa, ignores the buyer's question as to why he is selling an original da Vinci piece at such a low price).

A mistake regarding the content of a contract cannot be invoked by a person who signed the document without reading it.

A qualified form of mistake is deceit (an intentionally induced mistake). In this case the mistake does not have to be material. If a mistake has been deceitfully induced by a third party and the addressee of the declaration of will knew about it, it is as if that addressee himself or herself had deceitfully induced the party into making the mistake.[80]

The effects of a declaration of will made under the influence of a mistake or deceit can be evaded by submitting a declaration of will to the other party in writing within a year of the discovery of the mistake.

Mistake and deceit quite often appear in the context of defects of goods sold. Under Polish law, a buyer of a defective item has a choice of either invoking the provisions on non-conformity of goods or invoking mistake or deception. The latter is more advantageous, as defects may be discovered years later, for example if a work of art bought at an auction turns out to be a forgery only after a resale attempt.[81]

78 See judgement of the Supreme Court—Civil Chamber of February 23, 2018 III CSK 384/16, judgement of the Regional Court in Gliwice—III Civil Appeals Division of December 18, 2014 III Ca 1043/14, Legalis No. 2028827.
79 Sobolewski in Osajda, 2021, Commentary to Article 84 PolCC at 4.
80 Radwański and Gutowski, 2019, pp. 520 et seq.
81 Kozińska and Stec, 2015, pp. 173–200.

As for duress and its effect on the validity of the contract, the threat in such cases must be unlawful and serious. A threat is unlawful when the commission of an offence or even of a lawful action is threatened in order to achieve an unlawful result, for example, the counterparty threatens the party with reporting a crime—which was actually committed by the party—to the police in order to achieve sale of an asset at well below the market price. The threat must be serious, i.e., it must give rise to a genuine fear of its fulfillment. A person making a declaration of will under the influence of a threat must be convinced that either he himself (she herself) or another person is threatened with severe personal or material danger. It has been assumed in the case law that a suicide threat justifies invoking duress by the person who made the declaration of will out of a desire that that person not take his or her own life. At the same time, case law has accepted that the announcement of revealing that a person in a high position has an illegitimate child does not constitute an unlawful threat. One may free oneself from the effects of a declaration of will made under the influence of duress by making a declaration of will in writing within one year from the moment when the state of fear ceased.[82]

As already indicated, exploitation or *laesio enormis* is now treated as a breach of contractual balance. Exploitation occurs when the party, taking advantage of the other party's dire position, frailty, or inexperience, receives disproportionately more than the other party gets. The subjective circumstance here is the assessment of the characteristics of the exploited party. A dire position may mean, for example, a difficult personal situation, such as having to cover the costs of caring for a sick person or buying expensive medicines. Frailty may be due to ill-health or old age. Inexperience covers a wide range of cases, from the lack of familiarity with the object of the contract to overconfidence in a counterparty presenting themselves as a representative of a trustworthy institution, for example, to an inexperienced party. As of December 2021, there is a presumption in force according to which if the performance of one party is twice the value of what is performed by the other party, there is a disparity leading to *laesio enormis.* For this the counterparty must be aware that he or she is contracting with a person susceptible to manipulation and must also take advantage of this when determining the content of the contract. Inequality in the rights and obligations of the parties and an unjustified advantage for one of them is an objective circumstance.[83]

Provisions regarding exploitation were traditionally used in non-business relationships or as a tool for consumer protection. Nowadays, the courts do not distinguish between business-to-business and non-business relationships in this respect.[84] Modern judicial practice recognizes that an entrepreneur can also fall victim to exploitation. In recent years, in case law the provisions on such exploitation have been used, among others, to protect against the imposition of unfavorable credit

82 For a detailed analysis of the exploitation in Polish law see Kondek 2021.
83 Machnikowski, 2020, pp. 679 et seq.
84 Popiołek, 2020, Commentary to Article 388 PolCC, at 10.

or loan conditions on small entrepreneurs and to protect against the imposition of unfair terms in franchise agreements.[85] There is also a question of the possibility of using provisions on exploitation on such markets as the art market, where asymmetry of information and taking advantage of the counterparty's ignorance or inexperience is a normal part of the market game.[86]

The exploited party may claim an increase in the other party's benefit, a reduction in his own benefit, or, as a last resort, termination of the contract by the court. Such a claim may be submitted within two years from the conclusion of the contract. There are, however, cases where the plaintiff had raised the claim after this period. In some of them the courts decided to annul the contract as being *contra bonos mores*.[87] That leads to the conclusion that in Polish law there are in fact two different types of grave contractual imbalances: one leading to modification or termination of a contract (*laesio enormis*) and the other, exploitation (*laesio gravissima?*), resulting in declaring the contract null and void.

5. Romania

5.1. Mistake

A mistake (*error*) is 'a misguided idea of reality'.[88] From the point of view of the legal consequences of mistake, a distinction must be drawn between essential and non-essential mistakes. A mistake is essential if it had a decisive influence on the decision of the party whose consent was affected.

A mistake of fact (*error facti*) is essential in the following cases:[89]

— If it concerns the nature of the contract (*error in negotio*). For example, someone wants to give something as a deposit (*depositum*), but the recipient mistakenly believes that he has received it as a gift.

— If the mistake concerns the identity of the object of the contract (*error in corpore*). For example, the seller thinks he is selling a particular painting and the buyer thinks he is buying another painting.

— If the mistake relates to the quality, i.e., the essential characteristics, of the object of the contract (*error in substantia*; *error in qualitate*). Had the party in mistake been sufficiently aware of these characteristics, he would not have concluded the contract; for example, if the buyer buys a bronze

85 A good example of this practice is the judgement of the Katowice Court of Appeal dealing with a case where the interest rates in a long-term contract agreement (with a duration of 21 years) were so high that they exceeded the real costs of the credit. Judgement of the Katowice Court of Appeal of October 24, 2019, I ACa 184/19, Legalis 2488169. See also Kondek, 2021, p. 21.

86 Andrzejewski and Szafrański, 2016, pp. 130 et seq.

87 Girdwoyń, 2016, pp. 660 et seq.

88 RouCC, Articles 1207–1213; Fekete, 1958, p. 119; Boroi and Anghelescu, 2021, pp. 157–164; Nicolae, 2018, 375–386.

89 Veress, 2021, p. 108.

statue believing it to be made of gold, or a copy of a painting instead of the original.[90]

- If the mistake concerns the identity of the other party (*error in persona*). This can only be the case in contracts where the choice of the person of the contracting party is intrinsic to the essence of the contract (*intuitu personae*).
- Mistake may also affect the motives for concluding a contract (*error in causa*), but this is exceptional since a mistake in the reasons does not normally justify avoidance of the contract (for example, where a person buys shares believing that the share price will rise, but the share price falls after the contract is concluded). However, there are situations in which a mistake affecting the reasons for the contract may also render the contract voidable, for example, if a person grants a large donation in favor of a church in the mistaken belief that his or her only child has died, and the donor is without any heirs. A mistake by the donor as to the grounds for the donation may render it voidable if his or her child is alive.
- In general, there can be no mistake pertaining to the provisions of the law (*error iuris*). The law is presumed to be known to everyone. Ignorance of the law does not invalidate the contract (*nemo censetur ignorare legem*). Romanian law, however, regulates mistakes of law for cases where the law is not accessible and its provisions are not foreseeable (predictable).

Romanian law makes a distinction between excusable and non-excusable mistakes. In order to void the contract, it is not sufficient to show a mistake, but the mistake must be excusable. A mistake is not excusable if the party could have known and established the correct facts by exercising due diligence. Consequently, the contract cannot be avoided by the aggrieved party if reasonable efforts could have prevented the mistake, i.e., the mistake cannot be excused.

Likewise, a mistake concerning the financial situation of the other contracting party (for example, where the seller assessed that the buyer could pay the purchase price because everyone knew that his financial situation was excellent) cannot be excused.

The party in mistake may not rely on the *error* contrary to the principle of good faith. It has been established in case law that, in the case of a contract in a foreign language, a party cannot rely on a mistake as to the nature of the contract. Such conduct is contrary to the principle of good faith since, when expressing his or her consent in a foreign language with which he or she is not familiar, if he or she is acting in good faith, he or she will take the minimum precautions which are natural in such a case (for example, the use of a translator), particularly since the nature of the contract is already clear from the title of the instrument.[91]

90 However, in the case of a mistake as to the value, the rules of *laesio enormis* apply. If there is a fraudulent intent on the part of one party to deceive the other, we are not dealing with a mistake but with another defect of consent, namely deceit.

91 Timișoara Tribunal, judgement No. 46/2016.

Romanian legislation allows the counterparty to salvage the contract affected by a mistake on behalf of the party. If the party pleads a mistake, the counterparty may declare that the contract will be performed as the party in mistake understood it. In this case, the contract is concluded with the content of which the party in mistake was initially aware.[92]

In all cases, the sanction for mistake is the voidability of the contract. No damages can be awarded for a contract avoided by mistake.

A non-essential mistake does not affect the validity of the contract. A non-excusable mistake also does not lead to the contract being voidable; the contract is such cases is valid.

5.2. Deceit

Deceit (*dolus*) is the second type of defect of consent, but unlike mistake, deceit is a private law fraud: Employment of fraudulent means to influence the party to conclude a contract.[93] The conceptual elements of deception are the intention to deceive and the use of fraudulent means.[94]

For example, deceit occurs when the donor is persuaded by unfair influence to conclude a donation. One acts fraudulently if he or she knows that the deceit will lead a party to a decision that such a party would not otherwise have reached.

Deceit may also consist of omitting an important fact (*reticentia*). According to case law, there is no misrepresentation by omission if the lawyer did not inform the client when concluding a contract for representation in another country that he or she did not know the language of that country. The lawyer never claimed that he or she knew the foreign language, and the court held that by using a translator he or she could properly perform his or her obligations without knowing the foreign language and that the contract was therefore valid.[95] The court's decision may even be open to contest: In particular cases, it is necessary to examine whether the lawyer's concealment of the fact (lack of knowledge of the language) was deliberate in order to induce the other party to enter into the contract, or whether the client would or would not have entered into the contract if the concealment had not taken place.

Deceit may be principal (*dolus causam dans*), where it results in the deceived party entering into a contract that he or she would not have entered into in the absence of deception, or incidental (*dolus incidens*), where the deception results in a less favorable contract than would have been concluded in the absence of the deception.[96]

The other contracting party may cause deceit in contracts, but there is also deceit if a third party causes it but the contracting party who benefits from it knew (or ought to have known) about it (collusion with a third party).

92 RouCC, Article 1213.
93 RouCC, Articles 1214–1215; Boroi and Anghelescu, 2021, pp. 165–169; Nicolae, 2018, pp. 387–393.
94 Fekete, 1958, p. 119.
95 Iași Tribunal, judgment No. 1112/2014.
96 Veress, 2021, p. 112.

The sanction for deceit is the voidability of the contract. The deceived may also have a claim for damages against the deceiver. Deceit may never be presumed; therefore, the burden of proof in demonstrating it falls on the aggrieved party.

5.3. Duress

Duress (*vis ac metus*) is a threat forcing a party to enter into a contract or to do so under terms that in the absence of duress would not have been accepted.[97]

Duress results in a forced manifestation of consent caused by a sense of fear resulting from coercion. Coercion exists when the object of the threat is a person (for example, the physical integrity of the contracting party or a member of his or family or the integrity of his property), but the unlawful threat may also concern, for example, the honor or reputation of the person.

It does not constitute a case of duress when the party is induced to enter into a maintenance contract by statements of the counterparty that imply that, without entering into the contract, the party will be 'left alone,' 'will have no one to care for him,' or 'will die alone,' since these do not indicate possible wrongful conduct toward the party but simply indicate the consequences of not entering into the contract.[98] Recognizing a debt during police questioning is also in and of itself not a result of coercion.

It does not constitute duress but a complete lack of contractual consent when the victim's hands are held (physical coercion) and he is forced to sign a written instrument recording the contract. 'In such cases, passivity goes so far, that there is no legal consent, at most an appearance of consent. In the absence of a transactional consent, the contract is null and void.'[99] In the case of physical coercion (*vis absoluta*) there is no intent to conclude the contract. There is consent in the case of mental coercion, but it is distorted. Even under duress, the party chooses between two evils. Only mental coercion is a defect of intent and therefore a ground for voidability. Physical coercion, on the other hand, is an independent ground for nullity due to a total lack of contractual consent.[100]

Duress exists when the threat creates an insurmountable fear in the party, leading him or her to enter the contract. He or she can choose between just two options: either to suffer the prospect of threat being carried out or to enter into the contract. If he or she chooses the latter, his or her consent to enter into a contract will be defective since he or she would not have entered into the contract in the absence of coercion, or would have entered into it only on other terms more favorable to him or her.[101]

Duress must be substantial (serious) when considering the personal circumstances of the party being threatened. There is no particular threshold provided for by law, but the age, sex, economic, and social position, as well as any relevant individual

97 RouCC, Articles 1216–1220; Boroi and Anghelescu, 2021, pp. 169–174; Nicolae, 2018, pp. 394–398.
98 Bucharest 4th District Court, judgment No. 1182/2013.
99 Fekete, 1958, p. 120.
100 Veress, 2021, pp. 113–114.
101 Fekete, 1958, p. 120.

characteristics of the person threatened must all be considered. Whether the threat can intimidate the person threatened is a matter for the judge to consider. If a person merely pleads that the duress was caused by the other party's power or heightened self-worth, and the element of duress does not actually appear in the circumstances in which the contract was concluded, the judge cannot accept this as a ground for challenge. Fear of the authority, power, and personality of the other party (*metus reverentialis*) is not in itself a form of duress. Duress presupposes, in addition to the subjective fact of fear, some objective threat (e.g., verbal intimidation, the display of a weapon).

The threat proffered must be unlawful. A threat to exercise a right in accordance with its intended purpose cannot constitute coercion. For example, a creditor may threaten his debtor with legal action or enforcement. This is not coercion unless the creditor intends to obtain an undue advantage for him or herself by these means. It is also not generally unlawful to raise the prospect of a criminal charge. However, it is considered coercive to use the threat of a criminal charge to induce someone to enter into a contract, such as an interest-free loan, because the legitimate threat is used to obtain an undue advantage.

It is not unlawful and therefore does not invalidate an employee's written request to terminate an employment contract if the employee signed this request because the employer would otherwise have initiated a disciplinary investigation against him or her and claimed damages, because these are the employer's legal options against an employee who has committed a disciplinary offense and caused material damage.[102]

Putting pressure on a person to sign a contract by threatening suicide is unlawful.

The other contracting party can cause duress in contracts, but there is also an involuntary wrongful act when the coercion was caused by a third party but was known (or should have been known) to the contracting party who benefited from the duress.

The threat must always be proven, and the sanction is that the contract is voidable on the request of the aggrieved party. Voidability can be asserted in two ways: If the coerced party has already performed, he or she can bring an action to have the contract avoided and recover the services performed. If the other party (the threatening party or the party for whose benefit the threatening party has acted) demands performance, the coerced party can raise an exception (defense), i.e., request that the action be dismissed because the contract is voidable.

5.4. Laesio enormis

Disproportionality refers to a material disadvantage suffered by a party because the value of the service received is well below the value of his own service.[103] Hence, disproportionality can only exist in the case of a contract for consideration. The disproportionality requires the 'victim' to enter into the contract under financial pressure (economic hardship) or because of his inexperience or lack of knowledge (ignorance).

102 Bucharest Tribunal, III[rd] Labor Law and Social Security Section, judgment No. 10897/2014.
103 RouCC, Articles 1221–1224; Boroi and Anghelescu, 2021, pp. 174–177; Nicolae, 2018, pp. 399–404.

A contract cannot be avoided merely because there is a disproportionality between the performance and the counter-performance. There are two forms of disproportionality that can be considered to be a reason for voidability:

— The minor assumes an excessive obligation in relation to his or her financial situation or concerning the benefits arising from the contract, for example, the tenant rents a property the minor owns for a below-market rent. Since the minor as a rule cannot exercise his or her contractual capacity alone, such cases of disproportionality are relatively rare.
— For an adult, the disproportionality must be serious. In the system of the RouCC, this means that the apparent difference in value must be greater than half of the real value, and the disproportionality must exist not only at the time the contract is entered into but also at the time the action to avoid it is brought to the court, for example, where the seller accepts that the buyer under pecuniary constraint pays 4,000 lei for property worth 10,000 lei.

There is no disproportionality if the contract was only partially for consideration (for example, the seller donates two-thirds of the price to the buyer) or if the thing was bought in the context of an enforcement procedure in compliance with the legal provisions. There is no disproportionality but deceit when one party deliberately deceives the other party into disposing of a plot of land for a price much lower than its real value.

The sanction for disproportionality is the voidability of the contract or (*facultas alternativa*) restoring the proportionality of the contract on the application of the party entitled to avoid the contract. The court also may uphold the contract if the other party fairly offers a reduction of its own claim or, where appropriate, an increase of its own obligation (adaptation of the contract).

An action for annulment or for re-establishing proportionality becomes time-barred after one year from the conclusion of the contract. In this specific case, the voidability of the contract cannot be raised by way of an exception (in defense) after the one-year prescription period has elapsed.

Aleatory contracts (e.g., maintenance contracts, annuity contracts, insurance contracts) cannot be challenged on the grounds of disproportionality.

6. Serbia, Croatia, Slovenia

6.1. Serbia

The Serbian Law on Obligations makes the validity of a contract dependent on a contractual intent that is formed freely and is earnest.[104] The various forms of external influence on the free formation of contractual will and its internal defects, however, may yield different outcomes. Some do not jeopardize the public order and cause

104 SrbLO, Article 28 (2).

detriment only to the private interests of one of the parties. In these cases, the usual legal consequence is the right of the aggrieved party to avoid the contract. However, there are cases in which the process of free formation of contractual intention is hindered to such a degree that it shall be deemed that the contract has not been concluded at all. Mistake, deceit, and duress belong to the first group, psychical duress or coercion and misunderstanding to the second. The rules pertaining to these legal notions, though regulated in the SrbLO, apply to other juridical acts as well.[105] *Laesio enormis* is in Serbian law based on the parties' mistake concerning the true value of their performance and the counter-performance, and hence it is categorized in the first group. However, it is applicable only to contracts, more precisely only to contracts for consideration, and not to all juridical acts.

Already in the title of the rules pertaining to mistake, the SrbLO stresses that it must be essential: The legal institution bears the title 'Essential mistake.' The intention of the law seems clear: to delineate profound misapprehension of the facts by the parties having a set of legal consequences from situations that do not affect the validity of the contract. In defining mistake as essential, the law states that it must relate to essential properties of the object of the contract, to the person with whom the contract is to be made, should the contract be concluded with regard to that person (*intuitu personae*), or be in relation to other circumstances considered relevant according to trade usages or the intention of the parties, provided the mistaken party would otherwise not have concluded the contract under such terms.[106] The SrbLO, therefore, considers *error in substantia* and *error in persona* essential mistakes, but leaves the definition open to encompass any other circumstance that may be construed as such, according to the general opinion or the intent of the parties. The range of other circumstances in relation to which mistake is considered essential should be determined in the light of the cause of the contract.[107]

However, the right of the mistaken party to avoid the contract is subject to three significant limitations. First, the mistake is negligence-based: The SrbLO requires that the mistaken party act with due diligence, as ordinarily demonstrated in transactions of a similar kind. If a party failed to ascertain all circumstances of the transaction with due diligence before entering into the contract, this mistaken party is barred from avoiding it.[108] Second, the counterparty usually acts in good faith, meaning that he or she has not induced or maintained the misapprehension of the facts by the mistaken party. Therefore, the SrbLO provides that if the contract has been avoided on the grounds of mistake, the counterparty is entitled to claim damages.[109] Finally, in the light of the principle of the primacy of the contract, that is, of the requirement that a contract must be maintained as valid whenever possible, the contract may not

105 SrbLO, Article 25 (3).
106 SrbLO, Article 61 (1).
107 Cigoj, 1984, Book I, p. 255.
108 SrbLO, Article 61 (2).
109 SrbLO, Article 61 (3).

be avoided if the counterparty is willing to perform the contract under the terms that would have been agreed to but for the mistake.[110]

The SrbLO explicitly states that error in the motive, that is, a misapprehension concerning the subjective reasons that drove the mistaken party to conclude the contract, may constitute an essential mistake if the contract is gratuitous and the motive was decisive for engaging in the contractual obligation.[111] Under the influence of French law and legal literature,[112] the theory of cause of contract gained a direct embodiment in the law as one of the conditions of formation of the contract.[113] It distinguishes the objective from the subjective cause (motive) of contract, the latter being legally relevant in general only if it is illicit.[114] The frustration of otherwise lawful motives does not affect the validity of a contract[115] concluded for consideration, unless it has been formulated as one of the terms of the contract.[116] Exceptionally, in relation to mistake, an erroneous conception about the decisive motive that drove a party to conclude a gratuitous contract is, however, legally relevant, since it frustrates the cause of contract.[117]

The SrbLO extends the rules on mistake to all cases of indirect expression of contractual intention via intermediaries.[118] This means that the mistake of statutory representatives and agents during the formation of the contract is to be construed as a mistake of the principal, that is of, the party on behalf of whom they acted.

The mistake takes on the aggravated form of deceit if its emergence is attributable to the counterparty's imputable conduct. It exists according to the SrbLO when the counterparty caused the misapprehension on the part of the misled party or upon having detected that the party is in mistake and maintained him or her in such a state with the intention of inducing him or her to conclude the contract. In such cases the sanction is more stringent: The misled party may avoid the contract even in the case when the mistake is not essential.[119] Deceit therefore may be perpetrated even by the inactivity or silence of the counterparty, if he or she noticed that the party is in self-induced mistake.[120] Besides the right to avoid the contract under more favorable conditions as in the case of mistake, the misled party has a claim for damages from the counterparty as well.[121] The SrbLO regulates the situation in which the source of the misled party's misapprehension is not in the counterparty's conduct but attributable to a third party. The right to avoid the contract depends on the counterparty's

110 SrbLO, Article 61 (4).
111 SrbLO, Article 62.
112 Dudaš, 2011, p. 678.
113 SrbLO, Articles 51–53.
114 SrbLO, Article 53.
115 Dudaš, 2010, p. 150.
116 Perović in Perović, 1995, p. 137.
117 Cigoj, 1984, Book I, p. 259.
118 SrbLO, Article 64.
119 SrbLO, Article 65 (1).
120 See in more detail, Dabić, 2018, pp. 55–58; Hiber, 1991, p. 266.
121 SrbLO, Article 65 (2).

good faith. If the counterparty knew or ought to have been aware of the deceit caused by a third party, the misled party may avoid the contract.[122] In contrast, if the counterparty did not know and ought not have been aware of the deceit, the contract may not be avoided. In such case the contract is valid and the misled party may only claim damages, whereby the claim is to be directed against the third party. To be more precise, the claim to request damages is independent of the right to avoid the contract, and may be asserted even if the contract may not be avoided.[123] These rules apply to contracts concluded for consideration. A gratuitous contract entered into under deceit caused by a third party may be avoided regardless, if the counterparty knew or ought to have known thereof.[124]

Regarding the third traditional flaw of contractual intent, duress, the SrbLO prescribes that if the counterparty or any third party caused justified fear to the other party by unlawful threat, under the influence of which the latter concluded the contract, he or she has a right to avoid the contract.[125] Duress therefore always vitiates contractual intention and hence is a ground of avoidance of the contract, regardless whether it stems from the counterparty or from a third party, whereby it is irrelevant whether the counterparty acted in good faith.[126] The law further defines fear caused by duress as being considered legitimate if it can be implied from the circumstances of the case that the life, bodily integrity, or other important values of the contracting party or any third person were endangered.[127] These rules apply obviously to duress in a form of threat (*vis compulsiva*). The SrbLO does not regulate the legal consequences of concluding a contract under coercion (*vis absoluta*), which completely precludes the possibility of expressing one's own contractual intention freely. The majority opinion in the literature is that in such a case no contract is concluded, hence the contract is considered non-existent, triggering the consequences of nullity.[128]

The legal consequences of mistake, deceit, and duress are regulated in greater detail in the rules pertaining to the invalidity of contracts based on voidability or nullity. The SrbLO states that a contract may be avoided due to, among other grounds, flawed contractual intention,[129] upon the request of the party in whose interest the right of avoidance is instituted.[130] In case of mistake, deceit, or duress, the entitled party is the mistaken, the misled, or the party under duress, as the case may be. The right to avoid the contract lapses after one year as counted from the day when the party becomes aware of the ground for avoidance,[131] but no later than three years

122 SrbLO, Article 65 (3).
123 Perović in Perović, 1995, p. 142.
124 SrbLO, Article 65 (4).
125 SrbLO, Article 60 (1).
126 Perović in Perović, 1995, p. 133.
127 SrbLO, Article 60 (2).
128 Perović in Perović, 1995, p. 132.
129 SrbLO, Article 111.
130 SrbLO, Article 112 (1).
131 SrbLO, Article 117 (1).

from the day of the conclusion of the contract.[132] The former is usually referred to as a subjective prescription period, since it begins from the day when the party entitled to avoid the contract gains knowledge of the true circumstances in case of mistake and deceit or when the duress ceases.[133] On the other hand, the latter is referred to as an objective prescription period, since it begins from a moment (conclusion of the contract) that is independent of either parties' cognizance of the relevant facts.[134]

However, the counterparty may find his or her position legally insecure, since there is a contingency as to whether the other party would exercise his or her right to avoid the contract. For this reason, the SrbLO envisages the right of the counterparty to request that the other party state within a time limit not shorter than 30 days whether he or she intends to honor the contract.[135] If the party fails to submit a declaration within the said time limit, or states that he or she does not regard the contract as valid, the contract shall be considered avoided.[136]

Under Serbian law, *laesio enormis* is considered a special case of mistake concerning the inequality between the economic value of the performance and the counter-performance. The SrbLO, in the part pertaining to effects of contracts for consideration, prescribes that if there was an obvious disproportion between the value of the contractual obligations of the parties at the time of the conclusion of the contract, the aggrieved party may avoid the contract if he or she did not know and ought not have known of their true economic value.[137] Contrary to the general rule on prescription periods applicable to avoidance, the SrbLO sets out a single, one-year prescription period for the avoidance of contracts on the grounds of *laesio enormis*. The prescription period is considered objective, since it commences from the moment of conclusion of the contract.[138] Though *laesio enormis* is considered a subtype of mistake under Serbian law, thus triggering voidability of the contract, to some extent it may jeopardize public interests as well. For this reason, the SrbLO explicitly forbids the parties from waiving in advance the right of avoidance of the contract.[139] However, the right of the aggrieved party to request avoidance of the contract is limited in several respects. First, as in the case of mistake, the aggrieved party does not have a right to avoid the contract if the counterparty proffers to perform his or her obligations in a value or extent that does not vitiate the equality between the performance and counter-performance.[140] Second, the SrbLO explicitly excludes the application of *laesio enormis* to some categories of contracts, namely, aleatory contracts, sales at auction, contracts in which the higher price is paid because the object of performance

132 SrbLO, Article 117 (2).
133 SrbLO, Article 117 (1).
134 Perović in Perović, 1995, p. 231.
135 SrbLO, Article 112 (2).
136 SrbLO, Article 112 (3).
137 SrbLO, Article 139 (1).
138 SrbLO, Article 139 (2).
139 SrbLO, Article 139 (3).
140 SrbLO, Article 139 (4).

of the other party has a special or sentimental value for the counterparty (*pretium affectionis*),[141] and contracts on settlement of claims.[142] The rules on *laesio enormis* apply also to persons engaged in commercial activities, but in their case the standard of due diligence is set higher. Thus, the application of *laesio enormis* to commercial contracts is not excluded but may be considered exceptional.[143] The Preliminary Draft of the Civil Code explicitly excludes the application of *laesio enormis* to commercial contracts.[144]

In some cases, the misconception the parties may have can be so profound that it may even prevent them from reaching the minimal threshold of consent, in which case no contract is deemed to have been concluded at all. The SrbLO explicitly regulates such situations under the title 'Misunderstanding.' It prescribes that should the parties believe they have agreed, while in fact a misunderstanding exists between them regarding the nature of the contract or the cause or subject matter of their obligations, the contract does not come into existence.[145] The first situation exists, for instance, when one party believes that a contract of sale is concluded, while the other thinks a contract on donation has been entered into. The second relates to a case where a party believes that the counterparty will transfer an ownership right as the object of the contract, while it merely transfers a right of use. Finally, a misunderstanding also exists when a party believes that one specific item is the object of the contract, while the counterparty understood a different item.[146] In this case, the distinction between misunderstanding and mistake is at its narrowest. If the parties had in mind the very same item as the subject of the contract but it does not have the characteristics one party had in mind, the case may be qualified as a mistake. However, if the parties had in mind different items, the case is to be construed as a misunderstanding, since the misapprehension vitiates the cause of the contract.[147]

6.2. Croatia

The HrvLO has basically taken over the rules on mistake from the former federal law, though some significant novelties have been introduced. On the one hand, misapprehension in relation to the object of the contract has been removed from the notion of misunderstanding and qualified as one of the situations when the mistake is essential.[148] On the other hand, mistake is no longer negligent-based, that is, it is no longer required of the mistaken party that he or she acted with due care in the time of the formation of contract in order to prevent the emergence of misapprehension of

141 SrbLO, Article 139 (5).
142 SrbLO, Article 1094.
143 Krulj in Blagojević and Krulj, 1980, p. 361.
144 *Prednacrt Građanskog Zakonika Republike Srbije* [Preliminary Draft of the Civil Code of the Republic of Serbia] https://www.mpravde.gov.rs/files/NACRT.pdf, Article 273 (5).
145 SrbLO, Article 63.
146 Radovanović in Pajtić, Radovanović and Dudaš, 2018, p. 269.
147 Cigoj, 1984, Book I, pp. 264–265.
148 HrvLO, Article 280 (1).

facts.[149] The doctrine indicates that by this change the HrvLO returned to the tradition of objective mistake from the BGB and ABGB, where the avoidance of the contract on the grounds of mistake is not dependent on the culpability of the misapprehension of facts by the mistaken party.[150]

In the light of the changes introduced in the rules pertaining to mistake, the statutory rule on misunderstanding has also been subject to modification. Namely, the misapprehension of the parties concerning the object of the contract is no longer one of the grounds of misunderstanding. Furthermore, misapprehension concerning the cause of contract has also been excluded from the rule on misunderstanding, which is in line with the general standpoint adopted in the HrvLO that the cause of contract, understood in its objective meaning, should not presuppose the validity of a contract. Only the nature of the contract, as a ground of misunderstanding, remains from the former federal law on obligations, in addition to which a new ground has been introduced: Misunderstanding also exists if the parties have differing apprehension about any essential element of the contract.[151] The case law considers misunderstanding as resulting in a non-existent contract.[152]

Regarding *deceit*, no novelties may be identified in comparison to the former federal law on obligations, while in relation to duress only one new rule has been introduced. The new HrvLO explicitly states that a contract concluded under coercion (*vis absoluta*) is invalid,[153] whereas the former federal law regulated only the consequences of threat (*vis compulsiva*). Some consider that a contract concluded under coercion is properly qualified in the law as null and void,[154] but others tend to suggest *de lege lata* that it should be qualified as non-existent.[155]

The rules on voidability of a contract due to mistake, deceit, or duress in the HrvLO show no discrepancy from the rules of the former federal law.

Likewise, concerning *laesio enormis*, the HrvLO took over almost verbatim the rules from the former federal law. The only discrepancy is that it explicitly excludes commercial contracts from the scope of application of the rules on *laesio enormis*,[156] which was not the case in the former federal law. The newer literature points out that the diligence of a good salesman requires that persons engaged in commercial activities have a proper apprehension of the value of the performance and of the counter-performance.[157] By this statutory novelty the legislator acknowledged the same conclusion reached by the case law adopted during the application of the federal

149 HrvLO, Article 280 (2).
150 Gorenc in Gorenc, 2014, p. 431.
151 HrvLO, Article 282.
152 Decision of the Croatian Supreme Court No. Rev. 149/06. Cited by Gorenc in Gorenc, 2014, p. 435.
153 HrvLO, Article 279 (3).
154 Gorenc in Gorenc, 2014, p. 429.
155 Slakoper in Slakoper, Gorenc and Bukovac Puvača, 2009, p. 319.
156 HrvLO, Article 375 (5).
157 Slakoper in Slakoper, Gorenc and Bukovac Puvača, 2009, p. 342.

law on obligations regarding the application of the rule on the excusable negligence of persons engaged in commercial activity.[158]

6.3. Slovenia

Regarding mistake, misunderstanding, deceit, duress, and *laesio enormis*, no substantial amendments have been introduced in the SvnCO in comparison to the rules of the former federal law on obligations. The only discrepancy between the two statutes is that the rules on misunderstanding have been removed from the part in which mistake, deceit, and duress[159] are regulated into the part on the formation of contract, indeed to its very beginning.[160] This approach seems to have more merit, since misunderstanding is less a case of vitiated contractual intent leading to the avoidance of the contract than a case where no contract has been concluded at all. The newer literature points out that reasons for this translocation of the rules were never given by the legislative.[161] There are very few cases in the case law seeking to shed light on the differentiation between misunderstanding and mistake relating to the object of the contract.[162]

The literature also points out that court cases regarding mistake and *laesio enormis* are very rare in the case law, since the courts tend to take a strict interpretation of the excusable nature of the mistake.[163] Relating to threat and coercion, the usual consequence is voidability of the contract. However, recent case law demonstrates that the courts tend to declare the contract null and void if the pressure exerted on the aggrieved party was grossly excessive, frustrating his or her contractual will entirely.[164]

The rules on the voidability of contracts due to defect of contractual intention[165] have also been taken over verbatim from the former federal law.

7. Slovakia

7.1. General remarks

The Slovakian legal system contains an explicit regulation of mistake and deceit, a regulation of *laesio enormis* in a limited form as well, and, in general, a regulation of duress. However, the legal consequences of these situations are different.

In case of mistake (*omyl*) and deceit (*lesť*) the aggrieved party may invoke the voidability of a juridical act (in Slovakian legal writings and case law the term relative

158 See the Decision of the Supreme Court of Croatia No. Rev. 361/85. Cited by Slakoper in Slakoper, Gorenc and Bukovac Puvača, 2009, p. 342.
159 SloCO, Articles 45–49.
160 SloCO, Article 16.
161 Možina and Vlahek, 2019, p. 79.
162 See for example the judgment of the Slovenian Supreme Court No. II Ips 335/2015. Cited by Možina and Vlahek, 2019, p. 79.
163 Možina and Vlahek, 2019, pp. 79–80.
164 See for example the judgment of the Slovenian Supreme Court No. II Ips 94/2016. Cited by Možina and Vlahek, 2019, p. 81.
165 SloCO, Articles 94–99.

invalidity is used to describe such a situation) according to § 40a of the SvkCC. Under this paragraph, a juridical act is considered valid unless the person affected by such an act invokes the voidability of the act. Voidability cannot be invoked by the person who caused it. The court therefore takes voidability into account only on the basis of the aggrieved party's request. Thus, it is left to him or her to decide the fate of the juridical act.

On the other hand, the (*vis compulsiva*) duress (*nátlak, bezprávna vyhrážka*) leads to the contract being rendered null and void (so-called absolute invalidity), which can be invoked by anyone and which the court must take into account *ex officio*. However, this only applies to non-commercial relations. If it is a commercial relationship, then the duress leads to voidability under § 267 (1) of the SvkCommC, according to which '[i]f the invalidity of a juridical act is established for the protection of a participant, such invalidity may be invoked only by that participant.' The only exception is duress in the case of corporate law contracts, where nullity applies.

Laesio enormis can lead to voidability if the imbalances are the result of mistake or deceit; in that case, everything that is to be said about mistake or deceit applies to *laesio enormis* as well. In other cases, due to *laesio enormis*, only the right to withdraw from the contract (i.e., the right to terminate the contract unilaterally) may arise, but only if it is a contract concluded in distress (*tieseň*) and the imbalances are egregiously disadvantageous (*nápadne nevýhodné*). In this latter form, however, *laesio enormis* does not apply in commercial relations. The difference between voidability and withdrawal from the contract is that withdrawal is a juridical act but voidability is a state that must be invoked by the person affected. However, the effects of both are the same.

Where the consequence is invalidity—whether voidability, invoked by the person acting, or nullity—the juridical act does not give rise to the intended legal consequences. According to § 457 of the SvkCC, '[i]f the contract is invalid or has been avoided, each of the participants is obliged to return to the other everything he has received.' The law does not distinguish whether the party acted in good or bad faith. On the other hand, this obligation, as well as the right that corresponds to it, like any other right or obligation, should be exercised in accordance with good morals.[166] However, no case law invoking the rule of *nemo auditur* is known to us.

Moreover, the person who caused the invalidity shall be liable for the damage suffered as a result of the invalidity.[167] This is a general liability within the meaning of § 420 of the SvkCC of which the liable person may relieve himself or herself if he or she proves he or she was not at fault. The Slovakian Commercial Code has a similar provision (§ 268), stipulating that '[t]he person who caused the invalidity of a certain juridical act shall be liable to compensate the damage done to the party to which the juridical act was directed, unless the said party was aware of the invalidity of the juridical act.' However, it is not clear whether the damage should be compensated to

166 According to Gyárfáš, 2019. See also SvkCC, § 3 (1).
167 SvkCC § 43.

the extent of the positive or negative contractual interest. The literature tends toward the latter.[168]

7.2. Mistake

The Slovakian legal system contains a regulation of mistake in § 49a of the SvkCC, which applies to both commercial and non-commercial juridical acts. It distinguishes between the so-called ordinary mistake and deceit. In both cases, the legal relevance lies in the fact that the person acting may invoke the voidability of the juridical act.

An ordinary mistake is relevant legally only if it is essential. According to § 49a of the SvkCC, a mistake is considered essential if it was decisive for the party in concluding the juridical act. In other words, if it were not for the mistake, the acting person would not have performed the juridical act. There must therefore be a causal link between the mistake and the performance of the juridical act.[169] The SvkCC does not define what an essential mistake is. It does not distinguish between a mistake in the motive, in the object, in the properties, or in the subject of the juridical act.[170] The only exception is a mistake in the motive (*pohnútka*), which, taken alone, is never legally significant, i.e., it never renders on its own a juridical act null and void,[171] regardless of whether the contract is gratuitous or not. Whether a mistake is essential—a mistake in fact decisive for the performance of a juridical act—must be perceived objectively, although a subjective aspect is also possible if it was possible to determine from the circumstances which fact was subjectively decisive for the acting person.

The SvkCC does not provide for a consequence if a misunderstanding between the parties leads to no consensus between them, but tends to the doctrine that the existence of such *dissensus* means that the contract was not concluded at all.[172]

According to § 49a of the SvkCC, the party may avoid a juridical act for a material mistake only if the person to whom the juridical act was addressed caused the mistake himself or ought to have known about it. Otherwise, the party may not invoke voidability. It does not matter whether the person caused the mistake through a fault or not; all that matters is whether he caused it or must have known about it.[173] Slovakian legislation does not give the party the possibility to avoid a juridical act if the mistake was caused by a third party.

On the other hand, it can be deduced from § 40a of the SvkCC, according to which voidability cannot be invoked by the person who caused it himself or herself, that the party cannot invoke a mistake if the mistake is inexcusable. Therefore, if it was possible to detect the mistake and the party did not detect it merely because of negligence, then such party cannot avoid the juridical act due to this mistake.[174]

168 Mitterpachová, 2019; Hlušák, 2017.
169 Dobrovodský and Gyárfáš, 2019; Mazák, 2010, p. 179.
170 Dobrovodský and Gyárfáš, 2019; Fekete, 2018; Mazák, 2010, p. 179.
171 SvkCC § 49a *in fine*.
172 Knapp and Luby, 1974.
173 Dobrovodský and Gyárfáš, 2019.
174 Dobrovodský and Gyárfáš, 2019; Fekete, 2018.

7.3. Deceit

Unlike an ordinary mistake, which is legally relevant only if it is essential and excusable, an intentional mistake—that is to say, a deceit—is legally relevant even if it is not essential, that is to say, if it does not relate to circumstances decisive for the juridical act. Likewise, deceit is considered legally significant in legal literature even if it is inexcusable.[175] As with an ordinary mistake, it is irrelevant whether it is a mistake in a legal reason, in the properties, or in the subject of the juridical act. The only exception is a mistake in the motive, which does not render the juridical act null and void.

However, a deceit is legally significant only if it is caused by the person to whom the juridical act was addressed. It is not legally significant if caused by a third party. If the addressee knew of the deceit by the third party, then the person acting may avoid the juridical act only in accordance with the principles applicable to an ordinary mistake.

7.4. Duress

Slovakian legislation considers the issue of duress to be a question of freedom of action. According to § 37 (1) of the SvkCC, a juridical act must be concluded freely, otherwise it is null and void. The law does not provide any other details. However, the legal literature distinguishes between physical coercion when someone, e.g., moves a person's hand with a pen on a paper to simulate s signature, and an unlawful threat when someone threatens the person with some harm.[176] We are of the opinion—contrary to the view of the legal literature[177]—that the first case is not governed by § 37 of the SvkCC, because the law presupposes the existence of a declaration of intent; but if someone, e.g., moves the hand of the acting person, it is not a declaration of intent of the acting person at all. Thus, in our opinion only the second case falls within the scope of § 37 of the SvkCC.

In the legal literature, an unlawful threat means only a threat that is unlawful and is objectively capable of giving rise to a serious concern that the party or another person will be harmed if such a party fails to perform a certain juridical act. It is not sufficient, therefore, that a threat should pose a matter of concern to the acting person if that concern is not objectively justified. However, the direct addressee of the threat does not have to be the (future) party; it is sufficient if the threat is directed against another person, but its aim is to make the party perform a certain juridical act.[178] The originator of the threat does not necessarily have to be the contracting party; it is sufficient that he or she be a third party.[179]

175 Dobrovodský and Gyárfáš, 2019.
176 According to Mitterpachová, 2019; Fekete, 2018.
177 Mitterpachová, 2019; Fekete, 2018; Mazák, 2010, p. 126.
178 Mitterpachová, 2019; Fekete, 2018; Mazák, 2010, p. 126.
179 Mitterpachová, 2019.

The consequence of an unlawful threat in non-commercial matters is the nullity of the juridical act. However, as stated, in commercial relations it will lead only to voidability.[180]

7.5. Laesio enormis

Section 49 of the SvkCC stipulates that a person who 'has concluded a contract in distress under strikingly disadvantageous conditions has the right to withdraw from the contract.' To withdraw from the contract means to terminate it with *ex tunc* effect by juridical act toward the other party. The aggrieved party has this right regardless, whether she was in mistake or not. According to case law, '[d]istress is an economic or social situation in which a particular person finds herself at the time of conclusion of the juridical act, which affects her in such a way and with such an intensity that she will, as a result, perform a juridical act that she would not otherwise have performed.'[181] This state must be based on objectively existing (i.e., not only supposed) circumstances and is always determined by the subjective aspect—the acting person herself and her resistance to the difficult situation. The same objective situation can cause distress in one person but not necessarily in another. At the same time, from the point of view of the existence of distress, and this needs to be emphasized, 'it is irrelevant how this situation arose and what caused it.'[182]

Distress is thus a state objectively perceived as a difficult economic or social situation that is experienced in this way subjectively by the aggrieved party. There must be a causal link between the distress and the conclusion of a contract with strikingly disadvantageous conditions. It is irrelevant whether the other party caused the distress or knew about it at all.[183]

Distress gives rise to the right of the aggrieved party to withdraw from the contract. Strikingly disadvantageous conditions are those where the value disparity between the performance of one of the parties and that of the other is obvious or evident, i.e., where it can be surmised that the disadvantageous nature of the conditions must have been obvious to the other party. The disadvantage does not necessarily have to lie in a disproportionate performance (since *laesio enormis* also applies to gratuitous contracts), but can lie also in the contractual terms as such.

In some instances, a case may be assessed concurrently not only as *laesio enormis*, but also as usury or mistake (deceit) if the conditions laid down by law for usury and mistake (deceit) are met.

180 SkCommC § 267 (1).
181 Supreme Court of the Slovak Republic, case No. 2 Cdo 41/1996.
182 Supreme Court of the Slovak Republic, case No. 2 Cdo 41/1996.
183 Fekete, 2018; Mazák, 2010, p. 177.

8. Concluding remarks

All the analyzed legal orders have similar legal institutions, the aim of which is to secure that the parties' contractual intent is formed freely. For the most part, the pertinent rules show a great deal of similarity, but notable differences can also be adduced.

Concerning mistake, Czech law requires that the mistake originate from the other party. The counterparty's inaction can in some cases also be considered a conduct triggering legally relevant mistake. The Czech law requires that a mistake be excusable and differentiates essential from non-essential mistakes. In the former case the contract is voidable, while in the latter the contract cannot be avoided, but the party in mistake may request compensation. Mistake in motives is of legal relevance only exceptionally. In Polish law mistake cannot be invoked if it concerns the motives of a party. Mistake in Polish law is relevant only if it is somehow attributable to the counterparty. In Hungarian law mistake is also negligence-based, but in some way it must be attributable to the counterparty, since it is required that the latter caused it or at least that it could have been recognized by him or her. Romanian law also differentiates excusable and non-excusable mistakes, on the one hand, and essential and non-essential mistakes, on the other. Mistake concerning motives is in Romanian law only exceptionally relevant. Romanian law allows the counterparty to salvage the contract by offering performance as the party in mistake understood it. The legal remedy is voidability of the contract, but no damages may be awarded in relation to avoidance of contract due to mistake. Mistake in Serbian and Slovenian law is negligence-based, while the HrvLO shifted the nature of mistake toward its objective concept. In Serbian, Croatian, and Slovenian law mistake is essential if the party's misapprehension of facts relates to essential properties of the object of the contract, to the person of the contracting party in *intuitu personae* contracts, and other circumstances considered relevant according to trade usages and the intention of the parties. In all these three laws the remedy is voidability, but the party in mistake is liable for damages to the counterparty caused by the avoidance of contract. On the other hand, the counterparty has a *facultas alternativa*: He or she may maintain the contract in its validity if he or she is willing to perform the contract under the terms that would have been agreed to but for the mistake. Motivational error is legally relevant in gratuitous contracts. Slovakian law also makes legally relevant only a mistake that is essential. A motivational error alone never renders a contract invalid, regardless of whether it is for consideration or gratuitous.

Regarding deceit, Czech law makes it legally relevant even if it relates to non-essential terms or motives of the contract. The legal remedy is voidability of the contract with an obligation to pay damages by the person who caused deceit. In Hungarian law the dividing line between mistake and deceit is that in the case of deceit it is required that the counterparty had deliberately influenced the misled party's contractual intent. If deceit was committed by a third party, the misled party may avoid

the contract only if the counterparty was or should have been aware of it. In Polish law deceit is considered a qualified mistake intentionally induced by a counterparty or a third party. If deceit was induced by a third party, the contract may be avoided if the counterparty acted in bad faith. In Romanian law voidability is the legal remedy for deceit. In addition, the party who caused deceit is liable for damage caused by the deceit. Serbian, Croatian, and Slovenian law have identical rules concerning deceit. Deceit is legally relevant even when the mistake caused is not essential. A peculiarity of the Serbian, Croatian, and Slovenian rules is that deceit may be perpetrated by inactivity of the counterparty as well, and it may stem either from the counterparty or from a third party. If the deceit is caused by a third party, the contract may be avoided only if the counterparty knew or should have been aware of the deceit if the contract is for consideration. If it is gratuitous, it may be avoided regardless of the good faith of the counterparty. In Slovakian law deceit is legally relevant even if the mistake caused is not essential or excusable.

Czech law differentiates coercion from threat as two forms of duress, whereby the former results in non-existence of the contract, the latter in voidability. The legal remedy of duress in the form of threat is voidability in Hungarian law as well. The Romanian law also differentiates coercion from threat, leading to similar consequences. The Serbian and Slovenian laws on obligations do not regulate coercion specifically, but the case law and legal literature clearly differentiate it from threat, which is regulated explicitly. Threat makes the contract voidable, while coercion makes it non-existent, that is, null and void. Croatian law, however, explicitly regulates coercion as well, specifying that the contract in such cases is null and void. Slovakian law differentiates the consequences of threat: In commercial transactions it leads to voidability, while in other transactions it makes the contract null and void.

Concerning *laesio enormis* the Czech law uses the concept of gross disproportion between the values of the performance and the counter-performance. In addition, it requires that the aggrieved party neither knew of nor was required to know of the lack of equivalence. The right to request the court to invalidate the contract ceases in one year from its conclusion. In Hungarian law *laesio enormis* exists if there is a great disproportionality between the values of mutual performances, but the aggrieved party is not entitled to avoid the contract if he or she should have recognized it or undertook its risk. Romanian law does not require that the aggrieved party be in mistake concerning the equivalence of the contract. Another discrepancy is that the Romanian law does not use a legal standard in determining when *laesio enormis* exists, but instead specifies explicitly a threshold of more than half of the true value. The remedy is voidability, while the other party may uphold the contract by offering performance at the value at which the equivalence is restored. The right to avoid the contract is limited to one year from the conclusion of the contract. In Polish law this time limit is two years. The rules of Serbian, Croatian, and Slovenian laws on *laesio enormis* are identical: They are based on gross disparity as a legal standard and not on a precise mathematical threshold and rely on the injured party's mistake relating to the equivalence of the performance with the counter-performance. A novelty introduced

into Croatian law relates to the explicit exclusion of the application of the rules on *laesio enormis* in the case of commercial contracts. Slovakian law also excludes the application of *laesio enormis* to commercial contracts. In addition, in Slovak law it is not required that the aggrieved party be in mistake relating to the equivalence of performance and counter-performance.

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| Chapter VI |

Illegal and Immoral Contracts. Usury. Good Faith in Contract Law

1. General considerations

Free will is man's most prized asset in today's world. The principle of freedom of contract is deduced from this general liberty. Freedom of contract has always been—and will always remain—the linchpin of contract law. The parties may shape the content of the contract by their mutual consent in a way they think will best accommodate their economic interests. Without this principle, contracts would lose their primary purpose of being tools by which the supply and demand for all products and services in the market eventually meet.[1] However, as a vehicle for the accommodation of the private interest of the contracting parties, the legal institution of contract is always under supervisory (and normative) control exerted in the name of public interest in any given society. No contract may be considered valid, even though all preconditions are met, if it is disapproved of by the will of society manifested in the law. 'By private agreements the parties may not derogate from the rules of public law' (*Privatorum conventio iuri publico non derogat*), as the well-known Latin maxim states.[2]

1 Zweigert and Kötz, 1998, p. 326.
2 Ulpianus, from Digesta Book XXX on Edicts. D. 50.17.45.1.

Dudás, A., Hulmák, M., Zimnioková, M., Menyhárd, A., Stec, P., Veress, E., Hlušák, M. (2022) 'Illegal and Immoral Contracts. Usury. Good Faith in Contract Law' in Veress, E. (ed.) *Contract Law in East Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 175–218. https://doi.org/10.54171/2022.ev.cliece_chapter6

Society may express its displeasure toward private arrangements that are contrary to the public interest in different forms. In this respect the constraints on freedom of contract,[3] the very boundaries of lawfulness in contract law, are rather different and vague compared to criminal law. While in criminal law, which rests on the principle of strict legality, all acts are to be considered lawful unless explicitly prohibited, such an approach, although it might seem attractive, is simply not applicable to contract law. There is in the law of contracts, beside transactions infringing on statutory prohibitions, a wide gray zone in which contracts do not contradict any rules incompatible with derogation by the parties yet are still contrary to the general opinion regarding what is appropriate or inappropriate in a given society. The former may be defined as illegal, the latter as immoral contracts.

There are different legislative techniques for establishing the legal limits of the freedom of contract. In this regard the French Code Civil and its German equivalent, the BGB, may be considered legislative models for laying down the boundaries between lawfulness and unlawfulness in contract law for many other European legal orders. According to the emblematic Article 6 of the French Civil Code, individual agreements may not derogate from the laws concerning public order (*l'ordre public*) and good morals (*bonnes moeurs*). The other legislative beacon is the German BGB, which speaks simply of the immorality of juridical acts (contracts).[4] It sets out in § 138 (1) that juridical acts contrary to good morals (*gute Sitten*) are null and void. In addition, it prescribes in the following § the nullity of usurious juridical acts. Contracts by which one of the parties aims to secure for himself or herself an excessive benefit at the prejudice of the other party, taking advantage of the other party's economic distress, urgent needs, lack of bargaining skills, inexperience, or any other specific predicament, are regularly beyond the boundaries of lawfulness. In most jurisdictions they are statutorily prohibited or, as the case may be, considered contrary to public policy or good morals. Usurious contracts rely on the existence of a meaningful discrepancy between the values of performance and counter-performance. In modern societies, increasingly dominated by liberalism and relying on an acquisitive attitude by its members, general judicial control of equality in transactions would be considered excessively paternalistic and prejudicial to legal certainty.[5] For these reasons intervention into the economic equilibrium of the contract devised by the parties' consent is exceptional. *Laesio enormis* has already been mentioned in the chapter pertaining to defects of contractual intent. The basic common feature between *laesio enormis* and usury is that they are both based on the egregious inequality between performance and counter-performance. However, unlike to *laesio enormis*, in the case of usury the disadvantaged party is not necessarily in (a presumable) mistake concerning the true value of the performance or the counter-performance, while the counterparty regularly acts in bad faith. For usury to exist, the better-positioned party must abuse

3 Zweigert and Kötz, 1998, p. 327.
4 (Von) Bar and Clive, 2009, p. 537.
5 Kötz, 2017, p. 112.

a circumstance on the side of the disadvantaged party in order to obtain unfair gain from the transaction. For this reason, usury always evokes a harsher reaction from the legal order in the form of nullity, whereby the specific legal consequences vary from one jurisdiction to the other.

Different institutions of law may contribute to determining whether a contract is illegal or immoral in any given legal order. In jurisdictions that adopted the German legal tradition, the lawfulness of a contract is determined primarily by scrutinizing its content. On the other hand, in legal systems following the tradition of the French Civil Code, beside the content of the contract (as *instrumentum*), the lawfulness of a contract is also determined based upon the legality and morality of the cause of contract (*causa*), that is, by the direct legal purpose the parties intended to achieve by concluding the contract. The theory of *causa*, one of the crown jewels of French contract law, has exerted great influence in many countries, including some in Central and Eastern Europe.[6] However, it is likely that the legal function of the concept of *causa* will be redefined after the French Code Civil itself relegated it to desuetude in the long-prepared amendments eventually adopted in 2016. The text of the French Civil Code currently in effect simply provides that a contract must have a lawful content and must not infringe on public order.[7]

Determining the legal consequences of non-existent contracts is quite a challenging issue in all legal systems. These do not infringe on statutory prohibitions nor good morals, but at least one of the preconditions for their existence is not fulfilled. They are merely purported contracts.[8] Most legal orders do not provide for a specific legal regime applicable only to non-existent contracts, although they may use wording implying a differentiation from invalid contracts. The rules on the invalidity of contracts are usually two-pronged: An invalid contract is either null and void or voidable. Non-existent contracts have at least the pretense of a valid contract; hence it must be established that they have not been concluded validly at all. The purported contract must be invalidated in order to eliminate any possible false impression by third parties (and quite often by the contracting parties themselves) that a valid contract has been concluded. In a bipolar logic of null and of voidable contracts, non-existent contracts are usually declared as such under the rules applicable to nullity.

A judicial decision establishing that a contract is null and void is of a declaratory nature (i.e., the contract is deprived of its effects from the very moment it was concluded). This means that a contract has not become null and void 'because' the court decided so, but because the required statutory conditions were not met at the moment of contracting; their absence is merely established during a judicial procedure. A court decision is required, as it removes the ambiguity concerning the validity of the contract. Such judicial declaration of the invalidity of a contract has profound legal consequences that differ to some extent in various legal orders. Some common

6 Dudás, 2012a, pp. 92–96.
7 Kötz, 2017, p. 109.
8 (Von) Bar and Clive, 2009, p. 454.

features may still be identified, however. The parties are relieved from their obligations arising from a null and void contract: No party may demand performance from the other party, nor may damages be claimed for non-performance.[9] If the parties have already executed their obligations, they are entitled to reclaim what they have performed under the contract. In this context the question arises whether the party to whom the invalidity of the contract is attributable is entitled to restitution. According to the rule embodied in the adage *nemo auditur propriam turpitudinem allegans*, a dishonest party is barred from restitution. Today this principle has lost much of its edge,[10] but is still present in some jurisdictions in Central and Eastern Europe, where the judge is entitled to decline restitution to a party who acted in bad faith. Extraordinarily, in cases where the contract egregiously violates good morals, in some legal orders the court may order the party who acted in bad faith to transfer to the state or to some public entity the object of his or her performance. This legal institution still exists in some Central and Eastern European countries or has only recently been abolished. Finally, in cases where one party acted in bad faith, the other in good faith, in most jurisdictions the liability of the party acting in bad faith arises for the damage the other party sustained due to the invalidity of the contract.[11]

In the light of the *favor contractus* principle, in many legal systems various institutions exist with the aim of 'salvaging' the null and void contract, thus enabling the transactions to 'convalesce' under specific conditions.[12] The most notable are partial invalidity and the so-called conversion or re-qualification of the contract. By the former the null and void or voidable contract becomes valid after the part carrying the cause of its invalidity is removed, provided the remainder of the contract still represents a reasonable and executable consent of the parties.[13] By the latter, the court re-qualifies the parties' consent as another type of contract, if it may be presumed that they would have concluded that contract had they known of the invalidity of their initial contract.[14] A special case of 'salvaging' a usurious contract is the right of the aggrieved party to demand performance as if there were no inequality between the obligations of the parties. In this case the elimination of inequality removes the cause of the invalidity of the contract regardless of the other party's bad faith.[15]

Finally, a short overview of the statutory regulation of the principle of good faith and fair dealing will be given in this chapter, since it is the other principle having, among others, the function of channeling the application of the principle of freedom of contract. There is no legal order in Europe that does not apply the principle of good faith and fair dealing in its contract law regulation. However, its meaning might remain rather vague if one considers only the interpretation of the statutory

9 Kötz, 2017, p. 125.
10 Kötz, 2017, p. 128.
11 (Von) Bar and Clive, 2009, pp. 552–553.
12 Zimmermann, 1996, p. 682.
13 Kötz, 2017, p. 122.
14 Zimmermann, 1996, p. 684.
15 (Von) Bar and Clive, 2009, pp. 514–515.

declaration of this principle.[16] As usually it gains its precise meaning when it is applied in relation to specific institutions of law, it is thus a sort of 'open norm.'[17] One such application has already been mentioned in relation to null and void contracts: the right to claim damages from the party who acted in bad faith, that is, the party to whom the invalidity of contract is attributable. There are, however, many more such applications. The principle of good faith and fair dealing is endowed with several layers of meaning in the context of precontractual negotiations, exclusion of contractual liability, contractual waiver of the application of judicial intervention into the contract due to the *clausula rebus sic stantibus*, etc.

2. The Czech Republic

2.1. Illegal contracts

Pursuant to § 580 (1) of the CzeCC, a juridical act is invalid if it is contrary to good morals or contrary to the law, if required by the sense and purpose of a statute. By the term 'contrary to the law' we must understand not only a contract contravening statutes, but also one contrary to other legislative acts (e.g., a regulation).[18] In particular, contrariety to the law may mean a breach of an enforceable constitutive decision implementing a given statute.[19] Also, the bad faith circumvention of the law (*in fraudem legis*) needs to be qualified as being contrary to the law.[20] Moreover, the term 'illegal contract' needs to be interpreted in a broader sense—a non-existent contract can also be illegal (see below).

In the case of illegal contracts, the invalidity does not occur without further ado—it is indispensable to examine the meaning and purpose of the statute employing the teleological form of interpretation. For example, the operation of a retail shop during a public holiday listed in the Act No. 223/2016 Col. on Retail Sales Hours is an offense. However, there is no need to declare the purchase agreements concluded during such public holiday in the retail shop invalid. The meaning and purpose of the prohibition of retail sale during certain days or hours lies in the protection of staff (imposing proper working hours). The potential invalidity of purchase agreements will not help to achieve such a purpose.

Historically, not all courts examined the meaning and purpose of statutory requirements. They often concluded that any conflict with the law results in some

16 In this respect the DCFR seems quite revolutionary, since it defines the meaning of the principle of good faith and fair dealing. It refers to a standard of conduct characterized by honesty, openness, and consideration for the interests of the other party to the transaction or relationship in question. As an example of acting against this requirement, the DCFR mentions one party acting inconsistently with his or her prior statements or conduct when the other party has reasonably relied on them to its own detriment. DCFR I:103.

17 Zimmermann and Whittaker, 2000, p. 31.

18 Supreme Court Ref. No. 29 Odo 344/2002.

19 Supreme Court Ref. No. 23 Cdo 472/2008.

20 Supreme Court Ref. No. 26 Cdo 273/2018.

form of invalidity of the contract concluded, e.g., in a situation in which the object of the sale was a good not approved for sale by an authority, even though the sale should have been approved, the court found that the purchase agreement was invalid due to breach of the law. However, the buyer had claims arising out of defects that allowed his situation to be resolved—it was not necessary to declare the purchase agreement invalid for that reason.[21] Now this approach is changing due to explicit regulations in the CzeCC.

2.2. Consequences of illegal contracts

Regarding the consequences of illegal contracts, these may vary. The contract or contractual term may be null and void, voidable, or ineffective. A breach of law can lead generally to the payment of damages.[22]

2.2.1. Non-existence of the contract

A contract is deemed non-existent (*nicotnost, zdánlivost*) if it does not fulfill the characteristics of a juridical act (e.g., a manifestly non-serious act, uncertain obligations, or the existence of coercion), or the CzeCC qualifies it as non-existent in certain other cases (e.g., an unfair contractual term included in consumer contracts, or a term deviating from the flat lease regulation to the detriment of the lessee). It is indispensable to draw a distinction between a non-existent and an invalid juridical act. Only an existing contract may be invalid (e.g., null and void, or, as the case may be, voidable in whole or in part).[23] Notwithstanding that, the difference in consequences compared to null and void or voidable contracts is not substantial (e.g., rules on conversion, partial invalidity, or pre-contractual liability apply differently).

2.2.2. Invalidity

In other cases, the contract may be declared invalid when a statute explicitly imposes invalidity as a sanction for a given infringement,[24] or such a consequence may be derived from the purpose and meaning of the legal norm that had been breached.

Nevertheless, juridical acts are to be preferably considered valid rather than invalid.[25] Moreover, partial invalidity has priority whenever the invalid part of the contract is separable from other parts and we may reasonably assume that the parties would have concluded the contract without such a part had they known about its invalidity.[26] Czech law also knows the institution of 'reduction' in order to preserve the validity of the contract.[27] If the ground for invalidity is constituted only by the unlawful determination of the quantitative, temporal, territorial, or other scope, the

21 Regional Court in Hradec Králové Ref. No. 25 Co 355/2001.
22 CzeCC, § 2910.
23 Supreme Court Ref. No. 21 Cdo 2862/2019.
24 E.g., CzeCC, § 581—lack of legal capacity.
25 CzeCC, § 574.
26 CzeCC, § 576.
27 CzeCC, § 577.

court shall amend the scope so that it corresponds to a fair arrangement of the rights and obligations of the parties. The court shall not be bound by the proposals of the parties but shall consider whether they would have proceeded with the legal action at all if they had recognized the invalidity in time.

The CzeCC—as does some of the other legal systems in Central and Eastern Europe—differentiates between two kinds of invalidity, both possibly resulting in partial or complete annulment, it being necessary to assess every single case specifically. An illegal juridical act may be null and void (literally, it may be affected by 'absolute nullity,' *absolutní neplatnost*) or voidable (literally, it may be affected by 'relative nullity,' *relativní neplatnost*). The impact of a juridical act being null and void is that it does not produce any of the intended legal consequences *ex tunc* and *ex lege*. The courts must consider such a situation *ex officio*.[28] A juridical act being voidable means that it exists and produces all the intended legal consequences unless the aggrieved party explicitly objects its invalidity. Such an objection requires a mere juridical act by the aggrieved party addressed to the counterparty, a court decision is not necessary. In such a case, the juridical act is also invalid *ex tunc*. Nevertheless, the right to object the invalidity of the juridical act may be limited.

The contract is null and void not only when it infringes on the law but also when it manifestly disrupts public order.[29] Public order comprises basic rules that are essential to society and its functioning and that must be obeyed by individuals. It is primarily a matter for the legislator to establish which norms govern and are pertinent to public order. Whether a rule protects public order (and therefore may be considered as part of public policy) is determined primarily by its meaning and purpose.[30] For example, in rules protecting third persons, not only contractual parties may be considered as such.

In other cases of breach of the law resulting in invalidity, the contract shall only be voidable—typically if the invalidity of a juridical act is prescribed to protect the interest of a given person,[31] such as error[32] or duress.[33]

2.2.3. Ineffectiveness

The law sometimes prescribes ineffectiveness as a consequence of the breach of law. This may be the case when surprising clauses (e.g., clauses permitted by law but detrimental to some categories of parties) are included in the standard terms.[34] Relative ineffectiveness (not to be confused with voidability) is also a regular consequence of the *actio Pauliana*.[35] It should be apparent from the law whether such ineffectiveness

28 CzeCC, § 588.
29 CzeCC, § 588.
30 Supreme Court Ref. No. 31 ICdo 36/2020.
31 CzeCC, § 586 (1).
32 CzeCC, § 583.
33 CzeCC, § 587.
34 CzeCC, § 1753.
35 CzeCC, § 589 et seq.

must be invoked by someone or is taken into account *ex officio* (e.g., in the case of surprising terms).

2.3. Immoral contracts

The term 'good morals' is interpreted as rules that must be unconditionally upheld in society; these rules at times originate not from particular norms of law (like public order), but from the ethical tenets of society.[36] Immoral contracts are prohibited.[37]

In some cases, the concept of good morals is misunderstood and extended. In practical terms, any action particularly advantageous to a contracting party itself (e.g., an advantageous purchase contract) or a time of performance depending on a third party was at some time described as immoral in older case law. Nowadays the Supreme Court of the Czech Republic adopts a more lenient approach. There must be some other circumstances, not only an egregious discrepancy in performances, that render the contract immoral.[38]

2.4. Consequences of immoral contracts

An immoral contract is null and void if it is manifestly contrary to good morals.[39] As there is intense public interest in the preservation of good morals, it is then without any doubt that such preservation cannot be left solely to individuals. Violations of these rules must be taken into account by the public authorities, even if neither of the parties objects.[40]

2.5. Usury

Usury is regulated by § 1796 (1) of the CzeCC, according to which if a person exploits distress, inexperience, mental weakness, agitation, or carelessness of the other party when concluding a contract and causes the other party to promise or provide to him or her or to another person a performance the economic value of which is in gross disproportion to the counter-performance (consideration) received, such a contract is invalid. An entrepreneur who concluded a contract in the course of his or her business activity may not invoke the invalidity of the contract under § 1796 CzeCC.[41]

The list of subjective features of usury mentioned above is not limited; to qualify a juridical act as usurious, it is sufficient to meet at least one of them.[42] As for the requirement of a 'gross disproportion,' the rules of *laesio enormis* apply. A gross disproportion is a disproportion that is obvious and without any doubt. As the CzeCC

36 Constitutional Court Ref. No. II. ÚS 249/97.
37 CzeCC, § 580.
38 Supreme Court Ref. No. 30 Cdo 21/2012, 29 Cdo 3467/2016, 23 ICdo 56/2019.
39 CzeCC, § 588.
40 Melzer and Piechowiczová in Melzer and Tégl, 2014, p. 721; Beran in Petrov et al., 2019, p. 641; Handlar and Dobrovolná in Lavický et al., 2014, p. 2087.
41 See also CzeCC, § 1797.
42 Supreme Court Ref. No. 30 Cdo 4582/2014.

does not state any specific limit, it is necessary to assess every single case differently, but the general rule is that the threshold for usury is double the value of the performance when compared to the consideration.[43] Thus, for example, in case of a credit agreement, an interest rate of 30% makes it usurious.[44]

In order to speak of usury, some authors are of the opinion that the greater the disproportion between the performance and the counter-performance, the lower the threshold for exploitation required to ascertain usury, and *vice versa*.[45] However, it can be concluded that a higher-than-normal price in and of itself does not represent a provision contrary to good morals.[46]

There is a debate in the legal literature about the consequences of usury. Some authors argue that renders the juridical act voidable.[47] The reasons cited are the following: The CzeCC mentions invoking by an entrepreneur, the objection being required for *laesio enormis*, undue influence, or unfair contractual penalty as well; voidability gives the weaker party the choice of whether to invoke usury. Moreover, usury makes the contract voidable in Austria or Switzerland. Some other authors state that the juridical act is null and void,[48] because a different solution would lead to the consequence that public authorities would authoritatively impose immoral obligations and, moreover, enforce immoral arrangements through state coercion (in case the aggrieved party does not object to the otherwise voidable juridical act and enforcement then takes place against him or her). Moreover, there is the example of German regulation. A third opinion states that generally it is not possible to determine whether the juridical act is null and void or voidable in all cases of usury, it being necessary to assess such a consequence on a case-by-case basis.[49]

It is indispensable to distinguish between usury and *laesio enormis*. *Laesio enormis* is regulated by § 1793 (1) of the CzeCC. If the parties undertake to provide each other with a mutual performance and the performance provided by one of the parties is grossly disproportionate to the counter-performance provided by the other party, the aggrieved party may request that the contract be avoided and the original state restored, unless the other party reimburses him or her for the injury resulting from the disproportion, keeping in view the usual price at the time and place at which the contract was concluded. This rule does not apply if the disproportion between the performances is based on a fact that the other party neither knew of, nor was required to know of.

43 Janoušek in Petrov et al., 2019, p. 1874.
44 Janoušek in Petrov et al., 2019, p. 1874.
45 Janoušek in Petrov et al., 2019, p. 1875; Petrov in Hulmák et al., 2014, p. 337.
46 Supreme Court Ref. No. 29 Cdo 3467/2016.
47 Janoušek in Petrov et al., 2019, p. 1878; Petrov in Hulmák et al., 2014, p. 340.
48 Melzer in Melzer and Tégl, 2014, p. 785.
49 Zuklínová in Švestka et al., 2014, Sec. 1796.

2.6. Good faith in contract law

In the Czech Republic's legal system, good faith is used both in an objective meaning (fairness) and a subjective meaning (as a person's mental state based on an excusable belief in the existence of a fact, a claim, or a legal relationship e.g., that between a parent and a child). This chapter deals with the objective meaning of good faith: Everyone is obliged to act fairly in a legal transaction.[50]

Good faith should not be confused with good morals. Violation of the principle of good faith does not necessarily mean a violation of good morals, while any conflict with good morals always constitutes a violation of the good faith principle.

Good faith may manifest itself during the conclusion and interpretation of a contract or during its performance. The CzeCC contains some special rules regarding good faith as well (e.g., precontractual liability).

2.7. Consequences of infringement of the principle of good faith

The CzeCC states that no one may benefit from acting unfairly or unlawfully. Furthermore, no one may benefit from an unlawful situation that the person caused or over which he or she had control.[51]

In some cases, the CzeCC regulates consequences specifically (e.g., damages in precontractual liability). There is no general rule dealing with the consequences of breaching the good faith principle. However, the general belief is that this does not lead to the invalidity of the contract. Some exceptions may be found in the regulation of unfair contractual terms[52] or standard terms that the other party could not have reasonably expected,[53] if these are considered a display of bad faith.

3. Hungary

Contracts that are unlawful, circumvent the law, or violate good morals are null and void in Hungarian contract law.

3.1. Illegal transactions

As far as unlawfulness is concerned, violation of or incompliance with statutory provisions renders the contract null and void, insofar as the statutory provision interfered with does not provide for other specific consequences. Despite these other consequences, the contract also shall be null and void if this sanction is explicitly provided for by law, or if the purpose of the statutory law is to prohibit the legal effect intended to be achieved by the contract.[54] This rule is interpreted as a kind of teleologi-

50 CzeCC, § 6 (1).
51 CzeCC, § 6 (2).
52 CzeCC, § 1814.
53 CzeCC, § 1753.
54 HunCC, § 6:95.

cal reduction in court practice.[55] That is, violation of legal provisions results in nullity of contracts only insofar as the presumed intent of the legislator with the statutory prohibition was to deprive the contract of its legal effects if the contracting parties interfered with such a prohibition. If the contract interfered with a legal norm that addresses private law relationships, the contract shall be null and void except where the norm explicitly provides for applying consequences other than nullity. If the legal norm that had been interfered with does not address a private law relationship, it is to be assessed by interpretation of that norm, whether the legislator might have attempted to deprive the contract of its legal effect.

If, e.g., the party is entitled to operate a business on the basis of a permit, the absence of such a permit does not render the contract concluded by the party null and void.[56] Another aspect of this approach is that if rules of tendering were infringed (e.g., the contract had been concluded not with the highest bidder or any of the bidders had been unlawfully advantaged) but the content of the contract does not interfere with statutory norms, its nullity shall not be established on the grounds of illegality.[57] On the other hand, if the contract was concluded by entirely omitting the bidding procedure that was compulsory on the grounds of statutory law (e.g., the public procurement procedure), the contract shall be null and void. Compliance with statutory law shall be assessed at the time of conclusion of the contract. If the contract is valid at the time of conclusion but interferes with statutory laws due to changes that occurred later in the legal environment, this shall be assessed as a hardship or impossibility of performance that emerged after contracting.

A contract shall qualify as null and void due to circumventing the law even if it does not violate statutory laws directly, but its actual effect is not compatible with statutory laws. The Supreme Court established that if the parents undertook obligations in the name of the minor to be performed after such minor comes of age, the contract shall be null and void as circumventing statutory laws.[58]

3.2. Contrariety with good morals

Contracts incompatible with the values generally accepted in society are null and void as being contrary to good morals. Such contrariety includes incompatibility with public policy as well. Contracts are null and void that are oppressive, excessively restrict personal freedom, are concluded with the intent to cause harm to others, are detrimental to the public interest, or are incompatible with basic professional and commercial standards, family values, or other basic social and economic values.

In a socio-economic distribution system based on market mechanisms, it is essential to guarantee the freedom of choice of market players, in terms of both the voluntary nature of the choice and the information available to them. Where market

55 Vékás in Vékás, 2020, p. 1596.
56 Supreme Court, Legf. Bír. Pfv. III. 21.463/1995. BH 1997. No. 391.
57 Supreme Court, Legf. Bír. Gfv. X. 31.147/2000. BH 2001. No. 234.
58 Legf. Bír. Pfv. IV. 22.342/2003. EBH 2004. 1019.

conditions do not apply, the restriction of contractual freedom may be appropriately achieved by rejecting the validity of contracts infringing good morals and public policy: The law may reject enforcement of transfer of *res extra commercium*. The same applies to family relations, which determine the basic structure of society. There are interests that are not economic or family-related, but ensure social coexistence in the long term, such as personal and political freedoms. Restrictions on them may also be an accepted minimal limit to contractual freedom in a society where these freedoms are a precondition for its continued functioning. Within this framework, the values reflected in the provisions of the constitution (the Fundamental Law of Hungary) are points of reference for determining the content of morality, because the primary source of such basic values is the constitution itself.

Contracts restricting the economic freedom or the commercial autonomy of the other party are the most relevant cases of immoral contracts in commercial relations. Contracts distorting competition are null and void as illegal contracts, but other forms of interference with freedom and autonomy in commercial relationships are covered by the general clause of immoral contracts. The restriction may be excessive because of the duration of the contract (restriction) or because of the disproportionate nature of the stipulated rights and obligations, or even because it gives one party a broad right of control or influence over the conduct of the other. This may be achieved, for example, by a disproportionate allocation of risks in the transaction. It also includes contracts whose object is to exploit the position of the economically weaker party in a morally reprehensible manner, to obtain an undue advantage over him or her, to make his or her performance economically impossible, or to 'overburden' him or her. In judging such cases, economic policy considerations may also play an important role.

A contract whereby a creditor over-secures himself or herself against a debtor also may be void as contrary to good morals. These situations are considered by the courts to constitute an unacceptable restriction on the economic freedom of the other party. Thus, the transfer of property for purposes of providing a security, the assignment of all the debtor's claims to the creditor for the purposes of providing a security, and the reservation of title for an extended or enlarged period or 'global' assignment are considered contrary to good morals if the party providing the security would thereby restrict its own economic freedom to an unacceptable extent. Contracts that have as their object to deceive or to defraud third parties may also be regarded as manifestly unfair and interfering with good morals. It is generally accepted that the mere fact that a contract is detrimental to the interests of third parties does not in and of itself render it null and void as unfair, especially since in a market context a certain degree of detriment to the interests of third parties is inevitable in a competitive situation. In a social and economic model based primarily on the pursuit of individual interests, which is typical of the market economy, there can be only a limited requirement to take account of the interests of other persons with an adverse interest in economic transactions. Therefore, only exceptionally, in well-defined cases that seriously violate the essential requirements of economic transactions, can a contract be declared null

and void as violating good morals on the grounds that it is detrimental to the interests of third parties.

3.3. Good faith in contract law

The requirement of good faith and fair dealing is a generally recognized principle of private law and is one of the fundamental principles of the HunCC as well (§ 1:3). The requirement of good faith and fair dealing is a general clause, just like the provision rendering null and void a contract contrary to good morals. However, while the legislator lays down the consequence of interference with good morals in contract law, that is, rendering the contract null and void, the requirement of good faith and fair dealing is not only open-ended in its content but also in the legal consequence of interference. The principle of good faith and fair dealing sets out a general standard of requirements with a moral content, which is therefore equivalent in its content to moral values. The distinction between the nullity of contracts violating good morals on the one hand, and contracts contrary to the principle of good faith and fair dealing on the other, can be defined primarily in terms of a functional difference rather than with reference to their content.

The scope of the prohibition of contracts contrary to good morals is limited to controlling the validity of the contract and entails the nullity of the transaction as a legal consequence. It does not apply to situations arising in connection with the conclusion, performance, or enforcement of a contract, nor does it apply to changes in the circumstances in which the contract was concluded or regarding its termination. However, the requirement of good faith and fair dealing, in addition to constituting a fundamental principle that also applies outside the law of contract, is relevant in all aspects of the contract and is flexible in its consequences, since the court is not bound by invalidity or any other determined legal consequence in enforcing the principle. Good morals, good faith, and fair dealing reflect a common set of moral standards and values, with no perceivable qualitative or quantitative difference.[59] However, an interference with good morals does not necessarily render a contract null and void: It results in the nullity of the contract if the moral standard interfered with was intended to have that consequence and nothing else. If nullity cannot be inferred for the purposes of the moral standard, the contract may be found to be contrary to the requirements of good faith and fair dealing. The breach of the fundamental principle of good faith and fair dealing may be subject to another consequence than nullity. Such a situation arises, for example, where the violation of good morals is not obvious, i.e., it does not necessarily or directly follow from the content of the contract, circumstances of contracting, or goal of the contracting parties.

3.4. Correction of the consequences

In the context of the legal consequences of invalidity, the party providing performance under the contract can recover it by means of a claim for restitution on the

59 Földi is of a different opinion. See Földi, 2001, p. 102.

grounds of unjust enrichment (if a proprietary claim is not available) or a specific rule of restitution (as provided in the HunCC). There are, however, policy considerations that would justify rejecting restitution in the case of illegal or immoral contracts. The principle that no one shall be allowed to rely on his or her own wrongful conduct to obtain an advantage is a traditional principle of private law. If this principle is to be applied to the legal consequences of invalidity of the contracts, the court will reject the claim for restitution of the party who (also) caused invalidity. The refusal to grant restitution is also justified by the fact that otherwise there would be little preventive effect of the legal or moral prohibition (or other grounds for invalidity). The party violating a moral or legal norm would not risk anything, since at most he or she would get back what he or she has performed. Thus, the policy underlying the prohibition of such transactions cannot prevail. It would therefore seem obvious for the court to reject restitution for the party who has caused the invalidity, as this would prevent a party of bad faith from concluding such a contract. The disadvantage of this solution, however, is that rejecting restitution results in the unjust enrichment of the aggrieved party. To remedy this situation, the HunCC of 1959 introduced into Hungarian law the right of retention in favor of the state, which was finally abolished by the HunCC of 2013. Courts are disinclined to restrict the right of invoking nullity on the grounds of the lack of good faith and fair dealing or other doctrines, even if it was clear for the party concerned that he or she was party to an illegal transaction. Thus, nullity can also be invoked by the party that caused it, and such party is not barred from claiming restitution. In the case of 'bilateral turpitude,' the result may hardly be satisfactory, since either the refusal to return the performances or the full or partial granting of the claim for restitution contradicts the requirement of good faith and fair dealing, and therefore undermines the preventive effect of the sanction. In certain situations, this is not in line with substantive justice as perceived at the social level, and therefore reduces the effectiveness of the enforcement of the law.[60]

4. Poland

The PolCC deals with the illegality and immorality of contracts in two separate parts of the code: the General Part proper and the General Part of the Law of Obligations. The first provision is Article 58 of the PolCC, which sets out general rules as to the validity of all juridical acts (both contracts and unilateral acts), including contracts. Another is Article 353^1 of the PolCC dealing with the limits of contractual freedom. These two provisions are supplemented by the rules on simulated transactions (*pozorność*) and acts performed by persons unable to foresee the results of their actions.

There is a reason for this two-tier system. Initially, the PolCC did not include provisions on contractual freedom because that would have been contrary to the socialist vision of private law. Article 353^1 of the PolCC was added to the Law of Obligations in

60 Kelemen, 1937, p. 142.

the PolCC after the fall of communism in Poland in 1989. Another peculiarity of this system is the existence of two different terms denoting immoral acts—the classical *contra bonos mores* (*sprzeczny z dobrymi obyczajami*) clause, and the 'rules of social coexistence' clause (formerly referring to the 'rules of social coexistence of the People's Republic of Poland'). The latter is the original term used by the drafters of the PolCC, who wanted to break with the bourgeois traditions of the older civil law and replace it with a new set of rules fit for the new, socialist society. After 1989 the lawmakers decided to leave the original term almost intact (the reference to the People's Republic of course is now repealed) and use the *good morals* clause in newly added or completely changed articles of the PolCC. Although a minority of authors stresses that if you use two different terms in an act, they must necessarily have two different meanings, the majority believes that both *good morals* and rules of social coexistence are used in an identical meaning.[61]

According to Article 58 § 1 of the PolCC, juridical acts that are illegal or contradict the rules of social coexistence are null and void by virtue of the law (*ex lege*). Illegality is understood as undertaking an action that violates a statute or an act of equal standing, such as an EU Regulation.[62] It would be hard to provide the readers with an exhaustive list of cases where a contract would be illegal, but the following list of examples should give a good overview of the current practice. Contracts for committing a crime are evidently illegal and thus null and void. The same goes for contracts relating to *res extra commercium,* or goods covered by various trading restrictions (e.g., archaeological finds, human organs, various psychoactive compounds, or military equipment). Illegality may also occur as a sanction for disregarding requirements of form or including a clause explicitly prohibited by law. Thus, if the law requires the contract to be notarized, concluding it in any other form will lead to nullity. If, for instance, someone buys archaeological finds or ivory (illegal to trade on the grounds of international agreements on the protection of endangered species) on eBay, the contract will also be null and void.[63] The same sanction applies to contracts concluded by persons placed under guardianship and therefore lacking the exercise of their rights, or by a person who, due to a mental condition, serious illness, or any other personal reason, was not able to fully comprehend the consequences of his or her actions at the given time.[64]

A good example is a COVID-19 patient with a high fever signing documents without reading them beforehand because he or she cannot do it but feels bound to sign. Even if he or she has not read them carefully, he or she will not be bound by his or her apparent consent, as the action of granting such consent was vitiated by a psychological condition.

61 Sala-Szczypiński, 2007, pp. 66 et seq. For a detailed analysis see Zaradkiewicz, 2013, pp. 22 et seq.
62 Gutowski, 2021, pp. 211 et seq.
63 Szafrański, 2019, p. 56.
64 PolCC, Article 83.

Another atypical case of nullity is constituted by simulated contracts.[65] This type of defective expression of will happens when the parties pretend to enter into an apparent contract without intention to perform. Typically, this happens if the parties intend to delude the general public or creditors. Thus, if a debtor 'sells' his or her car to a friend in a bogus contract to present an apparent state of insolvency to any creditors that such a debtor may have, this contract will be invalid. The same applies to bogus sales at auction, where the auctioneer colludes with the owner of the goods sold and his or her cronies to accept fake bids. The purpose of such an auction might be, for example, to generate a market for an otherwise worthless article. The sale itself is bogus and void, but the 'sales price' will be published and the bidding public will be convinced that an artist's works are worth buying.[66]

The 'principles of social coexistence' are not defined by law. This is an umbrella term covering all the cases where there is no law against a contract or its provision but the contract should not be upheld due to morality or public policy reasons. What is or what is not against the rules of social coexistence or *contra bonos mores* depends largely on what society considers immoral or improper. In a particular case, it is all in the eyes of the judge.[67] A good example is contracts relating to sex, love, and romance. In the 1930s, a claim for commission owed to a professional matchmaker was declared immoral (apparently you can help people to find their significant other only for free). In the times of Tinder and matchmaking portals, this case law seems somewhat exaggerated. Promises to marry, once enforceable, are today held as non-binding, and a judge confronted with an engagement contract would probably declare it null and void because being contractually bound to choose a romantic partner is contrary to all the concepts of human freedom we now cherish. At this particular moment, we are probably seeing the shattering of one more iron-clad example of an immoral contract: the typical textbook example of a contract for sexual services rendered for money, or a contract for having sex in public.[68] However, there is currently a strong movement for acknowledging sex workers as part of the labor force, and one cannot deny the existence of pornographic theaters, skin businesses, and the adult movie industry. Classifying these contracts as null and void could lead to discrimination against the performers. Moreover, if such businesses exist and are socially accepted, they seem to fall out of the *contra bonos mores* group. Article 58 § 1 of the PolCC covers not only juridical acts containing clauses contravening rules of social coexistence, but also acts committed with an impure intent. For instance, the Supreme Court of the Republic of Poland has held that a buyer who paid a significantly lower price for goods in the knowledge that the seller has not paid the price for such goods to their former owner and has no intent to do so concludes an immoral contract.[69]

65 PolCC, Article 84.
66 Gutowski, 2021, pp. 104 et seq.
67 Radwański and Zieliński, 2012, pp. 395 et seq.
68 Radwański and Trzaskowski, 2019, p. 319.
69 Judgement of the Supreme Court of February 10, 2010 V CSK 267/09.

The invalidity of a juridical act can be total or partial, depending on the gravity and scope of the infringement of the rules. So, an act can be invalid as a whole or contain illegal or immoral clauses. In the latter case, only these clauses are invalid and simply fall out of the scope of the act. If, however, the act would be meaningless without these clauses, the whole act would be invalid.[70]

The invalidity of a contract or any other juridical act occurs *ex lege* and the court must invoke such invalidity, the juridical act being null and void, *ex officio*. However, Polish law also knows cases of voidability where the act is valid unless one of the parties contests its validity, either by an attempt to rescind it or have it invalidated by court. An example of the former is an essential error, where one can rescind a contract by simple declaration made in writing to the other party. An example of the latter would be the action for invalidation of a contract concluded at a rigged auction.[71]

As far as the illegality of a contract goes, the general framework is similar to that applied in cases of the illegality of any other juridical act described above. So, having a contractual clause contravening a statutory provision leads to the nullity of a contract or a part thereof. This limitation has to be read in connection with other provisions of the PolCC, in particular rules on clauses unfair to consumers.

The PolCC has a general provision stating that any contractual clauses contrary to good practices shaping the position of a consumer unfavorably vis-à-vis the entrepreneur are invalid. The PolCC contains a list of so-called 'gray' clauses that are deemed unfavorable vis-à-vis the consumer unless proven otherwise. This rule does not apply to provisions individually negotiated with a consumer. A recent example of applying these rules to consumer contracts is a Judgement of the Supreme Court[72] dealing with so-called 'spread' clauses in housing credit agreements, where the amount of the credit was converted into Swiss Francs. Many banks used the spread between the buying and selling price of the CHF to raise their profit margins. The contracts contained a clause that the customer would pay the credit installments in PLN and the bank would convert it into the CHF using its own exchange rates. The banks had unlimited freedom to set exchange rates, so they set them at levels largely unfavorable to customers. The Polish Supreme Court decided that such clauses are contrary to good practices and thus invalid. On the other hand, the Court for the Protection of Competition and Customers (*Sąd Ochrony Konkurencji i Konsumenta*) held that employing a complicated algorithm incomprehensible to average consumers to calculate the CHF/PLN exchange rate is not per se abusive or *contra bonos mores*.[73]

Acting contrary to good practices can also occur in the case of contracts where the position of the parties is not equal if the contract limits personal freedom or in family life.[74]

70 PolCC, Article 58 § 3.
71 PolCC, Article 70^5.
72 Judgement of the Supreme Court of February 27, 2019 II CSK 19/18.
73 Judgement of the Court for protection of Competition and Consumers of March 22, 2021 r. XVII AmA 12/19.
74 Machnikowski, 2020, pp. 609 et seq.

The third and the most complicated limitation of contractual freedom is contradiction between the contents of the contract and the nature of contractual relationship (*sprzeczność z naturą stosunku zobowiązaniowego*). There is no good explanation of what the lawmaker intended when introducing this particular rule. The legal literature usually limits itself to stating that contracts containing clauses contradicting basic principles of private law will fall within the scope of this provision. However, the same clauses will also be illegal or contrary to good practices.[75] In the case law the following clauses have been held as contradicting the nature of a given contractual relationship: a clause excluding a partner's right to participate in the profits if particular activities of an ordinary partnership governed by said partner are not profitable;[76] a life insurance contract where part of the premium can be invested in an investment fund, but the amount of the insurance paid to the beneficiary is close to null;[77] or a credit consortium agreement where one of the members was absolved from any risk.[78]

There is no general presumption of good faith in contract law; however, there is a provision requiring negotiating parties to act in accordance with good practices, and performance of contract requires conformity with customs, the law, and the rules of social coexistence. Breach of these rules may lead to contractual or non-contractual liability. The latter is applied in the field of contracts mainly for the broadly understood situation of *culpa in contrahendo*, i.e., a breach of an implied duty to act in good faith when entering into a contract.[79] To what extent *bonos mores*, rules of social coexistence, and contractual good faith are interchangeable remains uncertain.[80]

5. Romania

5.1. Illegal contracts

5.1.1. General aspects

Contracts or contractual clauses infringing on mandatory legal norms or on public order (public policy) in general are considered illegal.[81] The contract may thus be rendered null and void *ex lege* or may be voidable by a court upon request by the aggrieved party or by the agreement of the parties, both situations resulting in invalidity. Invalidity plays both a preventive role (the parties, knowing that the contract will be invalid, should not enter into it) and a repressive, sanctioning role (if the parties do enter into an illegal contract, that agreement cannot produce the desired effects).[82] The law uses

75 Machnikowski, 2005, pp. 350–351.
76 Judgement of the Supreme Court of November 9, 2006 IV CSK 216/06.
77 Judgement of the Supreme Court of May 21, 2020, I CSK 772/19.
78 Judgement of the Supreme Court of December 15, 2005, V CK 425/05.
79 Zawistowski, 2004, pp. 381 et seq.
80 Zaradkiewicz, 2013, pp. 22–23; Radwański and Zieliński, 2012, pp. 399–400.
81 RouCC Articles 1169 and 1246.
82 Boroi and Anghelescu, 2021, p. 271; Nicolae, 2018, p. 532.

the institution of invalidity as a defense against the creation of contracts that would be contrary to the public or at the very least to private interest. A contractual clause may also be invalid, in the meaning of 'non-existent,' if it appears to exist (materially) but does not produce the legal consequences intended by the parties under the existing law, without being null and void or voidable. The reason of all the above-mentioned manifestations of invalidity must in all cases exist at the moment the contract is concluded.

Invalidity is therefore a sanction affecting a contract by depriving it in whole or in part of the legal effects for which it was concluded. The essential sanction of invalidity is that it precludes the intended legal effect: The invalid contract does not bind the parties (the invalid contract does not have to be performed), nor can the invalid contract be enforced by the state directly or by way of an enforceable court decision. It is not sufficient to identify invalidity simply with the lack of any legal effects. It must be stressed that an invalid contract also produces legal consequences, but these are not the same as those that the parties intended to achieve. For example, the object of performance under an invalid contract must be returned (*restitutio in integrum*), even if the parties intended that the performance should occur even in cases when the contract itself is invalid.

What causes a contract to be invalid? Invalidity is caused by the absence of one of the general conditions of validity of contracts (capacity, consent, a definite, permissible, and possible object, a legitimate cause, or form in the case where this represents a condition of validity). Also, invalidity may be caused by the infringement of a specific condition of validity, resulting in the breach of prohibitive and mandatory rules of law.

Invalidity under Romanian law has two general forms and one specific form. The two general forms are also degrees of invalidity according to their mode of operation (*ex lege* or upon request by the aggrieved party or agreement of the parties): nullity and voidability. The specific form is the institution of non-existent clauses called 'clauses considered as unwritten' in the Romanian legal system—a novelty introduced as of October 1, 2011. The following table illustrates the use of these notions using their Latin equivalents as guides:

Invalidity (*nulitate*)	nullity (*nulitate absolută*)	*negotium nullum*
	voidability (*nulitate relativă*)	*negotium rescissibile*
	clause considered as unwritten (*clauză considerată ca nescrisă*)	*clausa pro non scripto habetur*

5.1.2. Nullity

Nullity[83] of a contract, by which such a contract is considered null and void *ex lege*, is a civil law sanction occurring when the norms protecting the public interest have been infringed upon, and therefore the contract may have no intended legal transactional effects at all.

83 RouCC Article 1247.

A contract is sanctioned by nullity if:[84]

— there is a total absence of (legal) intent to conclude the contract, for example, if the signature on the contract is not provided by the contracting party (obviously, e.g., in cases where the signatory has no right of representation, but also if the signature is forged),
— it issues from a person who does not have the legal capacity to conclude the contract,
— it is in direct breach of a mandatory legal norm protecting a general interest, e.g., when *Primus* as seller agrees with *Secundus* as purchaser to the sale of a kidney. The contract is null because it is contrary to the RouCC (Article 66 provides that any transaction that has as its object conferring a pecuniary value on the human body, its components, or its products is null and void, except in cases expressly permitted under the law),
— it constitutes an evasion of the law (*in fraudem legis*), therefore it is in indirect breach of a mandatory norm protecting a general interest; that is to say, it is a contract that, although not directly prohibited, is intended to circumvent the purpose of a prohibitive norm,
— contracts contrary to public policy, called 'public order' (*ordinea publică*), or good morals (*bunele moravuri*). Contracts contrary to public policy include those that are not as such immoral, nor expressly prohibited, but that contravene legal principles that are generally the basis of the legal order or of certain institutions of public law. For example, a contract that excessively restricts individual freedom contradicts public policy. There is no doubt that the vagueness, indefiniteness, and elasticity of the public policy concept raises interpretation problems,[85]
— does not comply with the prescribed formalities, provided that the contract is subject to a formality, for example, the authentic, notarized form.

The following consequences characterize nullity:[86]

— A contract is null and void regardless of whether or not proceedings for having it declared as such have been brought. The nullity is independent of the will of the parties. Since the contract does not legally exist, if proceedings for a declaration of nullity have been brought, the court does not annul the contract but merely finds, with declarative effects, that it is null.
— In principle, nullity may be invoked in court, or even during extrajudicial procedures (e.g., the inheritance procedure before a public notary), by any interested person or third party, not just the aggrieved party but also those who stand to benefit in any way from the contract being null and void. The contract must be declared null even against the common will of all the parties

84 For further details, see Boroi and Anghelescu, 2021, pp. 289–294; Nicolae, 2018, pp. 552–555.
85 For contracts breaching good morals, see the following sub-chapter.
86 For further details, see Nicolae, 2018, pp. 557–560; Veress, 2021, pp. 132–133.

who may be interested in its maintenance. Nullity is also effective against all parties before the contract is declared null by a court [e.g., the invalidity of a contract of gift (*contract de donație*) in a private deed can be successfully invoked against the creditors of the donee (*donataire*)].

— The court must also establish the nullity of its own motion. This is the case even if both parties request that the nullity be disregarded.
— It follows from the aforementioned fact that the nullity of a contract cannot be remedied by the parties' subsequent confirmation of it (*quod ab initio vitiosum est, non potest tractu temporis convalescere*), since confirmation is tantamount to waiving the action for a declaration of nullity. This action belongs not only to the contracting parties. However, according to Article 1260 (1) of the RouCC, it is possible to reclassify a null contract as a valid contract of another type (*conversiunea contractului lovit de nulitate absolută*). This refers to a situation where the contract sanctioned by nullity contains the essential elements of another—valid—contract and may therefore be reclassified as valid if this is not contrary to the parties' presumed intention. For example, a contract for the sale of immovable property concluded as a private deed (which is null and void for lack of authentic form) can be reclassified as a promissory contract for the sale of the same immovable (which is also valid as a private deed). Reclassification occurs *ex lege* in all cases when the parties have not expressly excluded this effect, or its tacit exclusion does not result beyond any reasonable doubt from the contents of their contract.
— An action for a declaration of nullity of a void contract does not become time-barred.

5.1.3. Voidability

The voidability[87] of a contract is a consequence of breaching legal norms protecting private interests, and therefore voidability of the contract can be invoked by the aggrieved party whose interests are protected by the violated norm.

Therefore, a voidable contract creates a contingency situation: The contract is provisionally in effect, but the law gives one of the parties (but not any third parties) the power to avoid it, with retroactive (*ex tunc*) effects. The principle of freedom of contract permeates the legal institution of voidability because the party entitled to initiate avoidance is free to choose whether to accept the voidable contract and tolerate the associated injury, or to exercise the action for avoidance.

In cases where the nature of the invalidity is not determined or is not clear from the law, the contract is considered voidable, not null and void.

A contract may be avoided if:[88]

— the will of one of the parties has been manifested in a defective manner (cases of mistake, deceit, duress, *laesio enormis*),

87 RouCC, Article 1248.
88 For further details, see Boroi and Anghelescu, 2021, pp. 294–296; Nicolae, 2018, pp. 555–556.

— the contract lacks a cause (*causa*),
— consent was given by a person who lacks the exercise of his or her rights, and therefore such consent would have been contingent on the prior approval of another person or entity,
— the law expressly provides for the sanction of voidability in the event of a breach.

Voidability has the following characteristics:[89]

— The contract exists until a court decision annuls it. However, if this happens, the contract is deemed not to have been validly concluded from the outset. If the contract is avoided, therefore, any effects such a contract hitherto acquired are retroactively extinguished (the *ex tunc* effects of avoidance). Once the contract has been avoided, voidability is thus no different from nullity. The difference between these two forms of invalidity is primarily one of degree, which is reflected in the applicable conditions, but not in the effects. Once successfully challenged, the consequences of a voidable contract must therefore be judged according to the same principles as those of a null contract. The agreement of the parties may also operate the avoidance of the contract.
— Unlike nullity, voidability, whether by action or as a plea in defense, may be raised only by the party who has suffered an infringement of his or her rights or legitimate interests as a result of the contract e.g., a person subjected to duress or deceit during conclusion of the contract. Neither the party of bad faith nor any third party may successfully request avoidance (there is one exception in this respect: The prosecutor may bring an action for avoidance to protect the interests of persons lacking capacity to exercise their rights).
— Since in such cases the invalidity of a contract depends solely on the party, the latter has the right to enforce the invalid contract by confirmation. By this, the uncertainty hanging over the contract is removed, and it is considered as if it had been valid from the moment it was concluded. The confirmation is therefore retroactive. Confirmation does not affect rights acquired by third parties in good faith.[90] Confirmation may only be valid if it is made with knowledge of the possible reasons for voidability, and only if the circumstances giving rise to the infringement of a legal norm no longer exist at the time of confirmation (otherwise, the confirmation itself may be challenged). In order to remove uncertainty, the law recognizes the possibility of requesting the person entitled to avoid the contract to confirm it. If the person does not act to avoid the contract within six months of receiving the notice, his or her right to avoid it at a later date is forfeit.[91] Confirmation may also be implied. Voluntary performance of a voidable contract after the ground for avoidance has ceased to exist also tacitly

89 For further details, see Nicolae, 2018, pp. 560–563; Veress, 2021, pp. 134–136.
90 RouCC, Article 1265.
91 RouCC, Article 1263.

confirms the contract. For example, after the cessation of the duress, the debtor may perform the contract, knowing the ground for avoidance but not asserting his or her right to challenge the contract.

— Voidability can only be raised by court action (a challenge) within the limitation period. This is usually three years. By contrast, it can be raised at any time by way of a plea (a defense) (*quae temporalia sunt ad agendum perpetua sunt ad excipiendum*). There may exceptionally be a time limit set on invoking voidability by way of a plea. For example, a plea of disproportionality (*laesio enormis*) may only be raised within the limitation period of one year.[92]

5.1.4. Further types of invalidity

Further forms of invalidity (which refer to nullity and also to voidability) are:

a. *Total invalidity (nulitate totală) or partial invalidity (nulitate parțială)*, depending on whether the invalidity deprives the contract of its legal effects in whole or in part;[93] the main rule is partial invalidity, where the contract continues to bind the parties while the invalid part is omitted. If part of the contract is illegal, the question arises whether this affects the whole contract or whether only the relevant part contrary to the law is invalidated. In other words, the question is whether the invalidity is total or partial. The invalidity of certain clauses does not make the contract void as a whole if it can be presumed that the contract would have been concluded without the invalid part being included. In such cases, a contract remains valid as a whole, and only the illegal part becomes void. The corresponding legal norms replace the illegal part, or, if possible and equitable, the invalid part is simply deemed not to exist. Total invalidity is established when it is found that there is such a relationship of interdependence between the invalid part and the rest of the contract that it is reasonable to assume that the parties would not have consented to the contract without the invalid clauses.[94]

b. *Express invalidity (nulitate expresă) or virtual invalidity (nulitate virtuală)*, where in the first case, the law expressly provides for the sanction of invalidity. However, in the second case, invalidity is not expressly provided for by the law but is undoubtedly implied from the mandatory norm governing the conditions of validity of the contract.[95]

5.2. Usury

The RouCC does not have explicit rules on usury. However, the activity of lending money at high interest is prohibited by Government Ordinance no. 13/2011. Contracts concluded against these rules are null and void as having an illegal cause (*causa*). There is no possibility to uphold the contract by decreasing the rate of the interest.

92 RouCC, Article 1223.
93 Boroi and Anghelescu, 2021, p. 273; Nicolae, 2018, p. 549.
94 RouCC, Article 1255.
95 RouCC, Article 1253. Boroi and Anghelescu, 2021, p. 275; Nicolae, 2018, p. 547.

Also, the creditor who lends money with an interest rate above the one legally permitted will lose all entitlement to any interest.

5.3. Unwritten clauses

In addition to nullity and voidability, the current RouCC also introduced a specific, transitional form of invalidity: the 'unwritten' (*pro non scripto habetur*) clauses (*clauze considerate nescrise*). Similar rules are also contained in the French, Belgian, and Swiss Civil Codes and the Civil Code of the Canadian province of Québec.

The legal nature of the unwritten clauses is disputed. According to the opinions expressed in the legal literature, such clauses are forms of partial nullity or partial voidability, and there is also a view that they are a distinct, *sui generis* type of sanction. In our opinion, unwritten clauses represent a specific form (subtype) of partial nullity (*nulitatea absolută parțială*) where a provision included in a contract that is contrary to the law, eliminated from that contract as null and void *ex lege*, is automatically replaced by the mandatory provisions of the law, thus 'salvaging' the contract and making it legal.[96] In general, partial invalidity (nullity or voidability) can only exist if the invalidity does not affect the essential elements of the contract. However, an unwritten clause may be an essential element, but it does not lead to the total invalidity of the contract because the mandatory rules of law replace the omitted provision.

Thus, for example, the following clauses are unwritten:

— the penalty provided for in the event of termination of an engagement to marry,[97]
— any clause in a contract concluded for an indefinite period that precludes its unilateral termination by either party, subject to a reasonable period of notice, or that stipulates a benefit in exchange for termination of such a contract,[98]
— an impossible condition, or one contrary to law or good morals unless it is the cause of the contract itself; in the latter case the contract shall be null and void,[99]
— any clause that precludes the tenant of a dwelling from unilaterally terminating the lease with at least 60 days of notice if the tenancy is for a fixed term;[100] in the case of the same contract, any clause under which the tenant is obliged to take out insurance with an insurer imposed by the owner is also unwritten,[101]
— in case of a partnership contract, any clause setting a guaranteed minimum level of benefits for one or some of the partners is considered unwritten,[102]

96 Veress, 2021, pp. 137–139.
97 RouCC, Article 267 (2).
98 RouCC, Article 1277.
99 RouCC, Article 1402. From this text the distinguishing criterion between nullity and the unwritten clause also follows. The unwritten clause salvages the contract by restoring the legality of the breach, eliminating the impossible condition or the condition contrary to the law or morality, but in case such a condition is the very cause of the contract, then the contract cannot be salvaged, as the destructive effects of nullity in this case are total.
100 RouCC, Article 1825.
101 RouCC, Article 1826.
102 RouCC, Article 1953 (5).

— any clause permitting unilateral termination of a contract of maintenance based on the conduct of the creditor of the maintenance to be performed that makes it impossible to perform the contract in concordance with good morals, or for unjustified non-performance of the maintenance obligation by its debtor,[103]
— any clause limiting the carrier's legal liability,[104] etc.

In the case law it has been held that unwritten clauses and nullity are similar in their effects, the distinction being based on the fact that the unwritten clause in itself constitutes a 'remedy by sanction' (*sancțiune remediu*) that does not require the intervention of the courts, and that the corresponding legal text replaces the unwritten clause *ex lege*. Consequently, if a contract contains an unwritten clause, it will not have any effect, and the relevant mandatory rule of law will inevitably take the place of the clause. The other provisions of the contract will remain in effect as if the unwritten clause had not been included in the contract. However, if the unwritten clause has been performed, the effects of the clause will be retroactively discharged, as in the case of invalidity.

Looking at the list of unwritten clauses mentioned in the legislation, we can conclude that the relevant provisions of the RouCC in these cases mainly protect private interests and are therefore closer to voidability.[105]

Therefore, the fundamental question concerns who may rely on the unwritten character of a contractual clause, only the protected contracting party or any interested third parties as well? In our view, when the law deems a contractual provision to be unwritten, the effects of the law in eliminating the clause, that is, in purging the contract from the unlawful provision, are automatic (*ex lege*), i.e., without any party's discretion being considered. Therefore, the unwritten character of a clause may be invoked by any interested third party so that the institution of unwritten clauses is in effect, which is closer to nullity than to voidability. However, unlike nullity, which also exists in a virtual form, a contractual clause may only be declared unwritten if there is an explicit legal basis for doing so.[106]

5.4. Immoral contracts

The Romanian Civil Code has several rules on contractual immorality, in practice creating a set of norms to ensure morality. It does not contain a definition of good morals since this concept depends on the changing values of a particular society, and it is up to the judge to define its precise boundaries at a given time. As stated, good

103 RouCC, Article 2263 (3).
104 RouCC, Article 1995 (1).
105 Mainly because in some cases, such clauses protect the general interest as well. For example, debtor protection can be an issue of general interest. Therefore, the legal text, for example, according to which 'the clause authorising the mortgagee to possess the mortgaged immovable or to appropriate its fruits or revenues until the date of the commencement of enforcement shall be deemed not to be written' (RouCC, Article 2385), is a text close to nullity and not voidability.
106 Veress, 2021, pp. 139.

morals are a set of rules imposed by a certain social morality existing at a given time and in a given place, which, together with public order, represent a norm, a standard against which human behavior is judged.[107] Good morals have been defined as 'the totality of the rules of good conduct in society, rules which have taken shape in the consciousness of the majority of the members of society and the observance of which has become obligatory, through long experience and practice, in order to ensure social order and the common good, i.e., the achievement of the general interests of a given society.'[108]

In general, the law itself expresses good morals. If such a specific mandatory rule that translates a moral value is infringed, we are in the presence of an illegal contract. Moreover, those contracts that are prejudicial to morality apart from any infringement of a specific legal text are sanctioned through the general rules on good morals. In this way, the judge will have a more comprehensive power of appreciation and will be able to declare null and void a particular provision that affects public morality even when it is not contrary to a particular mandatory rule. The judges' power of appreciation, as has been considered, could give rise to arbitrariness and abuse if judges were too rigid or too keen in assessing what is and what is not contrary to morality. It is therefore necessary to be measured and prudent in this assessment.[109]

We can classify the general rules on good morals of the RouCC into three clusters. The first set of rules is included in the general principles of civil law. In this context, no derogation may be made by agreements or unilateral juridical acts from laws concerning good morals,[110] and any natural or legal person must exercise their rights and fulfill their civil obligations in good faith and following good morals.[111] Good faith is an example of the intertwining of moral and legal norms.[112]

The second group of norms is included in the regulation of partnerships and legal persons. Every partnership must have a definite and lawful object in accordance with morality.[113] In the case of legal persons, invalidity is the sanction if the object of activity is contrary to good morals.[114]

The third set of rules refers to contracts in general,[115] even if one of these articles is situated in Book III of the RouCC, which deals with rights *in rem*. According to this legal text, the owner may consent to limit his or her right by a contract if it does not

107 Ungureanu, 2007, p. 33.
108 Pop, 2009, p. 384.
109 Hamangiu, Rosetti-Bălănescu and Băicoianu, 1928, p. 93.
110 RouCC, Article 11.
111 RouCC, Article 14. Good faith shall be presumed until proven otherwise.
112 Gherasim, 1981, p. 228.
113 RouCC, Article 1882.
114 RouCC, Article 196.
115 Complementing the general rules, Romania has a specific regulation in the case of the maintenance contract. Where the other party's conduct makes it impossible to perform the maintenance contract under good morals, the party concerned may request termination (RouCC, Article 2263).

violate good morals.[116] The other rules are also definitive for any contract. Regulating freedom of contract, the RouCC states that the parties are free to conclude any contracts and determine their content within the limits imposed by law, public policy, and good morals.[117] The subject matter of the contract must also be in accordance with good morals,[118] as the same condition is mandatory for the cause (*causa*) of the contract.[119] A contractual condition contrary to morality is considered unwritten,[120] and if it is the *causa* of the contract itself, it entails the nullity of the contract. However, as a general rule, the invalidity is partial: Clauses that are contrary to good morals shall render the contract invalid in its entirety only if they are, by their nature, essential or if, in their absence, the contract would not have been concluded.[121]

In Romanian case law, contracts of donation were qualified as immoral if the donor's purpose was to induce the recipient to enter into or continue a cohabiting relationship; such as if the donor's purpose was to induce the recipient to enter into a fictitious marriage for the sole purpose of avoiding criminal liability for the crime of rape.[122]

When criminal law leaves the possibility of pressing charges for certain offenses to the discretion of the aggrieved party, or when such party may later reconcile with the offender with the effect of the charges being dropped, or withdraw the charges pressed, the victim may waive or, as the case may be, exercise such rights only in order to make it possible for normal relations between him or her and the offender to resume. Any contract concluded in order to open up to the aggrieved party the possibility of making disproportionately large material profits in relation to the damage actually suffered by speculating in a situation in which the offender finds himself or herself has an immoral *causa*. Of course, within the limit of reasonable compensation, the aggrieved party may settle with the offender, who thus validly undertakes to cover the actual damage assessed by the parties themselves, but in this latter case the victim of the offense seeks to satisfy a legitimate interest, such a transaction having in itself nothing unlawful. The situation is quite different when, taking advantage of his or her position in the criminal proceedings, the aggrieved party obtains from the offender a sum considerably disproportionate to the actual damage, because in this case the subjective right, recognized by civil law, to obtain compensation for the damage is diverted from its economic and social purpose and can no longer enjoy legal protection.[123]

Also, the agreement by which a married man, temporarily abandoned by his wife, promised his concubine that he would marry her in case of his divorce or would

116 RouCC, Article 626.
117 RouCC, Article 1169.
118 RouCC, Article 1225.
119 RouCC, Article 1236.
120 RouCC, Article 1402.
121 RouCC, Article 1255.
122 Ionașcu et al., 1973, pp. 47–51, 62, 63.
123 Supreme Tribunal, civil decision No. 107/1960.

undertake to compensate her with a sum of money if the wife returned to the marital home was considered immoral.[124]

6. Serbia, Croatia, Slovenia

6.1. Serbia

Under the SrbLO the general limitation of contractual freedom is three-tiered: A contract must not be contrary to mandatory rules (*prinudni propisi*), public order (*javni poredak*) and good morals (*dobri običaji*).[125] The notion of mandatory rules is self-explanatory: Contracts must not infringe statutory or other regulations prohibiting derogation from their content by the parties' consent. All mandatory rules are construed as a limitation of freedom of contract, regardless of whether they are prescribed in the SrbLO or by any other statute.[126] The SrbLO itself has many regulations that are of a mandatory nature, the infringement of which makes the contract null and void in general. The most notable is the regulation pertaining to usurious contracts.[127]

Even if a contract does not infringe mandatory rules, hence it is not illegal, it still may be considered immoral if it is contrary to public order and good morals. Legal literature defines public order as the totality of written or unwritten principles that are mandatory in their nature, on which the functioning of society is based, and that stem from the spirit of the legal order.[128] Public order was incorporated in the statutory rule on the limitations of the principle of freedom of contract in 1993 by the amendments of the (then) Federal Law on Obligations, replacing the phrase 'constitutional principles of state organization,' as the rule was formulated at the outset when the former Federal Law on Obligation was adopted in 1978.[129] On the other hand, good morals are unwritten rules that emerge in a given business or trade and become generally accepted by spontaneous application throughout a longer period of time.[130] The former federal law from 1978 envisaged morals of the socialist self-governing society as the third barrier to freedom of contract.[131] It has been replaced in 1993 with good morals. Both public order and good morals have the aim of designating those explicitly not illegal contracts that still infringe on basic moral conceptions in society.[132]

124 Supreme Tribunal, civil decision No. 1912/1955.
125 SrbLO, Article 10.
126 Perović in Perović, 1995, p. 7.
127 SrbLO, Article 141.
128 Radovanović in Pajtić, Radovanović and Dudaš, 2018, p. 213.
129 Krulj in Blagojević and Krulj, 1980, p. 48.
130 Krulj in Blagojević and Krulj, 1980, p. 48.
131 Krulj in Blagojević and Krulj, 1980, p. 53.
132 Radovanović in Pajtić, Radovanović and Dudaš, 2018, p. 213.

The qualification of contracts as illegal and immoral under the SrbLO is done through the institutions of the object and the cause (*causa*) of the contract.[133] The SrbLO prescribes that if the object (*predmet*) of a contractual obligation is impossible, unlawful, unspecified, or undeterminable, the contract is null and void.[134] The object is unlawful if it is contrary to mandatory rules, public order, or good morals.[135] Similarly, a contract must have a lawful cause (*osnov*). The cause is considered unlawful if it is contrary to mandatory rules of law, public order, or good morals. It is presumed that a contract has a valid cause even if it is not directly discernible from its content.[136] This means that even so-called 'abstract contracts' must have a valid cause, although it may not be visible *prima facie*. The requirement of the existence of a valid cause applies to contracts establishing obligations (in the German legal tradition called *Verpflichtungsgeschäft*), but not necessarily to contracts by which the parties dispose of existing and valid obligations (*Verfügungsgeschäft*).[137] The SrbLO further states that a contract is null if its cause does not exist or is unlawful.[138] An example of the distinction between illegal and immoral contracts, based on the rules on the cause of contract, is the contract on fiduciary transfer of ownership for the purpose of securing a claim, which has been used as a functional equivalent to the mortgage (hypothec).[139] The case law took the standpoint that although it is not explicitly prohibited (illegal), it should be rendered null and void since its cause is unlawful.[140] Finally, the law explicitly regulates the legal relevance of cause in the subjective meaning (*pobude*), that is the reasons that drove parties to conclude a contract. First, it sets out clearly that such reasons do not affect the validity of the contract. This applies to lawful reasons. Unlawful reasons essentially influencing one party to conclude a contract for consideration render the contract null and void if the counterparty knew or should have been aware of them. However, in a gratuitous contract unlawful reasons of one party make the contract null and void regardless of whether the counterparty knew or should have been aware of them.[141]

Contracts infringing mandatory rules, public order, or good usages of trade according to the SrbLO are null and void (*ništav*), unless the purpose of the infringed rule implies or a statute prescribes a different sanction.[142] The SrbLO, however, states that if the conclusion of the contract is forbidden only to one party, the contract remains valid, but the party who concluded it against the prohibition shall face appropriate legal consequences.[143] This is usually the case with consumer contracts, where

133 Dudás, 2022, 53.
134 SrbLO, Article 47.
135 SrbLO, Article 49.
136 SrbLO, Article 51.
137 Dudaš, 2012b, p. 414.
138 SrbLO, Article 52.
139 Dudaš, 2014, pp. 219–221.
140 Decision of Supreme Court of Serbia No. Rev. 3708/2002.
141 SrbLO, Article 53.
142 SrbLO, Article 103 (1).
143 SrbLO, Article 103 (2).

the prohibition has legal effect regularly only toward the trader. In case the trader infringed a prohibition but the contract is otherwise in line with the interests of the consumer, these prevail, but the trader may be sanctioned for a misdemeanor.[144]

The basic legal consequence of the declaration of invalidity of a contract under the SrbLO is that the parties are released from their obligations. If they have already performed, they will be obliged to restore the performances conferred. However, if restitution is impossible, or the nature of the performances makes them incompatible with restitution, an adequate pecuniary compensation is owed according to the prices applicable at the time when the judicial decision was delivered, unless a statute provides otherwise.[145]

The SrbLO explicitly enables the courts to decline restitution. It provides that in the case of a contract that according to its content and purpose is contrary to mandatory rules, public order, or good morals, the court may decline the claim for restitution of the party who acted in bad faith.[146] Therefore, in light of the *nemo auditur* principle, the court rejects the claim of the party who acted in bad faith to reclaim the object of his or her performance, and allows the counter-party who acted in good faith to keep it, while the latter retains a claim to restitution of the object of his or her counter-performance.[147] In addition, the SrbLO enables the court to oblige the party who acted in good faith to have the object of the performance of the party who acted in bad faith handed over to the municipality on the territory of which the other party has his or her residence or domicile.[148] This is in effect a sort of confiscation, the most severe sanction that may be applied in the case of a contract rendered null and void. It is applied extremely rarely, only in the case of contracts considered null and void for gravely infringing good morals. This interpretation is supported by the SrbLO, which provides that in deciding whether to apply this measure, the court takes into account whether either or both parties acted in good faith, the relevance of the values and interests endangered by the contract, and general conceptions of morality.[149] The SrbLO laid down clear criteria for establishing liability for damage sustained because the contract has been declared null and void: The party to whom the conclusion of a null and void contract is attributable is liable to the other party for the damage accrued in relation to the invalidity of the contract, provided the other party did not know of and should not have been aware of the existence of the cause of invalidity.[150]

A null and void contract might still survive complete invalidation if the conditions of *partial invalidity* (*delimična ništavost*) are met. The SrbLO prescribes that the invalidity of a certain clause of a contract must not necessarily lead to the invalidity of the entire contract if it may be preserved without the invalid clause, provided that

144 Draškić in Blagojević and Krulj, 1980, p. 103.
145 SrbLO, Article 104 (1).
146 SrbLO, Article 104 (2).
147 Salma, 2004, p. 491.
148 SrbLO, Article 104 (2). *in fine*.
149 SrbLO, Article 104 (3).
150 SrbLO, Article 108.

the clause was not a condition of the contract or the decisive reason why the parties concluded it.[151] The first condition relates to the question whether the remainder of the contract still represents a coherent consent of the parties once the invalid clause has been removed. The other two requirements are applied alternatively. On the one hand, the invalid clause must not have the function of a condition on which the legal effect of the contract depends.[152] On the other hand, it must not be the cause of contract in its subjective meaning (the motive).[153]

The other legal tool for salvaging a null and void contract is the so-called *conversion* (*konverzija*) or requalification (reclassification) of the contract. The SrbLO specifies that if a null and void contract meets the conditions for the validity of another contract, it will be deemed that the latter has been concluded, provided it matches the purpose the parties had in mind at the time of the conclusion of the invalid contract and if it could be presumed that they would have concluded the other contract had they known the invalidity of the form they adopted.[154] In relation to conversion, the question arises as to how the phrase 'purpose the parties had in mind' should be construed. In the view of the majority of authors in the literature, it should be interpreted as the cause of contract in its objective meaning, and not the subjective reasons that drove the parties to conclude the contract.[155]

Finally, the SrbLO regulates the consequences of *subsequent cessation of the reason of invalidity*. First, it states that a null and void contract does not become valid merely because the prohibition or any other cause of invalidity subsequently ceased to exist. However, if the prohibition was of lesser importance and the contract is executed, the declaration of invalidity of the contract cannot be requested.[156] The court declares the null and void contract invalid *ex officio*, but the initiative may come from any person demonstrating legal interest in the invalidation of the contract, including the parties themselves. In addition, the SrbLO states that the prosecutor is also entitled to initiate the declaration of invalidity of a null and void contract.[157] The right to initiate the invalidation does not lapse with the passage of time, and therefore it does not become time-barred according to the statute of limitations.[158]

The SrbLO explicitly regulates the legal consequences of *usurious contracts* (*zelenaški ugovor*). It provides that a contract by which a party, while taking advantage of the counterparty's state of need or poor material situation, inexperience, recklessness, or state of dependence, stipulates for him- or herself or for a third party a benefit that is in obvious disproportion to what has been performed for the counterparty, or what has been promised be performed to such counterparty

151 SrbLO, Article 105 (1).
152 SrbLO, Article 105 (1).
153 Dudaš, 2010, p. 156.
154 SrbLO, Article 106.
155 Dudaš, 2010, p. 154.
156 SrbLO, Article 107.
157 SrbLO, Article 109.
158 SrbLO, Article 110.

in return, shall be null and void.[159] It stipulates the appropriate application of the rules on invalidity and partial invalidity.[160] However, the aggrieved counterparty may request the court to reduce his or her performance to a just level. The court will in that case approve the request, whereby the contract becomes valid.[161] The aggrieved counterparty may exercise his or her remedies as *facultas alternativa*, having a right to opt between invalidation of the contract or upholding it with the reduction of the counter-performance to a level where the equality of performance and counter-performance is re-established, in a preclusive period of five years from the conclusion of the contract.[162]

Along with freedom of contract with its associated limitations, the other basic principle of the SrbLO is the principle of good faith and fair dealing (*načelo savesnoti i poštenja*). It prescribes that in establishing obligations and in exercising the rights and performing the duties deriving from such obligations, the parties must observe the principle of good faith and fair dealing.[163] As a derivative of this principle, the SrbLO further prohibits the abuse of rights arising from obligations (*načelo zabrane zloupotrebe prava*), that is their exercise contrary to the purpose for which they have been established or recognized by law.[164] The meaning of the principle of good faith and fair dealing, as declared by the SrbLO in the part pertaining to basic principles of the law of obligations, is rather abstract. It obtains its true legal meaning in relation to the application of specific legal institutions. This means that the legal meaning of the principle of good faith and fair dealing becomes fully fledged, for instance, in relation to legal consequences of null and void contracts, as already indicated, precontractual negotiations, or termination or modification of contracts due to supervening events (*clausula rebus sic stantibus*).

6.2. Croatia

Croatian law limits the principle of freedom of contract by the Constitution (*Ustav Republike Hrvatske*), mandatory rules (*prisilni propisi*), and morals of society (*moral društva*).[165] Whereas the SrbLO kept the amendments of the former federal law from 1993, when the constitutional principles of state organization and morals of socialist self-governing society were renamed to public order and good usages of trade, respectively, the HrvLO replaced the former with the 'Constitution of the Republic of Croatia' and the latter with the wording 'morals of society.' The literature offers a reasoning according to which there is no need to name public order specifically as one of the boundaries to freedom of contract, since the Constitution comprises all those

159 SrbLO, Article 141 (1).
160 SrbLO, Article 141 (2).
161 SrbLO, Article 141 (3).
162 SrbLO, Article 141 (4).
163 SrbLO, Article 12.
164 SrbLO, Article 13.
165 HrvLO, Article 2.

values that are embodied in the notion of public order. Hence, it is enough to state that the parties' disposition of will must not infringe the Constitution.[166]

The primary tool for delineating lawful from unlawful contracts is through the object of the contractual obligation. The wording of the respective article in the HrvLO is for the most part the same as in the SrbLO, with the necessary accommodation to the formulation of the general constraints on the principle of freedom of contract. The contract is thus null and void if the object of the obligation is impossible, unlawful, unspecified, or undeterminable;[167] the object is considered unlawful if it is contrary to the Constitution of the Republic of Croatia, mandatory rules, and morals of society.[168]

A major novelty of the HrvLO, in comparison to the former federal law, is that it no longer requires that a contract have an existing and lawful cause in its objective meaning.[169] However, it retained the rules on the relevance of cause in its subjective meaning (motives), where the wording is the same as in the SrbLO.[170] The only difference is that there is an additional section specifying that the rules on the illegality and immorality of the object of contractual obligations apply appropriately to the motives as well.[171]

The rules of the HrvLO on the basic consequences of the invalidation of contract are verbatim the same as in the SrbLO. These rules pertain to the restitution of benefits conferred, liability for damages caused by invalidation of contract, *ex officio* invalidation, range of persons who may initiate the invalidation of the contract, non-existence of prescription periods for invalidation, and subsequent cessation of the cause of invalidity, partial invalidity, and conversion.[172] The only discrepancy in these rules is related to the notion of null and void contracts, which is in line with the changes of the wording of the rule on the general constraints of the principle of freedom of contract: Besides mandatory rules, the contract is null and void if it is contrary to the Constitution of the Republic of Croatia and the morals of society.[173]

However, there is a novelty in the HrvLO in comparison to the SrbLO. The HrvLO does not enable the court to decline restitution to the party who acted in bad faith or to order to have the benefits of his or her performance handed over to the state or local government. The literature points out that such sanctions are extremely punitive, to the extent of seeming penal, hence they are irreconcilable with the law of obligations, which is not supposed to envisage legal institutions of a penal nature.[174] In this regard, the HrvLO parted with the rule of the former federal law on obligations

166 Slakoper in Gorenc, 2014, p. 8; Slakoper in Slakoper et al., 2022, 592.
167 HrvLO, Article 270 (1).
168 HrvLO, Article 271.
169 For the reasons of abandoning the institution of cause of contract in the Croatian law see Nikšić, 2006, pp. 1836–1844; Klarić and Vedriš, 2014, pp. 148–149; Josipović and Nikšić, 2008, p. 79.
170 HrvLO, Article 273 (1) to (3).
171 HrvLO, Article 273 (4).
172 HrvLO, Articles 322–328.
173 HrvLO, Article 322 (1).
174 Klarić and Vedriš, 2014, p. 152.

providing a possibility of forfeiture of the object of performance of the party who acted in bad faith.

The rules on usurious contracts (*zelenaški ugovor*) in the HrvLO are also the same as the corresponding rules in the SrbLO.[175] However, they have been removed from the part pertaining to special effects of contracts for consideration and moved into the part relating to invalidity of contracts. This approach seems to have greater merit, since usury makes the contract immoral and thus entails the sanction of nullity.[176]

As for the principle of good faith and fair dealing (*načelo savjesnoti i poštenja*) and the prohibition of the abuse of rights (*zabrana zlouporabe prave*), the HrvLO has the very same rules as the SrbLO.[177] However, the HrvLO additionally prescribes the duty of co-operation between the parties in order to achieve full and proper performance of duties and exercise of rights arising from an obligational relationship.[178] There is no such rule in the effective SrbLO. The Federal Law on Obligations from 1978 at the outset contained a sort of a duty of co-operation between the parties, but the literature considered its wording overreaching, imposing duties of cooperation and mutual solidarity, in a sense that is not in line with the logic of a liberal market economy.[179] For this reason it was repealed in the amendments of the Law from 1993. However, a principle of the duty of co-operation in a modern sense, as it is regulated in the HrvLO, strengthens the contractual bond between the parties and directs them toward voluntary performance.

6.3. Slovenia

The SvnCO provides for the same general constraints of the principle of freedom of contract as the HrvLO: The parties are free to regulate their obligational relationship, but may not act in contravention of the Constitution (*ustave*), mandatory rules (*prisilni predpisi*), or moral principles (*moralna načela*).[180] However, unlike the HrvLO, the SvnCO has not repealed the concept of cause of contract.[181] In terms of the object of contract (*predmet obveznosti*) and cause of contract (*podlaga*), including motives (*nagibi*),[182] as primary legal tools by which the mentioned constraints of the freedom of contract are observed, the regulation fully corresponds to the regulation of the SrbLO, as well as of the former federal law. The only discrepancies may be identified in the different wording of general restrictions of the principle of freedom of contract. The newer literature, however, points out that the applicability of the doctrine of cause in jurisprudence is very limited, since it is quite difficult to differentiate the scope of

175 HrvLO, Article 329.
176 Klarić and Vedriš, 2014, p. 146.
177 HrvLO, Articles 4 and 6.
178 HrvLO, Article 5. For further details see Tomljenović et al. in Baaij, Macgregor and Cabrelli, 2020, pp. 88 et seq.
179 Salma, 2009, p. 160.
180 SvnCO, Article 3.
181 Grilc in Možina, 2019, pp. 107–108.
182 SvnCO, Articles 35, 39, and 40.

application of cause from that of the object of contract. In case law, the doctrine of cause is most often applied in reclaiming performance obligations from gratuitous contracts in prospects of establishing marriage or non-marital partnerships.[183]

Concerning other legal issues in relation to invalidity of contracts, the regulations of the SvnCO,[184] similarly to the HrvLO, are in the most part identical to the rules of the SrbLO, with the necessary terminological alterations mandated by the wording of general constraints of the freedom of contract. In a way similar to the HrvLO, the SvnCO also repealed the rule of former federal law enabling the court to order the handing over of the object of the performance of the party acting in bad faith to a municipality. However, unlike the HrvLO, it retained the rule enabling the court to reject the dishonest party's claim for the restitution of the benefits conferred based on the performance of his or her obligation.[185]

As far as the regulation of usurious contracts (*oderuška pogodba*) is concerned, the SvnCO provides[186] verbatim the same rules as the SrbLO or the former federal law. However, in addition, the SvnCO specifies in the part pertaining to contractual interest that in case the interest agreed by the parties exceeds by more than 50% the prescribed default interest rate, it shall be presumed to be usurious.[187] Such a rule could be considered progressive, since usury regularly occurs in loan contracts with interest; any agreed interest does not make the contract usurious, but only when the interest is manifestly excessive does the rule apply. The question arises as to what is considered an overly excessive interest rate. The new rule of the SvnCO provides a clear guideline in this regard. The SvnCO, however, states that the presumption does not apply to commercial contracts.[188] In addition, the literature points out that the scope of application is further limited, since in the context of consumer law the special rules of the Consumer Protection Act apply.[189]

The SvnCO retained the declaration of principle of good faith and fair dealing (*načelo vestnosti in poštenja*) from the former federal law on obligations in the same wording.[190] It has, however, been supplemented with a rule declaring that the parties must observe good usages of business in their obligational relationship,[191] which has been removed from the context of the rule on the application of good usages of business, where it was regulated in the former federal law. The doctrine points out that beside the Constitution, mandatory rules, and moral principles, the principle of good faith and fair dealing is the other general limitation to the principle of freedom of contract.[192]

183 Možina and Vlahek, 2019, pp. 64–65.
184 SvnCO, Articles 86–93.
185 SvnCO, Article 87 (2).
186 SvnCO, Article 119.
187 SvnCO, Article 377 (1).
188 SvnCO, Article 377 (2).
189 Možina and Vlahek, 2019, p. 82.
190 SvnCO, Article 5 (1).
191 SvnCO, Article 5 (2).
192 Možina and Vlahek, 2019, p. 52.

The prohibition of abuse of rights (*prepoved zlorabe pravic*) has, however, undergone significant modifications and gained more detailed wording. The SvnCO first declares that the rights deriving from obligational relationships shall be limited by the equal rights of others. These rights must be exercised in accordance with the basic principles of the SvnCO and their purpose.[193] The SvnCO further specifies that in exercising their rights, parties in an obligational relationship must refrain from any action by which the performance of the obligations of other participants would be rendered more difficult.[194] Finally, any action by which the beneficiary of a right acts with the sole or clear intention of harming another shall be deemed the bad faith exercise of such a right.[195]

7. Slovakia

7.1. Illegal and immoral contracts

According to § 39 of the SvkCC, '[a] juridical act the content or purpose of which is at variance with a statute [*zákon*], circumvent it, or contradict good morals [*dobré mravy*] shall be invalid.' This strict provision—one of the most discussed in Slovak civil law—regulates the consequences of the conflict of content and cause of the juridical act with law as well as good morals. The consequence is the invalidity of a juridical act, namely nullity, that is, the act being null and void, which can be asserted by anyone, is taken into account by the court *ex officio*, occurs directly *ex lege*, and operates retroactively from the conclusion of any such act (*ex tunc*).

The said provision covers three factual situations, which are present if the content or purpose of the juridical act is at variance (*odporuje*) with the law (*negotium contra legem*), circumvents (*obchádza*) the law (*negotium in fraudem legis*), or contradicts (*prieči sa*) good morals (*negotium vers bonos mores*). The content of a juridical act means the determination of the rights and obligations of the parties to the juridical act. The cause (the motive, or subjective *causa*) in turn means the subjective goal pursued by the juridical act.[196] Accordingly, the illegal cause of an obligation (*kauza záväzku*) renders the contract illegal as well.[197]

The variance of a juridical act with the law is understood quite widely in case law. These include not only cases where a juridical act contradicts a legal prohibition or public order, but also cases where the juridical act is the result of a—widely interpreted—illegal activity, or cases where the juridical act does not meet statutory requirements, often regardless of whether invalidity in such cases constitutes an adequate sanction. This takes place even though the Constitutional Court has repeatedly taken the view that

193 SvnCO, Article 7 (1).
194 SvnCO, Article 7 (2).
195 SvnCO, Article 7 (3).
196 Gyárfáš, 2019.
197 Knapp, 1957, p. 52.

> 'the basic principle of interpretation of contracts is the priority of an interpretation that does not invalidate a contract over such an interpretation that establishes invalidity of a contract if both interpretations are possible. The principle of autonomy of the contracting parties, the nature of private law and the associated social and economic function of the contract are thus expressed and supported. The invalidity of the contract should therefore be the exception and not the rule. Therefore, the practice, according to which the general courts prefer a completely opposite view, favoring the interpretation leading to the invalidity of the contract over the interpretation not establishing the invalidity of the contract is not constitutionally compliant and is in conflict with the principles of the rule of law arising from Article 1 of the Constitution.'[198] Legal literature therefore takes the view that the variance of a juridical act with the law must be of a qualified nature.[199]

Circumvention of the law is a situation where 'a juridical act is directed at consequences that are not expressly prohibited, but their inadmissibility can be inferred from the meaning and purpose of the law.'[200] By performing such a juridical act, the ultimate aim of the person acting is 'that the law not be complied with.'[201]

As for the contradiction between the juridical act and good morals, or the circumvention of good morals, good morals are considered open concept. The Supreme Court sees them as usual, honest, and fair behavior that corresponds to the basic moral principles prevailing in society.[202]

When resolving the question of whether a juridical act is invalid pursuant to § 39 of the SvkCC, it is always necessary to take into account whether the law provides a special sanction for a given situation. For example, if the conclusion of the contract was induced by fraud, the rules on deceit causing only voidability (in Slovak legal doctrine traditionally called 'relative invalidity') shall apply. Similarly, if a debtor transfers his or her property to a friend in order to frustrate the satisfaction of creditors' claims, it will not be an invalid juridical act but an act that may be avoided.

It is also necessary to examine whether all or only a part of the juridical act is invalid. According to § 41 of SvkCC '[i]f the ground for invalidity relates only to a part of a juridical act, only that part is invalid unless it follows from the nature of the juridical act or its content or from the circumstances under which it occurred that this part cannot be separated from the rest of the content.' Therefore, if it is a separable part, then the rest of the juridical act shall stay valid. Whether or not a certain part of a juridical act is separable depends not only on the content of the juridical act, but also on its nature or on the circumstances in which it occurred.

198 Case No. I. ÚS 242/07.
199 Knapp, 1957, p. 52.
200 Fekete, 2018.
201 Fekete, 2018.
202 R 5/2009.

Likewise, in the event of the invalidity of a juridical act, it is necessary to examine whether this invalid act does not meet the requirements of another juridical act that is valid. If it does, according to § 41a (1) of SvkCC it may be convalidated if it is clear from the circumstances that it expresses the will of the persons acting. In this case, the so-called conversion of a juridical act (*konverzia, premena*) occurs.

7.2. Usury

Usury is regulated in Slovak law in § 39a of the SvkCC, according to which '[a] juridical act performed by a natural person—[a] non-entrepreneur—in which someone abuses his or her distress, inexperience, intellectual immaturity, agitation, trustworthiness, recklessness, financial dependence or inability to fulfill his or her obligation and has his or her promise […] a performance, the value of which is grossly disproportionate to the counter-performance.'

It follows from this provision that usury causes the nullity of a juridical act only if the abused person is a natural person, a non-entrepreneur. The legal regulation of usury is therefore not applicable to entrepreneurs.

The subjective aspect of usury is that the aggrieved party must be in a certain unfavorable situation enumerated in § 39a of SvkCC, such as distress or inexperience affecting his or her consent to a juridical act. The objective side, in turn, is that there is a gross disparity between the mutual performances to the detriment of the abused person. The condition is that there is a causal link between the abuse of the unfavorable situation and the juridical act. It is not necessary that it be the other party to the contract who commits the abuse; it may also be committed by a third party.[203] That said, the other party to the contract does not necessarily have to be of bad faith.

The consequence of usury is—as mentioned earlier—the nullity of a juridical act. The Slovak legal system does not give the aggrieved party the possibility to maintain the juridical act in force, e.g., by eliminating the gross disparity between the mutual performances.

7.3. Legal consequences of invalidity of juridical acts

A juridical act that is rendered invalid due to a conflict with the law or good morals does not have the intended legal consequences. According to § 457 of SvkCC, '[i]f the contract is invalid or has been terminated, each of the participants is obliged to return to the other everything he has received.' The law does not distinguish whether the party acted in good or bad faith. On the other hand, this obligation, or respectively the right that corresponds to it, like any other right or obligation, should be exercised in accordance with good morals.[204] However, no case law invoking the rule of *nemo auditur* in such situations is known in Slovakia.

203 Fekete, 2018; Mitterpachová, 2019.
204 According to Gyárfáš, 2019. See also SvkCC, § 3 (1).

Moreover, as stated in the previous chapter, the person who caused the invalidity shall be liable for the damage suffered as a result of the invalidity.[205]

It should be added that according to § 41 of the SvkCC, '[i]f the reason for invalidity applies only to a part of a juridical act, only that part is invalid, unless the nature of the juridical act or its content or the circumstances in which it occurred lead to the conclusion that this part cannot be separated from other content.'

7.4. Good faith in contract law

Slovak law does not have an explicit special regulation for the area of non-commercial relations that would relate to good faith in contractual relations. Undoubtedly, however, the principle of the protection of good faith can be deduced from certain provisions that concern either specifically contractual relations or general legal relations as such.

Such a provision is primarily § 3 (1) of the SvkCC, according to which '[t]he exercise of rights and obligations arising from civil law relations may not, without legal reason, interfere with the rights and legitimate interests of others and must not be contrary to good morals.' Another important provision is § 43 of the SvkCC, according to which, 'When regulating their mutual contractual relationships, the participants must see to it that everything that could result in the arising of disputes is removed.'

It follows from these two provisions that, even at the pre-contractual stage, it is necessary to proceed fairly to avoid conflicts between the parties. This means, among other things, that the parties must formulate the content of the contract in such a way as not to unnecessarily raise doubts. After the conclusion of the contract, the exercise of any rights or the performance of any obligations must be in accordance with good morals. In this respect, in particular, the parties may not, through their actions, even if permitted, aim to cause damage to the other party. The consequence of the exercise of rights and performance of duties contrary to good morals is that such exercise and performance does not enjoy legal protection.

In commercial relations, the Commercial Code contains an explicit provision according to which 'the exercise of a right that is contrary to the principles of fair trade does not enjoy legal protection.'[206]

8. Concluding remarks

In determining the general confines of freedom of contract, Czech law states that a contract must not infringe good morals and statutory norms. If it does, the contract is invalid when required by the meaning and the purpose of a statute. In addition, the CzeCC specifies that a contract is null and void if it manifestly disrupts public order or good morals.

205 SvkCC § 43.
206 SvkCC § 265.

In Hungarian law contracts that infringe or circumvent the law or violate good morals are considered null and void. That legislation recognizes a great range of different contractual relationships that are considered null and void due to the violation of good morals. Hungarian law also takes into account whether the parties acted in good faith in concluding an invalid contract. The court may reject the claim for restitution submitted by the party who caused invalidity but may no longer order forfeiture of the object of performance to the benefit of the state.

The PolCC regulates the invalidity of juridical acts and contracts separately. In its General Part it specifies that a juridical act is invalid if it contravenes or circumvents the law, or if it is contrary to the principles of social coexistence. In relation to contracts, it specifies that parties are free to devise their contractual relationships as they see fit, but they may not infringe the law or the principles of social coexistence.

The RouCC specifies that contracts infringing mandatory norms or public order are considered illegal. It does not prescribe any limitation to claims for restitution by the parties based on the *nemo auditor* principle, nor does it provide for the forfeiture of the object of performance of the party who acted in bad faith in favor of the state.

In Serbian law the general confines of freedom of contract are mandatory rules, public order, and good morals. The HrvLO and SvnCO have departed to some extent from the former federal law on obligations. They both prescribe that a contract must not be contrary to the Constitution, mandatory rules, or moral norms. The SrbLO still has the rule, inherited from the former Yugoslav Law on Obligations, according to which the court may order the forfeiture of the object of performance of the party who acted in bad faith if the contract grossly violates good morals. Both the HrvLO and the SvnCO have parted with this legal institution.

The SvkCC specifies that a juridical act is considered invalid if, by its content or purpose, it infringes on a statute, circumvents it, or contradicts good morals. In terms of the consequences of the declaration of nullity, the institution of forfeiture of the object of performance of the party acting in bad faith has long been relegated in Slovakian law.

The CzeCC does not explicitly require that a contract have a valid and lawful cause. However, the case law considers contracts concluded to achieve illicit aims as being null and void. The HunCC also traditionally belongs to the group of legal orders in which a valid and lawful cause is not a precondition of the validity of a contract. However, contracts concluded with the aim of achieving illicit or immoral purposes are considered null and void, based on the general rules of invalidity of contracts. The RouCC also belongs to the group of legal orders in which a valid cause is a necessary precondition of the formation of a valid contract. Interestingly, the RouCC does not have explicit rules on usury. However, usurious contracts are considered null and void due to their unlawful motive (cause). Both the SrbLO and the SvnCO retained the institution of cause of contract from the former Yugoslav Law on Obligations. The HrvLO, however, relegated the institution of cause in its objective meaning yet retained the rules on cause in its subjective meaning (motive). The SvkCC also requires that a contract have a valid and lawful cause.

The CzeCC envisages the conversion or reclassification of an invalid contract into a valid one. There are, however, no general rules on convalidation of invalid contracts by performance. It also recognizes partial invalidity by which an invalid contract may be saved if the part of the contract carrying the ground of invalidity is separable. The PolCC explicitly regulates partial invalidity of juridical acts: The invalidity affects only the part carrying the reason of invalidity. However, if the act is meaningless without these clauses, the whole juridical act shall be declared null and void. The RouCC enables a conversion or reclassification of an invalid contract if it fulfils the conditions of another valid contract, if that is not contrary to the parties' presumed contractual intent, without requiring that the obligations of any parties be previously performed. It also envisages the possibility of saving the contract from the effects of complete invalidation if partial invalidity is applicable. The SrbLO prescribes a range of legal institutions, the aim of which is to save a contract from invalidation: partial invalidity, conversion or reclassification of a contract, and performance of the parties' obligations if the prohibition of smaller importance ceased to exist in the meantime. In this regard, the HrvLO and the SvnCO have the same rules. The SvkCC also envisages partial invalidity as a means by which an invalid contract, without the part carrying the reason of invalidity, may be salvaged. In addition, it also knows of the conversion or reclassification of an invalid contract into a valid one.

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| Chapter VII |

Gratuitous Contracts

1. General considerations

1.1. Gratuitous contracts defined

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

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

Stec, P., Hulmák, M., Balliu, A., Menyhárd, A., Veress, E., Dudás, A., Hlušák, M. (2022) 'Gratuitous Contracts' in Veress, E. (ed.) *Contract Law in East Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 219–252. https://doi.org/10.54171/2022.ev.cliece_chapter7

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

1.2. Delimitation from other bilateral juridical acts

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

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

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

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

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

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

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

1.3. Types of gratuitous acts

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

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

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

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

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

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

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

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

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

1.4. Contractual freedom, formalities, rights, and duties

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

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

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

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

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

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

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

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

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

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

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

2. The Czech Republic

2.1. Definition and delimitation from other bilateral acts

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

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

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

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

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

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

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

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

2.2. Differences from contracts for consideration

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

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

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

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

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

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

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

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

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

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

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

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

8 Compare CzeCC, § 591 to § 590.

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

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

2.3. Types of contracts

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

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

2.4. Validity and form

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

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

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

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

3. Hungary

3.1. General rules

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

3.2. Specific rules

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

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

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

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

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

3.3. The gift as a specific contract

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

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

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

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

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

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

4. Poland

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Romania

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Serbia, Croatia, Slovenia

6.1. Serbia

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

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

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

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

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

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

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

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

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

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

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

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

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

6.2. Croatia

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

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

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

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

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

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

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

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

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

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

6.3. Slovenia

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

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

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

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

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

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

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

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

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

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

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

7. Slovakia

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

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

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

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

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

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

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

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

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

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

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

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

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

8. Conclusions

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

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

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

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

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

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

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

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Chapter VIII

Form of Contracts

1. General considerations

In contemporary legal systems, the formation of a contract is—as a general rule—not subject to any prerequisites of form. The principle of freedom of contract also applies to the parties' free choice of the instrument by which they wish to record their consent. They can choose a written instrument or a variation of a notarized deed, if they consider it appropriate and necessary for safeguarding their agreement, but they may likewise freely opt to conclude the contract orally, without any written proof whatsoever. Though in philosophical terms an oral contract is also a sort of 'formality'—a form in which the parties' consent is expressed[1]—in legal terms it cannot be considered a form of contract, since it is the 'bare minimum.' There is no simpler method of expressing mutual consent than spoken words, gestures, or the conduct of the parties from which such consent may be unequivocally inferred. The simple intent to conclude a contract without any external manifestation is legally irrelevant.

The farther we look back into legal history, the greater the significance of formalities. Even today, there is a general attitude among laypersons that a contract agreed to by mere words is not a contract at all. It may be something similar to a contract, an expression of intent or good will, but not a legally binding contract. According to those

1 Salma, 2009, p. 303.

Dudás, A., Hulmák, M., Zimnioková, M., Menyhárd, A., Stępkowski, Ł., Veress, A., Hlušák, M. (2022) 'Form of Contracts' in Veress, E. (ed.) *Contract Law in East Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 253–288. https://doi.org/10.54171/2022.ev.cliece_chapter8

not well versed in the law, as the old Latin proverb also states, *verba volant, scripta manent*: Enforceable rights and obligations may arise only from a written document properly assumed under signature. Thus, even in the modern world, quite often one identifies formalities as the hard border separating enforceable and non-enforceable promises, though this is hardly the case in today's legal environment. However, for the greater part of legal history, formalities were the very criterion dividing the field of enforceable contracts from plain promises outside the reach of the law.

Such was the case in Roman law, which had developed perhaps the most sophisticated system for regulating contract law in antiquity. Only those contracts or other juridical acts could go on to produce legal effect that satisfied strict, often ritualistic formalities. Formalities do give the essence of things (*Forma data esse rei*), as the well-known philosophical maxim from the Middle Ages states.[2] Informal agreements of the parties that did not satisfy the prerequisites of any of the closed system of nominate (and innominate) contracts could not give birth to enforceable obligations[3] (*Nuda pactio obligationem non parit*[4]). Long after the collapse of the Roman Empire, it took many centuries until legal thought, under the influence of natural law concepts, would part with the Roman notion of *nuda pactio* and it would become generally accepted that even the informal consent of the parties may create enforceable obligations.[5]

One should, however, not rush to the conclusion that formalities have disappeared from modern contract law. On the contrary, the number of contracts presupposing some requirements of form rose to such a level that many today speak of the *renaissance of formalism*.[6] Such a statement may sound poetic but is not wholly without merit. The number of contracts for the valid conclusion of which a statutory formality is required has increased significantly. However, this state of affairs does not abolish the principle of consensualism as a rule, which makes the principle of formality exceptional, though the number of exceptions is apparently on the rise.

Various reasons may exist for why a legislator may decide to prescribe formal requirements for a given type of contract. The primary consideration is evidentiary: A contract in written form provides stronger proof of the rights and obligations of the parties than contracts concluded orally. Second, the requirement of written form protects the parties from hasty and light decisions. Third, the requirement of formality clearly delineates precontractual negotiations from the formation of the contract. Last but not least, the purpose of instituting formalities is very often the protection of a weaker party in a contract.[7]

Formalities may consist of different prerequisites. The simplest formality is the simple written form, by which the parties draw up a document recording their consent, assumed under their signatures (chirograph). In many cases the simple

2 Traditionally attributed to Boethius's work *De Trinitate*.
3 Zimmermann, 1996, p. 508.
4 Ulpianus Digesta 2, 14, 7, 4.
5 Zimmermann, 1996, p. 547.
6 Kötz, 2017, p. 74.
7 Kötz, 2017, p. 75.

written form does not suffice, and the participation is required of a state authority or an individual authorized by the state who confirms the parties' consent. This confirmation in Europe is usually done by notaries public and, exceptionally, by courts. There are jurisdictions in which, for the validity of some contracts, an attorney's countersignature is required.

The participation of an authority or a notary public in the process of conclusion of a formal contract can have different manifestations. The simplest is the verification of signatures, by which the authority or the notary confirms the identity of the parties but does not regularly scrutinize the content of the contract. An additional step, and a more complex way of supervising the parties' consent, is the case where the representative of the authority or the notary reads out the parties' contract and verifies its content in order to determine whether it is in compliance with mandatory rules, subsequently confirming the contract. In some cases, for the purpose of the protection of the weaker party, there is an obligation to draw parties' attention to specific legal effects of the contract that they intend to conclude. Finally, when there are particularly strong reasons to protect the interests of the weaker party or the public interest, some legal systems provide for the duty of the state organ or the notary to draft the contract himself, and not simply to confirm the draft the parties presented. This is the strictest formality in contemporary contract law.

All the mentioned formalities rely on the written form in one way or another. Contract law, however, knows of another type of formal prerequisite consisting of some action, usually the delivery of the object of one party's obligation. This is the so-called real form, and the contracts concluded under formal prerequisites of this kind are referred to as real contracts. In Roman law these had great significance and represented an important milestone in the relaxation of formal requirements.[8] Though they have lost much of their relevance, even today some legal systems have some contract types that are validly concluded only by the delivery of the object of the contract.

The crucial issue concerning formalities in the process of the formation of a contract is what the legal consequences are of failing to comply with the formal requirements. On the one hand, in most legal systems, under different conditions, the basic legal consequence is that the contract is rendered null and void. This is regularly the case when the formal requirements have been instituted with the aim of protecting public or important private interests. Even so, the majority of legal systems also allows a contract that has not been concluded in the proper form to 'convalesce.' The usual means of convalidation of a form-defective contract is by the performance of parties' obligations. Regarding the conditions under which convalidation is permitted, legal systems show significant discrepancies. On the other hand, the laws of some jurisdictions do not render the form-defective contract null and void but simply prohibit other proof of the parties' obligations in case of dispute, except for presenting a contract concluded in written form. The major source of inspiration

8 Zweigert and Kötz, 1998, p. 366.

in comparative law in this respect has always been and remains the French Civil Code, which provides that obligations from a contract exceeding a certain value may be proven only by private deed, signed or authenticated.[9] This value threshold is set at EUR 1500 as of 2004.[10] Though this rule is greatly relativized by number of exceptions, its message is quite clear: Above a certain value threshold, the rights and obligations of the parties cannot be proven in court proceedings based on oral evidence (witness testimony).

In recent years, the Internet and information technologies have been adopted worldwide at a rapid pace and are now available to the majority of people in most countries. This technological revolution has had an impact on the means of formation of contracts as well. The digital environment enables parties to conclude a contract without meeting in person, which has had a profound impact by reducing the transactional costs of the formation of the contract, especially in international relations. However, a reasonable concern appears regarding the legal certainty and evidentiary function of a contract concluded by electronic means. A written contract has a physical form signed by the parties themselves, sometimes even confirmed as a notarized deed, minimizing the risk of subsequent tampering with its content. In contrast, contracts concluded in electronic form do not have a physical form and both parties retain a copy as a sort of electronic document on their computers; hence, a subsequent unilateral altering of their content in bad faith is not unimaginable. In order to set aside or mitigate these risks, different verification technologies have been developed. The most frequently used is the digital (electronic) signature, which ensures that the identities of the parties are properly confirmed and fixes the contract in the given content at the given time. By now, formation of contracts by electronic means has become a reality in all legal systems. They show some differences regarding which contract types may be concluded under electronic signature.

Relying on the ever-increasing presence of the digital environment, the emergence of new means of concluding and executing contracts in electronic form is under way. These are the so-called smart contracts, based on the digital ledger (most commonly referred to as blockchain) technology,[11] that are logically linked together and are self-executing if the stipulated conditions are satisfied. In the near future most contracts, especially those underlying intertwined commercial transactions involving numerous parties (in addition to the seller and the buyer, for example, the bank providing the financing of the transaction, the insurer, and the freighter) will be concluded by blockchain technology, where all the contracts regulating a fraction of the transaction are mutually linked and the performance of one automatically triggers the performance of the others.

9 Code civil, Article 1359.
10 Décret n° 2004-836, Article 56.
11 On the notions of smart contracts and blockchain technology, and their legal implications see Đurović and Janssen, 2018, pp. 753–771.

2. The Czech Republic

2.1. The principle of informality

Everyone has the right to choose any form of their juridical act unless the choice of form is restricted by an agreement or by a statute.[12] The choice of form is restricted by a statute, e.g., when creating or transferring a right *in rem* over an immovable, as well as in the case of a juridical act altering or extinguishing such a right,[13] when parties conclude some specific contracts,[14] as well as in some special cases that can arise during conclusion of the contract.[15]

2.2. The significance of signature

In order to fulfill the requirement of written form, it is necessary for the juridical act to be drawn up in writing and signed[16] (notwithstanding the specifics of juridical acts set forth in § 562 of the CzeCC, as presented below).

As for the signature of juridical acts, it must be handwritten. In some cases, a first name may suffice (e.g., juridical acts between family members). It is also possible to use a pseudonym or nickname.[17] As for the certainty of the signature, the function of the signature will be decisive (in some cases the simple indication of the relationship will suffice). The legibility of the signature is not important.[18]

The signature can also be electronic. Czech legislation adheres to the norms of Regulation (EU) No. 910/2014 of the European parliament and of the Council of July 23, 2014, on electronic identification and trust services for electronic transactions in the internal market, repealing Directive 1999/93/EC (eIDAS),[19] and recognizes four types of electronic signatures: the electronic signature (*stricto sensu*), the advanced electronic signature, the advanced electronic signature based on a qualified electronic signature certificate, and the qualified electronic signature.

The signature may be replaced by mechanical means where it is typical to do so.[20]

12 CzeCC, § 559.
13 CzeCC, § 560; Zuklínová states that the given rule must be also applied to movables that are subject to the registration in a public register: Zuklínová in Švestka et al., 2020, § 560.
14 E.g., the commercial agency contract—CzeCC, § 2483 (2).
15 E.g., the asset is not delivered simultaneously with the expression of will to donate and accept the gift— CzeCC, § 2057 (2).
16 Supreme Court Ref. No. 30 Cdo 1230/2007.
17 CzeCC, § 79.
18 Melzer and Korbel in Melzer and Tégl, 2014, p. 636; Beran in Petrov et al., 2019, pp. 621–622; Hrdlička in Lavický et al., 2014, p. 2020; Zuklínová in Švestka et al., 2020, § 561.
19 OJ L 257, 28.8.2014, pp. 73–114.
20 CzeCC, § 561 (1).

2.3. Electronic juridical acts and their signature

According to § 562 (1) of the CzeCC, written form is also maintained in juridical acts drawn up by electronic or other technical means that enable their contents to be captured and the consenting parties to be identified.

The Supreme Court has ruled that if a written form of juridical act is to be maintained in the case of juridical acts performed electronically, it is necessary to attach an electronic signature.[21] On the other hand, there is an opinion according to which, if the form serves only a warning function, it is sufficient for the juridical act to fulfill the conditions laid down in the provision above without it being necessary to attach an electronic signature.[22]

The eIDAS Regulation was basically a solution to the question of whether the name in the text of an email can be considered an electronic signature.[23]

2.4. Consequences of infringing the requirement of written form

2.4.1. Form of the contract

According to § 582 (1) of the CzeCC, if a juridical act is not made in the form agreed by the parties or provided by a statute, it is invalid unless the defect is subsequently remedied by the parties. If an expression of will includes several simultaneous juridical acts, the defect of form required for some of them shall not in itself cause the others to be invalid.

Nevertheless, breaching the written form prescribed by the law does not automatically mean the invalidity of the juridical act. Instead, it is necessary to assess its meaning and purpose.[24]

Failure to observe the requirement of written form where the purpose is a warning function results in a juridical act being voidable (*relativní neplatnost*),[25] because it is not a violation of good morals or a violation of public order and thus not a null and void (*absolutní neplatnost*) juridical act.[26] Breaching the written form when its purpose is purely evidentiary does not affect validity at all. The same relevant facts can be proven by other means. Breaching the written form when its purpose is constituted by a security function results in the juridical act being null and void,[27] because in that case form becomes relevant to the protection of public order. The same applies in the case of breaching the written form, the purpose of which is to achieve a control function.[28]

21 Supreme Court Ref. No. 23 Cdo 1593/2012; Supreme Court Ref. No. 26 Cdo 1230/2019.
22 Melzer and Korbel in Melzer and Tégl, 2014, p. 647.
23 According to the Article 3 (10) of the eIDAS regulation, an electronic signature can be almost anything. Melzer and Korbel in Melzer and Tégl, 2014, pp. 640, 647; Beran in Petrov et al., 2019, p. 622.
24 Supreme Court Ref. No. 29 Cdo 3919/2014.
25 CzeCC, § 586.
26 CzeCC, § 588.
27 CzeCC, § 588.
28 Melzer in Melzer and Tégl, 2014, pp. 745–746; Beran in Petrov et al., 2019, pp. 644–645; Handlar in Lavický et al., 2014, pp. 2097–2098.

2.4.2. Agreed form

If the parties agree to use a particular form to conclude a contract, they are presumed not to intend to be bound by such a contract unless the form is complied with. This also applies where one of the parties expresses its will to conclude the contract in written form.[29]

However, failing to observe the agreed form does not automatically mean the invalidity of a juridical act. Instead, it is necessary to assess its meaning and purpose.[30]

2.4.3. Convalidation

According to § 582 (1) of the CzeCC, parties can remedy the defect when a juridical act is not made in the form they had agreed to or provided by a statute. This remedy can consist in a supplementation of form.

Under § 582 (2) of the CzeCC, the absence of the prescribed form may be remedied by performance as well, but only in cases when there is a lack of the agreed form or the form laid down in the Part IV of the CzeCC, i.e., in cases where the statutory formal requirement primarily has a warning function. The main performance must be done by all parties who are obliged to perform.[31] A partial performance may convalidate the contract partially, when partial invalidity is allowed[32] or when partial performance is otherwise allowed.[33] For convalidation to operate, the scope in which the mutual performances correspond is decisive. Even defective performance may suffice.[34]

Regarding the issues covered by this section, there are discussions about the moment from which the effects of such a remedy are produced (whether the juridical act should be considered valid *ex tunc*[35] or only *ex nunc*[36]). It is argued that *ex nunc* effects would not constitute a veritable remedy, being instead only a new juridical act in place of the one defective in its form.

It should not apply to cases of determination of a form, the breach of which results in the juridical act being null and void, even when it is the requirement set out in Part IV of the CzeCC.[37]

2.5. Change in the content of the juridical act

If a statute requires a juridical act to have a specific form, the content of the juridical act may be changed by an expression of will in the same or stricter form; if this form is only required on the basis of an agreement between the parties, the content of the

29 CzeCC, § 1758.
30 Melzer in Melzer and Tégl, 2014, p. 747; Beran in Petrov et al., 2019, p. 645.
31 Melzer in Melzer and Tégl, 2014, p. 747; Beran in Petrov et al., 2019, p. 645; Handlar in Lavický et al., 2022, p. 1869.
32 Beran in Petrov et al., 2019, p. 645.
33 Handlar in Lavický et al., 2022, p. 1869.
34 Beran in Petrov et al., 2019, p. 645; Zuklínová in Švestka et al., 2020, Sec. 582.
35 Melzer in Melzer and Tégl, 2014, p. 747; Beran in Petrov et al., 2019, p. 645.
36 Handlar in Lavický et al., 2014, p. 2100.
37 Melzer in Melzer and Tégl, 2014, p. 749; Beran in Petrov et al., 2019, p. 645; Zuklínová in Švestka et al., 2020, Sec. 582.

juridical act may also be changed in another form, unless expressly excluded by the parties themselves.[38]

There is a discrepancy between this section and § 1906 of the CzeCC (which sets forth that a 'stipulation on novation or settlement must be in writing if the original obligation was created in writing or where it is made with respect to a right which has already become time-barred.'). It is necessary to consider § 1906 of the CzeCC as a non-systemic rule and to apply it restrictively (only to the settlement and private novation, but not to change the content of the obligation).[39]

The prevailing view precludes the application of this provision to changes in identities. The formal requirements for a juridical act that changes identity are derived from the function of the form of juridical act establishing the obligation.

2.6. Blockchain, smart contracts, and written form

The identification of acting entities on the blockchain using smart contracts is based on asymmetric cryptography—a method of identification consisting of using a public and a private digital key. These keys can be considered an advanced electronic signature.

Juridical acts on the blockchain will thus meet the requirements for written form pursuant to § 561 (1) of the CzeCC as well as the requirements for written form pursuant to § 562 (1) of the CzeCC.[40]

3. Hungary

3.1. Form of the contract

As a rule, juridical acts, including contracts, can be made orally, in writing, or by way of implied conduct. In order for a given conduct to result in a juridical act via implied conduct, it must express the will of the party, including the aim of producing a legal effect. Silence or abstention from a certain conduct shall qualify as a juridical act only and insofar as the parties expressly agreed upon it, or if it is provided for by a specific legal norm. If form-related requirements are prescribed by law or by the agreement of the parties, the juridical act shall be valid in that form. If a juridical act can only be validly made under certain form-related requirements, the amendment, confirmation, withdrawal, and contesting of that juridical act, as well as the amendment and termination of legal relationships created under that juridical act, shall be made in that specified form as a requirement of their validity.

3.2. Written form

If a contract is subject to written form, i.e., it is required to be made in writing, it is valid if its substantial content is put down in writing. If the written form was required

38 CzeCC, § 564.
39 Melzer in Melzer and Tégl, 2014, p. 658.
40 Zimnioková, 2021, p. 42.

either by statute or agreed by the parties, non-compliance with the formal requirements shall result in the contract being null and void. As far as terms not qualified as substantial are concerned, such terms can become the content of the contract, even if they are not recorded in writing. The same is to be applied for amendments of existing contracts. Traditional written form (a paper-based hard copy) shall qualify as a written juridical act if it has been signed by the party making it. The same holds true for documents that comply with the requirements of the eIDAS Regulation. As for other type of juridical acts, the HunCC provides a 'technology-neutral' open norm that may allow juridical acts (including contracts) to qualify as written if they have been presented in a form enabling their content to be properly recalled by the party, and allowing the person who made the juridical act and the time when the juridical act was made to be identified.[41] This flexible norm provides the court with the power to decide whether the actual juridical act complies with these requirements and can be qualified as a written one. This is a source of legal uncertainty in transactional practice. The question arises as to whether scanned PDF documents, e-mails, text messages, signing a tablet, etc. could be qualified as written instruments and, if so, under what circumstances. This is still to be answered by court practice. Courts seem to tend to follow a rather conservative approach and are inclined to give an answer in the negative. This issue, however, has not as yet been considered by the Curia (the Hungarian Supreme Court).

If a juridical act was made by a person who is unable to write or is not capable of writing, it shall be valid if it is drawn up as a public deed or a private deed of full evidentiary value on which the signature or initials of the party making the statement are certified by a court or a notary, or on which an attorney-at-law certifies by countersignature, or two witnesses certify by their signatures that the party has signed or initialed in front of them the deed written by someone else or acknowledged the signature or initials on the deed as his own. For a person who is unable to read or does not understand the language in which the deed containing his written statement was drawn up, a further validity requirement is that the deed itself is required to indicate that its content was explained to the party making the statement by one of the witnesses or the certifying person. Invalidity on the grounds of non-compliance with such requirements may only be invoked in the interest of the person making the statement. With this rule, provided in § 6:7 (4) of the HunCC, the legislator specified procedural rules concerning evidence as substantive rules of validity. This seems rather problematic because while non-compliance with such formal requirements in the context of procedural rules does not deprive the party of the opportunity to provide the written instrument as evidence, the evidentiary value of that instrument, however, is somewhat lower. In the context of substantive law, non-compliance with those requirements renders the juridical act legally non-existent.[42]

41 HunCC, § 6:7.
42 Éless, 2015, pp. 321–325.

When it comes to formation of a contract,[43] the offer as well as the acceptance are to be made in a written form in order to create a valid contract. The contract shall also be considered drawn up in writing if the juridical acts of the contracting parties are contained in separate documents and these collectively contain the parties' mutual and concordant manifestations of consent. A contract shall also be considered drawn up in writing if, from the document drawn up in more than one copy, each of the parties signed a single copy that was intended for the other parties.

3.3. Consequences of non-compliance

The absence of compulsory formal requirements results in the contract being null and void. However, a contract that is null and void on the grounds of non-compliance with the formal requirements shall become valid upon the acceptance of performance with respect to the performed part. This effect of acceptance of performance shall not be applied if mandatory formal requirements prescribe that the contract is to be drawn up as a public deed or private deed with full evidentiary value, or the contract is aimed at the transfer of real rights over immovables. The amendment, termination, or rescission of a contract by disregarding the mandatory formal requirements shall also be valid if the actual situation reflecting the amendment, termination, or rescission has been established by the parties' mutual consent. This is not to be applied for a contract set to be drawn up as a public deed or a private deed having full evidentiary value, or if the contract is aimed at the transfer of real rights over immovables.

The amendment, dissolution, or rescission of a contract by disregarding the mandatory form-related requirements shall also be valid if the actual situation reflecting the amendment, dissolution, or rescission has been established by the parties' mutual intent. If the law prescribes that a contract is to be drawn up as a public deed or a private deed having full evidentiary value, or the contract is aimed at the transfer of real rights over immovables, the amendment, dissolution, or rescission of the contract by ignoring the mandatory form-related requirements shall be null and void, even if the actual situation reflecting the amendment, dissolution, or rescission has been established by the parties' mutual intent.

4. Poland

As to the form of contracts prescribed by Polish law, Article 60 of the PolCC recognizes that a statement of intent (*oświadczenie woli*) as a building block of a contract may generally be made in any form, except where the act provides otherwise; the intent of a person establishing a juridical act may be expressed through any behavior that discloses his or her intent in a sufficient manner. As such, there is no general requirement of a specific form for a contract (e.g., that it must be made in writing), unless the applicable rule states otherwise.

43 HunCC § 6:70 and § 6:94.

Nevertheless, the PolCC does provide for specific forms in which contracts may or must be concluded to be either fully effective or even valid. This is echoed in Article 60 of the PolCC by the part of the rule stating, 'except when the act provides otherwise,' and the PolCC does indeed at times provide otherwise (as do separate statutes) with regard to certain contracts.

Furthermore, the PolCC expressly recognizes several types of form of a juridical act, and thus of contracts. Those are generally listed in and governed by Part III (*Dział III*) of Title IV (*Czynności prawne*—Juridical Acts) in Book One—General Provisions (*Księga pierwsza—Część ogólna*). That Part is appropriately titled the Form of Juridical Acts (*Forma czynności prawnych*). These rules go beyond contracts in themselves, as while any contract governed by the PolCC is a juridical act, not all juridical acts are contracts. Neither the PolCC nor any specific statute provides for any kind of exhaustive list of types of form to be used by the parties, although some of the types are referenced by the PolCC, specific statutes, and the case law. Some are perhaps more common in practice than others.

The main subtypes of form applicable to contracts are:

— the oral form (*forma ustna*),
— the implicit conclusion of a contract, i.e., concluding it '*per facta concludentia*,' including the conclusion by commencement of performance,
— the documentary form (*forma dokumentowa*),
— the written form, i.e., concluding a contract in writing (*w formie pisemnej*),
— the electronic form (*forma elektroniczna*),
— the written form with a certified date (*na piśmie z datą pewną*),
— the written form with notarization of signatures (*w formie pisemnej z podpisami notarialnie poświadczonymi*),
— the notarial deed (*w formie aktu notarialnego*).[44]

The oral form, while not expressly provided for in Part III[45] referred to above, is recognized in the case law as one of the permissible forms of concluding a contract where the rules applicable to a given contract do not require any specific form.[46] Here, the offeror makes an express statement orally to the other party (either in the presence of another or by means of telecommunication—by radio, telephone, videoconferencing

44 While not expressly referred to in the PolCC, the legal literature posits that the types of form used with the assistance of a notary may at all times substitute the more 'ordinary' forms, with the form of a notarial deed being supreme to all. Radwański et al. in Radwański and Olejniczak, 2019, § 13. *Kwalifikowane formy pisemne*, para. 147.

45 The PolCC does refer to an oral form of juridical acts as regards last wills and testaments, as a last will and testament may be made orally in the presence of witnesses (see PolCC Articles 951 § 1, 952 § 2, 953).

46 See, e.g., judgment of the Polish Supreme Court of February 24, 2021, case Ref. No. III CSKP 60/21, reported in Wolters Kluwer's LEX, no 3123442 (insurance contracts); judgment of the Supreme Court of June 29, 2004, case Ref. No. II CK 393/03, reported in Wolters Kluwer's LEX, no 585758 (forward exchange contracts); judgment of the Supreme Court of February 6, 2008, case Ref. No. II CSK 474/07, reported in Wolters Kluwer's LEX, no 452984 (contracts for reserving a burial site).

etc.), who then also accepts the offer orally. Even if this form is not expressly referred to in Part III, it is considered permissible due to the rule in Article 60 of the PolCC on statements of intent, in which—save where the act prescribes otherwise—it is provided that the intent of a person performing a juridical act may be expressed through any behavior disclosing such intent in a sufficient manner. An alternative for concluding a contract orally is available in the form of negotiations conducted orally,[47] as the contract is formed when all parties consent to all the terms and conditions being negotiated, assuming that the substantive terms of the contracts have been agreed upon.

Another 'non-recorded' form outside the oral form is the implicit conclusion of a contract, where the parties do not make oral statements of intent (or any statements recorded in writing, for that matter) unto the other party. According to the rule in Article 60 of the PolCC, the parties are not limited to using verbal language. Thus, it is not prohibited to conclude a contract by actions alone, and the parties might conduct themselves in such a manner that a contract is implicitly formed (*per facta concludentia*). The statements of intent that make up the contract may be then inferred from the behavior of the parties, given the circumstances. This may be done by any behavior sufficiently disclosing the intent of the parties in view of those circumstances, such as communication by pictures, graphs, gestures, facial expressions, physical movement, appearance at a location, overall conduct of the parties over a time, and, pursuant to Article 69 of the PolCC, by commencing to perform the contract. In addition, according to the rule in Article 68^2 of the PolCC, an entrepreneur as offeree to whom an offer is made by an offeror with whom such offeree was in constant business relations may also form a contract by remaining silent and not responding immediately to the offer.[48]

47 PolCC, Article 72 § 1.

48 On the issue whether silence of the party may be capable of forming a contract and be a form thereof, the classic approach in the case law is that in the absence of an express statutory rule (such as PolCC Article 68^2), silence may be deemed a statement of intent (and thus, a building block of a contract) in view of PolCC Article 60 'only exceptionally,' and 'when the circumstances and the conditions in which the offer was made would allow for making a definite finding that such was the intent of the party that stayed silent. The previous relations between the parties may turn out to be important in that regard' (see judgment of the Supreme Court of July 26, 2000, case Ref. No. I CKN 398/00, reported in CH Beck's Legalis, no 54694). In my view and in the absence of a statutory rule to that effect, silence cannot as a rule either form a contract or constitute a form for it, and circumstances that would point to such silence being a statement of intent and thus a part of a contract which would be then partially or completely concluded by silence while being also framed in it would have to be exceptional (e.g., where there is a planned public appearance by a party at a location with an audience who then asks, while being next to a large display showing the terms and conditions of a contract, that anyone among the audience unwilling to accept the displayed terms and conditions leave). The persons who remain seated may reasonably be deemed to have formed a contract through their inaction. There appears to be a much more lenient approach to silence in the scope of a contract for construction works (*umowa o roboty budowlane*) and the consent of an investor for a contractor to engage subcontractor(s), on which the Supreme Court has ventured that 'tacit expression of consent is one of the types of implied statement of intent (giving consent)' [*Milczące wyrażenie zgody jest jednym z rodzajów dorozumianego oświadczenia woli (wyrażenia zgody)*], without limiting itself in that any such statement would be exceptional (see judgment of the Supreme Court of October 6, 2010, case Ref. No. II CSK 210/10, reported in CH Beck's Legalis, no 276043).

While not expressly referenced in Part III, the case law does recognize this type of form as distinct.[49]

The PolCC does not go beyond Article 60 regarding how these unrecorded types of form must be framed. However, they are implicitly referred to in Article 77^1 §§ 1 and 2 of the PolCC, which provide that where the parties have not observed (*nie zachowały*) either the written form or a documentary form when concluding a contract, and then one party serves on the other either a letter (in writing) or a document[50] that contains variations or supplements to the unrecorded contract—which, however, do not materially alter or supplement that contract—then the parties are bound by the contents as provided in that letter or document as contractual terms, unless the other party immediately objects, either in writing, where such amendments are made in a letter, or in a document, where they are made by document. As such, oral contracts and contracts concluded *per facta concludentia* may be—to a degree—superseded by these two types of instruments.

The so-called documentary form (*forma dokumentowa*) assumes using a document (*dokument*). According to the rule in Article 77^2 of the PolCC, to observe a documentary form of a juridical act, it shall be sufficient to make a statement of intent by means of a document in a manner that makes it possible to ascertain the person making the statement. Pursuant to Article 77^3 of the PolCC, a document shall be a data carrier (*nośnik informacji*) allowing one to familiarize oneself with the contents of that data. On this concept, the case law has provided that a data carrier shall be a document pursuant to this rule insofar as it contains data at all and the data are capable of being examined. Examples of such documents are paper, hard drives, data servers (e.g., for e-mail), optical disks, SSD thumb drives (or pen drives), flash drives, floppy disks, and cloud storage. Thus, the constitutive feature for a document is data, and not, e.g., a signature.[51]

The next form is the written form (*forma pisemna*), referred to in Article 78 § 1 of the PolCC, wherein it is stated that to observe the form, it is sufficient to place a handwritten signature on a document containing the contents of the statement of intent. To conclude a contract, it is sufficient to exchange documents signed by one of the parties containing the contents of the statements of intent, or exchange documents one of which contains the contents of the statement of intent of one of the parties

49 See, e.g., judgment of the Supreme Court of December 12, 1996, case Ref. No. I CKN 22/96, reported in OSNC 1997/6-7/75; order of the Supreme Court of April 4, 2019, case Ref. No. III CSK 81/17, reported in Wolters Kluwer's LEX, no 2642794 (commencement of performance as an instance of concluding a contract *per facta concludentia*); order of the Supreme Court of February 27, 2020, case Ref. No. III CSK 84/19, reported in OSNC 2021/5/33 (contract to specify the use of real property by co-owners, i.e., a *quoad usum* contract); judgment of the Supreme Court of May 23, 2019, case Ref. No. II CSK 159/18, reported in Wolters Kluwer's LEX, no 2672922 (contract for lending of premises).

50 Such as that according to the PolCC, Article 77^3.

51 Judgment of the Supreme Administrative Tribunal (*Naczelny Sąd Administracyjny*, the chief Polish court in administrative matters and the Supreme Court's counterpart therein) of January 26, 2021, case Ref. No. II GSK 36/19, reported in CH Beck's Legalis, no 2541671.

and is signed by that party. The legal literature adds that the parties may both sign a single document without exchanging anything.[52] According to the Supreme Court, a 'handwritten signature,' for the purposes of the rule in Article 78 § 1 of the PolCC, requires a surname, although it need be neither fully legible nor written in full. It does require that the signature consist of letters so as to permit identification of the author, comparison, and determination as to whether it was executed in the form usually written by the author, and thus whether it exhibits individual and repeating features.[53] The legal literature adds here that it is not actually legally required to use the hands to execute the signature (as the notion of 'handwritten' would suggest), so that persons impeded in using their hands may just as viably use writing implements with their feet or mouth to affix their signatures.[54]

According to the rule in Article 79 of the PolCC, a person who is unable to write may make a statement of intent in a written form by placing an ink impression of a fingerprint on the document, while a person authorized by such a signatory would then write the first name and surname of that signatory and then execute their own signature. Observing the written form is also possible when an authorized person signs a document instead of the maker of a statement and their signature is certified by a notary, a *wójt* (the head of a rural municipality called a *gmina wiejska*), a mayor (*burmistrz*), or the president of a city, a *starosta* [the head of the management of a *powiat* (*zarząd powiatu*), with a *powiat* being the middle tier of the three tiers of local government in Poland], or a marshal of a voivodeship (*województwo*, the third and highest level of local government), with a note that the signature was made pursuant to the wishes of a person unable to write. While this provision has usually been applied to illiterate persons, the legal literature posits that illiteracy is not a requirement for its applicability, and persons unable to write for a variety of reasons (such as stroke or paralysis) may also opt to avail themselves of this provision.[55]

The rule in Article 78^1 §§ 1 and 2 of the PolCC provides for the electronic form of juridical acts. To observe the electronic form of a juridical act, it is sufficient to make a statement of intent by electronic means and affix a qualified electronic signature thereto (§ 1). A statement of intent made in the electronic form is equivalent to the statement of intent made in writing. The PolCC does not provide any further rules on what is to be understood by a 'qualified electronic signature,' which is just as well, for this issue is subject to the binding rules of European Union law, specifically the eIDAS Regulation. According to Article 3 (12) of that Regulation, a qualified electronic signature is taken to mean an advanced electronic signature created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures—themselves subject to the rules of the Regulation. Article 78^1 of the PolCC does not go beyond stating that the electronic form is equivalent to the

52 On PolCC Article 78 see Strugała in Machnikowski and Gniewek, 2021, para. 9.
53 Order of the Supreme Court of June 17, 2009, case Ref. No. IV CSK 78/09, reported in Wolters Kluwer's LEX, No. 512010.
54 On PolCC Article 79 see Grykiel in Gutowski, 2021, para. 2.
55 On PolCC Article 79 see Sobolewski in Osajda, 2021, para. I.

written form, which amounts to a repetition of the rule in Article 26 (2) of the eIDAS Regulation. By virtue of the primacy of European Union law, this must not be taken to mean that other features of qualified electronic signatures (or electronic signatures in general), including those referred to in Article 25 of the Regulation, are not recognized.[56] Rather, it shows the obsolescence of Article 78[1] of the PolCC. The associated case law of the CJEU is fully applicable to electronic signatures within the ambit of the PolCC.

A contract may also be concluded in writing with a certified date (*na piśmie z datą pewną*). Article 81 § 1 of the PolCC provides that where the act makes the validity or certain legal effects of a juridical act contingent on the official certification of a date (certified date), such certification shall be effective vis-à-vis the persons who do not participate in the making of that juridical act. Article 81 § 2 of the PolCC provides in turn that a juridical act shall have a certified date in the following circumstances outside official certification:

— in the event the conclusion of a juridical act is recorded in any official document, from the date of that official record,
— in the event any inscription is placed on the document by which it is shown that the juridical act was subject to record by a public authority, authority of a unit of local government, or by a notary—beginning from the date of that record,
— in the event a qualified electronic time stamp is affixed to the electronic document,[57] from the date on which the qualified electronic time stamp was affixed.

In the event a signatory of the document is deceased, the date shall be considered certified from his or her date of death.

This type of form is required by certain (albeit only a few) rules in the PolCC resulting in some additional effects of a juridical act.[58] According to the Supreme Court, the alternative ways for certifying a date found in Article 81 §§ 2 and 3 of the PolCC are

56 See Regulation no 910/2014: Article 25 Legal effects of electronic signatures.
1. An electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures.
2. A qualified electronic signature shall have the equivalent legal effect of a handwritten signature.
3. A qualified electronic signature based on a qualified certificate issued in one Member State shall be recognized as a qualified electronic signature in all other Member States.

57 Electronic time stamps, including qualified time stamps, are governed by Regulation No. 910/2014 – see Article 3 (33) and (34) –, as 'electronic time stamp' means data in electronic form that bind other data in electronic form to a particular time establishing evidence that the latter data existed at that time, whereas 'qualified electronic time stamp' means an electronic time stamp that meets the requirements laid down in Article 42 of that Regulation.

58 For instance, a rent contract (*umowa najmu*) concluded in writing with a certified date would prohibit a third party who acquires the object of the rent and takes the place of the lessor from terminating it by notice with statutory notice time limits, where the rent contract was concluded for a specified period and the object thereof was handed over to the lessee (PolCC Article 678 § 2).

not retroactive in the sense that they do not make the statement of intent that was originally made compliant with that form of contract,[59] although such a conclusion does not readily follow from the wording of the rule at issue. In practice, the parties are likely to choose notarial forms of juridical acts over certification of a date for practical purposes, and using this form is somewhat uncommon. This is not helped by the fact that the notary also implements the certification of dates.[60]

The written form with notarized signatures (*w formie pisemnej z podpisami notarialnie poświadczonymi*) is mentioned only once in the PolCC in the context of contracts, in Article 75^1 § 1 of the PolCC. This rule provides that the written form with notarized signatures is required where an undertaking (*przedsiębiorstwo*) is to be disposed of, leased, or subjected to usufruct (*użytkowanie*). The PolCC does not provide for the exact features of this form. The notarial deed (*akt notarialny*) as a form of a juridical act is also referenced in the PolCC (among other things, as the form for the contract disposing of immovable property pursuant to Article 158 of the PolCC). The PolCC also does not provide for any specific rules for notarial deeds. Both of those forms are subject to the rules on notaries and their powers, which are governed by a separate statute—the Act of February 14, 1991—the Law on Notaries (*Ustawa z 14 lutego 1991 roku—Prawo o notariacie*). Among other things, that statute provides for the required contents of a notarial deed in Article 92.

The PolCC contains some additional rules on the form of juridical acts in view of the freedom of contract and the interdependence between various types of form. Among them, Article 63 § 2 of the PolCC provides that where consent of a third party is required to conclude a juridical act and a specific form is required for the act to be valid, the statement comprising the consent of that third party shall be made in that specific form.

Pursuant to the rule in Article 73 § 1 of the PolCC, when a statute specifies the written form, documentary form, or electronic form for a juridical act, an act concluded without observance of that specified form is null and void only when a statute provides for the sanction of nullity. However, according to § 2, when a statute reserves a different specific form for a juridical act, the act concluded without observance of that form shall be null and void. This sanction would not, however, apply to instances where observance of a specific form is reserved only to cause certain effects of a juridical act.

Article 74 § 1 of the PolCC provides that reserving the written form, the documentary form, or the electronic form without the sanction of nullity shall have such an effect that, in the event of not observing the form thus reserved, the taking of evidence by witnesses or by deposing the parties shall not be available to prove the conclusion of the juridical act in case of a dispute. This provision does not apply to instances where observance of the written, documentary, or electronic form is reserved only to cause certain effects of a juridical act. Nevertheless, pursuant to § 2, in spite of a failure to observe the written, documentary, or electronic form reserved for evidentiary

59 Judgment of the Supreme Court of April 17, 2019, case Ref. No. II CSK 131/18, reported in Wolters Kluwer's LEX, no 2650702.
60 See Article 99 § 1 of the Act of February 14, 1991—the Law on Notaries.

purposes, the taking of evidence by witnesses or by deposition of the parties shall be available where both parties consent to admit such evidence, where a consumer in a dispute with an entrepreneur so requests, or where the fact of concluding a juridical act is subject to *prima facie* evidence in the form of a document. Furthermore (§ 3), where the written, documentary, or electronic form is reserved for a statement of one of the parties, the taking of evidence by witnesses or by deposition of the parties shall also be available to the party in the event that such a form was not observed on the demand of the counterparty. Pursuant to § 4, the provisions on the effects of not observing the written, documentary, or electronic form reserved for evidentiary purposes shall not apply to juridical acts in relations between entrepreneurs.

Article 76 of the PolCC stipulates that where the parties have reserved in a contract that a certain juridical act between them is to be concluded in a specific form, that act shall be effective only through the observance of that reserved form. Nevertheless, where the parties reserved the conclusion of a juridical act in the written, documentary, or electronic form while not specifying the effects of failure to observe that form, it shall be presumed, in case of doubt, that it was reserved solely for evidentiary purposes.

Lastly, according to the rules in Article 77 §§ 1, 2, and 3 of the PolCC, supplementing the contract or variation thereof requires observance of the form prescribed by a statute or stipulated by the parties for the purposes of its conclusion. Where the contract was concluded in the written, documentary, or electronic form, its termination by consent of the parties, as well as by withdrawal (*odstąpienie*) or by notice shall require observance of the documentary form, unless a statute or the contract reserves a different form. Where the contract was concluded in a different specific form, its termination by consent of the parties shall require observance of the form provided for in a statute or referred to by the parties for the purposes of its initial conclusion; nevertheless, withdrawal from the contract or its termination by notice ought to be recorded in writing.

Rules on the form of certain contracts going beyond the PolCC may also be provided for in specific statutes. For instance, the Act of June 24, 1994, on the Ownership of Premises provides in Article 7 (2) that the contract to create a self-standing ownership of habitable premises ought to be concluded in the form of a notarial deed, and the creation of the right of ownership requires an entry in the Land Register (*księga wieczysta*) for the immovable at issue.

5. Romania

According to their form, a distinction is made between informal, formal, and real (*in rem*) contracts in Romanian law.

The first category consists of transactions of a consensual nature, which are also known as informal or formless transactions. The basic principle in civil law is the freedom of form in juridical acts. In the case of informal transactions, the

intention may be expressed in any recognizable way.[61] However, even in informal transactions, the parties very often, in order to facilitate proof, give their agreement a documentary form where no such formality is required by law, usually recording it in a private deed.

The second category is that of transactions subject to formality.[62] In this case, the law makes the valid conclusion of a juridical act subject to a formality, such as a public deed or even a private deed. In such cases, the consensus, agreement, or expression of the parties' consent must take this specific form; otherwise, the transaction is rendered null and void for lack of form. By a concise definition, a transaction is formal if the law determines the means of expression of consent in a mandatory way.

The third category is made up of transactions *in rem* or real juridical acts, where the valid conclusion of the juridical act requires the transfer of a good in addition to the agreement of the parties.[63] For example, in the case of a loan contract, the loan amount must be transferred to the debtor, and the conclusion of the contract also presupposes this transfer in addition to the parties' consent.

This classification is essential because:

— for transactions subject to formalities, a breach of formalities renders the transaction null and void,
— a formal transaction can be concluded by an agent if a power of attorney also takes the form of the transaction to be concluded (this is a consequence of the principle of symmetry, or parallelism of formal requirements): For example, the sale of immovable property by an agent presupposes a power of attorney in the form of a public deed because the sale is the subject of this requirement,
— the modification of a formal transaction also requires compliance with the appropriate formal rules,
— an *in rem* contract—as we have seen—presupposes the delivery of the goods, failing which the transaction is not concluded.

From another point of view, there are three arrangements of formality as defined by law: formality required for the purpose of evidence (*ad probationem*), formality required for the purpose of validity (*ad validitatem*), and formality required for the purpose of enforceability or effectiveness against third parties (*ad opposabilitatem*).

Regarding the *ad probationem* form, Article 309 (2) of the Romanian Code of Civil Procedure provides that juridical acts exceeding a value of 250 lei[64] that have not been concluded in writing may not be proven by the deposition of witnesses. It follows that, for example, a loan contract worth 1000 lei is valid without a written form, but if the debtor does not repay the loan, it is not possible to prove the existence and content of the loan contract in court by use of witnesses. However, if the debtor voluntarily

61 Veress, 2020, p. 24.
62 Veress, 2020, p. 24.
63 Veress, 2020, p. 25.
64 Approximately 50 euros.

performs (repays the loan), there is no issue with the juridical act because of a lack of the formality required *ad probationem*. It should be noted here that other forms of evidence, most importantly the statements of the counterparty who may recognize the contract, are not excluded.

In order to give the regulation a certain flexibility, evidence by witnesses is admissible in numerous situations, for example, if the party was materially or morally impeded in drawing up a document to prove the juridical act. The moral impediment to concluding a private deed exists, for example, if a loan contract is concluded between brothers. Also, evidence by witnesses is possible if the party has lost the documentary evidence as a result of an act of God or *force majeure* or if the parties agree, even tacitly, to admit the use of such evidence, but only in respect of rights of which they may freely dispose. The last example is when the legal act is contested on the grounds of fraud, error, deceit, or duress or is declared null and void for any unlawful or immoral reason (*causa*).

Of course, where the law requires a written form for the validity of a transaction, it cannot be proven by witnesses.

Finally, when *prima facie* documentary evidence is produced in the form of a written instrument emanating from the opposing party, even if it is unsigned, that lends credibility to allegations regarding a state of fact (such as the existence of a contract), or if the opposing party refuses to participate at an interrogation by the court regarding such a fact, or refuses to answer the questions posed without proper justification, witness evidence becomes admissible for proof of a contract not concluded by written instrument with a value exceeding 250 lei.

In other cases, the form is also condition for validity. For example, the law provides that the transfer of real rights over immovables may only take place by authentic notarial deed (Article 1244 of the RouCC states that except in cases provided for by law, agreements that transfer or constitute rights *in rem* over immovables may only be recorded in the Land Register if they are concluded by authentic instrument, under penalty of nullity). In such a case, a contract concluded by private deed or orally is null and void because the form required for its validity (*ad validitatem*) has not been observed by the parties. Another example is donation, which must be concluded by authentic notarial deed, also under the same sanction.[65] Maintenance contracts are regulated with the imposition of an identical set of formal requirements.[66] For suretyship, the law states that the status of surety is not presumed; it must be expressly assumed by a deed, concluded by authentic notarial deed or a private deed, under penalty of nullity.[67] One can observe that in this case the *ad validitatem* form is fulfilled even in the case where a simple written instrument is concluded by the parties. Any contract instituting a mortgage over real estate must be concluded in authentic form

65 RouCC, Article 1011; Veress and Székely, 2020, pp. 158–159.
66 RouCC, Article 2255.
67 RouCC, Article 2282.

by the notary public under penalty of nullity.[68] A contract establishing a mortgage over movable property, on the other hand, shall be concluded in authentic form or in a private deed under penalty of nullity.[69]

When the legislator imposes a formal condition of validity, such as compulsory authentication by a public notary, this is not done only in order to create evidence. Formal requirements constitute a warning to the parties of the seriousness of the transaction.[70]

The authentic notarial deed can present a high degree of importance in the case of informal transactions as well. Such a deed establishing a claim that is certain and of a fixed amount shall be enforceable as from the date on which it becomes due. In this situation, the creditor does not need to obtain a court decision in order to initiate enforcement but may instead proceed directly to enforcement on the basis of the authentic notarial instrument. In some cases, the form of a private deed may also produce identical effects. Leases concluded by private deeds that have been registered with the tax authorities, as well as those concluded in authentic notarial form, constitute enforceable titles for the payment of rent at the deadlines and in the manner established in the contract or, in their absence, by law.[71]

Finally, the law imposes formal conditions to ensure that they are effective against third parties (the so-called *ad opposabilitatem* form).[72] For example, the mortgage on a movable asset must be registered in the National Register for Publicity of Security Interests over Movables (*Registrul Național de Publicitate Mobiliară*). If the owner sells the encumbered asset and the mortgage was registered (a formal requirement), the buyer, i.e., the new owner, must also tolerate the property being foreclosed on in case the debtor has failed to fulfill the obligation secured by the movable mortgage. However, if the mortgage on the movable property has not been registered, the claim cannot be enforced against the third-party buyer as the new owner.

To summarize, the only condition for the validity of a transaction is the formality required *ad validitatem*. In other words, in such a case, failure to comply with the formal conditions entails the invalidity of the transaction. The consequence for failure to comply with the form required for the purpose of evidence is that the juridical act cannot be proven by witness evidence. Failure to comply with the formality prescribed for enforceability against third parties renders the juridical act ineffective against third parties (see the example above with a mortgage on movable property not included in the specific register). Otherwise, the juridical act is effective only between the parties.

68 RouCC, Article 2378.
69 RouCC, Article 2388.
70 Veress and Székely, 2020, p. 158.
71 RouCC, Article 1798.
72 Veress, 2021, pp. 148–149.

6. Serbia, Croatia, Slovenia

6.1. Serbia

The SrbLO explicitly declares that the formation of a contract is not subject to any formality, unless otherwise prescribed by statute.[73] If there is a requirement of a given form, it also applies to subsequent amendments of the contract.[74] This is another case of the application of the principle of parallelism (or symmetry) of formalities.[75] The SrbLO, however, lists a range of exceptions to this principle, of which two are of major importance in this chapter, as they enable a contract that is otherwise formal to be amended *solo consensu*, that is, by informal means. First, a formal contract may be amended in any form if the modifications relate to non-essential elements of the contract that have not been settled in the formal contract and if the non-formal amendment is not contrary to the purpose for which the formality of the contract has been instituted.[76] The requirement of formality applies in general only to essential elements of the contract. If the parties, however, included non-essential elements in their contract, the requirement of formality extends to them as well.[77] Second, the SrbLO considers valid the subsequent oral amendments of a formal contract, if their aim is to reduce or mitigate the obligation of either or both parties, provided the formality is prescribed only in their interest.[78] By envisaging formalities, as indicated earlier, the legislator intended to protect private and public interest. If the purpose of instituting a formality had the prevailing purpose of protecting the public interest, the oral amendments will have no legal effect.

The SrbLO does not regulate the concept of termination of contract by mutual consent of the parties, since it is rather self-explanatory: If the parties have the freedom to choose whether they will conclude a contract at all, with whom, and with which content they desire, such freedom also extends to the possibility of terminating the contract by mutual consent at any time. The only aspect of the termination of contract by mutual consent that is regulated by the SrbLO is the form of the terminating agreement aiming at extinguishing a formal contract. It prescribes that a formal contract that has been validly concluded may be terminated by the informal consent of the parties unless a statute provides otherwise or the purpose for which the formality has been instituted justifies that the terminating agreement is to be concluded in the same form as the formal contract itself.[79] The first exception requires no additional explanation: A mandatory regulation always excludes the termination of a formal contract by the parties' informal consent. However, the application of the

73 SrbLO, Article 67 (1).
74 SrbLO, Article 67 (2).
75 Perović in Perović, 1995, p. 154.
76 SrbLO, Article 67 (3).
77 Perović in Perović, 1995, p. 152.
78 SrbLO, Article 67 (3).
79 SrbLO, Article 68.

second exception, i.e., when the purpose of the form mandates that the terminating agreement should be concluded in the same form as the main, formal contract, requires judicial deliberation. Namely, it is up to the judge to ascertain what might have been the purpose for which the formality of the contract has been instituted and whether its informal termination jeopardizes such a purpose. The Serbian courts in this respect tend to demonstrate a lenient approach, almost always allowing the informal termination of the contract when there is no statutory prohibition. This seems particularly questionable in long-term contracts where the protective function of formalities clearly comes to the fore, such as the maintenance contract, which is concluded in one of the strictest forms known by Serbian law. Allowing informal termination of maintenance contracts might cause more harm than good, in our opinion.[80]

The aforementioned rules apply to so-called statutory formalities, to cases when a specific formality is prescribed by statute. The freedom of contract, however, implies not only the freedom of the parties to conclude a contract in any form where there is no statutory requirement as to its form, but also to choose and make a formal prerequisite mandatory by their intent. In this manner the SrbLO prescribes that the parties may agree to any special formality as a condition of the validity of their contract.[81] There are different opinions in the literature in relation to this rule. The majority view is that, lacking an unambiguous clause in the parties' agreement, it should be presumed that the parties intended that the agreed form of that contract be construed as being *ad solemnitatem*.[82] This is usually called a contractual formality (*ugovorna forma*) as opposed to a statutory formality (*zakonska forma*) of a contract, which is a formality presupposing the validity of the contract by the parties' will.[83] This applies to formal contracts as well, in the sense that parties may always choose any more stringent form than the one provided for by statute.[84] The SrbLO extends the rules on the informality of parties' consent on the termination of contracts concluded in a form prescribed by statute to the agreed form as well.[85] However, it distinguishes the mandatory form set by the parties' intent from a subsequent confirmation of a consensual contract by some formality. It prescribes that if the parties provided for a special formality only for the purpose of insuring proof of their contract, or to achieve a different purpose, the contract is deemed to have been concluded when the parties reached an agreement on its content, whereby they are obliged to supply the contract with the envisaged formality subsequently.[86]

The legal consequences of failing to satisfy the statutory requirements of formalities and the agreed form are in general identical. The SrbLO states that if a contract

80 Dudás, 2019, pp. 111–112.
81 SrbLO, Article 69 (1).
82 Živković, 2006, p. 181.
83 Perović in Perović, 1995, p. 155.
84 Karanikić Mirić, 2015, p. 337.
85 SrbLO, Article 69 (2).
86 SrbLO, Article 69 (3).

is not concluded in the prescribed form, it has no legal effect, unless the purpose for which the formalities have been instituted implies differently.[87] On the other hand, if the contract is not concluded in the form agreed to by the parties themselves, the contract has no legal effect only if the parties made the validity of the contract contingent on the satisfaction of formal requirements.[88] Though the SrbLO uses a wording implying non-existence of a contract not meeting the formal prerequisites, in the light of the rules on invalidity, such a contract may only be considered null and void.[89]

The SrbLO contains a merger clause specifying that if a contract is concluded in a special form, either prescribed by statute or agreed to by the parties, it comprises the entire content of the parties' agreement.[90] The reasoning is similar to that in relation to the aforementioned rules on the formal requirements instituted by statute: For the sake of simplifying the interpretation of formal contracts, the parties' entire agreement is deemed to be the one contained in the formal contract. The SrbLO, however, provides for similar exceptions as in the case of the exception to the rule of parallelism of formalities. First, simultaneous oral agreements of the parties on non-essential elements not regulated by the formal contract are considered valid, provided they do not contravene its content or the purpose for which the formalities have been instituted.[91] Second, oral agreements of the parties by which the obligations of either or both parties are mitigated are valid, if the formalities have been instituted exclusively in the interest of the parties.[92] The latter is the case with any agreed form or statutory form, the decisive purpose of which was the protection of the private interests of the parties.[93]

The most important question in relation to the validity of contracts not satisfying formal requirements is whether their invalidity may 'convalesce,' that is, whether the contract may be convalidated regardless of its formal defect. The response of the legislator in this respect is different from that to other cases of invalidity of contracts, because in contrast to the majority of illegal contracts and to immoral contracts, the content of a form-defective contract is regularly perfectly lawful. The only reason for its invalidity lies in the infringement of statutory rules or the parties' agreement mandating a specific formal requirement. For this reason the SrbLO prescribes that a contract that should have been concluded in a written form shall be considered valid even though the formal requirements are not met, provided that both parties performed their obligations, entirely or preponderantly, unless the purpose for which the formalities have been instituted implies differently.[94] The performance of the contract heals its, therefore, formal defects, provided the formalities were instituted

87 SrbLO, Article 70 (1).
88 SrbLO, Article 70 (2).
89 Perović in Perović, 1995, p. 157.
90 SrbLO, Article 71 (1).
91 SrbLO, Article 71 (2).
92 SrbLO, Article 71 (3).
93 Perović in Perović, 1995, p. 159.
94 SrbLO, Article 73.

for the main purpose of the protection of the parties' private interests. For quite a long time the most important cases to which this rule was applied in the case law were contracts for the conveyance of real estate not satisfying all formal prerequisites.[95] Typically, this rule was applied when the parties concluded a written contract but did not have their signatures verified by the local court, or later, by the notary public. The introduction of the notarial form of such contracts and the adoption of the current Law on the Conveyance of Real Estate from 2014 made the convalidation of form-defective contracts for such conveyance impossible.

Formalities in Serbian contract law may have three different manifestations. The basic formality is the simple written form. The most notable example is the contract on suretyship, for which the SrbLO prescribes the written form.[96] As for the means of accomplishing the simple written form, the SrbLO prescribes that if it is required for the validity of a contract that a document (deed) be drafted, the contract is considered concluded when all parties assuming any obligations have signed such a document.[97] If a party is illiterate, he or she shall place his or her fingerprint on the document, which should be confirmed by two witnesses, a court, or another state organ.[98] For the conclusion of a contract for consideration, it is sufficient that each party sign the copy of the document intended for the counterparty.[99] Finally, the SrbLO specifies that the requirement of a written form is satisfied if the parties exchange letters or agree by teleprinter or any other means enabling the determination of the content of the statement and the identity of the parties to the necessary degree of certainty.[100]

The real form, in which so-called real contracts had been concluded in the tradition of Roman law, is not present in Serbian law currently in force. Only one (accessory) contract is considered to belong to the category of real contracts, where the performance of one party's obligations results in the formation of the contract. This is the deposit of earnest money. The SrbLO prescribes that if one party deposits with the counterparty a certain amount of money or a quantity of other fungible goods as a sign of the formation of the contract (earnest money deposit), the contract is deemed to have been concluded when the earnest money has been given, unless the parties have agreed otherwise.[101] The SrbLO does not regulate loans for use (*commodatum*), which are traditionally considered as requiring a real contract. No type of donation is regulated in relation to which the performance of the gift sets aside the unenforceability of informal promises of donation or convalesces the defects in other requirements pertaining to form. To such contracts the Civil Code for the Serbian Dukedom from 1844 still applies, which made the enforceability of informal promises of donation

95 Perović in Perović, 1995, p. 163.
96 SrbLO, Article 998.
97 SrbLO, Article 72 (1).
98 SrbLO, Article 72 (2).
99 SrbLO, Article 72 (3).
100 SrbLO, Article 72 (4).
101 SrbLO, Article 79 (1).

contingent on performance.[102] As for the loan for use, the literature considers it a consensual contract.[103] On the other hand, the contract of loan and the contract of deposit, the other two traditionally real contracts, are regulated by the SrbLO, which qualifies them as consensual contracts.[104]

The notarial form was (re)introduced[105] into the Serbian legal system in 2011 by the adoption of the Law on Notaries, but effectively it gained a foothold only after its amendments from 2014.[106] Prior to that, the official confirmation of contracts for which such formality was prescribed was done by municipal courts. For most contracts (including contracts for conveyance of real estate), that meant a simple verification of signatures of the parties at the court. Exceptionally, for some contracts, like the maintenance contract, the strictest possible formality was prescribed, i.e., the formation of a contract in non-contentious judicial proceedings before a judge. Presently, a form stricter than the simple written form manifests itself in three possible formalities. First, the employee of the notary public may merely verify the authenticity of the signatures of the parties. This written form with the verification of signatures of the parties is envisaged for contracts for the transfer of a share in an LLC,[107] for example. However, the parties are always entitled to have their signatures on their consensual contract drafted in a simple written form verified by the office of the notary public, in order to constitute a stronger proof. Second, some contracts must be confirmed by the notary public (*solemnization*), whereby the parties present the notary public their draft of the contract, the notary reads it out to the parties, and controls that certain mandatory rules are not infringed on, then gives the parties instructions and draws their attention to certain facts or legal issues, if such duty is prescribed by law. This form is applied, for instance, to contracts concluded for the conveyance of real estate.[108] The third form, which is the strictest possible, is when the notary public personally drafts the contract according to the statements of the parties, then reads it out, verifies the observance of mandatory rules, gives the necessary instructions, and draws the parties' attention to specific facts and legal issues. According to the Law on Notaries Public, the contract for conveyance of real estate must be concluded in this form, for instance, when one or both parties exercise their rights by representative, as they do not personally possess the required capacity to conclude the contract.[109]

In recent times parties regularly involve electronic means in the formation of their contract, which may manifest in different ways. Sometimes they only exchange offer and acceptance by e-mail, SMS, or some online application for messaging and

102 Civil Code for the Serbian Dukedom from 1844, § 564.
103 Perović, 1986, p. 696.
104 SrbLO, Articles 557 and 712.
105 The legal profession of notaries public was only reintroduced into Serbian law in 2011, since it existed in the Kingdom of Yugoslavia between the two world wars but was abolished after the Second World War.
106 Miščević, 2022, p. 5.
107 Companies Act, Article 175 (1).
108 Serbian Law on Notaries Public, Article 93.
109 Serbian Law on Notaries Public, Article 82.

audio-video calls. The SrbLO does not regulate the conclusion of a contract by such means as a separate type of formality. For this reason, it would merit considering the electronic form rather as a means of conclusion of a contract than as a specific formality.[110] This means that for each and every case it must be assessed separately whether the electronic means used by the parties satisfies the conditions of the formation of a contract. The answer is rather straightforward in case of consensual contracts. Since they imply a free choice of form, the parties may adopt any electronic means of conclusion of the contract that they see appropriate. The contract is valid if the minimally required consent of the parties is met, regardless of the form in which it is achieved. Only concerns in relation to proving the authenticity of the identity of the parties may be raised. The situation is more complex regarding formal contracts. The simple written form may be accomplished by an electronic document signed by the parties using a qualified electronic signature. However, at present the notarial form, if prescribed by law, may not be replaced by electronic means of communication that are verified by electronic signature. Nor can the electronic form replace non-commercial guarantees and suretyships, and it may not be used when the possibility of conclusion of a contract by qualified electronic signature is excluded.[111] Serbia does not have a special regulation on contracts concluded by blockchain technologies, hence the general rules of the SrbLO, the Law on Electronic Commerce from 2009, and the Law on Electronic Documents, Electronic Identification, and Trust Services for Electronic Transactions from 2017 apply.

6.2. Croatia

The HrvLO took over the rules of the former federal law on the primacy of the principle of consensualism, statutory form, and its application to subsequent modifications verbatim, with the same two exceptions from under the principle of the parallelism of form.[112] However, the HrvLO prescribes a new rule regarding consensual contracts. Namely, in case of a contract concluded orally each party may, until the performance of the contractual obligations, request a written statement from the counterparty in which the latter confirms that the contract has been concluded.[113] The party requesting written confirmation of the contract is obliged to send two copies of the contract signed by himself or herself with the request to the counterparty to send back one copy once he or she has also signed it.[114] In case the counterparty fails to hand over or dispatch by registered mail a copy of the signed contract within eight days from the receipt of the request, the other party may request the court to declare the existence of the contract and oblige the counterparty to pay compensation for the damage caused by failing to provide a signed copy of the contract.[115] The HrvLO, however, clearly

110 Radovanović in Pajtić, Radovanović and Dudaš, 2018, p. 276.
111 Serbian Law on Electronic Commerce, Article 10.
112 HrvLO, Article 286.
113 HrvLO, Article 287 (1).
114 HrvLO, Article 287 (2).
115 HrvLO, Article 287 (3).

states that a contract concluded orally is considered valid regardless of whether the formal confirmation has been issued.[116] This rule did not exist in the former federal law, but the General Usages on Trade of Commercial Goods from 1954 envisaged such rules, from which the HrvLO later took them over.[117]

As for formalities instituted by statute or by the parties' intention, the HrvLO envisages the same rules as the SrbLO. Two important differences, however, can be identified. First, concerning persons who are illiterate or unable to write, the HrvLO prescribes that they shall conclude the contract by putting their fingerprint on the document, verified by a notary public. Second, the HrvLO explicitly regulates the conclusion of a contract by electronic means. As for the time of the formation of the contract, the HrvLO extends the application of the general rule of contract law to contracts concluded by electronic means, according to which a contract is considered concluded when the parties agreed on its essential elements.[118] An offer placed by electronic means is considered addressed to a person who is in legal terms present, provided that immediate reply is possible.[119] Finally, the law provides that the use of an electronic signature in the formation of the contract is governed by special statutes.[120] These are the Law on Electronic Signature from 2002, the Law on Electronic Commerce from 2003, and the Law on the Electronic Document from 2005.[121] The Law on Electronic Commerce specifies that a contract may be concluded by electronic means or in form of an electronic document.[122] Furthermore, it explicitly states that the offer and acceptance can be made by electronic means or in the form of electronic documents.[123] The validity of a contract cannot be contested only because it has been made in electronic form.[124] The law, however, sets out some types of contracts that cannot be concluded by electronic means. For example, nuptial and prenuptial agreements, agreements on the division of joint property, contracts on donation, and contracts for the sale of real estate, only to mention the most important ones, cannot be concluded by electronic means.[125] As for the use of an electronic signature, the law specifies that in cases where a statute prescribes a mandatory written form, the requirement is satisfied if the parties signed it by their electronic signatures.[126]

As in the SrbLO, the real form exists in the HrvLO as well, perhaps even more decisively. It retained the deposit of earnest money[127] as a real contract,[128] but also the

116 HrvLO, Article 287 (4).
117 Gorenc in Gorenc, 2014, p. 445.
118 HrvLO, Article 293 (1).
119 HrvLO, Article 293 (2).
120 HrvLO, Article 293 (3).
121 Gorenc in Gorenc, 2014, p. 454.
122 Croatian Law on Electronic Commerce, Article 9 (1).
123 Croatian Law on Electronic Commerce, Article 9 (2).
124 Croatian Law on Electronic Commerce, Article 9 (3).
125 Croatian Law on Electronic Commerce, Article 9 (4).
126 Croatian Law on Electronic Commerce, Article 11.
127 HrvLO, Article 303 (1).
128 Gorenc in Gorenc, 2014, p. 475.

contract on loan and deposit[129] as consensual contracts from the former federal law. However, it regulated loan for use (*commodatum*) and donation, the types of contracts that were not regulated in the former federal law.[130] Loan for use is considered a real contract,[131] while the contract on donation is in principle regulated as consensual contract.[132] If the donation relates to real estate, though, it must be concluded in written form. However, if the transfer of possession is not effectuated simultaneously with the conclusion of the contract, it must be concluded in the form of a notarial deed with the confirmation by the notary public (solemnization).[133]

The strictest formality in Croatian contract law exists when the public notary is involved in the formation of the contract. The participation of a notary public may manifest itself in different ways. For some contracts it is required that the notary draft the contract, monitor the observance of mandatory rules, and give the proper instructions to the parties when required, and that he or she read out the contract to the parties, who sign it in his or her presence. This is the form of a notarial deed, envisaged for a contract by which minors or persons who lack contractual capacity dispose of their property, contracts on donation where the object of the contract is not handed over in the direct possession of the donee, and all juridical acts undertaken by deaf persons unable to read or mute persons unable to write,[134] provided that in the latter case the value of the contract does not exceed 50,000 HRK (roughly EUR 6,700).[135] For all other types of contracts the Law on Notaries Public enables the parties to request the form of confirmation of the contract (solemnization), whereby the notary confirms the contract drafted by the parties, hence attributing to it the features of a notarial deed.[136]

6.3. Slovenia

The rules of the SvnCO regarding the general rules on formal contracts correspond almost verbatim to the SrbLO. These include the rules on the principle of consensualism of contracts, the exceptionality of the statutory form, the application of the rules on statutory form to subsequent informal agreements of the parties, termination of formal contracts by informal agreement, agreed form, consequences of the infringement of statutory or agreed form, presumption of the completeness of parties' agreement contained in the formal document, means of concluding a contract in simple written form, and convalidation of a contract deficient in the form.[137] There are, however, two deviations of lesser importance. On the one hand, the rule on the

129 HrvLO, Article 499 (1) and Article 725.
130 Nikšić in Josipović, 2014, 135.
131 HrvLO, Article 509. See Slakoper in Gorenc, 2014, p. 843.
132 HrvLO, Article 479 (1).
133 HrvLO, Article 482.
134 Croatian Law on Notaries Public Article 53 (1).
135 Croatian Law on Notaries Public Article 53 (2).
136 Croatian Law on Notaries Public Article 58 (1).
137 SvnCO, Articles 51, 53–58.

mandatory written form of contracts for conveyance of real estate has been removed from the rules on the contract of sale and moved to the general rules on the form of contract.[138] On the other hand, the means by which the simple written form can be achieved other than by signatures of the parties is harmonized with the technical possibilities of today's world. The teleprinter is no longer mentioned, and there is a general formulation according to which any method or form of communication that retains the original wording intact and allows the origin of the wording to be verified using generally accepted means shall have the same effects as a written document signed by the parties.[139]

Like the SrbLO, the deposit of earnest money is, according to the SvnCO, qualified as a real contract, since it is considered concluded when the earnest money has been actually deposited with (i.e., paid to) the counterparty.[140] The other feature common with the SrbLO is that the SvnCO retained from the former federal law the consensual character of loan and deposit contracts.[141]

However, like the HrvLO, but unlike the SrbLO, the SvnCO governs the contract on donation. Concerning its form, the SvnCO prescribes that if the performance of the gift does not immediately follow the conclusion of the contract, then the contract must be concluded in a written form.[142] Even if the contract does not meet the aforementioned requirement, it is still valid, but the promise of donation is not enforceable.[143] Similarly, the loan for use is also regulated by the SvnCO.[144] However, it is not considered a real, but instead a consensual contract.[145]

The SvnCO specifies a wide range of contracts that are to be concluded in the written form.[146] The strictest formality is, however, the notarial form. According to the Law on Notaries Public, contracts relating to the settlement of financial relations between spouses and contracts relating to the disposal of the assets of persons lacking contractual capacity are the most notable contracts that need be concluded in the form of a notarial deed. The list of the contract types is, however, not exclusive. Other statutes may prescribe that a certain contract is to be concluded in the form of notarial deed.[147] Beside the form of notarial deed, the law enables parties to have any contract confirmed by the notary. In this case the parties draft the contract, whereby the notary merely confirms it, providing it thus with the legal effects of a notarial deed.[148] However, if the contract is for the conveyance of real estate or establishing rights *in rem* in real estate, the notary public may confirm the contract only if it has

138 SvnCO, Article 52.
139 SvnCO, Article 57 (2).
140 SvnCO, Article 64 (1).
141 SvnCO, Articles 569 and 729.
142 SvnCO, Article 538 (1).
143 SvnCO, Article 538 (2).
144 SvnCO, Article 579.
145 Možina and Vlahek, 2019, p. 40.
146 Možina and Vlahek, 2019, pp. 38–40, 71–72.
147 Slovenian Law on Notaries Public, Article 47.
148 Slovenian Law on Notaries Public, Article 49 (1)

been drafted by another notary or an attorney at law. This fact is to be proven by the stamp of the notary or attorney on the document.[149]

Similarly to Serbian law, in Slovenia the formation of a contract by electronic means and the use of electronic signature are not regulated in the SvnCO but in a special statute. This statute is the Law on Electronic Commerce and Electronic Signature from 2004. The law specifies that a written form prescribed by statute or other regulation is satisfied by the electronic form, that is, it has equivalent effect with the written form, if the data stored in electronic form is available and suitable for later use.[150] This rule does not apply to a wide range of contracts: contracts for conveyance of property and establishing rights *in rem* over real estate, and contracts by which spouses regulate their joint property, to mention only the most notable.[151]

7. Slovakia

7.1. Formal requirements

Slovak civil law is based on the principle of informality of juridical acts, and thus also of contracts. According to § 40 (1) of the SvkCC, unless otherwise required by law or agreement of the parties, a juridical act may be made in any form. In commercial relations, a written form is required for the validity of a juridical act only in cases stipulated by law, or when, on the conclusion of the contract, at least one party in the negotiations expresses the will for the contract to be concluded in writing.[152]

From the point of view of contracts, the written form and the form of the notarial record are of particular relevance.

According to § 40 of the SvkCC, the written form of the contract is complied with if it has the form of a document (*listina, písomnosť*) and if it is signed by the contracting parties. A documentary requirement is met if the contract is recorded in writing (in text); it does not matter what the carrier of the document is, whether paper or other materials. However, it is important that the text be clearly legible.

As far as the signature is concerned, the law does not stipulate what requirements the signature must meet, but it follows from the logic of the matter that it must be handwritten. Legal doctrine takes the view that a signature with a surname or its abbreviation (referred to as a 'cipher') is sufficient wherever the identity of the signatory is indisputable and where such a signature is customary. However, a signature may not consist merely of the initials (initial letters of the name). The signature does not have to be legible in its entirety, it is sufficient if at least the first letter is legible and further strokes should indicate that it is a signature. The signature may be replaced by mechanical means, but only in cases where this is customary.[153]

149 Slovenian Law on Notaries Public, Article 49 (2) and (3).
150 Slovenian Law on Electronic Commerce and Electronic Signatures, Article 13 (1).
151 Slovenian Law on Electronic Commerce and Electronic Signatures, Article 13 (2).
152 SvkCommC, § 272.
153 SvkCC, § 40 (3).

According to the case law, it must also be clear from the document who issued the juridical act.[154] However, the exact identification of the party is not required. Even the occurrence of incorrect identification data does not automatically invalidate a juridical act if it is clear who the person granting consent is.[155] It must be pointed out that there are also court decisions holding the opposite.[156]

It is sufficient for the conclusion of the written contract that there be a written proposal and a written acceptance. Therefore, the signatures of the contracting parties do not have to be on the same document. An exception is the contract on the conveyancing of real estate, where the signatures must be on the same document.[157]

In the case of the electronic written form, for the validity of a juridical act the law requires that the content of the juridical act and the designation of the person acting be recorded by electronic means. The written form of electronic documents is preserved whenever the electronic document is signed by a qualified electronic signature or a qualified electronic stamp.[158] However, not all contracts can be concluded in electronic form. According to § 5 (8) of Act no. 22/2004 Coll. on Electronic Commerce, it is not possible to conclude via electronic devices:

— a contract for which a decision by a court, by a public administration body, or by a notary is required according to a special norm, or
— a contract constituting a security for obligations, unless at least one of the contracting parties is a bank or a branch of a foreign bank, a postal undertaking, or an undertaking providing electronic communications networks or electronic communications services.

As a rule, the authenticity of the signature of the acting person does not have to be officially certified. In some cases, however, such certification is required for the purposes of, e.g., recording of *in rem* over immovables in the Land Register on the basis of a real estate conveyancing agreement. However, according to case law, in that case the requirement of an official certificate of authenticity of the signature is not a condition for the validity of the contract.[159] A certificate of authenticity of the signature is not required if the contract is in electronic written form and is signed by a qualified electronic signature or a qualified electronic stamp.[160]

The SvkCC requires a written form, e.g., in the case of contracts on the conveyancing of real estate,[161] a contract on the establishment of a lien[162] or an easement,[163]

154 R 5/1988 civ.
155 R 13/2003; R 48/2019.
156 Supreme Court of the Slovak Republic, file no 3 Cdo 217/2018.
157 SvkCC, § 46 (2).
158 SvkCC, § 40 (4).
159 R 25/1966 civ.
160 SvkCC, § 40 (5).
161 SvkCC, § 46 (1).
162 SvkCC, § 151b (1).
163 SvkCC, § 151o (1).

a contract on the assignment of a claim,[164] on the assumption of a debt[165] or on the accession to an obligation,[166] an agreement on a contractual penalty,[167] on deductions from wages and other income[168] or on a security transfer of rights,[169] or a contract of donation in the case of real estate or if the movable gift is not given upon donation.[170]

A contract concluded in writing may be changed or terminated only in writing.[171] In commercial relations, however, there is another regulation: According to § 272 (2) of SvkCommC, if the contract concluded in writing contains a provision that it may be amended or cancelled only by the agreement of the parties in writing, the contract may be amended or cancelled only in writing.

The form of a notarial record is required in Slovak law for contracts only exceptionally. Pursuant to § 143a of SvkCC, the agreement of the spouses on the extension or narrowing of the legally determined scope of joint property, on reserving its establishment as of the date of termination of the marriage, and on the administration of joint property must take the form of a notarial deed. Also, according to § 40 (6) of the SvkCC, notarial record is required for written contracts concluded by those who cannot read or write. Such a record, however, is not required if that person is able to acquaint himself or herself with the contents of the contract with the aid of apparatus or special aids or through another person of his or her choice and is able to sign the contract.

7.2. Consequences of non-compliance

According to § 40 of the SvkCC, if the required form has not been complied with, the juridical act is invalid. If compliance with the form was required by law, then this invalidity is absolute, that is, the sanction is nullity. If only the agreement of the parties required it, then it the contract is voidable.[172] If it is a commercial contract and the requirement of a written form is established only for the protection of a certain party, then the contract is voidable, even if this requirement of the form follows from the law,[173] unless it is a contract in areas of corporate law.

According to § 455 (1) of the SvkCC, it is not considered unjust enrichment if the performance of a debt that is invalid only for lack of form has been accepted. Therefore, if the performance was rendered under a contract that is invalid for lack of form, no party has the right to demand a return of what was performed. However, according to the doctrine, synallagmatic contracts need to be performed by both parties in order for the § 455 (1) of the SvkCC to apply. If the contract was performed only by

164 SvkCC, § 524 (1).
165 SvkCC, § 531 (3).
166 SvkCC, § 533.
167 SvkCC, § 544 (2).
168 SvkCC, § 551 (1).
169 SvkCC, § 553a (1).
170 SvkCC, § 628 (2).
171 SvkCC, § 40 (2).
172 SvkCC, § 40a.
173 SvkCommC, § 267 (1).

one party, then a *condictio* is not excluded. There are also opinions that § 455 (1) of the SvkCC is a case of convalidation of a juridical act and that such a convalidation occurs when the performance of at least one party is rendered.

8. Concluding remarks

Czech law proclaims the principle of consensualism as a general rule: Parties are entitled to choose any form of their juridical act unless such choice is restricted by the parties' agreement or by statute. If the written form of the contract had a warning function, a failure to comply with it results in voidability of the contract. If its function was only evidentiary, non-compliance with the formal requirements does not affect the validity of the contract at all. However, if the purpose of the formal requirement was a security or control function, a failure to fulfill it results in the nullity of the contract. Czech law enables convalidation of a form-defective contract by the performance of parties' obligations, provided the form was agreed by the parties or prescribed by statute if the purpose of the formal requirement was to achieve the warning function of the form.

The HunCC prescribes that if the contract is subject to written form, it is valid if its substantial content is made in writing. Failure to comply with the formal requirements in the formation of the contract results in the nullity of the contract. A form-defective contract may still be considered valid if the parties performed their obligations. However, the possibility of convalidation does not apply if mandatory rules prescribe that the contract must be concluded in the form of a public deed or a private deed with full evidentiary value, or the contract is aimed at the conveyancing of ownership of real estate.

Polish law also states clearly, as a general rule, the primacy of the principle of consensualism. It prescribes that the statements of consent required for juridical acts, unless a statute provides otherwise, may be made in any form capable of disclosing the party's intent in a sufficient manner. The PolCC envisages a wide range of different forms of juridical acts. If the parties failed to observe the formal requirements of written, documentary, or electronic form, the juridical act is null and void only if the sanction of nullity is prescribed by statute. However, if a statute prescribes a specific form of a juridical act, a failure to observe the formal requirements results in nullity as a general rule.

The freedom of the parties to choose the form of their contract is a general rule also in Romanian law. The law, however, prescribes a wide range of exceptions where certain formalities must be observed. These may be classified into three categories. The first are formal requisites that are qualified as *forma ad validitatem*. As the designation indicates, in this case the validity of the contract depends on observance of the formal requirements—a failure to conclude the contract in the required form makes it null and void. A peculiarity of Romanian law is that it knows of the *ad probationem* form in a similar meaning as it is regulated in the French Civil Code: Rights

and obligations from a contract the value of which exceeds approx. 50 EUR cannot be proven in a court proceeding by way of witness testimony, except for certain, expressly regulated situations. Finally, there is the *ad opposabilitatem* form, which is not required in order to have a valid contract, or a valid proof thereof, but to make it effective against the claims of third parties.

For the most part, the general rules on formal requirements in contract law are almost identical in Serbian, Croatian, and Slovenian law. Only a small number of differences exist, but they do not concern the major rules relating to formal contracts. In all three legal systems primacy is given to consensualism. Formal contracts are considered exceptional, though their range is quite wide. They differentiate statutory and agreed formal requirements and the regular legal consequence of not observing them is the nullity of the contract. However, all three legal systems envisage the possibility of convalidation of form-defective contracts by performance of the parties' obligations. The performance of the parties' obligations must be mutual, complete, or at least materially preponderant. In addition, such convalidation must not be contrary to the purpose for which the formal requirements have been instituted. Therefore, the court needs to assess whether the purpose of the formal requirements was the protection of a public or a private interest. In the former case, the courts usually decline the convalidation of form-defective contracts regardless of the performance of the parties. In the latter case, the courts regularly approve convalidation. All three legal systems support the idea of parallelism or symmetry of formalities. This means that subsequent modification or termination of formal contracts must be done in the same form in which the contract itself was concluded. An exception is foreseen, however, for the informal termination of a formal contract by consent of the parties.

Slovak law also vindicates the principle of consensualism: If not prescribed by statute or stipulated by the parties' agreement, juridical acts may be made in any form. However, as in other legal systems that were subject to analysis in this chapter, there is a wide range of different contracts for which a specific formal requirement is prescribed. The legal consequences of the parties' failure to observe the formal requirements differ. If the statutory form in non-commercial contract has not been observed, the sanction is nullity. However, if in a non-commercial contract the parties did not observe the stipulated formal requirements, the contract is merely voidable. In commercial contracts the regular consequences of a failure to observe formalities, even those instituted by statute, is voidability. Slovak law also enables the possibility of convalidation of form-defective contracts, but not according to the rules of contract law, but rather to those of unjust enrichment. The parties cannot claim restoration of the benefits conferred upon them by a form-defective synallagmatic contract, provided that all parties rendered performance.

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Chapter IX

Unfair Terms

1. General considerations

In the middle of the 20th century, principles such as autonomy of will and freedom of contract became mere illusions in the conditions of mass production and consumer society. The need for consumption, limited competition, and economic inequality did not allow a wide range of actors to impose their will in shaping the content of their obligations. This asymmetry between mass producers (as well as marketers) on the one hand and the mass of consumers on the other was manifested in the standardized terms of contracts.

Standardized terms for multiple contracts (standard terms in a broader sense) allow entrepreneurs to consolidate the content of their obligations and to some extent simplify the formation of contracts. Sales and services and their distribution become easier to administer, and thereby cheaper. It is after all easy to fill out a form. The settlement of problems of interpretation, for example, results in the resolution of thousands of other cases based on the same arrangement. The contract itself becomes a unified, mass-produced product.[1]

On the other hand, the consumer's ability to negotiate any divergent arrangement is limited. He or she cannot protect his or her interests, either because the entrepreneur benefits from a monopoly or dominant position, or because all entrepreneurs offer the same or very similar terms. The will of the consumer is in this way made

1 Llewellyn, 1931, p. 731.

Hulmák, M., Menyhárd, A., Tomczak, T., Veress, E., Dudás, A., Hlušák, M. (2022) 'Unfair Terms' in Veress, E. (ed.) *Contract Law in East Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 289–320. https://doi.org/10.54171/2022.ev.cliece_chapter9

more or less subject to the terms set by the stronger party and to conditions whose consequences are often not even comprehensible to the consumer.[2] Most issues are resolved in advance by the contract, and usually in favor of the stronger party. Given the importance of the contract for a particular individual, it becomes a private law instrument of management and control.[3] The use of standard terms leads to the creation of a new form of servitude.[4] The consumer has only the right to choose who will govern him. Studying the terms and seeking to negotiate are ineffective when no change can be achieved in their contents. Any time devoted to such activity seems wasted.

As early as the 1930s, it was pointed out that the increasing possibility of control and management also calls for greater protection of the weaker party.[5] Interference with the autonomy of the contracting parties and no respect for freedom of contract occur historically when there is abuse.[6] For example, clauses limiting the entrepreneur's liability hidden in his standard terms have long been reviewed by courts. The criteria considered were incompatibility with good morals or good faith.[7]

The issue was never only the existence of a consensus, or any surprising terms, but also the adequacy of the performances. Emphasis was placed on procedural justice, while controlling material adequacy was an issue placed rather at the end of the queue. Rakoff has already pointed out that the control of some terms by the court and their subsequent non-application without adjusting the price may result in excessively onerous obligations for the weaker party when the price has been set precisely with respect to these terms, e.g., transferring risks to the weaker party. He spoke about retroactive unfairness. However, the mere fact that the term under examination was taken into account when setting the price (i.e., the price is adequate when considering the agreed content) does not mean that the term subject to control is fair.[8]

Gradually, the perception of standard terms as a manifestation of monopolistic behaviors hindering the free market was abandoned.[9] Standard terms were used to a much greater extent as a manifestation of the mass production and distribution typical of contemporary society.[10] Their use is connected with the increase in the number of entrepreneurs and growth of management, pressure toward the effectiveness of the contracting process, and the involvement of lawyers in the preparation of contractual documentation.[11] The modern economy is not a marketplace in which the

2 Kessler, 1943, p. 632.
3 Llewellyn, 1931, p. 732.
4 Kessler, 1943, p. 640.
5 Llewellyn, 1931, p. 733.
6 Niglia, 2003, p. 26.
7 E.g., in Germany § 138 and § 242 of the BGB in case law prior to 1976 (see decision of the German Supreme Court of February 24, 1971, Ref. No. VIII ZR 22/70, according to Raiser, 1958, p. 7).
8 Rakoff, 1983, p. 1243.
9 Kessler, 1943, p. 640.
10 Rakoff, 1983, pp. 1220 et seq.
11 Niglia, 2003, pp. 34 et seq.

price and contractual terms are negotiated; instead, it relies on firm and standardized terms that are not in principle negotiable.[12]

These changes in contractual terms are necessarily reflected in the need for specific rules in legislation. This legislation may impose an obligation to negotiate or to determine the price.[13] A partial solution is regulation preventing restrictions on free competition.[14] Nevertheless, eventually the need for legal certainty, comprehensibility, and predictability of standard terms and their growing importance led to the adoption of special rules. Invalidity of the term was connected with its surprising or unfair nature[15] or the absence of special written consent for certain arrangements.[16] Oversight was no longer a matter of procedural justice alone (formal contractual freedom), but was aimed at ensuring substantive justice (substantive contractual freedom—*materiale Vetragsfreiheit*).[17] However, judicial or administrative control of the content of the contract has been only slowly enforced despite the existence of such legislation, for example in Italy or France.[18]

At the same time, a consumer protection program in the European Economic Community was formulated.[19] Generally, the program started a fight for the protection of consumers against abuse of power by businesses, unilateral terms, the exclusion of fundamental rights, and unfair commercial practices.[20] Attention was focused on standard terms, not price arrangements, which differed from contract to contract and which, together with the definition of consideration, could be negotiated even if standard terms were applied.[21] At the level of the European Economic Community, these tendencies resulted in the adoption of Directive 93/13/EEC on Unfair Terms in Consumer Contracts (hereinafter 'UCTD').[22] Consumer protection against unfair contractual terms was motivated primarily by the need to respond to market failures. The aim was to eliminate the imbalance between the consumer and

12 Canaris, 2000, p. 323.
13 Raiser, 1958, p. 3 (enforced as a requirement of the social state and of social justice).
14 Raiser, 1958, p. 5.
15 Loi Scrivener (loi n°78-22 du 10 janvier 1978), Das Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (December 9, 1976, BGB I 1976, 3317), Unfair Contract Terms Act 1977, Restatement (second) of Contracts, § 211 (1979).
16 According to the *Codice Civile*, Article 1341. The bill on unfair terms in businesses' standard terms was eventually not adopted in Italy in the 70s (see details on this reform in Niglia, 2003, p. 62).
17 Canaris, 2000, pp. 321 et seq.
18 Niglia, 2003, pp. 63 and 67.
19 Preliminary programme of the European Economic Community for a consumer protection and information policy, April 25, 1975, OJ C 92, pp. 2 et seq.
20 This program was followed by the first directives on consumer protection. In 1984 the Commission adopted the Unfair Terms in Contracts Concluded with Consumers (Communication from the Commission), COM/1984/055 final. Regulation in particular Member States at that time is described in point 20 et seq.
21 Unfair terms in contracts concluded with consumers (Communication from the Commission), points 6 and 10.
22 Details on adoption of this directive in Niglia, 2003, pp. 93 et seq.

the entrepreneur.[23] However, it was also about harmonizing legislation in order to facilitate cross-border trade.[24]

Summarizing its basic principles, protection is provided to the consumer in the case of terms that have not been individually negotiated. Such a contractual term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.[25] The unfairness of a contractual term shall be assessed taking into account the specific circumstances of the case.[26] Some terms are presumed to be unfair.[27]

Subsequently, in other Member States, specific rules emerged for reviewing the unfairness of contractual terms. It was no longer necessary to rely on general institutions such as good morals, good faith, or usury. However, the UCTD was based on the principles of minimum harmonization,[28] and moreover only in view of business-to-consumer relations. Member States could also adopt stricter consumer protection regulations. Therefore, different legal regulations addressing the unfairness of standard terms can be found in Europe now.[29]

The (judicial) oversight of possibly unfair terms may be limited to consumer contracts only or it may be broader, and subject terms included in other contracts to control as well (e.g., adhesion contracts). Unequal bargaining power can also affect business-to-business relations. In this respect, Directive (EU) 2019/633 on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain is well known.

There may be one general regulation of unfair terms,[30] possibly with special provisions concerning consumers,[31] or two or more separate ones.[32] The special assessment of unfairness may concern standard terms in the broader sense.[33] It may be limited to terms that have not been negotiated individually.[34] We may find regulations where the entire content of the contract is assessed.[35] The law may exclude certain terms from under oversight, e.g., terms defining the main subject of the contract,[36]

23 E.g., CJEU, C-169/14 of July 17, 2014, Juan Carlos Sánchez Morcillo, María del Carmen Abril García v. Banco Bilbao Vizcaya Argentaria SA, para. 24.
24 UCTD, Preamble.
25 UCTD, Article 3.
26 UCTD, Article 4.
27 UCTD, Annex I.
28 UCTD, Article 8.
29 According to Schulte-Nolke, Twigg-Flesner and Ebers, 2007.
30 BGB, § 307; ABGB, § 879 (3); Dutch Civil Code, Article 6:231.
31 BGB, § 310; KSchG, § 6; Dutch Civil Code, Articles 6:236 and 6:237.
32 Code Civile, Article 1171; Code de la Consommation, Article L.132-I.
33 E.g., ABGB, § 879 (3); BGB, § 307.
34 PECL, Article 4: 110 (1); UCTD, Article 3.
35 Code de la Consommation, Article L.132-I.
36 PECL Article 4: 110 (2) l. a); DCFR, Article II.–9:406 (2); ABGB, § 879 (3); Dutch Civil Code, Article 6:231. l. a).

contracts from other fields of private law,[37] and terms merely taking over otherwise applicable provisions.[38] On the other hand, sometimes the regulation positively limits its applicability to terms deviating from the legal regulation.[39]

The way in which assessment of unfairness takes place differs not only in what is being reviewed, but also in the content of the test applied, typically depending on the nature of the relationship.[40] A review of the adequacy of mutual performances may be excluded from such supervision.[41] Particular attention is paid to the possibility of taking price into account during the assessment as a way to compensate the unfairness (price-based considerations). In some jurisdictions, an unclear and incomprehensible term is immediately declared unfair.[42] Surprising terms in standard terms are very often ineffective, regardless of the nature of the parties.[43]

The UCTD contains a list of terms that are presumed to be unfair (the 'gray list').[44] However, in Member States today, the legal system often contains a list of unfair terms prohibited without further ado (the 'blacklist').[45] It is interesting to compare the differences in these catalogues, such as the prohibited restriction on damages a consumer may claim, or arbitration clauses in consumer contracts. The law may also allow for the subsequent completion of these lists in the form of follow-up acts.[46]

Depending on the national legal system, unfair terms may be unenforceable, invalid (null and void, or voidable), or non-existent. Such consequences occur in some cases *ex lege* or may be invoked *ex officio*, while in others (such as voidability) only the aggrieved party may be entitled to raise them.[47] In most cases, the legislation seeks to maintain the validity of the rest of the contract. However, there may be different approaches and different means of filling the gap that is left in the contract after the unfair term is rendered invalid or non-existent. The law may also extend the unenforceability, invalidity, or non-existence of such a term, e.g., toward retailers in the middle of a distribution chain.[48]

37 E.g., contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law, and contracts relating to the incorporation and organization of companies or partnership agreements (preamble of the UCTD).
38 DCFR, Article II.–9:406 (1).
39 E.g., BGB, § 307 (3).
40 DCFR, Articles II.–9:403, II.–9:404, II.–9:405.
41 PECL, Article 4: 110 (2) l. b); UCTD, Article 4 (2); Code de la Consommation, Article L.132-I; DCFR, Article II.–9:406 (2).
42 BGB, § 307 (1); KSchG, § 6 (3).
43 BGB § 305c; Dutch Civil Code , Article 6:233. l. b).
44 Dutch Civil Code, Article 6:237; BGB, § 309; KSchG, § 6. (2).
45 Dutch Civil Code, Article 6:236; BGB, § 308; KSchG, § 6. (1).
46 Dutch Civil Code, Article 6:239; Code de la Consommation, Article L.132-I.
47 Dutch Civil Code, Article 6:231.
48 Dutch Civil Code, Article 6:244.

2. The Czech Republic

2.1. Overview

The regulation of unfair contractual terms in the CzeCC stems from the general obligations of fair dealing,[49] the prohibition of breach of good morals,[50] and the prohibition of abuse of economic power.[51] A person who acts as a professional (entrepreneur) in relation to others in an economic relationship must not abuse his or her professional quality or his or her economic position to create or take advantage of a state of dependence of the weaker party or to achieve an obvious and unjustified imbalance in their mutual rights and duties.

The regulation of unfair contractual terms can be divided into two basic sets of norms—the regulation of contracts of adhesion[52] and the regulation of consumer contracts.[53] This regulation is supplemented, for example, by the general prohibition of surprising clauses in standard terms inspired by § 305c of the BGB.[54] A clause included in the standard terms that the other party could not reasonably have expected is ineffective if it was not expressly accepted by the other party. Any provision to the contrary is disregarded. Whether such a clause is or is not surprising must be determined not only by reference to its contents, but also by reference to the manner in which it is expressed.

2.2. Adhesion contracts

The regulation of contracts of adhesion (*smlouvy sjednávané adhezním způsobem*) in the CzeCC was inspired by the Civil Code of Québec, Canada (specifically Articles 1379, 1432, and 1435–1437).

The provisions on contracts of adhesion apply to any contract the essential terms of which have been determined by or under the direction of one of the parties without the weaker party having had a real opportunity to influence the content of such essential terms. The burden of proof that a contract is a contract of adhesion is qualified by two rebuttable legal presumptions. The first is a presumption that the weaker party is the party who contracted with the entrepreneur in economic relations that lay outside the business of such a party.[55] It is also presumed that the contract of adhesion is a contract concluded with the weaker party by means of a standard form used in the course of trade or other similar means.[56]

49 CzeCC, § 6.
50 CzeCC, § 588.
51 CzeCC. § 433.
52 CzeCC, § 1800.
53 CzeCC, § 1813.
54 As implemented in the CzeCC, § 1753.
55 CzeCC, § 433 (2).
56 CzeCC, § 1798 (2).

A clause that can only be read with special difficulty or is incomprehensible to a person of average intelligence is voidable unless there is no prejudice to the weaker party, or the meaning of the clause has been sufficiently explained to the weaker party.

A clause that is particularly disadvantageous to the weaker party without reasonable cause is voidable as well, in particular if the contract deviates seriously and without special reason from the usual terms and conditions agreed to in similar cases. If the equitable arrangement of the rights and obligations of the parties so requires, the court shall decide *mutatis mutandis* in accordance with § 577 of the CzeCC (i.e., reduction for preserving validity). The court may set the amount of performance in accordance with the breached statutory limit.

Rules[57] known from consumer law may be to some extent used as a benchmark for the assessment of a particularly disadvantageous clause. The intensity of the disadvantage must not be higher than in the case of juridical acts involving consumers; the latter are considered by the legislator particularly worthy of protection.[58]

This provision is mandatory. However, entrepreneurs may exclude it in their relations with each other unless a party proves that a clause outside the actual text of the contract that was proposed by the other party is grossly contrary to commercial usages and the principle of fair dealing.

2.3. Consumer contracts

The regulation of unfair terms in consumer contracts[59] is an implementation of the UCTD. Unfair terms are those that, contrary to the requirement of good faith, create a significant imbalance of rights or obligations between the parties to the detriment of the consumer.

Basically, all clauses in consumer contracts fall under a review of unfairness. The scope of application is not limited to standards terms or to terms not individually negotiated. The only exception is a clause on the main subject of the obligation or the assessment of the adequacy of the mutual consideration, provided that it is laid down in a clear and comprehensible manner. This exception is interpreted in accordance with Article 4 (2) of the UCTD.[60] Obviously a clause corresponding to the otherwise applicable law should be a fair one.[61]

The CzeCC has a list of unfair and thus prohibited clauses. The list is to some extent inspired by the list in the Annex to the UCTD. Nevertheless, the Czech legislator adopted a stricter approach. The clauses prohibited as unfair without further consideration constitute mainly a veritable blacklist, not only a set of presumptions, as is the case with the gray list under the UCTD. Moreover, some clauses are prohibited although the UCTD does not mention such cases in the list. For example, the CzeCC

57 CzeCC, §§ 1813, 1814.
58 Janoušek in Petrov et al., 2019, p. 1886; Petrov in Hulmák et al., 2014, p. 352.
59 CzeCC, § 1813.
60 Hulmák, 2020, p. 118; Vondráček in Petrov et al., 2019, p. 1794.
61 Hulmák, 2020, p. 15.

prohibits[62] clauses that limit any consumer's rights arising from defects or the right to damages. Some clauses, e.g., setting jurisdiction or arbitration clauses, are prohibited in special acts.[63]

On the other hand, the presumption of abusive character (grey list) is laid down only in three cases, i. e., clauses (1) conferring on the entrepreneur the right to terminate the obligation without good cause without reasonable notice, (2) postponing the determination of the price until the time of performance; or (3) excluding or limiting the consumer's rights against the trader in the event of default by the trader, including the possibility of off-setting of the consumer's claim against the trader's claim.

The legislator adopted a list of criteria to be taken into account when examining unfairness.[64] The practice stems from the judgment of the CJEU in case C-415/11, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*.[65] The requirement of clarity and comprehensibility of the clause is explicitly emphasized.[66] However, the legislator did not strictly state that absence of clarity always means that the term is unfair. The uncertain term may be non-existent,[67] interpretation in favor of the consumer may be at stake,[68] or it may be a surprising term included in the standard terms.[69] Provided the term is a part of the contract, clarity and comprehensibility are taken into account during the test of unfairness also.[70] The approach set out by the CJEU is followed in this respect.[71]

The unfair term is non-existent, but the consumer may invoke such a clause as being fair.[72] Some authors[73] and the Supreme Court consider the unfair term null and void.[74] This difference has no significant consequence.

Not only a consumer may plead the unfairness of the term. An organization for the protection of consumers may initiate proceedings against the entrepreneur to force it to refrain from the use of an unfair term.[75] This constitutes the implementation of Directive 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests and Article 7 of the UCTD.

62 CzeCC, § 1814 (a) and (b).
63 Act No. 261/1994 Sb., on arbitration (§ 2), Act No. 99/1963 Sb. Code of Civil Procedure (§ 89a).
64 UCTD, Article 4 (1).
65 Supreme Court, Ref. No. Cpjn 200/2013.
66 CzeCC, § 1811.
67 CzeCC, § 553.
68 CzeCC, § 1812.
69 CzeCC, § 1753
70 CzeCC, § 1813; Hulmák, 2020, p. 116; Vondráček in Petrov et al., 2019, p. 1911.
71 CJEU, C-472/10, Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt., par. 27 a 29; CJEU, C-453/10, Jana Pereničová and Vladislav Perenič v. SOS financ spol. s r.o.; CJEU, C-621/17, Gyula Kiss v. CIB Bank Zrt., Emilu Kissovi, Gyuláné Kiss, par. 49.
72 CzeCC, § 1815; Hulmák in Hulmák et al., 2014, p. 475; Melzer in Melzer and Tégl, 2014, p. 572; Beran in Petrov et al., 2019, p. 614.
73 Pelikán and Pelikánová in Švestka et al., 2014, p. 198; Vondráček in Petrov et al., 2019, p. 1912.
74 Supreme Court, Ref. No. 26 Cdo 2666/2017.
75 Act No. 634/1992 Sb., on consumer protection (§ 25).

In case law, the most attention has so far been paid to the unfairness of loan administration fees. In the light of German case law,[76] there has been an attempt to declare such terms unfair and to recover such fees. The Supreme Court[77] and the Constitutional Court[78] have both rejected such an approach. They reasoned on the basis of the clarity and comprehensibility of the terms and eventually excluded them from the review of unfairness as a price arrangement.

2.4. Other examples

Problems in supply chains for food and agricultural products distribution led the legislator to adopt Act No. 395/2009 Coll., on Significant Market Power in the Sale of Agricultural and Food Products and its Abuse. Under § 4 of this Act the abuse of significant market power is prohibited in general. Aside from this, the same provision lays down prohibitions on specific contractual arrangements. Abuse is constituted for example by:

- the negotiation or application of contractual terms that create a significant imbalance in the rights and obligations of the parties, or
- the negotiation or obtaining of any payment or other consideration for which no service or other counter-performance has been provided, or if the counter-performance is disproportionate to the value of the consideration actually provided.

Such clauses are voidable.[79] An amendment to this Act is being prepared to implement Directive (EU) 2019/633 on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain.

In addition, it is necessary to mention the unfairness of the clauses on debt maturity or on default interests.[80] Such grossly unfair clauses are voidable. This rule constitutes the implementation of Directive 2011/7/EU on Combating Late Payment in Commercial Transactions.

3. Hungary

3.1. Overview

The HunCC, in line with European developments in the 1970s, provided rules for the invalidity of unfair contractual terms. These rules have been repealed by the implementation of the regime provided by the European legislator.

Hungarian private law provides a two-tier protection against unfair contractual terms. The first level of protection is provided for contracts concluded on the basis of standard contractual terms, whereas the second level is provided for consumer

76 BGH, Ref. No. XI ZR 388/10.
77 Supreme Court, Ref. No. Cpjn 203/2013.
78 Constitutional Court, Ref. No. III. ÚS 3725/13.
79 Zapletal in Petrov, 2019, p. 466; Kindl and Koudelka, 2017, p. 90.
80 CzeCC, § 1964.

contracts. The basis of this two-level protection is the distinction between standard contractual terms and contractual terms that are not individually negotiated.

3.2. Standard terms

As a general rule, a standard contractual term is unfair if it unilaterally, unreasonably, and by interfering with the requirement of good faith and fair dealing sets forth the rights and obligations arising from a contract to the detriment of the party contracting with the person applying that contractual term. The aggrieved party may claim the unfair standard contractual term invalid.

3.3. Consumer contracts

In contracts between consumers and undertakings, the provisions on unfair standard contractual terms shall also apply to contractual terms that are drafted in advance by the undertaking and not negotiated individually. The burden of proof is imposed on the undertaking that the contractual terms were individually negotiated by the parties. An unfair contractual term included in a contract between a consumer and an undertaking shall be null and void, where invalidity may be relied upon only in the interest of the consumer. Hungarian contract law has thus been harmonized with the UCTD.

3.4. Unfairness

The unfair nature of a term, stipulated either in a consumer or in a non-consumer contract, shall be assessed by examining all circumstances of concluding the contract, including the pre-contractual stage and the designated purpose of the stipulated performance, as well as the relationship of the term concerned with other terms of the contract or with other contracts. The provisions on unfair contractual terms shall not apply to terms defining the main performance or the proportionality between the performance and the counter-performance if those terms are clear and intelligible. A contractual term—established in accordance with legal requirements or as set forth by law—shall not qualify as unfair. In contracts between consumers and undertakings, the unclear nature of standard contractual terms and contractual terms determined by the undertaking in advance and not negotiated individually shall in itself suffice for the term to be deemed unfair. The black and gray lists provided by the UCTD are implemented by the HunCC.[81]

3.5. Loans denominated in Swiss Francs

A great bulk of the relevant case law covers consumer loans denominated in Swiss Francs (CHF). In Hungary, as in other Middle and Eastern European countries, a large number of citizens had become indebted with loans denominated in CHF. These consumer loans became a huge social problem because of drastic changes in the exchange rate and threats of mass insolvency among households. Thousands of claims were

81 HunCC, § 6:104.

submitted to the courts that led to diverging judicial practice, considering more than 30 different arguments submitted by the parties in such cases. They mostly argued that shifting the risk of changes in currency exchange rates to the debtor (a consumer) was unfair and thus that such provisions were invalid. In order to avoid the flood of claims, the legislator enacted a law that declared such clauses explicitly invalid. The Hungarian legislator then passed an act that declared the provision included in such consumer loan contracts that shifted the risk of changes in currency rates to the consumer as unfair.[82] In this way the Hungarian legislator provided a statutory interpretation of the concept of unfair contractual terms in this respect. The statutory intervention, however, was quick and clear, capable of closing the floodgates and providing legal certainty, especially for this group of cases. Development of the case law in Hungary also followed the judgements of the CJEU. The Supreme Court, along with the CJEU, assessed the problem with application of the UCTD as the unilateral right of the creditor to increase interest rates and to shift the risk of changes in currency exchange rates to the debtor.[83] In these cases, an element of the test of validity was constituted by whether the bank complied with the duty of disclosure, thus revealing the risks involved in such transactions. Court practice assessed this problem as an enforceability issue on the grounds of fairness of the terms. The problem was actually much less an issue of fairness than of the allocation of risk: that of placing the burden resulting from changed circumstances on the debtor, in effect a *clausula rebus sic stantibus* issue.[84]

3.6. Action in the public interest

An action in the public interest to establish the invalidity of an unfair contractual term that became part of a contract between a consumer and an undertaking may be brought by the public prosecutor; the minister of justice and the heads of autonomous state administration organs, main government agencies, and central agencies; the heads of the capital and county government offices; economic and professional chambers or organizations for the representation of their members' interests; and with regard to consumer interests protected by it, the associations that are engaged in the protection of consumer interests and the associations established to protect consumer interests under the law of any Member State of the European Economic Area.

On the basis of an action in the public interest, the court may establish the invalidity of an unfair standard contractual term effective against all parties contracting with the entity that applies the term and may then order the entity applying the

82 A Kúriának a pénzügyi intézmények fogyasztói kölcsönszerződéseire vonatkozó jogegységi határozatával kapcsolatos egyes kérdések rendezéséről szóló 2014. évi XXXVIII. tv. [Act XXXVIII of 2014 on the Resolution of Questions Relating to the Uniformity Decision of the Curia Regarding Consumer Loan Agreements of Financial Institutions].

83 Supreme Court, Unificatory Resolutions Nos 6/2013, 2/2014, and 1/2016.

84 As assessed, e.g., by the Hungarian Supreme Court in the case of Kúria Gfv.VII.30.030/2018., BH 2019 No. 54.

contractual term to arrange, at its own cost, the publication of an announcement of the establishment of the contractual term's unfair nature. The court decides even on the text and manner of publishing the announcement. The announcement must contain the precise identification of the contractual term concerned, the establishment of its unfair nature, and the arguments on which its unfair nature is based. The establishment of invalidity cannot affect contracts that have been performed up to the time of contesting the unfair contractual term.

Organizations representing the economic interests of undertakings may also submit actions pursuant to the provisions of the Rules of Civil Procedure on actions brought in the public interest, claiming as unfair a clause that becomes, as a standard contractual term, a part of the contract between undertaking, and sets forth unilaterally, unreasonably, and to the detriment of the obligee the time for performance of a pecuniary debt or the rate and due date of the default interest by violating the principle of good faith and fair dealing.

3.7. Examples

According to the case law, the standard contractual term according to which the agent is entitled to a commission even if the property is not purchased by a buyer introduced by the agent is unfair.[85] A standard contractual term derogating from the non-mandatory rule of the HunCC, under which the principal—in the event of lawful termination—is obliged to pay to the real estate agent a percentage of the success fee (fixed as a commission set according to the purchase price of the property), as compensation for costs, shall be deemed unfair.[86]

The amount of the general compensation for termination meets the requirements of good faith and fair dealing if the parties took into account the period of time after termination, the activities carried out by the party before termination, and the costs incurred. Imposing compensation without differentiation is unfair.[87] The exclusive jurisdiction clause is also a disadvantage for the consumer in terms of access to justice, where the fact that it does not apply to the same court as the place of establishment of the business is to be deemed unfair.[88]

The invalidity of unfair contractual terms is just one element in the system of the control of standard contractual terms. Although under formal control surprising terms (like jurisdictional clauses) do not become part of the contract, Hungarian court practice seems to prefer the fairness test instead of cases of formal control.

85 Supreme Court, EBH 2005 No. 1333.
86 Supreme Court, BH 2020 No. 181.
87 Supreme Court, PJD 2018 No. 29.
88 Supreme Court, PJD 2017 No. 7.

4. Poland

4.1. Overview

Celsus argued that *'Law is the art of the good and the equitable'* (Dig. 1, 1, 1). The aim of Polish civil law is to ensure the fairness of contracts. Therefore, numerous provisions may be found in the PolCC whose goal, at least to some extent, is to eliminate unfair terms.[89] The most general one is Article 58 of the PolCC, under which the contract can be entirely or partially declared null and void due to the breach of a statute, its circumvention, or due to inconsistency with the principles of social coexistence. Thanks to this provision it is possible to find a part of a juridical act (e.g., a contract) null and void.[90] The cited article does not provide any limitation regarding its personal scope. One other general provision whose application may in essence lead to similar consequences is Article 388 of the PolCC, which regulates the institution of exploitation of the other party.[91]

However, in this sub-chapter a narrow scope of the notion of 'unfair contractual term' will be adopted. It will focus on the regulations of Polish law that constitute the implementation of the UCTD. Such an approach is justified by the subject matter of this work and the fact that the provisions elaborated upon below constitute the most essential regulation on the basis of which parties may contest an unfair contractual term.

4.2. Legislative basis

In Poland the UCTD was mainly implemented by Articles 385^1–385^3 of the PolCC. The mentioned provisions entered into force on July 1, 2000, even before Poland became an EU Member State. On January 1, 2021, Article 385^5 was added to the PolCC, which extended the personal scope of the institution under examination (see below).

4.2.1. The definition of unfair contractual terms

Article 385^1 § 1 of the PolCC states that: 'Terms of an agreement concluded with a consumer not individually negotiated shall not bind the consumer if they frame his/her rights and obligations in a manner contrary to good manners, grossly violating his/her interests (unfair contractual terms). (...)'

89 E.g., PolCC Article 58 § 2 and 3.

90 Radwański and Olejniczak, 2010, p. 162.

91 PolCC, Article 388 § 1 states: 'If one of the parties, taking advantage of the other party's state of necessity, infirmity, or inexperience, in exchange for his/her performance accepts or reserves for himself/herself or for a third party a performance whose value at the moment of the conclusion of the contract blatantly exceeds the value of his own performance, the other party may demand a reduction in his/her performance or an increase in the performance due to him/her, and where both proved to be excessively difficult, he/she may demand that the contract be declared void.'

4.2.2. The personal scope of the applicability of norms on unfair contractual terms

According to Article 385[1] § 1 of the PolCC the institution of unfair contractual terms refers only to consumers. Under Polish law a consumer is defined as a natural person who enters into a juridical act with an entrepreneur, if that act is not related directly to his or her business or professional activity.[92]

However, on January 1, 2021, due to the entry into force of the new Article 385[5] of the PolCC, this personal scope was extended. Presently, a natural person concluding a contract directly related to his or her business activity may also rely on the institution in question when the content of such a contract shows that it does not have the character of his or her professional activity. In other words, in Poland the discussed institution applies not only to business-to-consumer relations, but to some extent may also be used in business-to-business relations. Below, the term 'consumer' will be used, but it shall refer also to the indicated business-to-business situations.

4.2.3. The conditions of unfair contractual terms

According to 385[1] § 1 of the PolCC, to find a certain term unfair, the following conditions have to be fulfilled cumulatively:

— the term has to be included in an agreement,
— the term must not be individually negotiated,
— the term must frame the rights and obligations of a consumer in a way contrary to good manners,
— the term must grossly (i.e., egregiously) violate the interests of the consumer.

If the above conditions are met, the term still cannot be found 'unfair' when it determines the main performance of the parties, including the price or the remuneration, if it was formulated in an unambiguous way.[93] The mentioned preconditions can be elaborated separately.

Article 385[1] § 1 of the PolCC speaks only about the terms of 'an agreement.' However, in the Polish legal literature and case law, it is unanimously stated that a term of a contract form (template) may be found to be unfair.[94] The issue is important since Polish law does not treat agreements and forms use for concluding contracts in the same way.[95]

According to the wording of Article 385[1] § 3 of the PolCC, a term shall be regarded as not having been individually negotiated where a consumer had no actual influence on its content. The indicated provision further explicitly states that this rule concerns, in particular, contractual terms taken over from a contract concluded on

92 PolCC, Article 221.
93 PolCC, Article 385[1] § 1.
94 Like the general terms of contracts, the contract form, the rules, and regulations. See the judgment of the Polish Supreme Court, 29.08.2013, I CSK 660/12, LEX No. 1408133.
95 See PolCC, Article 384 and Radwański and Olejniczak, 2010, p. 162.

a form. The burden of proof in this respect shall be incumbent on the person who claims this to be the case.[96]

The condition that a term has to frame rights and obligations of a consumer in a manner contrary to good manners is not uniformly interpreted in the case law.[97] However, quite generally, it may be stated that this condition is fulfilled if the terms of the agreement have been framed in such a manner by the entrepreneur that it violates the contractual balance of the parties.[98]

According to the wording of Article 385^1 § 1 of the PolCC, a term has to 'grossly' violate an interest of the consumer to be found unfair. However, in the literature and case law it is indicated that such terminology constitutes an incorrect implementation of the UCTD,[99] since the UCTD speaks only of a 'significant' imbalance. Therefore, on the basis of the obligation to interpret national law in accordance with European Union law, only a significant violation shall be required.[100]

In the opinion of the Polish Supreme Court this condition is fulfilled when in a specific legal relationship there is unjustified imbalance of rights and obligations to the detriment of the consumer.[101]

Very often in court proceedings a court analyzes a certain term of the contract and afterwards adjudicates that it is contrary to good manners and grossly violates interests of a consumer without making a clear distinction between these two premises.[102]

A certain term cannot be found unfair if it determines the main performances of the parties and was formulated in an unambiguous way. First, an assessment whether a certain term refers to the 'main performance' shall be done on the basis of a certain agreement. Swiss-Franc-denominated loan agreements showed that determining this issue can be very difficult.[103] Second, the requirement of unambiguity is fulfilled when the content of the given term was determined precisely, clearly, and obviously and was understandable to a typical consumer.[104]

96 PolCC, Article 385^1 § 4. For more about this premise, see, for example, the judgment of the Polish Supreme Court, 1.03.2017, IV CSK 285/16, LEX No. 2308321.

97 See Tomczak, 2020, pp. 1069–1070.

98 Of course, in favor of the entrepreneur. See the judgment of the Polish Supreme Court, 13.07.2005, I CK 832/04, LEX No. 159111.

99 See: Tomczak, 2020, pp. 1069–1070, and the resolution of the Polish Supreme Court (7), 20.6.2018, III CZP 29/17, LEX No. 2504739 and the judgment of the Polish Supreme Court, 4.04.2019, III CSK 159/17, LEX No. 2642144.

100 See: Tomczak, 2020, p. 1072.

101 See the judgment of the Polish Supreme Court, 13.07.2005, I CK 832/04, LEX No. 159111.

102 See for example the judgment of the Polish Supreme Court, 27.2.2019, II CSK 19/18, LEX No. 2626330.

103 For a contradiction in this respect in judgments of the Polish Supreme Court, see the judgment of the Polish Supreme Court, 29.10.2019, IV CSK 309/18 and the judgment of the Polish Supreme Court, 11.12.2019, V CSK 382/18, LEX No: 2771344.

104 The judgment of the Polish Supreme Court, 1.03.2017, IV CSK 285/16, LEX No. 2308321.

4.2.4. Consequences of finding a term unfair

According to Article 385[1] § 1 of the PolCC in connection with § 2 of the PolCC the unfair contractual term shall not be binding on the consumer, while the parties remain bound by the rest of the agreement. Any payment based on the unfair term is undue.[105]

Despite the clear wording of these provisions, the Polish Supreme Court found that unfair contractual terms, in certain circumstances, may lead to the whole agreement being null and void.[106] Such a conclusion was made in the context of Swiss-Franc-denominated loan agreements; however, it seems that invalidity of the whole contract will be especially likely in cases in which unfair terms determine the main performance of the parties ambiguously.

4.3. Unfair terms: The gray list

Article 385[3] of the PolCC provides a list of terms that are presumed to be unfair (the 'gray list').[107] In the PolCC there is no provision that provides for a so-called 'blacklist.'

Currently in Poland there are two legal paths by which a certain term can be found unfair. First, a court, when adjudicating in reference to a certain legal relationship, may determine the term to be unfair in the meaning of Article 385[1] § 1 of the PolCC. In such cases we are dealing with so-called 'incidental control.' Such a verdict does not produce effects toward third parties.

However, it is also possible for the President of the Office of Competition and Consumer Protection (hereinafter: POCCP) to commence an administrative proceeding against certain entrepreneurs. The aim of such a proceeding is to determine whether an entrepreneur had included unfair terms in its contract templates (forms). The procedure will end with an administrative decision of the POCCP that benefits from extended effectiveness. All the consumers who concluded the agreement with the entrepreneur on the basis of such a contract template can rely on this decision. This so-called abstract control is regulated in Articles 23a–23d and 99a–99f of the Polish Protection of Competition and Consumer Act.[108]

The amount in dispute in consumer cases was usually not high. That was probably why the institution of the rules pertaining to unfair terms has received relatively modest comment in the literature and case law. However, the practical problems of Swiss-Franc-denominated loan agreements breathed life into the debate regarding this institution. Currently it is very widely discussed both in case law and the literature.

105 The judgment of the Polish Supreme Court, 11.12.2019, V CSK 382/18.
106 The judgment of the Polish Supreme Court, 11.12.2019, V CSK 382/18.
107 The article states that: 'In the case of doubt it shall be presumed that unfair contractual terms are these which in particular (...).'
108 Polish Journals of Laws from 2021, item 275.

5. Romania

5.1. Unfair terms in consumer contracts

Romania implemented the institution of unfair contractual terms through the transposition of Directive 93/13/EEC through the provisions of Law No. 193/2000 on unfair terms in contracts concluded between professionals and consumers.[109]

The law prohibits professionals from stipulating unfair terms in consumer contracts. 'Consumer' in this context means any natural person or group of natural persons formed into associations who acts (act) for purposes outside his or her (their) commercial, industrial or production, craft, or liberal activities. The Romanian High Court of Cassation and Justice established that in accordance with the provisions of Article 14 of Law No. 193/2000, the provisions of this law may be invoked only by those subjects who are consumers within the meaning of the law. In this context, it follows from the accessory nature of the surety that in the case of a leasing contract concluded between two professionals for which a natural person has guaranteed as a surety, the natural person cannot claim to be a consumer and cannot apply the legal provisions on consumer protection contained in Law No. 193/2000. The surety has the legal status of a personal guarantor, substituting for the user in the performance of his obligation to pay his debts to the lessor, which does not confer on him the status of a consumer within the meaning of Law No. 193/2000. [110]

A contractual term that has not been directly negotiated with the consumer will be regarded as unfair if, by itself or together with other provisions of the contract, it creates, to the detriment of the consumer and contrary to the requirements of good faith, a significant imbalance between the rights and obligations of the parties. A contractual term will be regarded as not having been directly negotiated with the consumer if it has been agreed without giving the possibility for the consumer to influence its nature, such as pre-formulated standard contracts or general sales conditions applied by traders in the market for the product or service in question. The list contained in the Annex of the Law No. 193/2000 gives, by way of example, the terms considered unfair.

The effects of an unfair term are not clearly regulated. Article 6 of Law No. 193/2000 states that 'unfair terms contained in the contract and ascertained either personally or through the bodies empowered by law will not produce effects on the consumer, and the contract will continue, with the consent of the consumer, only if it can continue after their removal.' According to Article 7, 'insofar as the contract can no longer produce its effects after the removal of the terms considered unfair, the consumer is entitled to demand the resolution of the contract, and may also claim damages, if necessary.'

109 Monitorul Oficial, No. 543 of August 3, 2012.
110 High Court of Cassation and Justice, II Civil Section, Decision No. 1777 of June 25, 2015.

Resolution (termination) is an institution that presupposes a valid contract. On the contrary, the prevailing interpretation is that two distinct situations can be identified:

— If the contract cannot be performed without the unfair clause, the contract as a whole is invalid. In such circumstances, termination is more likely to take the form of an action for nullity (annulment) and may serve to enforce a claim for damages.
— If the contract contains an unfair clause, this is null and void, but the contract is preserved valid in itself. The unfair clause cannot have any legal effect in this case either. In this case, the consumer can choose to maintain the contract or to ask for resolution, which in this case appears as a specific sanction that entitles the consumer to decide on the fate of contract, even if the performance of the contract would be possible legally and materially after the elimination of the unfair terms. In both cases (maintaining or terminating the contract), the consumer is entitled to damages.

These interpretations are correct in our point of view, having in mind also Article 12 (4) of Law No. 193/2000, which states that 'a consumer who is asked to perform a contract of adhesion[111] containing unfair terms may invoke the nullity of the term by way of action or by way of exception, in accordance with the law.'

Compliance with the provisions of the law is monitored by authorized representatives of the National Authority for Consumer Protection and by authorized specialists from other public administration bodies in accordance with their powers. The inspection bodies carry out checks at the request of the aggrieved parties or *ex officio*. If they find that unfair terms are used in contracts of adhesion, the inspection bodies shall refer the matter to the tribunal having jurisdiction according to the entrepreneur's domicile or headquarters, requesting that the entrepreneur be ordered to amend all contracts currently in force by removing the unfair terms. The court, if it finds unfair terms in the contract, shall order the entrepreneur to amend all contracts of adhesion in the course of performance and to remove unfair terms from pre-formulated contracts intended for use in the course of business.

5.2. Standard unusual contractual clauses

While Law No. 193/2000 has a defined scope, an interesting regulation can be found in the RouCC on standard unusual contractual terms.[112]

Standard terms are stipulations that are agreed in advance by one party for general and repeated use and included in the contract without having been negotiated with the other party. It does not matter whether the standard terms are included in the body of the contract itself or whether the inclusion takes place through a

111 A contract of adhesion is a contract that is not negotiated by the parties and is usually embodied in a standardized form prepared by the dominant party.
112 Veress, 2020, pp. 44–46; Popa, 2016, pp. 135–154.

contractual provision referring to general contractual terms. Certain standard terms are considered unusual. Only standard terms can be considered unusual; negotiated terms cannot be categorized as such.

The law considers unusual terms to be those clauses that provide for the benefit of the party proposing them:

— a limitation of liability,
— the right to unilaterally terminate the contract,
— the right to suspend the performance of obligations.

Also included in this category of unusual terms are those that provide for the detriment of the other party:

— a waiver of rights,
— a waiver of the benefit of the due date (permit premature enforcement),
— a limitation of the right to invoke defenses,
— a restriction of the freedom to contract with other persons,
— tacit renewal of the contract,
— setting applicable substantive law,
— arbitration clauses,
— clauses derogating from the general rules establishing the jurisdiction of courts.

Considering the source of inspiration of this text, Italian law, the qualification given in Italy is that of a limitative enumeration. Moreover, in our opinion, the list in the RouCC cannot be qualified as illustrative.[113]

If a standard clause is determined to be unusual, a question of validity arises. The law makes the validity of such clauses contingent on their express, written acceptance by the other party. The question arises as to what sanction follows from this legal text. In our view, the rule does not institute the requirement of recording such clauses in a written instrument *ad validitatem*, the breach of which would render the contractual provision null and void. The written form (of a written instrument under private signature) is only required in order to provide easy proof of acceptance of these clauses. Accordingly, the sanction that arises in the absence of express written acceptance is voidability (in the Romanian context called relative nullity) of the unusual clause, with the legal regime that follows from this qualification. The resulting invalidity will as a rule be partial, i.e., it will render ineffective only the unusual clause, and the contract will produce its natural effects and will be supplemented by applicable legal provisions. Under these circumstances, the text of the law would have been much more in line with the orientation of the RouCC if the law had considered these clauses unwritten.

De lege ferenda, the legislator should distinguish between professional contracts on the one hand and other contracts (general, consumer-to-consumer, and

113 The same opinion is expressed by Almășan, 2014, p. 142.

business-to-consumer contracts) on the other. Professional (business-to-business) contracts should be exempted from the application of the rules on unusual contractual terms.[114]

5.3. Late payment in commercial transactions

Another regulation related to unfair terms was created in Romanian legislation in the context of the transposition of Directive 2011/7/EU on Combating Late Payment in Commercial Transactions through Law No. 72/2013 on Measures to Combat Late Payment Obligations Arising from Contracts Concluded Between Professionals and Between Professionals and Contracting Authorities.[115] According to Article 12, a contractual practice or clause that clearly sets the payment deadline, the level of interest for late payment, or additional damages unfairly in relation to the creditor is considered unfair. Such unfair terms are null and void pursuant to Article 15. Some clauses are considered in all cases unfair (a blacklist), covering the following contractual terms:

- those that exclude the possibility of penalty interest or set penalty interest lower than the statutory interest for late payment,
- that lay down an obligation to pay interest conditioned to a previous formal notification,
- that provide for a longer period for which interest shall be payable on the debt claim than that provided for in the law,[116]
- that eliminate the possibility of payment of additional damages,
- that set a time limit for the issue/receipt of the invoice.

In other cases, if a clause is deemed to be unfair, the court takes into account all the circumstances of the case, in particular:

- serious departures from established practices between the parties or from usages that are in accordance with public policy or morality,
- failure to observe the principle of good faith and due diligence in the performance of obligations,
- the nature of the goods or services,
- failure to provide objective reasons for waiving payment deadlines or interest rates in accordance with this law,

114 Veress, 2020, p. 46.

115 Monitorul Oficial No. 182 of April 2, 2013. For details, see Veress, 2020, pp. 249–252.

116 If the payment deadline has not been stipulated in the contract, penalty interest shall accrue from the following deadlines: 1. after 30 calendar days from the date of receipt by the debtor of the invoice or any equivalent request for payment, 2. if the date of receipt of the invoice or equivalent request for payment is uncertain or prior to the receipt of the goods or the provision of the services, 30 calendar days after the receipt of the goods or the provision of the services, and 3. if the law or the contract provides for a procedure of acceptance or verification allowing for certification of the conformity of the goods or services, and the debtor has received the invoice or equivalent request for payment on or before the date of acceptance or verification, after 30 calendar days from that date.

— the dominant position of the contractor in relation to a small or medium-sized enterprises.

Therefore, the institution of unfair terms is extended over consumer contracts, and in the case of the late payments even to contracts between professionals.

6. Serbia, Croatia, Slovenia

6.1. Serbia

The former federal law on obligations was adopted in 1978, a time preceding the golden era of the emergence of consumer law in the European Communities. Lacking a special law on the protection of consumers, it did however specifically regulate some issues pertaining to consumer protection. One is the issue of the validity of standard contractual terms, regularly but not necessarily applicable to business-to-consumer transactions. The SrbLO retained these rules but for one,[117] being heavily burdened with notions and categories that existed in the era of the socialist self-management system of the former Yugoslavia, which was repealed in 1993.

The SrbLO prescribes that standard contractual terms, either included in the text of the contract prepared in advance or contained in a separate document referred to by the contract, supplement the special terms and conditions agreed upon by the parties and oblige the parties just the same as the agreed terms.[118] The major feature of standard contractual terms, as defined by the law, is that they were not subject to individual negotiations between the parties.[119] The law further specifies that standard terms must be published in a customary manner.[120] They oblige the other contracting party, if he or she knew or should have been aware of them at the time of the formation of contract.[121] If specific terms agreed upon by the parties contravene the standard contractual terms, the former shall apply.[122] The law specifies that some or all of the standard contractual terms are considered null and void if they are contrary to the purpose of the contract or to good trade usages, even in the case where the standard contractual terms have been approved by the competent authority.[123] In addition, the court is entitled to refuse the enforcement of specific standard terms depriving the other party of his or her right to raise an exception or limiting other rights stemming from the contract, lead to loss of deadline, or are in any other way unfair or disproportionately severe to the other party.[124]

117 SrbLO, Article 144.
118 SrbLO, Article 142 (1).
119 Đurđević, 2012b, p. 386.
120 SrbLO, Article 142 (2).
121 SrbLO, Article 142 (3).
122 SrbLO, Article 142 (4).
123 SrbLO, Article 143 (1).
124 SrbLO, Article 143 (2).

The first Consumer Protection Act from 2005, enacted in the legislative competencies of the Republic of Serbia, did not regulate the subject matter of unfair contractual terms. The second Act from 2010, however, contained such rules, which profoundly relied on the UCTD.[125] Though the Directive mandates only the control of terms that have not been individually negotiated, the Act from 2010 extended the scope of the application of the rules on unfair contractual terms to all terms regardless of whether they have been individually negotiated or contained only in standard contractual terms.[126] The next Consumer Protection Act from 2014 retained for the most part the rules from the previous Act from 2010 regarding unfair contractual terms, as does the new Act from 2021, which specifies the requirement of transparency of the terms of a consumer contract. A contractual clause obliges the consumer if it has been expressed in plain and intelligible language, provided that a reasonable person possessing the consumer's knowledge and experience would understand it.[127] Ambiguous terms of the contract shall always be construed in favor of the consumer.[128] A term shall be considered unfair if, contrary to the principle of good faith and fair dealing, it causes a substantial imbalance of rights and obligations of the parties to the detriment of the consumer.[129] The unfairness of a contractual term is to be determined taking into account the nature of the goods or services that are the object of the contract, circumstances of the conclusion of the contract, other terms of the same or other contract to which the contract is related, and the means by which the parties' consent on the content of the contract has been reached and by which the consumer has been notified thereof.[130] Unfair terms in a consumer contract are considered null and void.[131] In addition, the law specifies a set of typical terms that are always considered unfair, and another set for which it shall be presumed to be unfair unless rebutted.[132] The former are traditionally denoted a 'blacklist,' the latter a 'gray list' of unfair contractual terms.[133]

Taking into account that two statutes regulate unfair contractual terms, the SrbLO and the Consumer Protection Act, the issue of their scope of application inevitably surfaces. The rules of the SrbLO on standard terms are not limited only to consumer contracts, but apply in all cases when either of the parties use standard contractual terms, regardless of whether the parties are legal entities or natural persons.[134] However, they are applicable only to standard contractual terms and to terms that have not been individually negotiated,[135] while the rules of the Consumer Protection

125 Karanikić Mirić, 2012, p. 219.
126 Karanikić Mirić, 2012, p. 222.
127 SrbCPA, Article 40 (1).
128 SrbCPA, Article 40 (2).
129 SrbCPA, Article 42 (2).
130 SrbCPA, Article 42 (3).
131 SrbCPA, Article 42 (1).
132 SrbCPA, Articles 43 and 44.
133 Karanikić Mirić, 2009, p. 139.
134 Karanikić Mirić, 2009, p. 133.
135 Đurđević, 2012b, p. 386.

Act apply to all terms of a consumer contract.[136] It seems that the only proper conclusion may be that the Consumer Protection Act narrowed the scope of application of the rules of the SrbLO concerning standard contractual terms: Since 2010 these rules of the SrbLO are not applicable to consumer contracts.[137]

6.2. Croatia

The HrvLO has only partially retained the rules of the former federal law on standard contractual terms.[138] The rules on the notion of general contractual terms, conditions of their application, relation to individually agreed terms, and publication of the general terms remained the same as in the former federal law.[139] Some novelties have been introduced in relation to the rules on the nullity of standard contractual terms.[140] They were imposed by the fact that the transposition of Directive 93/13/EEC into the then effective Consumer Protection Act from 2003[141] led to a parallel legal framework for the validity of standard contractual terms in consumer law relations and in general contract law, with different standards and dimensions of protection.[142] The novelties introduced by the HrvLO from 2005 had the purpose of synchronizing the two systems of rules applicable to standard contractual terms.[143] The new rules are considered to provide a lower level of protection of the other party than the former federal law.[144] First, in contrast to the former federal law that considered standard contractual terms as being always invalid if they frustrate the purpose of the contract or they are contrary to good usages, the HrvLO makes the invalidity of such terms dependent on whether they, in a way that is contrary to the principle of good faith and fair dealing, create an obvious imbalance between the rights and obligations of the parties or frustrate the purpose of the contract.[145] In both cases, the condition of the invalidity of standards terms is the infringement of the principle of good faith and fair dealing, a requirement that did not exist in the former federal law.[146] The SrbLO specifies further that when determining whether a given standard term is invalid, the court must take into account all the circumstances that existed prior and at the time of the formation of contract, its legal nature, the nature of the goods or services that are the object of the performance, the terms of the contract, and the terms of other contracts to which the given standard term is related.[147] Finally, the application of these rules is excluded in relation to standard terms the content of which is a result

136 Đurđević, 2012b, p. 390.
137 Đurđević, 2012b, p. 391.
138 Josipović in Možina, 2019, p. 142.
139 HrvLO, Article 295.
140 HrvLO, Article 296.
141 Mišćenić, 2012, p. 184.
142 Josipović in Možina, 2019, p. 141.
143 Josipović in Možina, 2019, p. 139.
144 Josipović in Možina, 2019, p. 145.
145 HrvLO, Article 296 (1).
146 Josipović in Možina, 2019, p. 145.
147 HrvLO, Article 296 (2).

of compliance with mandatory rules, and terms that were subject of individual negotiation between the parties, whereby the other party had the possibility to influence their content. The application of statutory rules is also excluded regarding the terms of the contract pertaining to its object or the price to be paid, insofar as these terms are clear, intelligible, and easily discernible.[148]

The rules of the Croatian Consumer Protection Act in effect from 2022, just like those of the former Act from 2014 on unfair contractual terms, convey the impression of a literal transposition of Directive 93/13/EEC, which was the legislative technique adopted in the transposition of major parts of the consumer *acquis*.[149] The notion of an unfair term is restricted to terms not individually negotiated, for instance, those that contrary to the principle of good faith and fair dealing create a substantial imbalance between the rights and duties of the parties to the detriment of the consumer.[150] In addition, the law contains only a 'gray list' of unfair contractual terms[151] that fully corresponds to the unfair terms listed in the Annex of Directive 93/13/EEC.[152] Unfair terms in a consumer contract shall be deemed null and void.[153] The law, however, specifies further that only partial invalidity shall apply if the contract can exist without the clauses declared null and void.[154] This is a clear discrepancy in comparison to the Serbian Consumer Protection Act, which does not explicitly regulate partial invalidity in relation to unfair terms of consumer contracts. Still, the application of the general rules of contract law on partial invalidity could yield a very similar outcome. Such conclusion could be implied from the HrvLO as well.

6.3. Slovenia

The SvnCO prescribes verbatim the same rules on standard contractual terms as the SrbLO.[155] The Slovenian legislature has thus transposed the UCTD into the Law on the Protection of Consumers[156] without amending the general legal frame of the SvnCO.[157]

The Consumer Protection Act specifies that the professional is forbidden from imposing contractual terms that are unfair to the consumer.[158] The unfair contractual term is considered null and void.[159] A contractual term is considered

148 HrvLO, Article 296 (3).
149 See Mišćenić, 2014, p. 280; Mišćenić, 2018, pp. 127–159; Mišćenić and Petrić, 2020, pp. 95–160.
150 HrvCPA, Article 53 (1).
151 HrvCPA, Article 54.
152 Mišćenić, 2014, p. 283. This conclusion has been inferred in relation to the CPA from 2014. However, there is no major difference in the wordings of the respective rules of CPA from 2022 in comparison to CPA from 2014.
153 HrvCPA, Article 59 (1).
154 HrvCPA, Article 59 (2).
155 SvkCO, Articles 22–24.
156 SvkCPA, Articles 22–24.
157 Možina and Vlahek, 2019, p. 95.
158 SvkCPA, Article 23 (1).
159 SvkCPA, Article 23 (2).

unfair if it—to the detriment of the consumer—causes a significant imbalance in the contractual rights and obligations of the parties, makes the performance of the contract unjust to the detriment of the consumer, causes performance of the contract to be significantly different from what the consumer reasonably expected, or is otherwise contrary to the principle of good faith and fair dealing.[160] This definition of unfairness of a term in a consumer contract is considered broader than the respective rule in the UCTD.[161] In addition the Slovenian Consumer Protection Act did not transpose the rule from the UCTD, according to which terms relating to the main subject matter and to the adequacy of consideration are not subject to fairness assessment. However, the literature points out that both issues are interpreted in the case law in the light of the UCTD.[162] In addition, the act prescribes that the terms of the contract must be interpreted in conjunction with other terms in the same contract or in another contract between the same parties and taking into account the nature of the goods or services and any other circumstances relating to the conclusion of the contract.[163] The law specifies a non-exhaustive 'gray list' of unfair contractual terms.[164]

7. Slovakia

7.1. Overview

Neither the SvkCC nor the SvkCommC contain a universal rule that would explicitly consider a dishonest, unfair contractual term (*nepoctivé zmluvné podmienky*) automatically invalid. Such an explicit rule is laid down only for consumer relations and, to a very limited extent, also for commercial relations. At the same time, it is debatable whether the invalidity of an unfair term could be inferred from § 39 of the SvkCC, according to which a juridical act that in its purpose or content contradicts good morals is invalid, although in the legal literature for the area of commercial relations there is an opinion that if a juridical act contradicts the principles of fair trade, then it is also contrary to good morals.[165]

7.2. Consumer relations

Slovakian regulations on consumer relations are a mixture of norms based on EU law with some national specificities. Pursuant to § 52 (1) of SvkCC, a consumer contract is any contract, irrespective of the legal form, concluded by a supplier with a consumer. At the same time, § 52 (2) of the SvkCC states that if a consumer contract contains a provision that is less favorable to the consumer than the regulation of consumer

160 SvkCPA, Article 24 (1).
161 Možina and Vlahek, 2019, pp. 96–97.
162 Možina and Vlahek, 2019, p. 97.
163 SvkCPA, Article 24 (2).
164 SvkCPA, Article 24 (3). See Možina and Vlahek, 2019, p. 97.
165 Ovečková, 2017.

contracts or the dispositive regulation of the legal relationship that is considered a consumer relationship in that particular case, then these provisions are invalid.[166] This means that the contractual terms and conditions regulated by a consumer contract may not deviate from the SvkCC to the detriment of the consumer. At the same time, the consumer may not waive the rights granted to him or her by the SvkCC or other consumer protection regulations in advance, or otherwise worsen his or her contractual position.[167]

In accordance with Directive 93/13/EEC, consumer contracts must not contain provisions that cause a significant imbalance in the rights and obligations of the contracting parties to the detriment of the consumer [so-called 'unacceptable terms' (*neprijateľné zmluvné podmienky*)]. However, this does not apply if the terms relate to the main object of the performance and the reasonableness of the price (if such terms have been expressed in a definite, clear, and comprehensible manner) or if they are individually agreed terms.

In § 53 (4) of the SvkCC there is a list by way of example of the terms that are considered unacceptable. This wording suggests that it is a so-called 'blacklist'[168] (although this issue is disputed in the literature[169]). This means that the terms and conditions listed therein are considered unacceptable *per se* and it is not necessary to examine whether, in the context of the contract in question, they actually cause a significant imbalance in the rights and obligations of the contracting parties to the detriment of the consumer. The list of unfair terms includes not only the terms defined as unfair in Directive 93/13/EEC, but also a set of unfair (unacceptable) terms that are specific to Slovak legislation. Among these, for example, is a term that requires the consumer to pay for a service the provision of which by the supplier is not predominantly in the interests of the consumer, or a term that requires the consumer to be bound by the contract for an unreasonably long period of time, even though it was obvious at the time of conclusion of the contract that the subject matter of the contract could be achieved in a considerably shorter period of time.

In addition, Slovak legislation contains other specificities. For example, according to § 53 (7) of the SvkCC, the consumer's obligation cannot be secured by a security transfer of the right; similarly, according to § 53c of the SvkCC, if a consumer contract is made in writing, the subject matter and the price may not be stated in smaller type than any other part of such contract except for the title of the contract and the titles of its parts, and the contract, including the general terms and conditions or other parts of the contract, may not be written in type smaller than 1.9 mm. A contract concluded in contravention of this provision shall be invalid.

At the same time, under § 53a of the SvkCC, if a court has found a contractual term to be unfair (unacceptable), the professional must refrain from using it (or using a

166 Budjač, 2018.
167 SvkCC, § 54.
168 Csach, 2009d; Budjač, 2018.
169 Jurčová and Novotná, 2016.

similar term with the same meaning) not only in relation to the consumer who was a party to the court proceedings, but in relation to all other consumers.

Another peculiarity of the Slovak legislation is that, according to § 54a of the SvkCC, a time-barred right under a consumer contract cannot be enforced or validly secured. In other words, the court is obliged to take into account the statute of limitations *ex officio*, even without the debtor's objection. It is irrelevant whether the debtor is the consumer or the professional. Under this provision it is possible to alter the content of a time-barred right under a consumer contract, to replace it by a new right, or to reinstate it only if the debtor was aware of the limitation.

7.3. Commercial relations

Pursuant to § 265 of the SvkCommC, the exercise of a right that is contrary to the principles of fair commercial dealing (*zásady poctivého obchodného styku*) does not enjoy legal protection. However, this provision *per se* concerns only the exercise of a right; it does not concern whether a contractual term may be void if it is contrary to the principles of fair dealing. The only express provision on such invalidity for commercial relations is contained in § 365d of the SvkCommC, which is based on Directive 2011/7/EU (the Late Payment Directive).

According to this provision, a contractual term relating to the maturity of a pecuniary obligation, the rate of interest on late payment, or the lump-sum reimbursement of the costs associated with the claim, that is grossly disproportionate to the rights and obligations arising from the contractual relationship for the creditor, without there being a just (fair) reason for it, is unfair (*nekalá zmluvná podmienka*) and therefore invalid. A contractual arrangement that excludes the right to interest, which results in the creditor waiving the right to default interest before the contractual obligation has been breached, or that excludes the right to a lump-sum reimbursement of the costs of the claim, is *per se* unfair and therefore invalid.

All the circumstances of the case, in particular compliance with the principle of fair dealing, the nature of the subject matter of the obligation, and the existence of a just (fair) reason for the debtor's deviation from the law, are decisive for the assessment of whether a contractual term is unfair.

In a way similar to that applied in consumer relations, if a court has declared a contractual term to be unfair, the contracting party must refrain from using it not only in relation to the entrepreneur who was the other contracting party, but in relation to all other entrepreneurs. Procedurally, the commencement of proceedings to refrain from further use of an unfair contractual term or a final judgment on the merits in favor of the other party to the contract constitutes an obstacle to the commencement of other proceedings concerning the same term by other undertakings (other undertakings may, however, intervene in the first proceedings already commenced).

8. Concluding remarks

A comparison of the various legal systems shows that there is no uniform understanding of the concept of unfair terms and no clear distinction from other defects of juridical acts. Tests of unfairness are not always limited to standard terms. They are often accompanied by explicit prohibitions and injunctions. Some jurisdictions even include within this concept prohibitions under Directive 2011/7/EU (Romania, Slovakia, the Czech Republic), while others would include the implementation of Directive (EU) 2019/633 (the Czech Republic) as well.

The historical basis for combatting unfair contractual terms seems to be the regulation of good morals. It is still applied as a general corrective. In some jurisdictions, it is even today the basis for the examination of unfairness (Poland); however, it is also often applied beside rules specifically tailored to unfair contractual terms (the Czech Republic, Slovakia). In Croatia, Serbia, and Slovenia, the specific protection against unfair terms has older foundations that can already be found in the Federal Law of Obligations of 1978.

The fundamental regulation of unfair terms is the implementation of the UCTD in the compared countries, even in non-EU jurisdictions (Serbia). Obviously, exceptions to the scope of application of a given directive are not always explicitly reflected in the legislation in question. For example, only the Croatian report explicitly mentions that the review of standard terms, the content of which is a result of compliance with mandatory rules, is excluded. We may assume that this constitutes an implementation of Article 1 (2) of the UCTD.

The distinction between states where the regulation applies to consumer contractual terms (the Czech Republic, Serbia, Slovenia) and states where the applicability is limited only to cases of consumer contractual terms that have not been individually negotiated (Hungary, Poland, Romania, Slovakia, Croatia) seems to be crucial. However, it may be interesting to examine how the fact that the arrangement has not been individually negotiated, i.e., the ability of the other party to influence the content of the arrangement, is interpreted in each state. It seems that in Hungary it is additionally emphasized that the arrangement must be drafted in advance by an entrepreneur. The Slovak regulation lays down a rebuttable presumption that the clause was not individually negotiated, and the Polish and Hungarian regulations function in the same way.

There appears to be no uniform approach to the exception in Article 4 (2) of the UCTD in the compared states. This exception appears in various forms in Poland, the Czech Republic, Hungary, and Croatia. It is worth mentioning the formulation in Croatia, where, although the subject matter of the contract and the price are excluded from coming under review generally, case law and the literature interpret the exception in line with the wording of the directive. The exception, while not contained in Slovenian legislation, is enforced by the influence of case law. In Romania and Serbia, the exception is not mentioned.

The unfairness test is essentially an attempt to translate Article 3 (1) of the UCTD. Therefore, in most states the key point is good faith (Serbia, Croatia, Slovenia, Hungary, the Czech Republic), in others good morals (Poland). Slovenian regulation elaborates on this test and also mentions the criterion of justice or reasonable expectation. Elsewhere, no similar criterion appears; a mere significant imbalance or a deviation from statutory provisions to the detriment of the consumer is sufficient (Slovakia). Thus, both Slovak and Slovenian acts are stricter toward entrepreneurs in this respect. Only in some states does the statute contain circumstances that must be taken into account in a decision on unfairness (Poland, Hungary, the Czech Republic).

When it comes to specific prohibited arrangements, legislators have chosen all solutions: a blacklist (Slovakia), a gray list (Croatia, Poland, Romania, Slovenia), or their combination (Serbia, Hungary, the Czech Republic). Naturally, this matter depends on the content of the prohibited arrangements. Inspiration was sought in the Annex to the UCTD. Special attention must be given to the strict prohibitions in Slovakia. The parties must not deviate from the legal regulation to the detriment of the consumer. Apparently inspired by German case law, there is a ban of clauses requiring the consumer to pay for a service the provision of which by the supplier is not predominantly in the interests of the consumer. The size of the font, the prohibition of security by assignment of a right, or the *ex officio* consideration of limitation periods are laid down there as well. We can also mention the prohibition of any limitation of the right to compensation or rights from defects (the Czech Republic). The mere unclear nature of a provision shall in itself suffice for the term to be deemed as unfair in Hungary.

National reports show the importance of regulations applicable to unfair contractual terms for dealing with loans denominated in a foreign currency (Hungary) or bank fees (the Czech Republic). The case law of the CJEU reveals that this was also a problem in Romania and Poland. The same legal question was also addressed in Croatia.

The comparison disclosed no significant difference in the consequences of unfair terms. Unfair or surprising contractual terms are usually rendered null and void or considered non-existent. Legislators have tried to varying degrees to regulate certain peculiar situations—the emphasis being on preserving the rest of the contract (Croatia, Romania, Poland), the possibility of invoking the unfair clause by the consumer (Czech Republic), or the fact that invalidity may be relied upon only in the interest of the consumer (Hungary). Consumers in Romania have a stronger position in this respect, as they can decide to terminate the entire contract for just one unfair term. Other peculiarities inferred by the case law of the CJEU, e.g., application of supplementary rules, however, are not codified.

Although we are in the area of private law, the protection of the consumer and the enforcement of the prohibition of unfair terms is not left to him or her alone. In most of the jurisdictions compared, public law enforcement of the prohibition of unfair terms is also offered, in some cases even with effects against third parties. This can take place in an administrative procedure (the Czech Republic, Poland) or court

proceedings initiated by public authorities (Hungary, Romania). An important role is played by associations established to protect consumer interests under the law of any Member State of the European Economic Area. A special regulation can be found in Slovakia, where the legislator has explicitly extended the effects of incidental control toward third parties. The term found to be unfair in a particular case should also not be used in relation to all other consumers.

It is evident from the comparison that protection against unfair terms is not limited only to consumer contracts. Historically, the basis of the regulation was not the need to protect the consumer, but to protect against the use of standard terms. Regulation in this other area varies, and the inspirational patterns are also different.

The simplest way is to extend the application of unfair terms in consumer contracts to other cases. This can be done covertly by extending the concept of consumer (as in Poland). Another way is the separate regulation of standard terms, i.e., contractual terms prepared in advance and employed by one of the parties for repeated use (Hungary, Romania). In other cases, the bargaining position of the contracting parties also needs to be taken into account, as in contracts of adhesion (the Czech Republic).

We may identify some sources of such regulation in the compared countries. German regulation of surprising terms in § 305c of the BGB (in the Czech Republic), the regulation of contracts of adhesion in the Civil Code of Québec (the Czech Republic), and Italian regulation of standard terms in Article 1350 of the Italian Civil Code and the requirement of written form in certain cases (Romania). Apparently, in view of the historical development, we have not observed the German model, § 305 and 310 of the BGB, i.e., a mere extension of the regulation of standard terms with certain additions to consumers.

Other examples originate in EU regulation. In the first place, Directive 2011/7/EU should be emphasized. This directive appears in a number of national reports (the Czech Republic, Slovakia, Romania). Romanian legislation is worth mentioning here since, with regard to this directive, it prohibits a number of arrangements in commercial relations, not only in the standard terms, e.g., elimination of additional damages. As to Directive (EU) 2019/633 on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply, it is mostly not mentioned in the individual reports. This may be due to the fact that its scope of regulation is limited to a specific sector of trade.

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| Chapter X |

Contracts for the Benefit of Third Parties and *Action Directe*

1. General considerations

A contract for the benefit (in favor) of a third party (*pactum in favorem tertii*) is a contract concluded between a debtor, called a promisor (*promitent*), and a creditor, called a promisee (*promisar, stipulant*), under which the promisor is obliged to render some performance to a third party, called the beneficiary (*tertius*). The beneficiary in such situations shall have a direct right to demand performance from the promisor. These kinds of contracts are thus an exception to the general rule that contracts may have effects only between the contracting parties (the doctrine of privity).

The significance of this contract lies especially in the fact that it facilitates the process of economic circulation by extinguishing—at the same time—two obligations with only one performance, namely the debtor's (promisor's) obligation to the creditor (the promisee), which is the basis for the contract for the benefit of a third party, and the creditor's (the promisee's) obligation to that third party (the beneficiary), since the creditor either owes or will owe the third party something, or intends to confer a gratuitous benefit upon that third party.

This not only shortens the duration of the transaction, but also secures the position of the third party, who—as a result of the contract—will usually be awarded with two claims for performance, one against the creditor and one against the debtor.

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Instead of two performances—the performance of the debtor to the creditor and the performance of the creditor to the third party—only one performance will take place, namely the performance of the debtor to the third party. For example, if the debtor was obliged to return something to the creditor, say, an item received on loan, the debtor and creditor may agree that the debtor will hand over the borrowed item directly to the third party, by which the creditor's desired performance to that third party (e.g., when the donation of the item was promised to the beneficiary) will also be fulfilled.

However, a contract for the benefit of a third party is also used for purposes other than the fulfillment of the creditor's debt to the third party. The significance of that contract may also lie in securing the livelihood of the third party or granting other forms of protection to him or her. A good example of such situations can be, in particular, insurance relationships, where it can be agreed that the beneficiary of the insurance benefit will be a person different from those who have concluded the insurance contract. Similarly, this importance of protecting the interests of the third party can be reflected, for example, in annuity (rent) contracts.

Last but not least, contracts for the benefit of a third party are important in the field of transport, where the consignee or the passenger may have direct claims against the carrier.

Historically, under early Roman law, a contract for the benefit of a third party (as well as direct representation) was as a rule invalid because it defied the principle that juridical acts may affect only those who have made them.[1] Therefore, if one had obtained a promise of performance to be rendered to oneself and to a third party, then only the direct party, not the third party, was entitled to the promised performance, in one opinion in its entirety, in another only in half.[2] In classical Roman law, the exception was a contract in which the creditor was promised that the performance would be rendered to himself as well as to his heirs after his death. However, if the promised performance was to be rendered only to the heirs, and therefore only after the creditor's death, such a contract was invalid. In post-classical Justinian law, however, such a contract for the benefit of the heirs to obtain performance after the death of the creditor was permitted.[3] In this classical period, the direct claim of a third party was also allowed in some other specific cases, e.g., the pledgee could, when selling the pledged property, contract with a buyer that the pledgor would have a right that the pledged property be sold to him[4] or the donor could donate on condition that the donee would later pass the gift to a third party.[5]

Such an approach—limiting the use of the contract for the benefit of a third party only to some special situations—lasted until the 19th century, when it was gradually abandoned. First, the admissibility of contracts for the benefit of a third party was

1 Heyrovský, 1910, p. 558.
2 Gaius III, 100, 101.
3 C 4, 11.
4 D 13, 7, 13.
5 C 8, 54, 3.

generalized in such a way that, in the case of an obligation to return the borrowed thing, it became possible to agree that the thing would be returned to a third party.[6] Later, however, increasingly complex economic relations made it necessary to also allow contracts for the benefit of a third party, granting that third party direct claims against the debtor, in other areas, e.g., within new forms of insurance, annuities, or various types of transport activities.[7]

At present, there are general explicit provisions in many jurisdictions that allow the debtor to perform to a third party, with that third party having the right to claim such performance (e.g., § 328 BGB). Likewise, explicit provisions on contracts for the benefit of a third party have been included in European works of legal unification (Article 6:110 PECL, Article II.-9:301 DCFR). Moreover, a large number of national legal systems contain, in addition to general regulations, regulation of the contract for the benefit of a third party within the framework of certain specific contractual relations, especially in the areas of insurance and transport.

A contract for the benefit of a third party is not a special type of contract that would differ from other contractual types by its specific content or subject of performance. It is therefore a contract that never stands out on its own. It represents a certain agreement that modifies another contract (the so-called underlying contract) or is an integral part of it, or it represents an agreement that modifies an existing non-contractual obligation. An essential part of the contract for the benefit of a third party is not only that the debtor undertakes to provide performance in favor of a third party, but that that third party will also be entitled to demand—in his or her own name—such performance against the debtor.

It is exactly this feature that distinguishes this contract from other similar agreements, especially from the so-called false contract for the benefit of a third party, which is based only on the debtor's obligation to render performance to a third party without giving that third party a direct claim to the promised performance or contractual damages in the event of non-performance.

Likewise, a contract for the benefit of a third party must be distinguished from a contract with a protective effect for third parties (*Vertrag mit Schutzwirkung für Dritte*), which is a construct of German case law. Such a protective contract does not give the debtor any obligation to render any performance to a third party, and therefore does not confer any right to performance on a third party either. However, in the event of non-performance, the third party may claim compensation for the contractual damage incurred as a result of the non-performance, precisely because the purpose of the contract was not only to protect the interests of the creditor but also those of the third party (or only the interest of that third party). Whether the contract in question was concluded with protective effect for a third party does not depend on the will of the parties, but on an objective point of view. The main purpose of such a construct is to circumvent the shortcomings of German law on non-contractual liability, in particular

6 According to Jhering, 1858, p. 110.
7 According to Arndts, 1868, p. 395; or Radwański, 1981, p. 442.

the restrictions on vicarious liability and the restrictions on compensation for pure economic loss, as regards the liability of professional service providers (e.g., liability of the auditor for unintentional misstatements). In order for a third party to be able to rely on the protective effects of a contract to which it is not a party, and thus to be able to claim, in particular, damages or other secondary rights against the debtor, three main conditions must be met. First, there must be a proximity of performance, i.e., the third party must be endangered by any mis-performance; second, the creditor must have a genuine interest in protecting the third party; and third, these first two conditions must have been known to the debtor at the time of conclusion of the contract.[8]

It may be said that the contract for the benefit of a third party is the intersection of three legal relationships. The first of these relationships is the relationship between the debtor and the creditor (the so-called underlying relationship, or the coverage relationship), the second relationship is between the debtor and the third party (the so-called payment or performance relationship), and the third and last relationship is the relationship between the creditor and the third party (the *valuta* relationship).

The underlying relationship between the debtor and the creditor is a relationship that, in addition to determining the performance to which the third party will be entitled against the debtor, also constitutes a cause (*causa*) of the debtor's obligation to perform to the third party. It is also a relationship that establishes the right of a third party to claim against the debtor to be provided with the performance to which the debtor is liable to the creditor.

The performance relationship between the debtor and the third party is based on the debtor's obligation to perform to the third party and on the third party's direct right to demand such performance from him. The debtor's obligation to render the performance to the third party is not an abstract obligation, since its cause (*causa*) arises from the underlying relationship. This is why the law usually allows the debtor to raise both peremptory and dilatory objections arising from the underlying relationship against a third party. The debtor can thus also invoke the invalidity of the underlying contract or defects in the expression of will. The debtor may also invoke its own objections to a third party: For example, it may invoke a set-off against a third party's claims arising from the contract for the benefit of that third party. However, the debtor cannot avail itself of the objections that the creditor would have against the third party.

The *valuta* relationship between the creditor and the third party is a relationship in which, in principle (but not necessarily), the creditor receives from the third party some consideration that justifies its entry into a contract with the debtor for the benefit of that third party. It is a relationship that lies somehow outside the contract for the benefit of a third party, which may result from various legal facts. This may be, for example, the creditor's debt to a third party arising out of a contract, whether one for consideration or gratuitous (e.g., a donation), but also from non-contractual obligations.

8 Unberath, 2003, pp. 18–21.

The individual rights and obligations arising from these relationships may be regulated by the legislator differently. The answers require, in particular, posing questions as to whether the creditor and the debtor may modify or terminate the obligation to perform for the benefit of a third party; to what extent the third party must be identified in the contract; whether such third party becomes the party to the contract between the debtor and creditor (underlying contract); whether the creditor may demand that the debtor render the performance to the third party; whether in case of waiver of the right by the third party the debt is extinguished; or whether the third party's right can be contingent, e.g., on fulfillment of certain conditions.

2. The Czech Republic

2.1. The notion of a contract for the benefit of a third party

A contract for the benefit of a third party is not an independent contract type. It is merely a situation in which a debtor is to perform in favor of a third party under a contract and the creditor may require that the debtor discharge his debt to that person.[9] It is not necessary for the contract for the benefit of third party to contain a reason why the debtor shall discharge his debt to the third party.[10]

The general principle is that it is not possible to conclude contracts for the performance of a third party. Czech law recognizes such institution; however, it is merely a term—the essence of the so-called contract for the performance of a third party is based on something else. According to § 1769 of the CzeCC: 'If a person undertakes to ensure that a third person discharges a debt in favor of another party, he is obliged to induce the third person to provide the stipulated performance. However, if a person undertakes that a third person fully discharges the stipulated debt, he shall compensate the creditor for the damage resulting from the failure to discharge the debt.'

Yet it is possible that the third party acquires not only a right to demand performance, but also ancillary rights and duties. Other duties can be acquired under the consent of the third party (e.g., the third party must provide payment for the debtor's performance).[11]

2.2. True or apparent contract for the benefit of a third party

Czech law the recognizes so-called true contract for the benefit of a third party (*pravá smlouva ve prospěch třetího*) and the so-called apparent contract for the benefit of a third party (*nepravá smlouva ve prospěch třetího*).

The essence of the true contract consists of a direct right of the third party to demand a performance from the debtor (individually or jointly with the creditor). An apparent contract for the benefit of a third party means that the third party is merely

9 CzeCC, § 1767 (1).
10 Hulmák in Hulmák et al., 2014, p. 239.
11 Hulmák in Hulmák et al., 2014, p. 239.

entitled to assume a performance. The apparent contract resembles an arrangement regarding the place[12] of performance.

Whether and when the third party also acquired a direct right to require that the debt be discharged must be considered relying on the content, nature, and purpose of the contract. A third party is presumed to have acquired such a right if the performance is to primarily benefit such a third party.[13] Special provisions may stipulate otherwise.

The content, nature, and purpose of the contract are important in determining when the third party acquires the direct right to demand performance. This moment may be when the contract becomes effective, after certain conditions are met (e.g., the insured event occurs), or the time of a consent granted by the third party. Unless it is obviously provided otherwise, it will usually be at the time of notification.[14]

When the third party acquires the direct right to demand performance, the creditor as a rule loses that right. Divergent contractual arrangements, however, cannot be ruled out, e.g., the creditor and third party may become jointly and severally entitled to demand performance. Until the third party has acquired the direct right to demand the performance, the creditor has the rights of the contracting party.[15] He is entitled to change or to cancel the obligation, assign the claim, waive the debt, etc.[16]

In the case of a true contract for the benefit of a third party, a disposal of the right of the third party is not admissible after the third party acquired the right, i. e., generally he or she has been notified of the creation of that right. In the case of an apparent contract, a disposition regarding the right of the third party is possible even after the creation of the right.[17]

2.3. Differences as to other institutions of law

As mentioned above, it is necessary to differentiate between a contract for the benefit of third parties and a contract with a protective effect for third parties (*smlouva s ochrannými účinky vůči třetí osobě,* in German *Vertrag mit Schutzwirkung für Dritte*).

Also, it is important to differentiate between the contract for the benefit of third parties and a bill of exchange (*poukázka*). A bill of exchange entitles a payee (the beneficiary) to collect in his own name a performance from a payer (called a drawee), and the bill of exchange obliges the payer to perform to the payee on the account of the issuer (called the drawer) of the bill of exchange. The payee in the bill of exchange shall acquire a direct right against the payer only if the payer accepts the bill of exchange.[18]

12 CzeCC, § 1954.
13 CzeCC, § 1767 (2).
14 Supreme Court of the Czechoslovakian Republic Ref. No. Rv I 1020/25.
15 Hulmák in Hulmák et al., 2014, p. 242.
16 Hulmák in Hulmák et al., 2014, p. 240.
17 Dvořák in Petrov et al., 2019, p. 1839.
18 CzeCC, § 1939 (1).

2.4. Requirements

Regarding the form of the contract for the benefit of third parties, everyone has the right to choose any form in which a juridical act may be concluded, unless the choice of form is restricted by an agreement or by a statute.[19] E.g., a contract of donation where the asset is not delivered simultaneously with the expression of the consent to donate and that for accepting the gift has to be done in writing,[20] while a purchase agreement (generally) does not have to adhere to this form.[21]

As for the identification of the third party, it is not required to identify such a party individually. It is sufficient that there be sufficient personal details mentioned as to allow the subsequent identification of the third party.[22] The creditor or the debtor may also be empowered to establish the third party themselves at a later date. Such establishment cannot be changed without the consent of the contracting parties, unless agreed otherwise or provided by a statute.[23] The third party need not necessarily still exist by the time the contract for the benefit of that third party takes effect.[24]

2.5. The debtor's contractual defense

A debtor may invoke a contractual defense against the third party.[25] The debtor may invoke unenforceability (*neúčinnost*) or voidability (*relativní neplatnost*) of the contract or, e.g., the statute of limitations. The debtor may terminate the obligation or withdraw from the contract in accordance with the law. He or she can also set off his or her claim against the claim of the third party, but not his or her claims against the creditor, unless they arise out of the contract, or the creditor has the right to benefit from performance together with the third party. There may also be procedural defenses invoked (e.g., absence of jurisdiction, as a result of an arbitration clause). If, after the direct right to demand a performance has been created, the obligation is changed or terminated (e.g., by the debtor or creditor), this may affect the third party only if the parties originally reserved such a possibility or the third party expressly consented to it.[26]

The existence of a juridical act resulting in the termination of the main contract can be effectively invoked as an objection by the debtor against the third party only after such objection has already been successfully used against the creditor. Until then, the debtor is entitled to withhold the performance to the third party.[27]

19 CzeCC, § 559.
20 CzeCC, § 2057 (2).
21 Hulmák in Hulmák et al., 2014, p. 238.
22 Supreme Court of the Czechoslovakian Republic Ref. No. Rv I 475/28; Supreme Court Ref. No. 22 Cdo 2643/99.
23 Hulmák in Hulmák et al., 2014, p. 239.
24 Supreme Court Ref. No. 33 Odo 824/2005.
25 CzeCC, § 1767 (3).
26 Dvořák in Petrov et al., 2019, p. 1840; Hulmák in Hulmák et al., 2014, p. 243.
27 Dvořák in Petrov et al., 2019, p. 1840.

2.6. Rejection by the third party

Pursuant to the § 1768 of the CzeCC, if a third party rejects a right acquired under a contract, such party is considered never to have acquired the right to any performance. The creditor may require that a performance be provided to him or her instead unless it contradicts the contents and purpose of the contract. Such rejection can be addressed to the creditor or the debtor.[28]

The law does not set any time limit for rejecting the acquired right. Apparently it is necessary to do so without undue delay. However, it is no longer possible to reject if the third party has given his or her explicit consent to the performance.[29]

If the third party rejects the acquired right while the creditor does not have such right either, the obligation is extinguished due to the impossibility of performance.[30]

2.7. Special provisions

The CzeCC contains specific cases where a contract for the benefit of third parties is regulated. According to § 2758 (1) of the CzeCC, by an insurance contract an insurer undertakes to provide the policyholder or a third party with an insurance indemnity in the case of an event covered by insurance, and the policyholder undertakes to pay a premium to the insurer. Pursuant to § 2768 (1) of the CzeCC, if a contract has been concluded in favor of a third party, that party may also grant his consent to the contract subsequently, when asserting his or her claim to an insurance indemnity. A third party has the right to an insurance indemnity if the insured person or his or her legal representative has authorized the third party to receive the insurance indemnity after becoming familiar with the contents of the contract. A risk to another can be insured against for the benefit of a third party.[31]

The inheritance contract can be concluded for the benefit of a third party as well, when the third party is designated as an heir or legatee.[32]

3. Hungary

3.1. The structure of the contract for the benefit of third parties

The doctrine of privity of contract prevails in Hungarian contract law as well. A contract normally creates rights and obligations between the contracting parties. This, however, does not exclude the possibility of concluding a contract for the benefit of third parties. In such a case the third party (beneficiary) may claim the performance if his or her right to this was expressly set forth by the parties, or if it clearly follows from the purpose of the contract or the circumstances of the case. The third party may claim performance if he or she was notified that a contract for his or her benefit has

28 Sedláček, 1924, p. 130; Dvořák in Petrov et al., 2019, p. 1841.
29 Dvořák in Petrov et al., 2019, p. 1840; Hulmák in Hulmák et al., 2014, p. 245.
30 CzeCC, § 2006 (1).
31 CzeCC, § 2768 (2).
32 CzeCC, § 1582.

been concluded by the parties. Consent of the third party is not required. If, however, the third party waived the right to claim the performance, it may be claimed by the creditor (promisee), concluding the contract for the benefit of the third party.[33] The creditor does not have the right to deprive the beneficiary of his or her right stemming from the contract, but the creditor and the debtor (promisee) are not prevented from amending or terminating the contract. The beneficiary must be identifiable, as must any party to an obligation. There is no norm requiring that the beneficiary must exist at the time of concluding a contract; this issue is relevant at the time of performing the contract.

If a contract was concluded in the interests of the third party beneficiary—e.g., the party undertook the obligation to buy a flat to that third party's child—that does not necessarily mean that it was a contract for the benefit of a third party.[34] The *differentia specifica* of the contract for the benefit of third parties is that the third party beneficiary shall be entitled to claim performance. In case of contracts for the interests of third parties, there is no such claim for performance provided. There is no presumption that if performance should be provided to a third party, then the third party shall have the right to also claim performance.

In case of a contract for the benefit of a third party, the creditor (promisee) shall not be entitled to claim performance for which the third party has been designated as the beneficiary after the third party had been notified of this. Performance vis-à-vis the creditor (promisee) does not terminate the contractual obligation toward the third party beneficiary. The third party may either claim performance or may claim restitution of unjust enrichment from the creditor (promisee) accepting performance. In the tripartite structure of the contract for the benefit of third parties, there is a legal relationship between the promisor (the debtor) and the promisee (the creditor) providing the coverage for the obligation to be performed to the third party (the beneficiary) by the promisor. The transfer of value occurs indirectly between the promisee and the beneficiary and is normally based on a separate legal relationship extant between them.

There is no written form required for concluding such contracts validly.

3.2. Some specific forms of contracts for the benefit of third parties

In principle, any contract can be concluded as a contract for the benefit of a third party. There are, however, some specific forms of contracts for the benefit of third parties, such as those that institute a nominee beneficiary in insurance contracts and certain deposit schemes, bills of exchange, or trusts (fiduciary asset management).

Fiduciary asset management in Hungarian private law is a tripartite legal relationship, which sometimes may follow the model and structure of a contract for the benefit

33 HunCC, § 6:136.
34 Supreme Court, Legf. Bír. Pfv. II. 21.361/2003. sz. BH 2006 357.

of third parties. Fiduciary asset management should not be confused[35] with the Anglo-Saxon legal institution of trust, even though it may have an identical purpose and very similar rules may apply to it. In terms of structure, fiduciary asset management is a special form of contract that may be concluded for the benefit of third parties. Under a deed constituting fiduciary asset management for the benefit of a third party beneficiary, the settlor (the promisee) transfers marketable assets (such as property) to the trustee (the promisor), who is under an obligation to exercise the rights of disposal, use, and enjoyment of the property acquired by the transfer for the benefit of another person, the beneficiary. In the structure of this relationship, the transfer of property in an economic sense takes place between the settlor and the beneficiary, performed for the benefit that the trustee is obliged to bestow onto the beneficiary, under the deed constituting fiduciary asset management. It must be emphasized here that not all forms of fiduciary asset management result in a tripartite operation, as the settlor and the beneficiary may also coincide. The shift of the value of the assets actually occurs with this benefit bestowed upon the beneficiary. From the point of view of this *valuta* relationship, the trustee is considered to be the settlor's vicarious agent,[36] since the trustee is liable for delivering performance to the beneficiary. The performance relationship is established between the trustee and the beneficiary. The performance is perfect if it meets the express or implied expectations of the deed by which fiduciary asset management was instituted.[37] On this basis, the beneficiary may, for example, assert warranty or other breach of contract claims against the trustee. In this performance (or service) relationship, the nature of the transfer cannot be interpreted as being a transfer of property by the trustee, as the object of the transfer is not constituted by the trustee's own assets but by the assets of the fund constituted with the purpose of fiduciary asset management (ultimately the property of the settlor).

Although the trustee may be a vicarious agent for the purposes of the *valuta* relationship between the settlor and the beneficiary, the trustee has an independent personal obligation toward the beneficiary under the instrument that created the fiduciary asset management vehicle, for which such a trustee is liable. If the trustee's performance was in accordance with the terms of that instrument but did not meet the expectations (obligations) arising from the *valuta* relationship between the settlor and the beneficiary, the trustee has performed in accordance with the instrument. Therefore, the beneficiary has no claim for breach of contract against the trustee. This does not mean, however, that the beneficiary cannot have a claim against the settlor on the basis of the substance of the relationship for pecuniary interest with the settlor.

The deed by which fiduciary asset management is instituted and the transfer of property under it provide the coverage for the trustee's obligation to the beneficiary.

35 The underlying mechanisms differ fundamentally between the two institutions, as the Anglo-Saxon trust is based on the concept of ownership, which is not wholly compatible with the continental concept of property and of real rights when it comes to the exclusive character of such rights in civil law jurisdictions.

36 HunCC, §6:129.

37 HunCC, § 6:123.

The purpose of fiduciary asset management is to provide the legal basis (title) and, through the transfer of assets, the actual coverage for the services to be provided to the beneficiary under the fiduciary asset management vehicle, since the trustee provides the services out of the assets held in trust and not out of his own assets. The coverage relationship (fiduciary asset management) gives rise to the obligation that the beneficiary can claim from the trustee. Moreover, the assets belonging to the fund instituted for fiduciary asset management on the basis of this relationship are the assets against which the trustee discharges this obligation. Thus, the fund instituted for fiduciary asset management is the coverage for the trustee's obligation to the beneficiary. The fiduciary asset management fund is also the coverage for the *valuta* relationship between the settlor and the beneficiary. The trustee has two obligations under the deed by which the asset management was instituted: one toward the settlor and one toward the beneficiary. The beneficiary is the holder of the obligations arising from the deed, but the settlor has the rights relating to the creation, content, and termination of the deed.

3.3. Further considerations

The contract with a protective effect for third parties, especially the contract for the interests of third parties, is not covered by any specific rule of the HunCC, but it is accepted in court practice. If the party failed to perform such a contract, the third party shall not have a claim for performance or a claim for damages for breach of contract vis-à-vis the promisor in the contract. The claim of the third party on the basis of non-contractual liability is, however, not excluded.[38] The promisor shall be entitled to raise objections arising from the underlying contractual relationship vis-à-vis the third party beneficiary.

4. Poland

4.1. Historical background

The direct model for the provisions of Polish law discussed below was Article 92 of the Ordinance of the President of the Republic of Poland of October 27, 1933—The Code of Obligations. The mentioned regulation stated that a person 'who, when concluding a contract, reserved a performance for a third party, that person, in the absence of a different contract, may directly demand the performance from the debtor.'

4.2. Legal basis

Presently under Polish law there is an express provision that regulates a contract for the benefit of a third party, i.e., Article 393 of the PolCC. The indicated provision reads as follows:

38 Kemenes, 2018, p. 1641.

'§ 1. If it is stipulated in the contract that the debtor would render performance to a third party, that person, unless an agreement provides otherwise, may claim directly from the debtor that he/she render the performance specified in such stipulation.
§ 2. A stipulation as to the duty to render performance for the benefit of a third party cannot be revoked or altered if the third party has declared to either of the parties that he/she would like to benefit from such stipulation.
§ 3. The debtor may raise defenses arising from the agreement also against a third party.'

4.3. General information

Under Polish law, a contract for the benefit of a third party is not a specific type of agreement that would differ from other contractual types by its specific content or subject of performance.[39] As a rule, any benefit (*świadczenie*) can be stipulated in favor of a third party.[40] However, it is inadmissible to conclude a dispositive contract (*umowę o skutku rozporządzającym*) for the benefit of a third party.[41] Notably, for its valid conclusion, it is not necessary to inform a third party about such an agreement.[42] The third party does not become a party to the contract for his or her benefit, even if he or she makes a statement provided for in Article 393 § 2 of the PolCC.[43]

The law does not require any special form for such a contract. Therefore, the general rule regarding freedom of form is applicable.[44] A special form may be required if there is a specific provision that requires a particular form for the performance of certain juridical acts that are covered by such agreement.[45]

Furthermore, in the literature it is undoubted that the contract by which a future contract is promised (a pre-contract) can be concluded for the benefit of a third party.[46]

Finally, Polish law does not provide a provision regarding contracts with a protective effect for third parties (*Vertrag mit Schutzwirkung für Dritte*). It is disputable whether such an agreement is permissible.[47]

4.4. The concept of a third party

Any entity that has legal capacity may be considered a 'third party' in the meaning of the institution in question. Such a person does not have to be indicated very precisely but should at least be identifiable.[48] Precise identification should be possible when the

39 Radwański and Olejniczak, 2010, p. 182.
40 Drapała et al., 2020, p. 1148.
41 Such a view prevails in Polish doctrine; see Drapała et al., 2020, p. 1151.
42 Judgment of the Polish Supreme Court, 4.04.2019, III CSK 149/17, LEX No. 2642796.
43 Drapała et al., 2020, p. 1171.
44 See Article 60 PolCC and Radwański, 2009b, p. 229.
45 Radwański and Olejniczak, 2010, p. 183.
46 Drapała et al., 2020, p. 1149.
47 Drapała et al., 2020, pp. 1156–1158.
48 Drapała et al., 2020, p. 1160.

performance must be rendered.[49] Thus, such a person does not have to exist at the time of the conclusion of the contract.[50] Determining the consequences of what will happen if this condition is not met constitutes a complex issue that exceeds the scope of this work.[51]

4.5. The third party's rights

Art. 393 § 1 of the PolCC institutes a presumption according to which, if an obligation is to be performed to a third party, the third party has a direct claim to demand performance from the debtor.[52] However, such a right has a provisional nature.[53] The third party has to declare to either of the parties that he or she would like to benefit from such a right.[54] Consent may be expressed in any form unless otherwise stipulated.[55] Until such a statement occurs, the contract for the benefit of a third party can be revoked or altered. Under Polish law it is unclear whether in such a situation the creditor may unilaterally revoke or alter a third party's right to performance, or whether the debtor's consent is also required. The view prevails that the consent of both parties is required.[56] However, the agreement between the debtor and the creditor may stipulate that the creditor may unilaterally revoke the contract.[57]

Under Polish law it is possible to make the third party's right to the performance conditional.[58] Parties may agree in a contract for the benefit of a third party that such right:

— will accrue to the third party only if he or she fulfills a certain condition (a precedent condition);[59]
— will lapse if a certain condition is fulfilled (subsequent condition).[60]

Under Polish law it is disputable whether it is possible to include in an agreement a condition that the debtor render the performance to the third party only after the death of the creditor.[61]

If the debtor fails to perform, the third party is entitled not only to a claim for performance, but also to compensation.[62] Damages are not limited to negative contractual interest.

49 Drapała et al., 2020, p. 1161.
50 Drapała et al., 2020, p. 1161.
51 Drapała et al., 2020, pp. 1161–1163.
52 Radwański and Olejniczak, 2010, p. 183.
53 Radwański and Olejniczak, 2010, p. 183.
54 PolCC, Article 393 § 2.
55 Radwański and Olejniczak, 2010, p. 184.
56 Drapała et al., 2020, p. 1146.
57 Drapała et al., 2020, p. 1146.
58 Drapała et al., 2020, pp. 1138–1141.
59 Radwański, 2009b, p. 283.
60 Radwański, 2009b, p. 283.
61 Drapała et al., 2020, pp. 1141–1143.
62 Drapała et al., 2020, pp. 1188–1189.

4.6. The creditor's rights

If the third party declares that he or she would like to benefit from the right granted,[63] the creditor cannot claim the performance from the debtor unless otherwise provided in the contract.[64] However, the question arises as to whether such creditor's claim exists until the third party has given his or her consent. This issue is not clear under Polish law. If we agree with the above view that the consent of both parties is required to revoke or alter the third party's right to performance, consequently we have to state that such claim of the creditor does not exist unless otherwise provided by the parties.

The question also arises as to what happens to the creditor's rights in a situation in which a third party rejected the benefit (waived his or her right to it). The character of the stipulated right determines whether the debtor's debt becomes extinguished or still exists.[65] However, the debtor and the creditor may determine the fate of the debtor's obligation in the event of the rejection of the benefit by the third party.[66]

If the debtor fails to perform, the creditor is entitled to damages. The damage may result from non-performance of obligations resulting from the coverage relationship and/or the performance relationship.[67] In addition, the creditor may demand that the debtor render the performance to the third party.[68]

4.7. Debtor's defenses

Article 393 § 3 of the PolCC explicitly states that the debtor may raise defenses arising from the underlying relationship with the creditor also against a third party. Furthermore, the debtor can assert his own objections to a third party.[69] However, the debtor cannot raise against a third party defenses arising from the *valuta* relationship, since he or she is not a party to it and there is a lack of a provision that provides such right to a debtor.[70]

4.8. Specific provisions for the contract for the benefit of a third party

Contracts for the benefit of a third party are often used in contractual relations since such a contract 'shortens the path of economic exchange.'[71] In addition to the general regulation discussed above, in many areas there are specific provisions regarding them. To name just a few:

— Article 785 of the PolCC, regarding a contract of carriage,

63 PolCC, Article, 393 § 2.
64 Radwański and Olejniczak, 2010, p. 184; Drapała et al., 2020, p. 1148.
65 Machnikowski, 2017, p. 776.
66 Drapała et al., 2020, p. 1173.
67 Drapała et al., 2020, p. 1189.
68 Drapała et al., 2020, p. 1189.
69 For example, to set off his or her claim against a third party's claim for the performance arising from the elaborated contract; see Radwański and Olejniczak, 2010, p. 184.
70 Drapała et al., 2020, p. 1182.
71 Radwański and Olejniczak, 2010, p. 182.

— Article 829 of the PolCC, regarding payment of the indemnity for an ensured risk to a third party,
— Article 908 § 3 of the PolCC regarding life annuity contracts,
— Article 56, 56a and 57 of the Polish Banking Act[72] regarding reservation of payment—in the event of the creditor's death—of a certain amount from his or her bank account.

In case of such specific provisions, the application of the general rules is usually, at least to some extent, excluded.[73]

5. Romania

The RouCC regulates contracts for the benefit of third parties under the name 'stipulation for another.'[74] This is perceived as a contract or contractual clause by which one party, called the stipulator (*stipulant*), orders the other party, the promisor (*promitent*), to give, do, or refrain from doing something for the benefit of a third party, the beneficiary (*beneficiar*). In this scheme the stipulator is the promisee of the performance, while this is rendered by the promisor to the beneficiary. Basically, stipulation for another is 'a means of making a person who has not participated in the contract into a creditor.'[75]

The parties to the contract are the promisee and the promisor, the beneficiary being a third party to the contract. By the effect of the stipulation for another, the beneficiary acquires the right to demand directly from the promisor the performance of the service: A subjective right to performance arises directly among the assets of the beneficiary, without this person having participated in the conclusion of the contract. The beneficiary must be determined or at least determinable at the time of the conclusion of the stipulation and must exist at the time the promisor is to perform the obligation. Otherwise, the stipulation benefits the promisee without any increase to the burden on the promisor.

According to the case law, the clause in a contract for the sale of shares whereby the buyer has undertaken to the seller that, in the event of the privatized company failing to pay its obligations to the national budget, the buyer itself will pay these debts from its own resources, is, in reality, a stipulation for another, in which case the rights arise directly among the assets of the third-party beneficiary (i.e., the state), which has an action against the promisor to satisfy its claim.[76]

72 The Act of August 29, 1997, Law on Banking ('*Ustawa z dnia 29 sierpnia 1997 r. Prawo bankowe*'), Polish Journals of Laws from 1997, No. 140, item. 939 as amended.
73 Radwański and Olejniczak, 2010, p. 184.
74 RouCC, Articles 1284–1288. See Veress, 2020, pp. 82–85.
75 Hanga, 1977, p. 364.
76 High Court of Cassation and Justice, II Civil Section, Decision No. 153 of January 22, 2015.

However, a right cannot be included among the beneficiary's assets without the beneficiary's acceptance. In this sense, if the third party beneficiary does not accept the stipulation, his or her right is deemed never to have existed. Thus, the right arising from a stipulation for another is contingent on a resolutory condition. The Romanian High Court of Cassation and Justice has stated that once performance has been requested by the third party beneficiary, the condition of acceptance is fulfilled and the beneficiary may use all the means available to any creditor to enforce his right. In this case, in a subcontract for works (*locatio conductio operis*) concluded between A (the general contractor) and B (the subcontractor), it was stipulated that A would pay the price of the materials supplied by C for the subcontractor B, C not being a party to this contract.[77]

It follows from an analysis of the statutory provisions that by stipulating for another, the third-party beneficiary acquires the right to demand performance directly from the promisor, but acceptance of the stipulation is not provided for as a condition of validity because, in the absence of acceptance, it is deemed, according to the provisions of Article 1286 (1) of the RouCC, that the right of the third party beneficiary never existed, but the main consequence of acceptance is the consolidation of his or her right to the performance that is the subject of the stipulation.

The importance of the stipulation for another also lies in the fact that the beneficiary does not have to bear the competition of any unsecured creditors of the promisee nor the risk of the promisee's insolvency. On the other hand, the stipulation for another may be attacked by the promisee's creditors by means of an *actio Pauliana*[78] if there is fraud against the interests of the creditors.

As regards the relationship between the promisee and the promisor, the promisee may require the promisor to carry out the stipulation. The stipulation may be revoked as long as the beneficiary's acceptance has not reached the promisee or the promisor.

Thus, the moment from which the acceptance by the third-party beneficiary takes effect is essential to determine the date from which the stipulation for another is irrevocable.[79]

The promisee alone is entitled to revoke the stipulation, his or her creditors or heirs being unable to do so. However, the promisee may not revoke the stipulation without the consent of the promisor if the latter has an interest in enforcing it. The revocation of the stipulation takes effect as soon as it reaches the promisor. If no other beneficiary has been designated, the revocation shall benefit the promisee (or his or her heirs, as the case may be) but may not increase the burden of the promisor.

77 II Civil Section, Decision No. 5146 of December 4, 2018.
78 By way of *actio Pauliana*, a creditor who suffers injury through a juridical act made by his or her debtor in fraud of his or her rights, in particular an act by which the debtor renders or seeks to render himself or herself insolvent, or by which, being insolvent, he or she grants preference to another creditor, may obtain a declaration that the act may not be invoked against him or her.
79 High Court of Cassation and Justice, II Civil Section, Decision No. 5146 of December 4, 2018.

As regards the effects between the promisor and the beneficiary, the beneficiary has the right to require the promisor to perform since an obligation arises between the beneficiary as creditor and the promisor as a debtor. The promisor may only raise against the beneficiary defenses based on the contract containing the stipulation. Thus, in his defense, the promisor may rely, for example, on the contract containing the stipulation being null and void or may raise against the beneficiary the exception of non-performance (*exceptio non adimpleti contractus*), based on the fact that the promisee has also failed to perform the contract containing the stipulation.

While the stipulation for another has a contractual nature, the *action directe* has its origin in the law. *Action directe* is the right of a third party, known as the beneficiary (or claimant in the *action directe*), to claim performance directly from the contractual debtor of his initial debtor, regardless of whether performance then takes place amicably or by recourse to the coercive force of the state.[80]

For example, in the case of non-payment of rent due under a lease, the landlord may pursue the sublessee up to the amount of rent that the latter owes to the lessee.[81] Thus, e.g., the lessor A has concluded a tenancy agreement with the lessee B, and lessee B has then also concluded a sublease agreement with the sublessee C. B owes rent of 4,500 lei to the lessor A under the lease. C owes rent of 3,000 lei to the lessee B under the sublease agreement. Although A is a third party to the sublease agreement between B and C, he or she has an *action directe* to pursue the sublessee C to the extent of 3,000 lei.

The RouCC also regulates *action directe* in the field of the subcontract for works (*locatio conductio operis*) and the contract of mandate.

In the case of an undertaking contract, to the extent that they have not been paid by the contractor, the sub-contractors who have carried out an activity for the provision of services or the execution of the work have a direct action against the beneficiary up to the amount that the latter owes to the general contractor at the time the action is brought.[82] The marginal title of the relevant Article 1856 of the RouCC refers to 'laborers,' but the normative text speaks more generally of 'persons.' In our opinion, the text also applies to a sub-contractor who is a legal person, and the notion of 'laborer' should not be construed as restricting the applicability of the text to sub-contractors who are natural persons.[83] Thus, the sub-contractor directly exercises the contractor's rights arising from the contract concluded by the general contractor with the beneficiary of the undertaking.

In the case of mandate, if the mandatary has substituted in his or her place another person in the performance of the mandate without the mandator's authorization, the mandator still has an *action directe* against the person with whom the mandatary has substituted himself or herself.[84]

80 For a general analysis, see Popa, 2020, pp. 204–221.
81 RouCC, Article 1807.
82 RouCC, Article 1856.
83 Veress, 2013, pp. 81–88.
84 RouCC, Article 2023.

Action directe should not be confused with an indirect action (*action oblique*).[85] In the case of an *action directe*, the creditor exercises a right of his or her own, and if this action is admitted, the creditor will acquire an enforceable title against the debtor of his or her debtor, and such a creditor shall solely benefit from any assets obtained as a result. In the case of an indirect action, the creditor exercises the rights of his or her debtor, and if the indirect action succeeds, any value claimed is obtained from among the assets of the debtor to the benefit of all of that debtor's creditors.

6. Serbia, Croatia, Slovenia

6.1. Serbia

Concerning the subjective scope of the legal effects of a contract, the SrbLO declares that a contract creates claims and obligations for contracting parties and their universal legal successors, unless otherwise stipulated in the contract or as may be implied from the nature of the contract.[86] However, the law enables the parties to stipulate a claim on behalf of a third party as well.[87] Under the SrbLO, if the creditor stipulates a claim in his or her own name, but on behalf of a third party, the latter gains an own, that is, a direct claim against the debtor, unless otherwise agreed upon by the parties or implied by the circumstances of the transaction. However, the creditor also retains the right to request performance from the debtor on behalf of the beneficiary.[88] The consent of the beneficiary is not required for the validity of a contract on his or her behalf.[89] However, this by no means implies that his or her consent is without any legal relevance. A claim stipulated on behalf of a third party is revocable by the creditor until the beneficiary accepts it.[90] The rights of the beneficiary may be stipulated for the case of a creditor's death as well. In such case the creditor may revoke the right at any time, including through a revocation by a last will, unless the contract or the circumstances of the given case imply otherwise.[91] If the creditor effects the revocation within the mentioned time limits or the beneficiary rejects the right, it shall belong to the creditor unless otherwise agreed in the contract or implied by the nature of the transaction.[92] Besides the right to request performance from the debtor, the beneficiary is entitled to invoke all objections from the contract by which his or her right has been instituted.[93]

85 A creditor whose claim is certain and past due may, in the debtor's name, exercise the rights and actions of the debtor where the debtor, to the prejudice of the creditor, refuses or neglects to exercise them.
86 SrbLO, Article 148 (1) and (2).
87 SrbLO, Article 148 (3).
88 SrbLO, Article 149.
89 Perović in Perović, 1995, p. 299.
90 SrbLO, Article 150 (1).
91 SrbLO, Article 150 (2).
92 SrbLO, Article 152.
93 SrbLO, Article 151.

It goes without saying that parties to a contract may not institute obligations at the expense of a third party. Such a contract does not bind the third party without his or her consent to the obligation. The question, though, arises whether the party's commitment that a third party will perform an obligation creates an obligation for that party. The SrbLO prescribes that a party's commitment that a third party shall perform an obligation does not oblige the third party, but the party who made the commitment shall be held liable for the damage the other party sustained because the third party refused to assume or perform the obligation according to the contract.[94] However, the contracting party who made a commitment at the expense of a third party may be released from liability for damage if his or her commitment was only to take actions to have the third party perform an obligation, but the third party has not performed despite the contracting party's best efforts.[95] This is a case of the so-called obligation of means (French: *obligation moyen*), whereby the debtor may be relieved from liability for damage even if the envisaged result or purpose is not achieved, but the debtor demonstrated best efforts and good faith in achieving it.[96]

The SrbLO envisages a range of cases in which the creditor may request the performance from the debtor's debtor without voluntary assignment of claim (*action directe*). The most notable are the contract on lease in which the lessee subleases the object of the lease. For such case the SrbLO prescribes that the lessor is granted a direct claim against the sub-lessee for the amount of rental payments payable by the lessee based on the basic lease contract.[97] Similarly, the rules on the general contract for works (*locatio conductio operarum*) do not require the contractor to perform the contractual obligations personally, unless the contract or the nature of the assumed obligation implies otherwise.[98] He or she may employ a sub-contractor to perform his or her contractual obligations. In such case, however, the sub-contractor gains a direct claim against the client for the amount of obligation of the contractor toward him, up to the amount the client owes the contractor at that time, provided they have been admitted by the contractor.[99] Similar rules exist in the case of sub-license contracts[100] and sub-mandate contracts.[101]

6.2. Croatia

The HrvLO contains verbatim the same rules on contracts for the benefit of a third party and commitment of the contracting parties on the expense of the third party as the SrbLO.[102]

94 SrbLO, Article 153 (1).
95 SrbLO, Article 153 (2).
96 Perović, 1986, p. 445.
97 SrbLO, Article 589.
98 SrbLO, Article 610. Sec. 1
99 SrbLO, Article 612.
100 SrbLO, Article 707. Sec. 2.
101 SrbLO, Article 753. Sec. 5.
102 HrvLO, Articles 337–341.

The HrvLO also knows of several cases of *action directe*. The most notable are those prescribed for the sub-lease,[103] the sub-rent,[104] sub-contracting or works,[105] sub-license,[106] and sub-mandate[107] contracts.

6.3. Slovenia

The SvnCO also did not depart from the norms on former federal rules on contracts in the benefit of a third party and commitment of the contracting parties at the expense of a third party. The regulation is the same as in the SrbLO.[108]

Just as in the SrbLO and the HrvLO, a direct claim is possible, among others, in the case of sub-lease,[109] sub-contracting of works,[110] sub-license,[111] and sub-mandate[112] contracts.

7. Slovakia

In Slovakia, the contract for the benefit of a third party (*zmluva uzavretá v prospech tretieho*) is explicitly regulated in § 50 of the SvkCC. Under such a contract the third party is entitled to directly demand performance from the debtor as soon as he or she consents to such a contract. Whether a contract entitles a third party to demand performance from the debtor will depend on the interpretation of the contract; the law does not stipulate any presumption that in the event that the performance is to be rendered to a third party, that third party is directly entitled to performance under the contract.

There is no prescribed form for a contract for the benefit of a third party, but if its content is a contract for which a certain form is prescribed, then the contract for the benefit of a third party must have the same form. For example, if it is a donation contract for the benefit a third party where the movable gift is to be handed over only after the conclusion of the contract, the contract has to be in writing.[113]

The third party does not have to be specified in the contract; it is sufficient if it is only identifiable. It is therefore not necessary for the third party to already exist at the time of the conclusion of the contract.[114]

103 HrvLO, Article 539.
104 HrvLO, Article 568.
105 HrvLO, Article 602.
106 HrvLO, Article 720 (2).
107 HrvLO, Article 767 (5).
108 SvnCO, Articles 126–130.
109 SvnCO, Article 608.
110 SvnCO, Article 631.
111 SvnCO, Article 724 (2).
112 SvnCO, Article 770 (5).
113 Fekete, 2018; Mazák, 2010, p. 180; Dobrovodský, 2019.
114 Fekete, 2018; Dobrovodský, 2019.

In principle, any contract can be concluded for the benefit of a third party. According to the literature,[115] a purchase contract or other contract on the transfer of ownership may also be concluded in this form, although this opinion may be disputed given that the acquirer should be a party to such a contract, not just a third party entitled to performance. However, it is not excluded that a contract for a future contract, also called a pre-contract (*pactum de contrahendo*), may be concluded in the form of a contract for the benefit of a third party.

A contract for the benefit of a third party cannot be equated with a contract with a protective effect for third parties. The construction of such a contract is in principle not necessary in Slovak law due to the widely understood general duty of care (*neminem laedere*) according to § 415 of the SvkCC, which can sufficiently protect the interests of third parties. However, this problem may arise when the claim of third parties is of a non-contractual nature: It may therefore be questionable whether their claim will be limited, for example, by restrictions resulting from the contract, e.g., as regards the amount of damages.

A contract for the benefit of a third party may also be concluded in such a way that the debtor will not perform until after the creditor's death. Such a contract is not, in fact, a *mortis causa* contract. It can therefore be concluded within the framework of contractual autonomy. However, if the performance under this contract is intended for the creditor's heir and the heir accepts this performance, then this performance can be considered a gift from the creditor, which means that the rules on imputing the gift onto the share[116] of inheritance will also apply to it.

A contract for the benefit of a third party may not impose any obligations on the third party. However, we believe that this does not preclude the right of the third party to be conditional on that third party doing something or omitting something. As this act or omission will not be a duty of the third party, though, it will therefore not be possible to demand it from that third party, and the third party's actions which are in conflict with this condition do not involve any liability of the third party toward the creditor or debtor. The right of the third party can thus also be granted contingent on a resolutory condition (*conditio resolutiva*).

According to Slovak law, the right of a third party to performance does not arise together with the conclusion of the contract for his or her benefit, but only after he or she has given his or her consent to the contract.[117] Thus, only a creative authorization for consent (*facultates, Gestaltungsrecht*) arises directly from the contract, which in the case of its use establishes a direct subjective right of the third party to performance against the debtor.

The law does not require any form for consent, so it can also be granted *per facta concludentia*.[118] The law also does not specify to whom the consent is to be addressed;

115 Fekete, 2018.
116 SvkCC, § 484.
117 SvkCC, § 50 (2).
118 Mazák, 2010, p. 181.

however, we believe that it should be addressed to both the creditor and the debtor.[119] However, by giving consent, the third party does not become a party to the contract, only a person entitled to performance under that contract.

It is not excluded that a third party may refuse to give consent: In such a case the creditor will be entitled to performance under that contract, unless otherwise agreed.[120]

Until the third party gives his or her consent, the contract is valid only between the creditor and the debtor,[121] which means that the contract can be terminated or amended so that it is no longer a contract for the benefit of a third party, or it can be otherwise modified (e.g., the content of the performance or the person of the third party can be modified as well). However, unless otherwise agreed, the creditor cannot do so unilaterally without the agreement of the debtor. That means that despite the fact that the third party has not yet given her consent to the contract, the creditor cannot unilaterally revoke his or her right to performance (or, more precisely, his or her right to consent to the contract by which, in turn, he or she obtains the right to the performance). On the other hand, until the third party gives his or her consent, the creditor may assign the claim to another person or make it an object of a pledge.[122]

Until the consent is granted, the debtor is obliged to perform to the creditor and the creditor is entitled to demand that the debtor provide such a performance.[123] However, as soon as the third party agrees to the contract, the creditor loses this right. It is acknowledged, though, that the creditor may still demand that the debtor render the performance under contract to a third party (i.e., not to the creditor), as the creditor may have an interest in having the third party obtain performance.[124] In the event of non-compliance, the creditor may also claim compensation for the damage caused to him. Such damage may consist, for example, of default interest that the creditor had to pay to a third party if the performance by the debtor was to extinguish the creditor's debt to that third party.

Regarding remedies for non-performance available to a third party that has given his or her consent to the contract, in the event of non-performance, such third party is entitled to compensation for the damage caused to him or her by the non-performance to the extent of a positive contractual interest (i.e., expectation interest) or negative interest (i.e., reliance interest), whichever is higher. However, the extent of the damage will be limited to the amount that the debtor could have foreseen when concluding the contract.[125]

After giving consent, a third party may waive her right to performance. In this case, the debt is extinguished, i.e., the debtor is not obliged to perform to either the

119 Mazák, 2010, p. 181.
120 SvkCC, § 50 (3).
121 SvkCC, § 50 (3).
122 Mazák, 2010, p. 181.
123 SvkCC, § 50 (3).
124 Fekete, 2018.
125 SvkCommC, § 379.

third party or the creditor. However, the law allows that it be agreed in the contract that in such a case the creditor will regain the right to performance.[126]

The debtor is entitled to raise against the third party all objections that he or she could also raise against the creditor.[127] He or she may therefore also raise an objection based on the statute of limitations, as the consent does not affect the running of the limitation period in any way. The debtor may also raise any objections that the debtor may have against a third party. The debtor can, for example, set off his claim against the third party's claim for the performance arising from the contract for the benefit of that third party. However, the debtor may not raise objections against a third party that the creditor may raise against that third party in relation to the *valuta* relationship.

As far as the arbitration clause is concerned, this issue is not addressed in the SvkCC or in case law or legal literature. However, we believe that this clause will also bind a third party as a result of § 3 (2) of the Arbitration Act (No. 244/2002 Coll.).

Regarding the special regulation of contracts for the benefit of a third party, Slovak law specifically regulates legal relationships for the benefit of a third party, e.g., in the case of insurance.[128] In such a case the general provisions[129] of the SvkCC regulating the contract for the benefit of a third party must in principle be applied subsidiarily.[130] However, as far as life insurance is concerned,[131] the general provisions cannot be applied.[132] That is also true for the specifically regulated form of the contract for the benefit of a third party—the order to pay or deliver (*Anweisung*) according to § 535 of the SvkCC.

8. Concluding remarks

The construction of a contract for the benefit of a third party based on the existence of a direct legal claim of the third party, i.e., of the beneficiary against the debtor, is known in all the jurisdictions analyzed. Indeed, this construction is expressly provided for in all these jurisdictions. Although the details vary from one legal order to another, it can be said in general that the basis is the same in all cases and the arrangements show substantial overlap. At the same time, it should be added that the legislation in each jurisdiction allows the parties to a contract to negotiate different rules for their contract than those set out in the legislation.

In all the jurisdictions compared, it is possible to conclude a contract for the benefit of a third party in such a way that the third party does not have a direct claim

126 SvkCC, § 50 (2).
127 SvkCC, § 50 (2).
128 SvkCC, § 794.
129 SvkCC, § 50.
130 SvkCC, § 794.
131 SvkCC, § 817.
132 Fekete, 2018.

to performance, but also in such a way that he or she does have a direct claim. Thus, all legislations—as mentioned above—allow the third party to have a direct legal claim to the performance. However, the legislations differ in the guidance on how to determine whether the benefit to the third party was agreed with or without a direct claim. In Poland, for example, the rule is that if it has been agreed that the debtor will benefit a third party, that party, in the absence of any other agreement, acquires a direct claim. In other jurisdictions, whether a third party has a direct claim depends not only on the content of the contract but also on other circumstances. In the Czech Republic, for example, the answer to this question may also depend on the nature or purpose of the contract; in Hungary, it may also depend on the circumstances of the case. In addition, Czech legislation contains a presumption that if the performance is mainly for the benefit of the third party, then the third party has a direct claim.

The legislation of the analyzed jurisdictions does not provide for any specific form for a contract for the benefit of a third party. Thus, a contract may be concluded otherwise than in writing. However, if the substance of an individual contract for the benefit of a third party consists in a contract for which a certain form is prescribed, then, according to the doctrine in some jurisdictions (the Czech Republic, Slovakia, Poland), the contract for the benefit of a third party must comply with that form. As regards the identification of the third party (beneficiary), the legal systems do not require that the third party be precisely defined in the contract; it is sufficient that he or she be at least identifiable. Nor is it required that the third party exist at the time the contract is concluded; it is sufficient if he or she exists at the time of performance.

Some jurisdictions require the consent of the third party for the creation of a direct claim (Poland, Romania, Slovakia), but in other cases no acceptance is necessary. No special form is prescribed for acceptance. As regards the time when the direct claim arises, in jurisdictions where consent is required, the claim arises only upon the granting of consent. Where consent is not required, according to the legal literature of some states (the Czech Republic) or express legislation (Hungary), the claim already arises when the third party is notified of that claim. At the same time, some jurisdictions expressly provide that the creditor is the beneficiary of the contract until the time of acceptance, i.e., that the creditor has the right to performance (Slovakia); other jurisdictions do not share this conclusion (e.g., Poland). As regards the possibility for the third party to waive his or her claim after he or she has consented to it, this possibility is expressly provided for in Slovakia: In such a situation the debt is extinguished unless otherwise agreed.

In all jurisdictions, it is possible for a contract for the benefit of a third party to be modified or cancelled within a certain time. In some cases (the Czech Republic) this can be done up to the time when the third party has been notified of the claim, in others (Poland, Romania, Serbia, Croatia, Slovenia, Slovakia) up to the time when the third party has consented. In most cases it is also possible for the creditor to cancel the claim up to this time on his own, but in some cases the debtor's consent is required (Slovakia). In Romania, the creditor can also cancel the claim by himself or

herself, but cannot do so without the debtor's consent if the debtor had an interest in the performance.

In accordance with individual autonomy, all jurisdictions allow the third party to reject the claim. In such a case, some jurisdictions expressly provide that the third party is treated as if he or she had never acquired the claim (the Czech Republic, Romania). Some jurisdictions (the Czech Republic, Hungary, Romania, Serbia, Croatia, Slovenia, Slovakia) expressly include a rule that the creditor is entitled to the performance in such a case. However, some legal orders make this rule conditional on the fact that nothing else has been agreed or that nothing else follows from the nature or purpose of the contract.

All the jurisdictions compared expressly allow the debtor to assert against the third party all the defenses that the debtor could assert against the creditor under a contract for the benefit of a third party.

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Chapter XI

Changes in Circumstances: Frustrated Contracts and Legislative or Judicial Modification of the Contract

1. General remarks

1.1. Overview

In some instances, the performance of the contract in the conditions expected by the parties is not possible because of changes in the circumstances in which it was concluded. Occasionally these changes in circumstances justify even the adjustment of contracts by the legislator itself. Sometimes the law allows courts to intervene in contracts to rebalance them if the economic conditions in which they were concluded had changed radically. A special case is when the contract can no longer be performed because of an external event (frustration of contract). It was stated that 'it is sometimes difficult to draw a line between circumstances that render the performance of the contract impossible and those that render it more onerous or more costly or frustrate the purpose of the transaction.'[1] The challenge for national legislators is to establish a set of conditions reflecting the specificity of very different cases, which can appear at an individual level, or on a larger scale, at the social level.

1 Kötz, 2017, p. 279.

Veress, E., Hulmák, M., Balliu, A., Tomczak, T., Dudás, A., Hlušák, M. (2022) 'Changes in Circumstances: Frustrated Contracts and Legislative or Judicial Modification of the Contract' in Veress, E. (ed.) *Contract Law in East Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 347–388. https://doi.org/10.54171/2022.ev.cliece_chapter11

1.2. Legislative modification of contracts

The legislative modification of the contract is a particular and extraordinary way of intervening in the private law relationship between the parties.[2] In this case, the contract is amended by an act, justified by changes in circumstances. The classical theory of the autonomy of will denies the possibility of legislative intervention in contracts, but the political practice exists despite the complexity. For example, there are cases in which the law provides for the legal extension of certain contractual terms; the legislator can choose the forced extension of certain contracts. 'The legal extension of the contract consists in the forced postponement of its existence with a certain time interval, after the fulfillment of the extinctive term established by the agreement of the contracting parties.'[3]

The state protected, for example, in some Central and Eastern European countries, the lessees of the buildings nationalized by the communist regime who were subject to restitution to former owners (or their heirs). The law maintained the lease agreements concluded by the state with these lessees before the restitution of the building, extending their duration, even several times, and also establishing the amount of rent due after restitution to the owners based on the income of the lessee.

In other cases, states may institute a moratorium through legislative means. For example, the restitution of bank loans in case of economic crises or the COVID-19 pandemic.

1.3. Judicial modification of contracts for unforeseen changes in circumstances

According to the classical theory of contractual freedom and autonomy of will, courts cannot intervene in contracts. They cannot modify agreements because only the consensus of the contracting parties can amend and adapt a contract. The role of the court is manifested in the interpretation (construction) and the enforcement of the contract, the latter by coercing the party that does not perform its obligations willingly. Classical civil law recognizes the court's right to grant grace periods to the debtor. In general, any judicial intervention in contracts is incompatible with the traditional concept regarding the binding force of the contract.[4] Nevertheless, there are situations in which 'the infinite diversity of the contractual phenomenon makes the mechanical application of the law difficult and demanding,' and the initial contractual balance is broken 'because of changing economic, political, monetary or social context,' consequently one of the contracting parties is prejudiced.[5]

For example, a lease is concluded with a predetermined rent for three years. In the first year, rampant inflation occurs, which significantly reduces the actual value of the rent. Alternatively, an individual takes out a loan in Swiss Francs at a time when the exchange rate is favorable. He or she then realizes that his or her income is

2 Vékás, 2019, p. 192.
3 Pop, 2009, p. 531.
4 Veress, 2020, p. 60.
5 Pop, 2009, p. 533.

payable in the national currency. After a while, the exchange rate is altered abruptly because of shifting economic conditions and he or she is forced to buy Swiss Francs, which results in paying a much higher percentage of his or her income than when the loan was contracted. In such situations, judicial intervention in contracts restores contractual balance. There are, of course, other, less energetic methods of restoring the contractual balance which is more compatible with the classical conception of the binding force of the contract. According to the theory of contractual solidarity, the parties may even be obliged to proceed with the adaptation of the contract to the new realities. Another method is to insert an indexation clause, i.e., a clause which automatically pegs the contract price to the inflation index or other indexation factors. The parties may also establish review clauses (hardship clauses), which oblige the contracting parties to renegotiate the contract if there are objective changes in economic or monetary circumstances. By such a clause, the parties may even empower the court or arbitrator to restore the contractual balance if the rebalancing negotiations fail.

There is a fundamental difference between unforeseen changes and imbalance because of *laesio enormis*.[6] In the case of *laesio enormis*, the contractual imbalance is contemporaneous with the conclusion of the contract. In contrast, in the case of unforeseen changes in circumstances, the imbalance occurs after the conclusion of the contract, during the execution of the agreement in time. A distinction must also be drawn between *force majeure* and unforeseen changes. *Force majeure* results in the suspension or termination of the contract. The first difference is that in the event of *force majeure*, the adaptation of the contract, the main consequence of unforeseen changes, is not possible. Another difference is that in the case of force majeure, the contract is impossible to execute, while in case of unforeseen changes, the contract can be performed, but it becomes excessively onerous for the debtor.

A judicial modification of the contract is based on the idea that the parties expressed their consent to the contract based on the existing circumstances (*rebus sic stantibus*) at the moment of conclusion of the contract. Even with the current development of civil laws, when the binding force of the contract is not treated with extraordinary rigidity, judicial modification of the contract remains a controversial institution.

Generally, the conditions for judicial modification of the contract are the following:[7]

— the performance of the contract on the part of the debtor has become excessively onerous, so there is now a serious imbalance between it and the consideration received,
— the exceptional change of circumstances occurred after the conclusion of the contract,

6 For this issue, see Chapter V above.
7 Vékás, 2019, p. 191; Veress, 2020, pp. 62–63.

— the change of circumstances, as well as its extent, were not and could not reasonably have been considered by the debtor at the time of concluding the contract,
— in most jurisdictions, there is also a substantive and procedural preliminary requirement according to which the debtor should first try to renegotiate the contract to avoid overloading the courts with such cases and cooperate with the creditor in rebalancing the contractual relationship.

In a situation where the performance of the contract has become excessively onerous because of an exceptional change of circumstances that would make it manifestly unfair to oblige the debtor to perform the obligation, the court has two options. First, it may order the contract's adaptation to distribute the losses and benefits resulting from the change of circumstances equitably between the parties. The notion of adaptation also includes the possibility of suspending the performance of the contract. Second, it may decide to terminate the contract at the time and under the conditions it deems fit.

1.4. Frustration of contract

In some cases, the performance of the contract can become impossible. The impediments that lead to this can be physical (a good is destroyed), legal (international sanctions instituted after the conclusion of the contract prohibit performance), or economic (changes in economic conditions which make the performance impossible). A comparison is possible in the case of unforeseen changes in the circumstances, but the dissimilarity is also essential: unforeseen changes leave the performance possible, but unfairly onerous for the debtor. The difference is basically in the intensity of the changes. Commonly, it is a *vis maior* (act of God) that frustrates a contract. However, national legislation can recognize other legitimate causes of frustration, such as fortuitous circumstances (*casus fortuitus*). Acts of God and fortuitous circumstances frustrate the contract if these circumstances do not result in a simple delay or suspension of the parties' duties.

In case of frustration, the contract shall terminate. National legal rules can impose information duties (the first party to become aware that the performance has become impossible must inform the other party without delay).

2. The Czech Republic

2.1. Legislative modification of contracts

Legislative intervention in contracts is not very common in the Czech Republic. Historically, Czech law only exerted such legislative modifications on two occasions. One being the transformation of the economy after the fall of the communist regime and the second being the COVID-19 pandemic.

As in other post-communist states, the Czech legislator concerned itself, *inter alia*, with legal relations between the lessees and the owners of the leased premises. Even more so since in 1991, the communist concept of the right of personal use of apartments was transformed into the more traditional concept of the lease.[8] Pursuant to the previous CzeCC adopted in 1964, the lessor was entitled to unilaterally raise the rent, while the particulars of this measure were supposed to be set out in a special legislative act. To protect the lessees against sudden political and economic changes (or so they proclaimed), the Czech Government consecutively adopted special regulations to sustain very low and gradual raises of the rent. All these regulations had a substantial impact on ongoing lease agreements, preventing the lessor from unilaterally increasing the rent beyond the limit set out in the respective regulation and, at a certain point in time, even depriving the lessor of any right to unilaterally raise the rent. The Czech Constitutional Court declared all of these unconstitutional, mainly because they were disproportionately unfavorable to the rights of the owners, and struck them down.[9]

To mitigate the economic consequences of the COVID-19 crisis, the Czech legislator adopted several special acts modifying contracts concluded before their adoption. These acts either deprived the lessor of his or her right to unilaterally terminate the lease agreement for the lessee's delay with payment of the rent[10] or entitled a loan debtor to postpone the due date of his/her installments.[11] Of course, both cases were subject to the fulfillment of several conditions set out in the respective act. Privation of a right to unilaterally terminate the lease agreement (in cases where the lease referred to flats) has already been subject to review by the Czech Constitutional Court. This regulation was found proportionate and in compliance with the Czech Constitution.[12]

2.2. Judicial modification of contracts for unforeseen changes in circumstances

Changes in circumstances (*změny okolností*) are generally regulated for all types of contracts in §§ 1764 – 1766 of the CzeCC, albeit with separate modifications for some types of contracts (usually having less severe preconditions and different legal consequences).[13] For changes in circumstances to have any relevance to the contract under the sections cited, the following conditions must be fulfilled. First, there must be a change in circumstances (usually originating in a natural or socio-economic event but may also be constituted by changes in regulation). Second, the changes in circumstances must be substantial, i.e., they must create a gross disproportion in the rights and duties of the parties leading to an imbalance of performances on one side,

8 Act No. 501/1991 Coll.
9 See decisions Ref. No. Pl. ÚS 3/2000, Pl. ÚS 8/02, and Pl. ÚS 2/03. Herc, 2009, pp. 601–611 (see also Kuloglija Podivínová, 2012, pp. 494–499).
10 Act No. 209/2020 Coll., and Act No. 210/2020 Coll.
11 Act No. 177/2020 Coll.
12 See Decision Ref. No. Pl. ÚS 21/20.
13 See e.g., CzeCC, §§ 1788 (2), 2000, 2059 or 2287.

such as a disproportionate rise of the costs to render performance or a disproportionate diminution in the value of the subject of the performance. There must be a causal link between the changes in circumstances and the gross disproportion in the rights and duties of the parties. Third, the changes in circumstances must have occurred only after the conclusion of the contract or the party became aware of it only after the conclusion of the contract. Forth, the party to the contract must prove that it could not have foreseen the changes in circumstances. What the party could or could have not foreseen is assessed by the standard of an average person or, in the case of professionals, by the standard of a professional. Fifth, the party must prove that it could not have affected the changes in circumstances.[14]

If all the conditions above are fulfilled, then the affected party has the right to renegotiate the contract with the other party. Asserting this right does not entitle the affected party to suspend performance. Upon failure to reach an agreement within a reasonable time limit, a court may, on the application of any of the parties, decide to change the contractual obligation by restoring the balance of rights and duties of the parties or to extinguish it as of the date under the conditions specified in the decision. The court is not bound by the applications of the parties. A court will dismiss an application to change an obligation if the affected party fails to assert the right to renew contractual negotiations within a reasonable time after it ascertained the change in circumstances (this time limit is presumed to be two months).[15]

There is an unfinished discussion in the Czech legal literature as to whether the court may modify the contract also for the past. Traditionally decisions instituting changes in contracts had only *ex nunc* effects.[16] Yet, there are some exceptional *ex tunc* effects (back to the initiation of the proceedings), e.g., the change of rental conditions under § 2249 of the CzeCC. Nowadays, there is a tendency to allow *ex tunc* effects, but not earlier than the moment when the change of circumstances occurred.[17] There is, unfortunately, no case law on the matter.

The rules of changes in circumstances are excluded if the affected party assumed the risk of such a change. The same must apply accordingly to the contracts that presuppose some aspect of risk in their very nature, e.g., to aleatory contracts (contracts where the extent of the performance or the counter-performance to be rendered by at least one party is contingent on a factor not known to that party at the moment the contract is concluded and is therefore uncertain).[18]

Under Czech law, the court has no right to grant a grace period to the debtor. The only exception is when the court finds the maturity date grossly unfair to the creditor under § 1964 of the CzeCC. However, an excessively high amount of contractual penalty can be reduced.[19]

14 Petrov et al., 2019, pp. 1835–1836. See also Hulmák et al., 2014, p. 222.
15 CzeCC, §§ 1765 and 1766.
16 Králík and Lavický, 2012; Hulmák et al., 2014, p. 237.
17 Melzerová, 2018, S. 179; Petrov et al., 2019, p. 1837.
18 Hulmák et al., 2014, p. 222.
19 CzeCC, § 2051.

2.3. Frustration of contracts

The frustration of the contract is regulated in §§ 2006 et seq. of the CzeCC. If the contract becomes frustrated, the obligation is extinguished *ex lege* with an *ex nunc* (non-retroactive) affect.[20] The debtor is obliged to inform the creditor about the frustration of the contract without undue delay after he or she is aware of the frustration. If the debtor fails to inform the creditor, he or she is liable for all the damages arising to the creditor as a result of not having been made aware of the frustration. If only a part of the performance becomes unrealizable, the obligation is extinguished only to the extent of the affected part, unless the nature of the obligation or the purpose of the contract of which the parties were aware of indicate that the performance of the rest is useless for the creditor.[21]

The conditions under which the contract may be considered as frustrating are as follows. The first condition is when the performance becomes unrealizable (*nesplnitelný*). It is of no relevance whether the performance becomes unrealizable as a result of *vis maior* (act of God – *vyšší moc*) or merely as a result of *casus fortuitus* (*náhoda*). The performance must become unrealizable after the conclusion of the contract. If the performance is unrealizable at the moment of the conclusion of the contract, the contract is null and void because of the initial impossibility of the performance (*počáteční nemožnost plnění*). In general, the objective unrealizability of the performance is required for the frustration of the contract to occur (if the performance is impossible for anyone) – regardless of whether there is a factual or legal objective impossibility to render performance. Thus, if the debtor is able to render the performance under more difficult conditions at higher costs with the help of another person or only after a given period, the contract will not be considered frustrated. However, the subjective unrealizability of performance can, under some conditions, acquire the quality of an objective one, i.e., if the debtor would have to put forth completely excessive costs or effort to render performance. The last condition for the contract to become frustrated is that the performance is permanently (not temporarily) unrealizable.[22]

The Czech Supreme Court concluded that the contract is frustrated for example if 1. the individually designated subject of the performance is destroyed;[23] 2. the performance to be provided has been already rendered by someone else;[24] or 3. the performance cannot be rendered in the way and the place agreed in the contract and the contract precludes the performance in another way or place.[25]

In this context, it is important to note that despite the individually designated subject of the performance being destroyed, the contract will not become frustrated in case of *mora creditoris* (unless the subject is destroyed by the debtor himself). In such a case, the creditor will remain obliged to pay the price for the performance, etc.[26]

20 Hulmák et al., 2014, p. 1219.
21 CzeCC, §§ 2006–2007.
22 Petrov et al., 2019, pp. 2163–2167.
23 Ref. No. 25 Cdo 4850/2009.
24 Ref. No. 23 Cdo 4092/2007.
25 Ref. No. 33 Cdo 2726/2009. Petrov et al., 2019, pp. 2163–2167.
26 Petrov et al., 2019, pp. 2126.

3. Hungary

3.1. Legislative modification of contracts

The amendment of a contract by the legislator is exceptional. This is explained by the fact that the contracting parties are in a position of equality, instituted by the will of the parties. State intervention cannot be interpreted as anything other than a bias in favor of one party to the detriment of the other. State interference is also a restriction of contractual freedom. In consequence, legislative modification of a contract before entry into force of the law is exceptional. On the one hand, judicial amendment of contracts is a way of dealing with individual situations. On the other hand, when a mass crisis affecting a high number of contracts occurs, it is not the courts but the legislature that can make the appropriate adjustments for a generally equitable effect.

The HunCC indirectly recognizes the possibility of amending contracts by legislation since it contains provisions protecting the contracting parties in such a case. Article 6:60 of the HunCC provides that if a law changes the content of a contract concluded before its entry into force and the changed content of the contract is prejudicial to the essential legal interests of either party, that party may apply to the court to modify the contract or may withdraw from the contract.

The Constitutional Court also chiseled the issue of legislative modification of contracts:

> 'the requirements of legal certainty, freedom of contract, and confidence in the performance of the contract are met if the legislator is unable to amend individual contracts by judicial means when amending a large number of contracts. Long-term private legal relationships can be shaped by legislation applying the *clausula rebus sic stantibus*. Judicial amendment of contracts is a means of rebalancing the divergent interests of private parties by weighing up all the circumstances of the case. A legislative modification of a contract must also take into account, as much as possible, the equitable interests of each party, i.e., such a modification must also seek to achieve a balance of interests in the changed circumstances.'[27]

So, the possibility of legislative modification of a contract is not limitless, and the strict requirements prescribed for judicial modification of contracts presented below must be observed.

The most recent case where the legislature amended a contract occurred in the 1990s with changes to interest rates on home loans. The Constitutional Court ruled that

> 'circumstances unforeseen at the time of the conclusion of the contract may substantially alter the situation of the contracting parties, the relationship between

27 Constitutional Court decision No. 8/2014. (III. 20.) 91.

> rights and obligations, and may make it extremely onerous or even impossible for one of them to maintain the contract unchanged or to perform it. In such cases, therefore, public intervention, reassessment and modification of contractual obligations, and possibly termination of contracts, are clearly necessary.'[28] Recently, a series of acts modifying loan contracts was passed, in which the loans were contracted in foreign currency (Act XCVI of 2010, Act LXXV of 2011, Act CXVI of 2011, Act CXXI of 2011, Act XVI of 2012, Act XXXVIII of 2014, Act XL of 2014, etc.). The Constitutional Court maintained its jurisprudence since the circumstances justified legislative intervention while there was general adherence to the principles dictated by the *clausula rebus sic stantibus*.[29]

3.2. Judicial modification of contracts

In Hungary, the judicial modification of the contract is legislated by Article 6:192 of the HunCC. The principle here is also the binding force of the contract: the contract is applied and enforced by the court and is binding on the court. Therefore, judicial modification of a contract is only possible within the narrow limits set by law. According to the legal text, either party may request the court to amend the contract if, because of a circumstance that occurred after the conclusion of the contract, the performance of the contract with unchanged conditions would harm their substantial legal interests in the long-term legal relationship between the parties, and

- the possibility of a change in the circumstances was not foreseeable at the time when the contract was concluded,
- the change in circumstances was not caused by the party; and
- the change in circumstances falls outside the party's normal business risk.

The text of the law indirectly but explicitly excludes the possibility of amending the contract *ex officio*. The second condition is that the contract must be of a longer duration. In practice, for example, leases, long-term financial contracts, maintenance contracts, and even service contracts can be considered durable. The change of circumstance must occur unexpectedly and after the conclusion of the contract, while also substantially harming their legal interests. However, the court will reject the request to amend the contract if the change in circumstances falls within the party's normal business risk, or if the changes were caused by the party or were foreseeable. For example, a change in supply and demand is a business risk factor that does not give either party the right to request a contract modification.[30] The law also does not allow for retroactive judicial amendment of the contract. The legislator allows the contract to be modified from the date of the court filing of the action at the very earliest, but judicial discretion may allow a later date.

28 Constitutional Court decision No. 32/1991. (VI. 6.) 3.
29 Constitutional Court decision No. 3048/2013. (II. 28.) 33. For further details, see Juhász, 2019, 247–254.
30 BH1988. 80.

If these conditions are fulfilled, the court may amend the contract from the date determined by it. The judicial modification aims to prevent the change in circumstances from harming the substantial legal interests of any of the parties. It is also very important to note that the Curia (the supreme court of Hungary) has ruled that judicial contract modification is not a suitable legal instrument to remedy the consequences of economic changes on a societal scale when changes in circumstances are affecting a large number of similar contracts in a similar way but to the detriment of only one party. Such changes require legislative intervention. If the adverse consequences have been remedied by the legislature by means of an act, legislative intervention in this area precludes individual judicial amendment of contracts.[31]

3.3. Frustration of contracts

Hungarian contract law has an interesting approach[32] toward the frustration of contracts: it envisages frustration as a breach of contract. In this context, if performance has become impossible after the conclusion of the contract, this shall terminate. If performance was impossible at the time the contract was concluded, the contract is null and void.[33] However, an agreement – the performance of which was impossible at the time the contract was concluded – is valid if the conditions for performance are created in due time by one of the parties. For example, the mere fact that the seller is not the owner of the subject matter of the contract at the time of its conclusion (the absence of ownership) does not preclude the conclusion of the contract.[34] If the non-owner seller undertakes in the contract of sale, at the time of its conclusion, to transfer ownership of the property, but physical or legal reasons preclude him or her from acquiring ownership of the property at a later date, the contract contains an impossible purpose and is therefore null and void.[35]

The party who gains awareness of the fact that the performance has become impossible is required to inform the other party of it without delay. Damage arising from failure to provide information shall be compensated by the party who was at fault with respect to that failure.[36]

There are three possible situations:

— If neither of the parties is liable for the performance becoming impossible (objective frustration of contract), monetary reimbursement shall be provided for the (partial) performance rendered before the termination of the contract. If the other party did not provide the consideration corresponding to the monetary service already performed, the monetary service shall be returned.
— If one of the parties is liable for the performance becoming impossible, the other party shall be released from the performance obligation arising from the

31 Civil judgement for unity of the jurisprudence No. 6/2013, point 7.
32 HunCC, Article 6:179–182.
33 HunCC, Article 6:107.
34 EBH 2003. 867.
35 BDT 2004. 1055.
36 Vékás, 2019, pp. 299–300.

contract and may claim compensation for the damage caused as a result of the breach of contract.
— If both parties are liable for the performance becoming impossible, the contract shall terminate and the parties may claim damages from each other *pro rata* to their contribution.

If, in the event of the provision of an asset subject to performance becoming impossible, the residue of the good or a part of it remaining in the possession of the obligor, or which the obligor received, or the replacement value an obligor would be entitled to claim from someone else, may be demanded by the obligee, who may request their transfer in exchange for the *pro rata* part of the consideration.

4. Poland

4.1. Overview

Under Polish law there are different provisions regulating:
— extraordinary changes in circumstances,[37]
— a significant change in the purchasing power of money,[38]
— the situation in which performance has become impossible (frustration of contract in general),[39]
— the situation in which performance – in case of a synallagmatic contract – has become impossible.[40]

4.2. Extraordinary changes in circumstances

Clausula rebus sic stantibus was regulated in Article 269 of the Ordinance of the President of the Republic of Poland of October 27, 1933 – the Polish Code of Obligations. However, after the Second World War, Poland became a socialist state. The legislator's assumption was that such an economic system would be resistant to any crises or economic breakdowns, therefore such provisions were not required in the PolCC.[41] This assumption did not stand the test of time and after the regime change in 1989, a new Article 357[1] was introduced into the PolCC on October 10, 1990.[42] The original version of this regulation stated that:

> '§ 1. If, owing to an extraordinary change of circumstances, the performance would be faced with excessive difficulties or threaten one of the parties with a gross loss, which the parties did not predict when concluding the contract, the

37 PolCC, Article 357[1] § 1.
38 PolCC, Article 358[1] § 3 and § 4.
39 PolCC, Article 475.
40 PolCC, 493 and 495.
41 Radwański and Olejniczak, 2010, p. 305.
42 Compare Radwański and Olejniczak, 2010, 305.

court may, after considering the interests of the parties, in accordance with the principles of social coexistence, determine the way in which the obligation will be performed, the amount of the obligation and/or even decide upon termination of the agreement. When terminating the contract, the court may, whenever needed, decide upon a settlement between the parties, bearing in mind the principles set out in the previous sentence.
[Currently repealed] § 2. The party running an enterprise may not request a determination of the way in which the obligation will be performed, the amount of the obligation and/or termination of the contract, if the performance is related to the running of such enterprise.'

The above quoted § 2 was repealed on December 28, 1996 but § 1 keeps the same text to this day.

Article 357[1] § 1 of the PolCC, according to its wording, should apply only to contractual obligations, which would differentiate it from Article 358[1] § 3 of the PolCC elaborated on below. However, some judgments by the Polish Supreme Court have attempted to extend the scope of the respective provision to non-contractual obligations as well.[43]

For the discussed regulation to be applicable, the following conditions have to be met:

— an extraordinary change of circumstances,
— a performance being faced with excessive difficulties or threatening one of the parties with a gross loss,
— the parties did not predict the influence of such extraordinary change on their relations.[44]

These conditions have to be fulfilled cumulatively and are of strict interpretation.[45]

The mentioned extraordinary change must have a universal nature, i.e., as a rule, it may not refer to the situation of a certain, particular party.[46] The term 'extraordinary' is understood broadly in Polish case law and refers, for example, to an unexpected change of the tax rates.[47] However, *clausula rebus sic stantibus* is distinguished from the institution of *vis maior*.[48]

In reference to the second premise, there must be a causal link between an extraordinary change and the above indicated excessive difficulties or potential gross loss.[49]

43 See for example judgment of the Polish Supreme Court, 26.11.1992, III CZP 144/92, LEX No. 5374 or judgment of the Polish Supreme Court, 30.5.2017 r., IV CSK 445/16, Lex No. 2348538.
44 Radwański and Olejniczak, 2010, p. 306.
45 Machnikowski, 2021, commentary to Article 358[1] PolCC paragraph II.1.
46 Radwański and Olejniczak, 2010, p. 306.
47 Judgment of the Polish Supreme Court, 16.05.2007, III CSK 452/06, LEX No. 334987.
48 Brzozowski, 2018, p. 1283.
49 Radwański and Olejniczak, 2010, p. 307.

Note that if the contract has been fully performed, its modification by the court is not allowed.[50]

The last condition is the most difficult to interpret.[51] The wording of the discussed article indicates that unpredictability must refer to the influence of an extraordinary change of circumstances on their relation, not to the extraordinary change on its own.

If the above premises are fulfilled, the court may:

— alter the way in which the obligation will be performed,[52]
— alter the amount of the obligation, or
— terminate the agreement.

In the framework of the first type of judgment, the court may grant a grace period. In case of terminating the agreement, the court may decide upon a settlement between the parties. Furthermore, the term 'even' included in the provision suggests that termination should be the last resort.[53] The court, when deciding to apply any of these measures, shall consider the interests of the parties and take into account the principles of social coexistence. It seems that even in case of permanent obligations (*zobowiązań trwałych*), the court may decide that the contract be modified with *ex tunc* effects (retroactively).[54]

The discussed provision constitutes *ius dispositivum* (i.e., a non-mandatory rule, permissive of derogation), therefore parties may modify or exclude its application.[55]

The COVID-19 pandemic led to the introduction of special legislation, the so-called anti-crisis shield (*tarcza antykryzysowa*), on the basis of which many contractual relations were modified by statute.[56]

4.3. Significant change in the purchasing power of money

Article 358[1] of the PolCC entered into force on the same day as Article 357[1] of the PolCC and its wording remains unchanged to this day. The relevant paragraphs state as follows:

> '(...) § 3. In the case of a substantial change of purchasing power of money after the arising of the obligation, the court may, after considering the interests of the parties and in accordance with the principles of social coexistence, change the amount or the manner of performance of the pecuniary obligation, even if these were fixed in a judgment or a contract.

50 Compare Judgment of the Polish Supreme Court, 9.4.2003, I CKN 255/01, LEX No. 78890 and see the remarks below.
51 Radwański and Olejniczak, 2010, p. 307.
52 For example: time or place of the performance. See: Radwański and Olejniczak, 2010, p. 308.
53 Radwański and Olejniczak, 2010, p. 309.
54 Machnikowski, 2021, commentary to Article 357[1] PolCC paragraph III.4.
55 Machnikowski, 2021, commentary to Article 357[1] PolCC paragraph I.5.
56 The Act of March 2, 2020 on Special Solutions Related to the Prevention, Protection Against and Combating of COVID-19, other Infectious Diseases and Crisis Situations Caused by Them ('*Ustawy z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych*'), Polish Journals of Laws from 2021, item. 1842 as amended.

§ 4. Change of the amount or the manner of rendering the pecuniary obligation is not available for a party running an enterprise, if the performance is related to the running of such enterprise.'

Notably, § 4 of Article 358[1] in the PolCC was not repealed. Therefore, we can conclude that this type of reevaluation is not available to entrepreneurs. Such a legislative solution is based on the assumption that professional entities shall protect their own interests by including the appropriate indexation clauses in their contracts.[57] Furthermore, only pecuniary obligations in a strict sense can be valorized based on the discussed provision.[58] However, the wording of the article did not limit its scope only to contractual obligations. It is disputable in Polish legal literature whether the discussed provision may be applicable in cases in which the amount of pecuniary obligation was determined via the contractual valorization clause.[59] What is more, judicial modification may be excluded on the basis of special provisions.[60] Notably, Article 358[1] § 3 PolCC is not applicable to bank loans and amounts deposited in bank accounts.[61]

Article 358[1] § 3 PolCC may be applied if there is a substantial change in the purchasing power of money after the obligation arises. Whether the change is substantial or not shall be decided by a court on a case-by-case basis.[62] The provision does not specify any specific reason for such a change, therefore it is irrelevant.[63] Such valorization is not allowed if the obligation was extinguished as a result of its fulfillment.[64] However, according to Polish case law, if the debtor provides the agreed performance, the creditor shall promptly express that he or she does not consider the obligation extinguished and promptly take appropriate court action to avoid losing the discussed right to valorization.[65]

If the above conditions are fulfilled, the court may change the way in which the obligation will be performed and/or the amount of the obligation.

In the framework of the first judgment, the court may grant a grace period. The court may decide on both the mentioned types of changes simultaneously, but it is not allowed to terminate the agreement.[66] Per the case of Article 357[1] of the PolCC,

57 Radwański and Olejniczak, 2010, p. 71.
58 Radwański and Olejniczak, 2010, pp. 69–70.
59 Machnikowski, 2021, commentary to Article 358[1] PolCC paragraph III.2.
60 Machnikowski, 2021, commentary to Article 358[1] PolCC paragraph III.2.
61 Machnikowski, 2021, commentary to Article 358[1] PolCC paragraph III.2.
62 Radwański and Olejniczak, 2010, p. 69 and the resolution of the Polish Supreme Court, 10.04.1992, III CZP 126/91, LEX No. 3743.
63 Machnikowski, 2021, commentary to Article 358[1] PolCC paragraph III.6.
64 Radwański and Olejniczak, 2010, 69. This remark applies also to the above elaborated *rebus sic stantibus* clause.
65 The judgment of the Polish Supreme Court, 30.05.2017, IV CSK 445/16, LEX No. 2348538. This judgment was provided in the context of Article 357[1] PolCC, but it seems that such a standpoint may be provided also in reference to the discussed provision.
66 Radwański and Olejniczak, 2010, p. 71.

the court, when deciding to apply any or both of these measures, shall consider the interests of the parties and take into account the principles of social coexistence.

There is a dispute in the literature as to whether Article 358^1 § 3 PolCC constitutes *lex specialis* in reference to Article 358^1 PolCC. It seems that in this case, we are not dealing with the *lex generalis – lex specialis* situation and, if the premises of both provisions are fulfilled, the interested person may choose the legal basis of his/her right.[67]

4.4. Impossible performance (general case)

The basic Polish provision regarding the subsequent impossibility to perform is Article 475 PolCC, which states:

> '§ 1. If the performance becomes impossible because of the circumstances for which the debtor is not liable, the obligation expires.
> § 2. If the good which is the object of the performance has been disposed of, lost or damaged, the debtor is obliged to release everything, what he/she obtained in return for this good or as compensation for damage.'

Polish law does not specify what the performance having become 'impossible' actually means. In the literature, the accepted view is that circumstances have be altered to such an extent, that performance, as a rule, becomes impossible to be discharged by the obliged party (the objective concept).[68] The causes may be physical, legal, but controversially also economical i.e., from the economic perspective the performance is irrational.[69] The impossibility should have a permanent, not temporary character.[70]

Article 475 § 1 of the PolCC refers specifically to a situation in which neither party is liable for the performance becoming impossible. In such a case, a contract is extinguished *ex nunc*.[71] However, the contract will not terminate if the performance became impossible because the good has been disposed of, lost, or damaged. In such case, the creditor may demand surrogates (buying performance) from the debtor[72] and the obligation will simply demand a different object.[73] The debtor is obliged to provide surrogates even if their value is higher than the amount of the obligation.[74] In case the obligation became impossible after the due date, the debtor may be liable for not rendering performance when it was still possible.[75]

67 Radwański and Olejniczak, 2010, pp. 309–310 and the resolution of the Polish Supreme Court, 29.12.1994 r., III CZP 120/94, LEX No. 4152.
68 Radwański and Olejniczak, 2010, p. 328.
69 Radwański and Olejniczak, 2010, pp. 330–331. However, the issue of „economic impossibility' is disputable in the Polish doctrine.
70 Radwański and Olejniczak, 2010, pp. 329–330. Differently: Kondek, 2021, commentary to Article 475, paragraph 6.
71 Kondek, 2021, commentary to Article 475, paragraph 10.
72 PolCC, Article 475 § 2.
73 Radwański and Olejniczak, 2010, p. 331.
74 Kondek, 2021, commentary to Article 475, paragraph 20.
75 Kondek, 2021, commentary to Article 475, paragraph 11.

If performance becomes impossible because of the circumstances for which the debtor is liable, the obligation shall still exist however albeit the object of it is now transformed into a compensation claim.[76] The prevailing view is that the creditor may claim surrogates.

The article discussed above is not applicable in case of synallagmatic contracts.[77]

4.5. Impossible performance (synallagmatic contract)

In Polish civil law, special rules regarding the impossibility of performance are provided for in case of synallagmatic contracts. Consequences are determined differently depending on whether the debtor is responsible for the impossibility[78] or not.[79] The indicated provisions state:

> 'Art. 493 § 1. If one of the reciprocal performances became impossible as a result of the circumstances for which the party obliged is liable, the other party may, according to his/her own choice, either claim compensation for the damage resulting from non-performance of the obligation, or withdraw from the contract.
> Art. 495 § 1. If one of the reciprocal performances became impossible as a result of the circumstances for which neither party is liable, the party who was to render the performance may not claim the reciprocal performance, and if it was already received, he/she is obliged to return it in accordance with the provisions on the unjust enrichment.'

If the debtor is responsible for the impossibility, the creditor may:

- claim compensation for the damage resulting from non-performance of the obligation, or
- withdraw from the contract.

In the first case, the obligation still exists albeit the object is transformed into a claim for compensation.[80] That means that the creditor is still obliged to render his or her synallagmatic obligation if it was not rendered already.[81]

In the second case (withdrawal from the contract), the creditor will also have a compensation claim.[82] However, such a claim must take into account that the creditor is released from his or her performance.[83] Furthermore, if the creditor obtained

76 Radwański and Olejniczak, 2010, p. 332.
77 Kondek, 2021, commentary to Article 475, paragraph 17.
78 PolCC, Article 493.
79 PolCC, Article 495.
80 Radwański and Olejniczak, 2010, p. 333.
81 Radwański and Olejniczak, 2010, p. 333.
82 PolCC, Article 494 § 1.
83 Radwański and Olejniczak, 2010, p. 333.

something on the basis of such a contract, he or she is obliged to hand it over to the debtor.[84] The agreement is terminated, as a rule, *ex tunc*.[85]

The situation looks different if the debtor was not liable for the impossibility.[86] In such cases, the creditor is released from his or her reciprocal performance. If such performance was already received by the debtor, he or she is obliged to return it in accordance with the provisions on unjust enrichment.[87] In such a case, the whole contract expires.[88] However, the creditor may demand surrogates in place of the impossible performance. In such a case, the obligation does not expire but the object is changed.[89]

Art. 493 § 2 of the PolCC and Article 495 § 2 of the PolCC refer to the partial impossibility of performance. However, their detailed elaboration exceeds the scope of this book.[90]

5. Romania

5.1. Modification of the contract by legislative means

Legislative modification of a contract is exceptional. After the collapse of the Soviet-type dictatorship, there were cases where the law provided for the legal extension of contractual periods, i.e., the forced extension of lease contracts. 'Legal extension of a contract consists in the forced prolongation of its existence for a certain period of time after the expiry of the extinctive term established by agreement of the contracting parties; this procedure has been and is used for the extension of tenancies' against the will of the owners and the protection of certain categories of tenants (e.g., successive extensions of leases under Act No. 17/1994, Act No. 112/1995 and Article 2 of Government Emergency Ordinance No. 40/1999 on the protection of tenants and the fixing of rents for residential premises).

Another situation of legislative modification of contracts can result from the succession of laws over time. Thus, the contract may affect the future in unintended ways which were not – and could not have been – foreseen by the contracting parties.

84 PolCC, 494 § 1.
85 Kondek, 2021, commentary to Article 493, paragraph 5.
86 PolCC, Article 495.
87 PolCC, Articles 405–414.
88 Radwański and Olejniczak, 2010, p. 332.
89 Radwański and Olejniczak, 2010, p. 332.
90 Those articles read as follows:
'Article 493 § 2. In case of partial impossibility to render performance by one of the parties, the other party may withdraw from the contract if partial performance would have no significance for him/her due to the nature of the obligation or due to the purpose of the contract intended by that party, known to the party whose performance has become partly impossible.'
'Article 495 § 2. If the performance of one of the parties has become only partially impossible, that party loses the right to an appropriate part of the reciprocal performance. However, the other party may withdraw from the contract if a partial performance would have no significance for him/her due to the nature of the obligation or due to the purpose of the contract intended by that party, known to the party whose performance has become partly impossible.'

For example, the RouCC introduced regulation of a particular practical interest for the enforcement of installments on life annuity contracts.[91] In the event of non-fulfillment of the obligation to pay the installments due, the creditor may request the seizure and sale of the debtor's assets up to an amount sufficient to ensure payment of the annuity for the future. Once the amount has been obtained from the sale of the debtor's assets, it shall be deposited with a credit institution and paid to the creditor in accordance with the amount and the due dates agreed in the annuity contract. These provisions shall also apply to annuity contracts concluded before the date of entry into force of the RouCC in the event of non-payment of annuity installments due after that date. This special effect of life annuity contracts also affected the contracts under performance.

5.2. Judicial modification of the contract

In the case of Romania, the RouCC in force from 2011 introduced a new legal institution: the possibility of judicial modification of contracts. This was a powerful form of intervention in the private autonomy of the parties. The possibility of judicial contract modification can be extremely important in times of economic crisis, as the parties entered a contract taking into account the state of affairs extant at the moment the contract was concluded (*rebus sic stantibus*), which can change fundamentally during the performance in time of the contract.

We can see this in times of economic crisis when an obligation is 'distorted by external influences, its equilibrium is upset, its lines of force are disturbed and, as a consequence, the debtor's interests are affected, the sacrifice of which was not the intention of the transaction.'[92] In such and similar cases, a judicial modification of the contract may be required. External economic circumstances may upset the (initial) balance of values existing at the time of the conclusion of the contract. A correctly established balance of values cannot be distorted fundamentally by external influences, which is why the legislator has created a legal framework for rebalancing the agreement. The current RouCC regulates judicial contract modification in Article 1271, literally translated under the subheading '*imprevizіune*,' meaning unforeseeability.

The first paragraph of that article reaffirms the principle of the binding force of contracts, stating that 'the parties are bound to perform their obligations even if performance has become more onerous because of an increase in the cost of performing their own obligations or a decrease in the value of the consideration.' The fact that the rules on judicial modification of contracts begin with this provision, which is essentially a re-emphasizing of the binding force of the contract, indicates the exceptional nature of judicial intervention in contracts. Under market conditions, a change of circumstances is natural and should be anticipated by both parties. If possible, the necessary mechanisms to mitigate this risk (indexation clauses, etc.) should already be included in the contract.

91 RouCC, Article 2250.
92 Kelemen, 1941, p. 59.

Judicial modification of the contract is possible if the performance of the contract has become not just simply more onerous, but 'overly' – grossly, egregiously more – onerous because of an extraordinary change of circumstances, and it would be manifestly unfair to require the debtor to perform under such circumstances.

In such cases, the courts may modify the contract to restore the upset contractual equilibrium or, if they consider it necessary, terminate the contract. The court is given considerable power and discretion here if the conditions are met. Thus, the RouCC has thus created a very important exception to the binding force of contracts. In our view, the modification of a contract has an advantage over the termination of a contract, because the court must refrain as far as possible from interfering in private autonomy and must choose the least direct method of intervention, provided that it is appropriate to restore contractual equilibrium.

The cumulative conditions for judicial intervention are as follows:

— the extraordinary change of circumstances occurred after the conclusion of the contract,
— the change in circumstances or the extent of the change was not and could not have been foreseen by the debtor at the time of the conclusion of the contract,
— the debtor did not assume the risk of the change in circumstances and could not reasonably be expected to have assumed that risk,
— performance of the obligation by the debtor has become manifestly unfair,
— the debtor tried in good faith and within a reasonable time to negotiate an adaptation of the contract to the changed circumstances (prior consultation with the creditor is a precondition for exercising the right of action).

The question arises as to whether the risk of a change of circumstances can be assumed by the debtor in advance by means of a general contractual clause. This will be decided by court practice. In our view, the validity of overly-general clauses that pass the risk of a change of circumstances onto one party as a preventive measure is questionable.

Other cases when a court can intervene in contracts under Romanian law are the following:

— a court may order the contract to be supplemented by additional (secondary) elements where the contract has been concluded only by agreement of the parties on the essential elements, taking into account the current circumstances, the nature of the contract, and the intention of the parties,[93]
— a judge may fix a time limit for acceptance in the matter of option agreements if the parties have omitted to provide such a time limit,[94]
— in the case of pre-contracts, if the promisor refuses to conclude a promised contract, the court may render a judgment in lieu of a contract, which supersedes the will of the party who failed to perform the pre-contract where the nature

93 RouCC, Article 1182.
94 RouCC, Article 1278.

of the contract permits it and the requirements of the law for the validity of the promised contract are met,[95]
— a court may reduce the amount of the excessive contractual penalty[96] if the main obligation has been performed in part and this performance has benefited the creditor or if the penalty is manifestly excessive in relation to the damage that could have been foreseen by the parties at the conclusion of the contract.

5.3. Frustration of contract

The initial impossibility of the contract, which existed at the time of the conclusion, resulted, according to the classical understanding, in the transaction being null and void (*ad impossibilium, nulla obligatio*). On the contrary, the contract is valid under the current RouCC despite the initial impossibility of the object of the obligation, unless otherwise provided for by law. Such initial impossibility occurs, for example, when the seller is not the owner of the asset sold. In this case, the rules on breach of contract apply in practice with the clarification that it is not possible to enforce the contract in kind. Nonetheless, there are remedies at the disposal of the claimant, such as breach of contract and compensation for the damage caused, since the seller may acquire ownership of the asset in the meantime, meaning that the impossibility is only temporary.

Otherwise, the rule discussed above is worth nuancing. If the seller is aware that he or she is not the owner, the buyer can challenge the transaction on the grounds of error or even deceit as to the other party's ownership. The consequence of this is the invalidity of the contract. Similarly, when the seller is mistaken about his or her ownership and the buyer knows that this is lacking, the transaction is voidable (the seller may choose to avoid the contract). If both parties are in error, then the issue of invalidity also arises. In other words, a contract concluded in an original situation of impossibility is valid if both parties were aware that the seller was not the owner and the seller effectively assumed the risk of the impossibility of performance. The seller may try to obtain ownership from the third party (the effective owner) and transfer it to the buyer or may try to persuade the third party to approve the transaction and thus transfer ownership directly to the buyer. If these attempts are unsuccessful, the original obligation to transfer ownership will be converted into an obligation to compensate for damages.

Besides initial impossibility, the impossibility of performance occurs after the conclusion of the transaction (intermediate impossibility). While the validity of the transaction is not affected by this form of impossibility, if it prevents the transaction from being performed, the contract is frustrated. The impossibility of performance may be permanent or temporary.

95 RouCC, Article 1279. For further details, see Chapter III of this book.
96 RouCC, Article 1541.

Impossibility of performance, if it is final (absolute) or affects a substantive contractual obligation, terminates the contract *ope legis* from the moment the impossibility occurred.

The legal effects of permanent impossibility are:

— If the impossibility of performance affects a less significant contractual obligation, only a proportionate reduction of the counter-performance may be requested.

— In case of a debtor's default (if the debtor has been formally put in default – i.e., notified of being in default – or the debtor is in default *ope legis*), the risk of destruction of the goods is borne by the debtor and he or she cannot be released, even if he or she proves that the goods would have also perished if the obligation to hand them over had been performed on time.

— If the impossibility is caused by a circumstance for which the debtor is liable (the impossibility is attributable to the debtor), he or she owes damages to the creditor; in such a case, the obligation of compensation takes precedence over the original performance (for example, the seller sold a movable to a first buyer, who handed it over to a second buyer in good faith; in this case, the seller owes damages to the first buyer).

— If the impossibility is caused by a circumstance for which the debtor is not responsible (*force majeure* or other similar events), the obligation is terminated. It is for the debtor to prove that he or she is not responsible for the frustration of the contract. However, the debtor is discharged if the event causing the frustration of contract occurred before the debtor was put in default. The debtor shall also be discharged, even if in default, if the creditor would not have been able to benefit from performance of the obligation unless the debtor has taken upon himself or herself the risk thereof. The debtor must notify the creditor of the event causing the impossibility of performance. If the notification does not reach the creditor within a reasonable time after the debtor knew or ought to have known about the impossibility of performance, the debtor is liable for the damage caused thereby to the creditor. The legislative solution is described as 'illogical and unfair,' because if the non-performance itself – being fortuitous – cannot be blamed on the debtor, then the debtor should not have to bear the consequences of failing to comply with a formality.[97]

— The fact of impossibility does not imply the absence or existence of imputability: for example, if the horse has died or the goods have been stolen, only the fact of impossibility is clear (the cause for which is to be sought). The question is whether resulting from what fact (circumstances) did the horse die, or whether the debtor could have avoided the theft, i.e., whether there is imputability on behalf of the debtor for the occurrence of the impossibility to perform.

— In the absence of imputability, the debtor is discharged, regardless of whether the service has become impossible in general (objective impossibility) or only

97 Vasilescu, 2012, p. 67.

for the person in question (subjective impossibility). Subjective impossibility cannot relate to solvency, because the debtor is necessarily responsible for it. A general lack of assets is not a ground for an exemption.

If the impossibility of performing a contract is only temporary, the creditor may suspend the performance of his own obligations for a reasonable time or even can initiate the termination of the contract.

Consequently, termination of contract because of frustration may include the permanent and not imputable impossibility of performance. If the debtor is not at fault for the impossibility of performance, if performance becomes impossible because of circumstances for which he is not responsible, the debtor is released from the contract. This legal consequence only applies if the impossibility affects a substantial part of contractual obligation, otherwise the impossibility through no fault of the debtor only modifies the obligation (the possibility of a proportionate reduction of the performance is opened). In the case of imputability, the contract is not terminated, but the original performance is transformed into damages, and only the performance of the compensation extinguishes the contractual obligation. Attributable impossibility is not a fact that terminates the contract but a fact that modifies it.

6. Serbia, Croatia, Slovenia

6.1. Serbia

6.1.1. Modification of contracts by law

Legislative intervention into an already concluded and existing contractual relationship should be a rare legal phenomenon, prompted only by serious problems threatening to cause grave social implications. In Yugoslavian and Serbian law, intervention into the privity of contract was present but rare. For instance, such laws were enacted in socialist Yugoslavia to combat inflation, and later on in the last decade of the 20th century to address the restitution of citizens' savings in foreign currencies and compensation for seized property.[98]

In recent Serbian legal history (pre-COVID-19 era), the most notable such legislative attempt was the Law on Conversion of Housing Loans Indexed to Swiss Francs adopted in 2019, the declared political aim of which was to finally resolve the issue housing loans indexed to that currency. In short, the Law imposed a *post facto* obligation on banks to convert loans denominated in CHF into loans denominated in EUR at the exchange rate applicable on the day the contract was concluded, to apply a discount of 38% on the amount of the remainder of the debt, and to apply an interest

98 See in more detail Andrejević, 1999, pp. 221–227.

rate not higher than the rate fixed by the Law on Conversion. The law obliged the state to take over from the banks 15% of the costs of conversion.[99]

As in all countries, the National Bank of Serbia introduced a 90-day payment moratorium at the onset of the COVID-19 pandemic, immediately after the special legal order was introduced on March 16, 2020. The addressees were banks and lessors in financial leasing transactions. On the same day, the Government also banned the export of medicines and basic products essential to the population.[100] It was followed by the next decision of the National Bank, by which the moratorium was extended to a period of 60 days from August 1 till September 30, and to payment obligations that became due in July, but with which the debtor was in default.[101] Finally, additional loan repayment facilities were introduced in December, comprising mainly special rules for reprogramming and refinancing loans.[102] In addition, the problem of citizens' frozen prepayments for vacations also surfaced. To address it, the Government adopted a Decree near the end of April that entitled the organizers of travel arrangements to offer replacement packages in lieu of reimbursement that could be used by the traveler until the end of 2021 at the latest.[103]

These recent pieces of emergency legislation were viewed negatively by the literature. In all these cases, the legislature did not apply the regular rules of contract law. Due to what the legislature saw as grave social and political problems, their application was suspended by rules tailor-made to such particular cases.[104] This 'interventionist attitude' of the legislature has been gaining a foothold in recent years, as seen by the increasing number of legislative acts aiming to intervene in the application of laws and regulations.[105] A similar critique can be found present in the literature in relation to the Government Decree on the replacement of travel packages as well.[106]

6.1.2. Judicial modification of contracts (general case)

Outside the context of the *clausula rebus sic stantibus*, judicial intervention into the privity of a contract should be a rarity despite the rules in the SrbLO enabling the court to modify or specify the content of the contract. These prescribe that if the parties agreed on essential elements and left the non-essential elements to agree upon at a later point in time, but failed to reach an agreement subsequently, the court may determine the non-essential elements of the contract, taking into account the parties' prior negotiations and the practice established in their preceding transactions and

99 The Law on Conversion, Articles 4 and 11.
100 See these acts in the Official Gazette No 33/2020. For the comprehensive analysis of the governmental measures introduced in the light of COVID-19 pandemic in the field of contract law see. Đurđević, 2020, pp. 457–475; Mišković, 2020, pp. 587–619; Mišković, 2021, pp. 239–259.
101 See these Decisions of the National Bank in the Official Gazette No. 103/2020.
102 See these Decisions in the Official Gazette No. 150/2020.
103 See this Decree in the Official Gazette No. 63/2020.
104 See. Karanikić Mirić, 2020b, pp. 116–117.
105 For the detailed list of such laws See Karanikić Mirić, 2020b, p. 117.
106 See Karanikić Mirić, 2020c, pp. 102–115.

customary rules.[107] Concerning earnest money, the court may upon the request of the debtor, decrease the amount if it is considered to be excessively high.[108] The court may uphold the usurious contract, upon the request of the aggrieved party, by reducing his or her obligation to a level that the court considers just.[109] Similarly to earnest money, the court may, upon the request of the debtor, decrease the amount of contractual penalty if it is considered excessively high after taking into account the value and importance of the object of the obligation.[110] If one of the parties is entitled to set the time limit for the performance of the obligation and fails to do so, the counterparty may request the court to determine a reasonable time limit for performance.[111] In alternative obligations, the parties may authorize a third party to choose the object by which the obligation will be performed. In case of his or her failure, the choice shall be made by the court.[112] In a wide range of contracts, the court may determine the price (remuneration) if the parties fail to agree thereupon or reduce it if the court considers it too high. This applies to commercial sales contracts,[113] contracts for works,[114] commission agency contracts,[115] commercial agency contracts,[116] brokerage contracts,[117] and shipping contracts.[118] The SrbLO does not have a general rule enabling the court to grant a defaulting debtor an additional deadline or grace period for the performance. However, in case of an installment sale, the court may at the request of the buyer, when it is justified by the circumstances of the case, extend the deadlines for the payment of installments of which the buyer is in default, if he or she provides security for the performance of his or her obligations and if the seller does not suffer damage because of the extension of deadlines.[119]

The possibility of judicial intervention into the parties' consent appears in relation to life-long maintenance contracts as well, which are not regulated in the SrbLO but in the Law on Inheritance. It prescribes that in the case of a maintenance provider's death, his or her spouse and descendants may take over his or her position in the contract. If they refuse, the contract is repudiated and they may claim compensation for the maintenance provided by the deceased. The amount of compensation shall be determined by the court on its own free judgment, taking into account the financial position of both the beneficiary of the maintenance and the heirs of the deceased

107 SrbLO, Article 32 (2).
108 SrbLO, Article 80 (4).
109 SrbLO, Article 141 (3).
110 SrbLO, Article 274.
111 SrbLO, Article 317.
112 SrbLO, Article 406.
113 SrbLO, Article 462 (2) and (3).
114 SrbLO, Article 623 (2).
115 SrbLO, Article 783 (2).
116 SrbLO, Article 806 (2).
117 SrbLO, Article 822 (2) and (3).
118 SrbLO, Article 839.
119 SrbLO, Article 547.

maintenance provider.[120] In the case of altered circumstances, the court may convert the contract on life-long maintenance into an annuity contract for life.[121]

6.1.3. Judicial modification of contracts because of changed circumstances

By the adoption of the Law on Obligations in 1978, the former Yugoslavia became part of the group of legal systems which in the 20th century enacted detailed statutory rules on the repudiation or modification of contracts because of changed circumstances (*rebus sic stantibus*) in the part pertaining to the general rules of contract law.[122] These rules are still being applied in Serbia.

The SrbLO specifies that if, after the formation of the contract, circumstances emerge making the performance of the obligation of either party more difficult, or if because of them the purpose of the contract cannot be realized, in both cases to such a degree that it becomes evident that the contract does not meet the expectations of the contracting parties anymore or it would be unjust to maintain it unchanged – the party having difficulties in performing the obligation or the party being unable to realize the purpose of contract may request its repudiation.[123] The changed circumstances (supervening events), therefore, distort the prospects of performing the obligation as the parties envisaged it at the time of the conclusion of the contract, but do not render it impossible,[124] or frustrate the realization of the cause of contract.[125] However, the party whose position is aggravated (debtor) may not request repudiation of the contract if he or she needed to take into account the possibility of the change of circumstances or could have avoided or surmounted them.[126] The application of the rules on the repudiation of contracts because of supervening events is, therefore, based on the principle of good faith, fair dealing, and the requirement that the debtor act with due diligence.[127] A restriction of major significance is imposed by the rule prescribing that the debtor is declined the right to request repudiation if the supervening events emerged after the time limit for the performance of his or her obligation had lapsed.[128] This rule is also in line with the principle of good faith and fair dealing. In addition, it represents the implementation of a principle developed by Roman law, according to which the default of the debtor makes his or her obligation 'eternal' (*perpetuatio obligationis*), in the sense that the debtor is liable even for a supervening event rendering the performance impossible.[129] However, the SrbLO states that the contract shall not be repudiated if the other party agrees to or proposes an equitable modification

120 Law on Inheritance, Article 205 (2).
121 Law on Inheritance, Article 202 (2).
122 Dudaš, 2015, p. 210.
123 SrbLO, Article 133 (1).
124 Karanikić Mirić, 2020a, p. 49.
125 Dudaš, 2010, p. 161.
126 SrbLO, Article 133 (2).
127 Đurđević in Perović, 1995, p. 262.
128 SrbLO, Article 133 (3).
129 Zimmermann, 1996, 785.

of the relevant terms of the contract.[130] This rule raises the question of whether the court is entitled to intervene in the parties' consent and adjust it to the effect of the supervening events. The wording of the rules implies that the court cannot do that *ex officio*. Neither can the debtor request the modification of the contract directly. The claim of the debtor may only be directed at the repudiation of the contract since it is the primary consequence of supervening events. This means that litigation may not be initiated by the plaintiff's claim for modification of the contract.[131] In the course of the proceedings, the counterparty or respondent may lodge such a request, or it may come from the plaintiff.[132] In fact, the court may also invite the parties to agree on the modification of the contract because of supervening events according to the rules of civil procedure and help them reach a settlement. Moreover, it can offer concrete proposals as to which terms and to what extent they ought to be modified. However, the prerogatives of the court are merely of providing initiative and assistance. The court cannot impose any modification of the contract, and can only confirm the agreement of the parties on the modification of the contract. That, though, requires their cooperation. The debtor cannot force the counterparty to a modification of the contract. Without the agreement of the parties, the only remedy for the aggrieved party is the repudiation of the contract.[133] In the main article of the SrbLO pertaining to the effects of supervening events, the last section, however, fundamentally limits the prospects of repudiating the contract. It prescribes that, upon the request of the counterparty, the court may oblige the plaintiff to compensate the counterparty for an equitable portion of the damage he or she has sustained because of the repudiation of the contract.[134]

The debtor is obliged to notify the counterparty about his or her intention to repudiate the contract without undue delay after he or she is aware of the supervening event. Failing to notify the counterparty does forfeit the right to repudiation, but it does trigger an obligation to compensate the counterparty for the damage he or she might have sustained as a consequence of the failure of the notification.[135]

The SrbLO lists circumstances relevant for the repudiation or modification of the contract: the court bases its decision upon the principles of fair dealing, especially taking into account the purpose of the contract, normal risks of the contract of the kind, public interests, and the private interests of the parties.[136]

Finally, the SrbLO sets out that the default rules on the repudiation of contract because of supervening events: the parties may exclude their application unless it is done contrary to the principle of good faith and fair dealing.[137] It shall be consid-

130 SrbLO, Article 133 (4).
131 Đurđević in Perović, 1995, p. 264.
132 Đurđević in Perović, 1995, p. 265.
133 Karanikić Mirić, 2020d, p. 314.
134 SrbLO, Article 133 (5).
135 SrbLO, Article 134.
136 SrbLO, Article 135.
137 SrbLO, Article 136.

ered that the party acted contrary to this principle if, for example, he or she was in a stronger bargaining position that enabled him or her to adjust the content of the contract in his or her own interest, whereby he or she should have been aware of the prospects of supervening events. The purpose of this rule is, therefore, to enable the parties to exclude the application of the rules on supervening events, which they can do so in the confines of the normal contractual risks.[138]

6.1.4. Frustration of contract

As for the effect of the impossibility of performance on the existence of the contract, the SrbLO differentiates cases of impossibility that are caused by *force majeure* events from the cases that are attributable to either party.

If neither party is at fault for the impossibility of performing the obligation of one party, the obligation of the other party also ceases. However, if the other party performed the obligation or part thereof, he or she is entitled to restitution according to the rules of unjustified enrichment.[139] In case of partial impossibility, the other party may request partial repudiation of the contract if partial performance of the first party's obligations has no interest to him or her. Otherwise, the contract struck by partial impossibility remains effective albeit the other party has a claim to decrease his or her obligation proportionately.[140]

If, however, the impossibility of performing one party's obligation is attributable to the other party, the first party is released from his or her own obligation, but retains his or her claim against the other party, though it shall be decreased by the value of the benefits from the release of his or her own obligation.[141] In addition, the first party is obliged to transfer to the counterparty all rights having effects toward third parties, in relation to the object of his or her obligation that became impossible.[142]

The general rules on the performance of an obligation specify when the performance is considered to have become impossible. The SrbLO prescribes that the obligation ceases when its performance becomes impossible for a reason outside the debtor's scope of liability.[143] The burden of proof for such reasons lies with the debtor.[144] It further specifies that when the object of the obligation is generic property, the obligation does not cease even when all of such property in the debtor's possession perishes for a reason for which he or she is otherwise not liable (the *genera non-pereunt* rule).[145] Nevertheless, if the object of the obligation is generic property that should have been sorted out from a specific quantity of such property, the obligation ceases

138 Đurđević in Perović 1995, 266.
139 SrbLO, Article 137 (1).
140 SrbLO, Article 137 (2).
141 SrbLO, Article 138 (1).
142 SrbLO, Article 138 (1).
143 SrbLO, Article 354 (1).
144 SrbLO, Article 354 (2).
145 SrbLO, Article 355 (1).

if such a specific quantity has perished entirely.[146] If the impossibility is attributable to a third party, the debtor must cede to the creditor the rights he or she may have against the third party.[147]

6.2. Croatia

6.2.1. Modification of contracts by law

Similarly to Serbia, the most important emergency regulation in the pre-COVID-19 period was the 2015 Amendment to the Consumer Credit Act, known as the Law on Conversion. The aim of the Law on Conversion was to exchange the amounts of loans denominated in CHF into loans denominated in EUR at the exchange rate applicable at the time of loan disbursement.[148] The application of the Law on Conversion allegedly caused losses to banks, because of which they initiated arbitration proceedings before the ICSID.[149] During mid-summer 2021, a settlement was reached between the Croatian Government and the majority of the banks which initiated arbitral proceedings.

Croatia also introduced protective measures when the COVID-19 pandemic broke out. The legislator first intervened in the subject matter of travel package arrangements and tourist services, taking into account the importance of tourism for the Croatian economy.[150] The legislator therefore amended the Act on Provision of Tourism Services, enabling travelers to terminate travel package contracts that should have been performed after March 1, 2020 and the issuance of vouchers for non-performed contracts. At the same time, the amendments also included protections for tour operators, since they suspended the travelers' right to terminate the contract upon the expiry of 180 days following the cessation of special circumstances, a special legal regime introduced because of the pandemic.[151] Interestingly, no special legislative measures of compulsory nature have been introduced in other areas of private law albeit different forms of state subsidies were available to overcome hardships.[152] However, all bankruptcy and enforcement procedures were suspended and no legal interest would accrue during the duration of special circumstances.[153]

6.2.2. Judicial modification of contracts (general case)

According to the HrvLO, the court may intervene in the content of the contract in relation to the same legal institutions as those listed in Serbian law. These are the

146 SrbLO, Article 355 (2).
147 SrbLO, Article 356.
148 Law on Conversion, Article 19.c.
149 Ilić, 2019, pp. 509–512; See Mišćenić and Petrić, 2020, pp. 332–350; Mišćenić, 2020, pp. 226–235.
150 Josipović, 2020, pp. 68–69.
151 Josipović, 2020, p. 70.
152 Josipović, 2020, p. 73.
153 Josipović, 2020, p. 71; See COVID-19 Consumer Law Research Group, 2020, pp. 437–450.

choice of object of the performance in alternative obligations,[154] stipulation of the time limit for performance if the entitled party fails to do so,[155] determination of non-essential elements of the contract,[156] reduction of the amount of the earnest money[157] and contractual penalty,[158] convalidation of a usurious contract by equitably reducing the aggrieved party's obligation,[159] extension of time limits for payment of overdue installments in an installment sale contract,[160] and determination or reduction of the price/remuneration in commercial sale contract,[161] contract for work,[162] brokerage contracts[163] and shipping contracts.[164] Finally, the court shall determine the reimbursement to the spouse and descendants of the provider if they cannot take over his or her obligations in a life-long maintenance contract[165] in case of his or her demise.[166]

6.2.3. Judicial modification of contracts due to changed circumstances

The rules[167] of the HrvLO on the right to repudiate a contract because of supervening events are predominantly the same as in the SrbLO. However, there are some major differences. First, Croatian law abandoned frustration with the purpose of the contract as one of the two situations in which supervening events are considered to have legal relevance.[168] Instead, besides the inequality between the performance and counter-performance, the contract may be repudiated if the performance of either party's obligations because of supervening events causes overly high loss.[169] In this regard, the HrvLO slightly differs from the former federal law, in which it sufficed that the performance became more difficult. The HrvLO requires that the performance become excessively onerous.[170]

In contrast, it modified the order of legal remedies. Whereas in the former federal law, as in the effective SrbLO, the party prejudiced by the supervening events may lodge a claim only for the repudiation of the contract, whereby the parties may agree to modify it in the course of the proceedings; under the HrvLO, the aggrieved party's

154 HrvLO, Article 35.
155 HrvLO, Article 176.
156 HrvLO, Article 253 (2).
157 HrvLO, Article 304 (4).
158 HrvLO, Article 354.
159 HrvLO, Article 329 (3).
160 HrvLO, Article 469.
161 HrvLO, Article 384 (3).
162 HrvLO, Article 613 (2).
163 HrvLO, Article 844 (2).
164 HrvLO, Article 861.
165 HrvLO, Article 585 (4).
166 HrvLO, Article 588 (5).
167 HrvLO, Articles 369–372.
168 Petrić, 2007, pp. 143–144.
169 HrvLO, Article 369 (1).
170 Josipović and Nikšić, 2008, p. 85.

claim may initially be oriented to modification of the contract.[171] He or she can make a disposition in the claim as to whether a modification or repudiation of the contract will be requested from the court.[172] Therefore, revision of the contract has primacy over its repudiation.[173] Such a rule was envisaged by the General Trade Usages from 1954, but not by the former federal law.[174]

In comparison to the former federal law, the HrvLO enumerates somewhat different circumstances taking into account what the court decides, i.e., whether a claim for repudiation or modification of a contract shall be upheld. The court must rely in the decision on the principle of good faith and fair dealing (principles of fair trade in the former federal law), taking into account the purpose of the contract, allocation of risks according to the contract or a statute (instead of normal risks of the contracts of such kind), duration and effects of the supervening effects (not an element according to the formal federal law) and the interests of both parties (public interest is no more a circumstance that needs to be taken into account).[175]

Taking into consideration these circumstances the court modifies the contract to the least possible extent, to achieve compliance with the initial agreement of the parties to the greatest possible extent. The literature suggests that the court is mandated by the HrvLO to modify equitably the contract whenever it is possible, to avoid the repudiation of the contract.[176]

6.2.4 Frustration of contract

In terms of the effect of impossibility of performance on the existence of a contract, the HrvLO retained the structure and logic of the rules of the former federal law on obligations.[177] However, there is also a major difference here. The HrvLO explicitly states that a *force majeure* event must be an external event emerging after the formation of the contract, but before the obligation became due, that could not have been foreseen at the time of the formation of the contract, nor could the party relying on the event prevent, evade or surmount it, whereby neither party could be held responsible for its emergence.[178] Defining precisely the attributes of a *force majeure* event triggering impossibility of performance bears greater merit, thus a similar legislative consideration is advisable in relation to the SrbLO as well.

Concerning the rules when the performance of an obligation becomes impossible, the HrvLO has not deviated from the rules of the former federal law.[179]

171 Slakoper in Gorenc, 2014, p. 610.
172 HrvLO, Article 369 (1). *in fine*.
173 Josipović and Nikšić, 2008, p. 85.
174 Krulj in Blagojević, 1980, p. 354.
175 HrvLO, Article 371.
176 Slakoper in Gorenc 2014, p. 614.
177 HrvLO, Articles 373–374.
178 HrvLO, Article 373 (1).
179 HrvLO, Articles 208–210.

6.3. Slovenia

6.3.1. Modification of contracts by law

Slovenia has not yet adopted a special law by which the legislature would modify *post facto* the content of contracts on loans in CHF, which is the most notable example of legislative intervention in the privity of contract in the region in recent years. Still, a legislative draft has been made available to the public, titled Draft Law on Relations between Lenders and Borrowers Concerning Credit Agreements in Swiss Francs. It was scrutinized by the European Central bank.[180] Eventually, a special law was adopted in 2022 regulating the mandatory change of consumer loans in CHF. This is the Act on the Limitation and Distribution of Currency Risk between Lenders and Borrowers of Loans in Swiss Francs. However, even before this Act entered into force, the Constitutional Court stayed its application. It is, therefore expected, that the Act will probably also be repealed.

To mitigate the impact of the restrictions caused by the COVID-19 pandemic, the Slovenian legislature adopted the Law on Intervention Measures for the Extension of Payment Obligations of Borrowers in March 2020. The law prescribes a deference of repayment of installments for 12 months,[181] based on the nature and extent of the debtors' financial hardships and his or her plan to overcome them.[182] The same law specifies interventive measures in travel package contracts as well.[183]

6.3.2. Judicial modification of contracts (general case)

The SvnCO envisages the possibility of the courts to intervene in the content of the contract within the confines of the same legal institutions as in the former federal law. These are the determination of non-essential elements of a contract,[184] reduction of the amount of earnest money[185] and contractual penalty,[186] convalidation of a usurious contract by readjusting the value of performance or counter-performance,[187] setting an appropriate deadline for performance of the obligation, in case the party entitled to set it failed to do so,[188] choosing between the objects of performance in alternative obligations, if the entitled third party failed to,[189] setting or reducing the

180 Opinion of the European Central Bank of 18 July 2019 on the conversion of Swiss franc loans (CON/2019/27).
181 Law on Intervention Measures for the Extension of Payment Obligations of Borrowers, Article 2 (1).
182 Law on Intervention Measures for the Extension of Payment Obligations of Borrowers, Article 3.
183 Law on Intervention Measures for the Extension of Payment Obligations of Borrowers, Article 35.
184 SvnCO, Article 22 (2).
185 SvnCO, Article 65 (4).
186 SvnCO, Article 252.
187 SvnCO, Article 119 (3).
188 SvnCO, Article 292.
189 SvnCO, Article 387.

price or remuneration in commercial sales contracts,[190] contract for works,[191] commission agency contract,[192] contract on mandate,[193] brokerage contract,[194] shipping contract.[195] In addition, the court also may requalify the lifelong maintenance contract into annuity for life, if circumstance change[196] and set at its own discretion the compensation for the provided maintenance, if the contract is terminated because of the maintaining party's death, under the condition that his or her heirs do not want to take over his or her contractual position.[197]

6.3.3. Judicial modification of contract because of changed circumstances

The SvnCO for the most part took over verbatim from the former federal law the rules on repudiation and modification of a contract because of supervening events.[198] Only the list of circumstances to be taken into account by the court has changed to a smaller extent. The SvnCO prescribes that the court takes into account the purpose of the contract, the risks usual in contracts of the same kind, and the balance of the interests of the parties.[199]

The literature points out that actions for the repudiation of contracts because of changed circumstances are rarely, if ever successful.[200]

6.3.4. Frustration of contract

The rules on the effects of impossibility of performance, on the existence of bilateral contracts, have also been taken over verbatim from the former federal law into the SvnCO.[201] However, a new section has been introduced which regulates cases when the impossibility of the performance of the obligation is attributable to the debtor. It prescribes, that if the performance of the obligation of one party in a bilateral contract becomes impossible because of an event for which the same party bears responsibility, the other party may choose between a claim for compensation for damage because of non-performance or to rescind the contract and demand compensation for damage.[202]

190 SvnCO, Article 442 (2) and (3).
191 SvnCO, Article 642 (2).
192 SvnCO, Article 800 (2).
193 SvnCO, Article 824 (3).
194 SvnCO, Article 846 (2) and (3).
195 SvnCO, Article 863.
196 SvnCO, Article 562 (2).
197 SvnCO, Article 563 (4).
198 SvnCO, Articles 112–115.
199 SvnCO, Article 114.
200 See for example the judgements of the Slovenian Supreme Court No. III Ips 154/2015, and that of the High Court of Ljubljana Nos. I Cpg 573/2015 and II Cp 829/2912. In all these cases the claims for the termination of the contract have been dismissed. Cited by Možina and Vlahek 2019, point 272.
201 SvnCO, Articles 116–117.
202 SvnCO, Article 117 (3).

Similarly, the rules on the impossibility of performance also correspond literally to the rules of the former federal law.[203]

7. Slovakia

7.1. Overview

Slovak law does not regulate the effects of a change of circumstances (*zmena pomerov*) on contractual relations in a general way.[204] The impact of such a change is to some extent regulated rather casuistically.

Thus, the impact of a change of circumstances is regulated in Slovak law in particular in connection with the performance of a future contract,[205] with the subsequent impossibility of performance,[206] with the frustration of the choice of performance,[207] with the frustration of the purpose of the commercial contract[208] and with the commercial contract of deposit.[209] In these cases, the change of circumstances usually leads directly to the termination of the obligation; the court is not given the possibility to modify the contract so that it can be at least partially preserved. Outside the scope of the law of obligations, the change of circumstances is of relevance in connection with easements.

7.2. Judicial and legislative modification of contracts

As can be seen from the above, in the event of a change of circumstances, the court is not allowed to interfere with an existing contract, i.e., neither the SvkCC nor the SvkCommC provides for the court to modify the terms of an existing contract without the consent of the parties. The only exemption – which, however, relates to the law of property rather than to the law of obligations – is § 151p of the SvkCC, according to which if a change in circumstances results in a gross disproportion between the easement and the benefit of the person entitled, the court may order that the easement be limited or abolished in return for adequate compensation. If, because of the change in circumstances, the easement cannot be fairly insisted upon, the court may order that monetary compensation be provided in lieu of the easement.

In contrast, legislative interference is not excluded, e.g., the SvkCommC directly provides for it by considering a performance that was prohibited by law after the conclusion of the contract as an impossible performance.[210]

203 SvnCO, Articles 329–331.
204 Kanda, 1966, p. 154.
205 SvkCommC, § 50a; SvkCC, § 292 (5).
206 SvkCommC, § 575 et seq.; SvkCC, § 352 et seq.
207 SvkCC, § 561 para. 2.
208 SvkCommC, § 356.
209 SvkCommC, § 518.
210 Ovečková, 2017.

7.3. Frustration of contracts

As mentioned above, Slovak law regulates frustration of contract specifically in several situations. The common feature of these cases is that frustration is caused by a change of circumstances that occurred after the conclusion of the contract, with the consequence usually (although not always) being the termination of the obligation.

7.3.1. Future contract

According to § 50a (3) of the SvkCC, an obligation to enter into a future contract is extinguished if the circumstances on which the parties based the obligation have changed to such an extent that it cannot fairly be required to enter into the future contract. Similarly, according to § 292 (5) of the SvkCommC, an obligation to enter into a future contract or to make up a deficiency in the content of a contract also lapses if the circumstances on which the parties apparently relied when the obligation arose have changed to such an extent that the obliged party cannot reasonably be required to enter into the contract; however, the lapse only occurs if the obliged party has notified the change of circumstances to the party entitled without undue delay. Thus, under both regulations, the change must be material,[211] and there must be a causal link between the circumstances in which the contract was concluded and its conclusion. At the same time, it is admitted that the changed circumstances may also consist in an increase in the value of the object of the future contract.[212] However, the change in circumstances cannot consist in the impossibility of performance. If the conclusion of the future contract has become impossible, then the provisions on the termination of the obligation because of the subsequent impossibility of performance apply to the case.

7.3.2. Subsequent impossibility of performance

Subsequent impossibility of performance (*následná nemožnosť plnenia*) is one of the general grounds for the termination of an obligation under the SvkCC. This means that any obligation can be extinguished by reason of a subsequent impossibility of performance.

Pursuant to § 575 (1) and (2) of the SvkCC, if performance becomes impossible, the debtor's obligation to perform is extinguished; however, performance is not impossible, in particular, if it can also be performed under more difficult conditions, at greater expense or only after an agreed time period has elapsed. This also applies to commercial relations. It follows from this provision that the so-called economic impossibility or subjective impossibility of performance does not constitute a case of impossibility of performance and is therefore not a ground for the termination of the obligation. In contrast, despite the text of the law, the legal literature takes the view that even such an economic or subjective impossibility of performance may exceptionally lead to the termination of an obligation if the performance of the

211 Števček, 2019; Fekete, 2018; Ovečková, 2017.
212 Fekete, 2018.

obligation would be extremely burdensome, extremely costly, etc.[213] At the same time, it is pointed out that demanding performance in such cases would be an exercise of a right contrary to good morals pursuant to § 3 (1) of the SvkCC, and thus would not enjoy legal protection.[214] Other opinions say that there is no extinction of the obligation, but demanding performance would be unsuccessful in court anyway because it would constitute an exercise of a right contrary to good morals.[215]

Thus, performance is considered impossible if its provision is objectively and permanently impossible.[216] The reason for such impossibility may be different: for example, it may be both force majeure (*vyššia moc*) or *casus fortuitus* (*náhoda*); according to case law, the impossibility may be factual as well as legal.[217] According to case-law, it is a case of impossibility of performance if the seller has undertaken to hand over an individually determined asset and subsequently alienates this asset to a third party; the alienation of the asset to the third party renders the fulfillment of his or her obligation toward the buyer impossible and thus extinguishes it.[218]

The consequence of the impossibility of performance is therefore the extinction of the obligation. If it was a mutual obligation, according to the legal literature, the obligation of the other party is also extinguished. If that party has already performed under that obligation, then it is entitled to reimbursement of the performance on the grounds of unjust enrichment (*condictio ob causam finitam*).[219] However, if the other party has borne the risk of accidental destruction of the thing (for example, if the creditor was in default), then its obligation is not extinguished.[220] In non-commercial relations, if the impossibility of performance was caused by fault, liability for damages caused by the termination of the obligation because of the impossibility of performance is not excluded. In commercial relations, the regulation of § 353 of the SvkCommC applies, according to which an obligor whose obligation has been extinguished because of impossibility of performance is obliged to compensate the other party for the damage, unless the impossibility of performance was caused by circumstances excluding liability.

If the impossibility concerns only part of the performance, a distinction must be made as to whether the nature of the contract or the obvious purpose of the performance implied that the creditor would or would not have an interest in only part of the performance.[221] In the former case, the obligation will be extinguished only in part, but the creditor has the right to rescind the entire contract. In the second case, the entire obligation is extinguished unless the creditor, without undue delay, after

213 Sedlačko, 2019.
214 Sedlačko, 2019.
215 Fekete, 2018.
216 Sedlačko, 2019.
217 R 109/1998.
218 Supreme Court of the Slovak Republic, case No. 4 Cdo 46/2009.
219 Sedlačko, 2019.
220 Fekete, 2018.
221 SvkCC, § 575 (3).

becoming aware of the impossibility of part of the performance, notifies the debtor that he or she insists on the remainder of the performance. In commercial relations, the consequence of partial impossibility is regulated differently: the creditor may withdraw from the remainder of the contract only if the remaining performance would not be of economic importance to him or her in view of its nature or in view of the purpose of the contract, which is apparent from its content or was known to the other party at the time the contract was concluded.

7.3.3. Frustration of the purpose of the contract

According to § 356 (1) of the SvkCommC in commercial relations, if, after the conclusion of the contract, as a result of a substantial change in the circumstances in which the contract was concluded, the essential purpose of the contract, which was expressly contained in the contract, is frustrated (*zmarený*), the party affected by the frustration of the purpose of the contract may withdraw from it. However, a change in the circumstances shall not be deemed to be a change in the financial circumstances of a party and a change in the economic or market situation.

The legal literature is of the opinion that the essential purpose of the contract must be frustrated, that is to say, a purpose that makes it clear that, but for its existence, the party would not have concluded the contract. It is irrelevant for what reasons the essential purpose of the contract was frustrated. At the same time, the essential purpose of the contract must be expressly stated. If this condition is not fulfilled, the contract cannot be rescinded based on § 356 of the SvkCommC. It is therefore not sufficient that such a purpose was known to the parties at the time of the conclusion of the contract or can be inferred from the nature of the obligation.[222]

Thus, withdrawal from a contract gives a party the opportunity not to perform a contract that is already impracticable for it. In contrast, for the other party not to be harmed by withdrawal from the contract by the withdrawing party, the withdrawing party must compensate it for the damage it incurs by withdrawing from the contract.[223]

7.3.4. Frustration of the choice of performance

Pursuant to § 561 (2) of the SvkCC, if an obligation can be discharged in several manners according to the choice of one of the parties and the accidental extinction of a thing has frustrated that choice, the party who had the right to choose may withdraw from the contract. According to the legal literature, this is the case where the extinction of the thing reduces the manner of performance to a single alternative, i.e., where the party entitled no longer has even the possibility of choosing between two performances.[224]

222 Ovečková, 2017.
223 SvkCommCC, § 357.
224 Fekete, 2018.

7.3.5. Contract of deposit

A special case of change of circumstances is regulated by § 518 of the SvkCommC, according to which, even if the depositee undertook in the agreement on the deposit to care for the good in a certain manner, he or she may deviate from this manner, if circumstances arise which the depositee could not foresee at the time of conclusion of the agreement, and which make the performance of the obligation unreasonably difficult for him or her. The depositee shall notify the depositor in good time of the occurrence of those circumstances. Similarly, pursuant to § 523 (1) of the SvkCommC, the depositee is entitled to require the depositor to take possession of the good deposited without undue delay even before the expiry of the agreed period of deposit if further performance of the obligation would cause the depositee undue hardship which he or she could not foresee at the time of conclusion of the contract, or if a third party seeks the delivery of the thing deposited.

8. Concluding remarks

In the classical scientific literature of civil law, it was stated the 'Every subsequent judicial modification of a contract is a deprivation of rights and a violation of the law, unless the law itself contains specific provisions which exclude or modify the legal effect of the contract in the event of certain ex post facto circumstances.'[225]

Legislative modification of contracts has an exceptional character in all the analyzed legal systems, however, every state considered here had such experiences, especially related to some crisis situation. For example, in the Czech Republic such interventions happened during transformation of the economy after the fall of the communist regime or during the pandemic crisis relating to the spread of the COVID-19 disease. Other states, such as Hungary adopted several acts to modify loan contracts, for the special cases in which the loans were contracted in foreign currency. The same happened in Serbia and Croatia, in the context of loans in Swiss Francs. We can observe that it is accepted that crisis justifies such an intervention, but this intervention is not limitless. For example, the Hungarian constitutional practice observed that the strict conditions for judicial modification of the contracts must be observed when a legal act provides for mass modification of contracts: only when an extraordinary change in circumstances occur it is acceptable to interfere in contracts by a legislative act to rebalance those contracts, otherwise such an intervention is an unjustifiable alteration of private autonomy.

Regarding judicial modification of contracts, all the legal systems, except for that of Slovakia, implemented the judicial modification of contracts for unforeseen changes in circumstances (*clausula rebus sic stantibus*), under similar conditions, even if there are slight differences between the requirements envisaged by the legislator to amend or cease contracts. In some countries (the Czech Republic, Romania) there

225 Szigeti, 1938, 567.

is an obligation for the debtor to initiate the renegotiation of the contract, before addressing the court. What is under discussion in the Czech Republic, is the question whether a judge may modify the contract also for the past, the tendency being the interpretation that the judge can alter the contract also for the past, from the moment when the circumstances have changed. On the contrary, in Hungary the modification of the contract is possible only from the moment at which the request to adapt the contract is lodged with the court or from a later date determined by the judge.

A third issue is frustration of contract, when the performance effectively becomes impossible. If neither of the parties is liable for the performance becoming impossible (objective frustration of the contract), in general monetary reimbursement shall be provided for the performance rendered before the termination of the contract. This is a just solution to keep the balance between the parties who must support equally the consequences of contract frustration. If the other party did not provide the counter-performance corresponding to the monetary service already performed, the monetary service should be returned. A specific case is when one of the parties is liable for the performance becoming impossible. In this situation, the other party shall be released from the performance of the obligation arising from the contract and may claim compensation for the damage caused to him or her because of the breach of contract.[226] If both parties are liable for the performance becoming impossible, the contract shall terminate, and the parties may claim damages from each other *pro rata* to their contribution.

Frequently objective frustration is related to the fortuitous destruction of a good. In this situation, no damages are granted because the non-performance is not because of a breach of contract. In the case of synallagmatic contracts, the reciprocity between the considerations necessarily means that, when one of the contractual obligations has forcibly become impossible to perform, the other consideration ceases to exist: in other words, the legal relationship is terminated. Each contracting party has undertaken a reciprocal and interdependent service but if one of them is impossible, the reason to maintain the corresponding obligation disappears.

In the matter of property transfer contracts, in the absence of a clause to the contrary, as long as the good is not handed over, the risk of the contract remains with the debtor of the delivery obligation (even if the property, or title was transferred to the acquirer in the legal systems which perceive the sales agreement as a consensual and not as a real contract). In case of fortuitous loss of the good, the debtor of the obligation to deliver the good loses the right to consideration, and if he or she has received one, is obliged to return it.

For example, A and B enter into a contract of sale. B paid the price. The good was to be handed over within ten days but perished fortuitously before being handed over (the sale of a painting destroyed in a fire before handing over, but after the sale is completed). According to the law, the risk of the contract is borne by the debtor of the obligation to deliver. Consequently, A bears the risk of the contract and will have to

226 See Chapter XIII for further details.

return to B the price received. The solution is justified by the fact that the seller can no longer perform its service. Therefore, it would not be reasonable to claim the price. The risk of the contract, in this context, designates a specific way of termination.

However, the overdue creditor (who disrespected the term to take over the good) assumes the risk of accidental loss of the good (*mora creditoris*). Depending on the legal system analyzed, there can be a rule that a creditor cannot be released even if he or she proves that the good would also have perished if the obligation to deliver would have been executed in time.

If in the above-described situation, B has not taken over the painting in time, being notified by A to take over the canvas because the contractual term has been exceeded, then the risk passes to B. If the good perishes, then B no longer has to return the price received. The fact that the painting was destroyed in the fire and in possession of A is of no importance. The rule can be generalized by the phrase *res perit debitori*: the risk is borne by the debtor of the obligation that has become impossible to execute. For example, A bought a theater ticket. Nevertheless, the show is cancelled because of the illness of one of the main actors. The theater is the debtor of the obligation impossible to execute because the theatrical presentation will no longer take place. A has the right to a refund of the ticket price.

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Chapter XII

Claims for Performance

1. General considerations

1.1 The binding force of contracts

Contracts are legally binding promises. That is, legal enforcement is the *differentia specifica* of the contract as a promise. Whether a promise is legally binding or not depends on the qualification of the promise. The preconditions of such qualifications are addressed in Chapter IV. The binding force of contract implies that if the party failed to perform the contract, there are remedies provided to the aggrieved counterparty. The remedies for breach of contract aim at bringing the aggrieved party into a position, as if the contract had been performed. The most important factor determining the structure of remedies for breach of contract is the availability of performance in kind for the aggrieved party. Historically, legal systems could follow two paths and, accordingly, two different paradigms in developing the system of remedies for breach of contract. The initial paradigm of English common law was that the remedy for breach of contract could only be liability for damages, but the courts rejected in kind performance on the ground that they would not interfere with party autonomy.[1] This system was similar to that of Roman law. This was later changed by introduction of the notion of equity. Specific performance has become available as an equitable remedy. The Chancery, however, has never developed any coherent doctrine or clear

1 Holmes, 1991, p. 301.

Menyhárd, A., Hulmák, M., Zimnioková, M., Stec, P., Veress, E., Dudás, A., Hlušák, M. (2022) 'Claims for Performance' in Veress, E. (ed.) *Contract Law in East Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 389–418. https://doi.org/10.54171/2022.ev.cliece_chapter12

guidelines for ordering specific performance. It seems likely that the Chancellor granted specific performance simply because it was in accordance with a good conscience to do so and never attempted to decree specific performance of all contracts: the granting of this relief might vary with the circumstances of each case[2] and thus, it remained exceptional. This origin of specific performance in English law determined its nature: it remained a discretionary remedy granted only upon the plaintiff's request, and only if the court found it just to do so, but the plaintiff was not entitled to claim specific performance as of right.[3] One could assume that specific performance is, in the light of the aim and function of remedies for breach of contract, the proper method of enforcing contracts since it provides the promisee the performance he or she had bargained for. There are, however, some restrictions applied in legal systems on specific performance. These limits may be because of the fact that courts try to conserve resources and are reluctant to order specific performance if supervision of performance would be too difficult or costly. Another policy for implementing such limits may come from protecting individual liberty. This may be the case where the performance of the contract involves personal services.[4]

In continental legal systems, the binding force of contract means that if a party to a contract failed to keep its promise, the aggrieved counterparty has the right to claim the enforcement in kind. This approach was the result of elevating the principle of performance in kind, originally provided by the law of Justinian for *dare*[5] obligations (the transfer of real rights), to the level of a general remedy. This approach complies with the moral principle stating, that promises are to be kept simply because they are promises and the choice of the debtor to buy off its duty to keep its promise would be incompatible with this moral tenet. This would not take into account the interests of the promisee either, who surely had the good reason to request the contractual promise as a counter-value for its own obligation. Unavailability of specific performance would also compromise the mutual trust inherent to society since the interests of the promisee in many cases would not be protected properly by an obligation to pay. There are idiosyncratic values and there are transactions where the aim of the parties is not purely to make a profit. In absence of the possibility of enforcing performance in kind, the promisee would not be able rely on that he or she can claim, and also get what he or she has bargained for, if the promisor failed to perform his or her obligations voluntarily.[6] This was also the main consideration that led the Chancery to amend the remedies provided by common law and award specific performance in certain cases. In commercial transactions, the interests of the promisee can for the most part be protected properly with awarding monetary remedies either by enabling him or her to gain a substitute performance on the market with a cover transaction or by awarding him or her the net gains that he or she lost because of non-performance.

2 Jones and Goodhart, 1996, pp. 6, 8.
3 Jones and Goodhart, 1996, pp. 6, 8.
4 Collins, 1993, p. 392.
5 Szászy, 1943, p. 17; Zimmermann, 1996, p. 772.
6 Fried, 1981, p. 17.

1.2. Performance in kind vs damages

In spite of the completely different paradigms, legal systems developed – and continue to point – in the same direction. Specific performance shall be awarded when idiosyncratic values underlie the protection of interests of the obligee via awarding performance in kind. Damages should be awarded if there are no such values involved or when enforcing performance is not possible. In common law the line of development points from damages (considered a main rule as opposed to specific performance, as an exception) while in continental law from specific performance to damages. In continental legal systems the doctrines of impossibility of performance or frustration of purpose convert the claim for performance into a claim for damages. If the promised performance is available on the market, an obligation can be imposed upon the obligee to cover its needs by a substitute transaction which also results in the claim being restricted to damages instead of performance in kind.

The CISG provides a compromise solution as to specific performance. According to Article 28 of the CISG if, in accordance with the provisions of the Convention, one party is entitled to require performance of any obligation of the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by the Convention. This is a compromise, which does not solve the issue of specific performance by substantive rules but simply shifts it, to be resolved by the *lex fori* and the courts. Both the UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law provide explicit provisions regarding the performance of non-monetary obligations. Article 7.2.2 of the UNIDROIT principles provides, that where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless performance is impossible in law or in fact; the performance or, where relevant, enforcement is unreasonably burdensome or expensive; when the party entitled to performance may reasonably obtain performance from another source; when performance is of an exclusively personal character; or the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance. Article 9.102 of the PECL provides that the aggrieved party is entitled to specific performance of an obligation other than one to pay money, including having a defective performance remedied. Specific performance cannot, however, be obtained where the performance would be unlawful or impossible; or the performance would cause the obligor unreasonable effort or expense; or the performance consists in the provision of services or work of a personal character or depends upon a personal relationship, or the aggrieved party may reasonably obtain performance from another source. Paragraph 3 of Article 9.102 provides that the aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance. Both the UNIDROIT principles and the PECL seem to find a compromise in a solution admitting enforced performance as a main rule and creating exceptions for specific cases.

1.3. Performance in kind and efficient breach of contract

Availability of performance in kind is an important factor of assessing efficient breach of contract. The availability of specific performance may prevent the efficient breach. From a point of view of economic analysis, breach of a contract in some cases may be more efficient than performing it. The breach is more efficient than performance when the costs of performance exceed the benefits to all parties. According to the theory of efficient breach, a unilateral breach of contract shall not only be permitted but even encouraged where the party in breach found a more profitable opportunity to invest the resources that would otherwise be dedicated to the performance provided that he or she is able to compensate the aggrieved party. According to this theory, the precondition of allowance of a breach is that the breaching party has to be willing and able to compensate the promisee for his full expectancy loss and still be able to realize gains from the new opportunity. All of this infers that the breach is Pareto superior, that is to say, as the result of the breach nobody is worse off and some are better off.[7] The breach is still efficient if the breaching party is in the position to compensate the aggrieved party while still being better off (Kaldor–Hicks efficiency). Even if there are also strong arguments against the doctrine of efficient breach,[8] in commercial transactions this is a reality, which seems to be quite logical and inevitably makes some sense.[9] One of the main suggested strong limitations of this doctrine is the protection of interests based on idiosyncratic non-market values or non-compensable preferences which is also the main policy behind the availability of performance in kind.

Thus, efficient breach may be supported in commercial transactions where mostly the loss of the aggrieved party can be compensated in money and where, in most of

7 Trebilcock, 1997, p. 142. A widely cited and discussed four-players-example for the illustration of the paradigmatic situation of efficient breach has been created by Peter Linzer as follows. Assume that Athos owns a woodworking factory capable of taking one or more major projects. He contracts to supply Porthos with 100,000 chairs at $10 per chair, which will bring Athos a net profit of $2 per chair, or $200,000 on the contract. Before any works takes place, Aramis, who sells tables, approaches Athos. Although there are several chair factories in the area, only Athos's factory can make tables too. If Athos will supply Aramis with 50,000 tables, Aramis will pay him $40 per table. Athos can produce the tables for $25, so he can make a net profit of $750,000 if he uses his factory for Aramis's tables. But to do so, he must breach his contract with Porthos. There are other chair factories, and Porthos will be able to get the chairs from one of them – for example, from D'Artagnan's. Let us assume that because of his distress situation Porthos will have to pay D'Artagnan 20% more than Athos's price for comparable chairs, and that Porthos will sustain $100,000 in incidental administrative costs and consequential costs such as damages for delay to his customers. Even with these costs, Porthos will lose only $300,000 because of Athos's breach, and Athos can reimburse him in full and still make $450,000 profit, over twice the profit from his contract with Porthos. Linzer, 1981, pp. 114–115.

8 One objection to this theory is that it 'encourages uncivil, unilateral, uncooperative attitudes towards contractual relationship' and that 'it deprives the non-breaching party of the possibility of sharing in the gains from the new opportunity presented to the breaching party, which a negotiated release from an entitlement to specific performance would probably engender.' Trebilcock, 1997, p. 142.

9 Macneil, 1982, p. 957; Collins, 1999, p. 119.

the cases, there is a substitute performance available on the market. That is why there is a two-step approach suggested in legal scholarship, where in each of the cases, the courts first shall compare the efficacy of monetary damages with that of specific performance paying attention especially to idiosyncratic interests. In commercial transactions involving tangible assets this test normally results in favoring monetary damages contrasting to specific performance. In non-commercial transactions, the promisee often has idiosyncratic values that are to be protected by the law. The recognition of such values should result in preferring specific performance to monetary damages because that is the more efficient solution.[10]

1.4. Specific performance and other claims for performance

Specific performance, that is, imposing an obligation with a judgment upon the defendant to act as it was required by the contract is not the only way of claiming performance. If the obligation, the defendant failed to comply with, was to give a declaration, such a declaration can be replaced by the judgment of the court. In a way, the replacement of a juridical act with a judgment may be seen as a specific form of performance in kind, because as the result of such a judgment the situation is the same as if the contract had been performed.

In context of defective performance, legal systems normally provide remedies like repair and replacement for the obligee either with a general rule or as a remedy in the context of sale of goods. Repair and replacement also aim at providing performance to the party, as it had been promised by the obligor, even though they are not means of specific performance, at least not in the narrow sense.

2. The Czech Republic

2.1. Overview

Under an obligation, a creditor has the right to a particular performance as a claim from the debtor, and the debtor has the duty to satisfy that right by discharging the debt.[11] The creditor may claim such particular performance.

2.1.1. Performance

A creditor may not be forced to accept any performance, other than what pertains to his or her claim, and a debtor may not be forced to render, against his or her will any performance, other than what he or she owes according to the contract. The same applies to the place, time and manner of discharge of contractual obligations.[12]

There are some exceptions to above mentioned principle. Pursuant to § 1930 paragraph 2 of the CzeCC if a debtor offers a partial performance, the creditor must

10 Linzer, 1981, p. 131.
11 CzeCC, § 1721.
12 CzeCC, § 1910.

accept it, unless it is contrary to the nature of the obligation or the purpose of the contract, provided that such a purpose was at least obvious to the debtor. Another example is § 2628 of the CzeCC. A client does not have the right to refuse to take over a structure because of small, isolated defects which, by themselves or in conjunction with others, neither functionally or aesthetically prevent the use of the structure, nor substantially hinder its use.

However, the creditor may agree to accept something other than what pertains to his or her claim (*datio in solutum*). It is unclear what the nature of *datio in solutum* is under Czech law. Some authors conclude it is an agreement on a change in the content of the obligation, while others are of the opinion that it is an agreement on a specific manner of performance. We adhere to the opinion that the will of the parties is not to agree on any change in their rights and duties, it rather signifies the extinction of the obligation by a performance that is different to the one initially stipulated.[13]

The debtor can also endeavor to offer something other than what pertains to the claim of the creditor by *datio solutionis causa*. *Datio solutionis causa* is not an alternative to what the debtor owes, instead it is an instrument by which the creditor may satisfy his or her claim. The debt is not discharged by such an offer. It is discharged when the creditor obtains the target performance.[14]

2.1.2. Right to withhold performance

Where the parties are to perform mutually and concomitantly, a performance may only be required by the party which has already discharged the debt or is willing and able to discharge the debt simultaneously with the other party.[15]

A party who is to perform in advance in return for a counter-performance may withhold such a performance until the counter-performance is discharged or ensured to him or her, but only if the counter-performance is jeopardized by circumstances which occurred in respect of the counterparty, of which he or she was not, and should not have been, aware at the conclusion of the contract.[16] It is also possible to cancel the contract upon the expiry of the additional time limit within which the debt is not discharged or performance is not ensured.[17]

2.2. Exclusion of a claim for performance

Any particular performance may be impossible. In such a case it is obvious that it cannot be required. In some other cases, the creditor may require certain performance, but it is impossible to enforce such performance directly (e.g., when personal performance is involved). There is no exception from the binding force of contracts when circumstances change to the extent that the performance arising from the

13 Šilhán in Hulmák et al., 2014, p. 848.
14 Šilhán in Hulmák et al., 2014, p. 849.
15 CzeCC, § 1911.
16 CzeCC, § 1912 (1).
17 CzeCC, § 1912 (2).

contract becomes more onerous for one of the parties[18] unless there is so-called hardship involved (see more below).[19]

2.2.1. Impossibility of performance

A claim for performance is excluded if it is impossible for the debtor to perform the contract. The CzeCC recognizes two types of impossibility – initial impossibility (*počáteční nemožnost plnění*) and subsequently occurring impossibility (*následná nemožnost plnění*).

Initial impossibility results in the contract being null and void (*absolutní neplatnost*), while subsequently occurring impossibility results in the extinction of the obligation.

2.2.1.1. Initial impossibility

If the contract requires the provision of a performance which is impossible from the outset, that contract is null and void.[20] The knowledge of parties in this respect is irrelevant. It is questionable whether parties may conclude the contract contingent on an initially impossible performance becoming possible in the future. This would mean that the impossibility was not permanent, and there is no need to apply the sanction of considering the contract null and void.[21]

2.2.1.2. Subsequently occurring impossibility

If, after the creation of an obligation, a debt becomes impossible to discharge, the obligation is extinguished because of the impossibility of performance (*ex lege* with *ex nunc* effect). Impossibility is to be evaluated objectively[22] and must be of a permanent nature.[23] A debt also becomes impossible to discharge when such discharge would be illegal.[24] Such illegality must be based on a regulation which took effect after the creation of the obligation.[25] Otherwise the obligation was initially impossible.

A performance is not impossible if the debt can be discharged under more difficult conditions, at higher costs, with the help of another person or only after a determined period.[26] However, under some circumstances, unreasonably high costs can lead to

18 CzeCC, § 1764.
19 Supreme Court Ref. No. 28 Cdo 4454/2011.
20 CzeCC, § 588.
21 Melzer and Piechowiczová in Melzer and Tégl, 2014, p. 734. A different view is found in Výtisk in Petrov et al., 2019, p. 642 ('from the beginning' means before the planned force).
22 Výtisk in Petrov et al., 2019, p. 2164; Šilhán in Hulmák et al., 2014, p. 1222; Kindl in Švestka et al., 2014, Sec. 2006.
23 Výtisk in Petrov et al., 2019, p. 2165; Šilhán in Hulmák et al., 2014, p. 1222; Kindl in Švestka et al., 2014, Sec. 2006.
24 Výtisk in Petrov et al., 2019, p. 2165; Šilhán in Hulmák et al., 2014, p. 1223.
25 Výtisk in Petrov et al., 2019, p. 2165.
26 CzeCC, § 2006 (1).

the application of provisions regarding the change in circumstances.[27] In such cases, after renewed negotiation or a subsequent court decision (see below), the contract can be modified or even (partially or completely) terminated. Moreover, in other cases totally unreasonable costs of performance result in subsequently occurring impossibility, i.e., when it is not justifiable to ask the debtor to perform, e.g., search for a lost ring in the sea.[28]

If one of several performances left to the debtor's choice become impossible, the obligation is restricted to the remaining performances. However, if the person who did not have the right to choose caused the impossibility, the other party may cancel the contract.[29] Where only part of a performance is impossible to be provided, the obligation is extinguished in full if the nature of the obligation or the purpose of the contract of which the parties were aware at its conclusion indicate that the performance of the rest is irrelevant for the creditor. Otherwise, the obligation is extinguished only to the extent of the affected part.[30]

2.2.1.3. Personal performance

Personal performance excludes discharge of the debt by someone different from the debtor. This is the case in which performance is linked to the debtor's personal characteristics or abilities, or when it is directly dependent on a personal relationship with the other party. It can be caused by the nature of the performance (e.g., an artistic performance), by the arrangement of the parties or it can be determined by regulations.

In such cases a creditor is not obliged to accept a performance offered by a third person.[31] If the debtor does not perform, the creditor may sue for personal performance. However, the performance is enforced only by court penalties.[32] A claim for personal performance is excluded (with *ex nunc* effect) in case of the debtor's death.[33]

2.2.2. Hardship

Exclusion of a claim for performance can also arise when there is a change in circumstances (so-called hardship).

Pursuant to § 1765 paragraph 1 of the CzeCC, if such a substantial change in circumstances occurs, that it creates a gross disproportion in the rights and obligations of the parties by disadvantaging one of them either by disproportionately increasing the cost of the performance or disproportionately reducing the value of the counter-performance, the affected party has the right to claim the renegotiation of the contract

27 CzeCC, §§ 1764–1766.
28 Šilhán in Hulmák et al., 2014, p. 1225, Výtisk in Petrov et al., 2019, p. 2164, Melzer and Piechowiczová in Melzer and Tégl, 2014, p. 734.
29 CzeCC, § 1927 (2).
30 CzeCC, § 2007.
31 CzeCC, § 1936 (1).
32 Czech Code of Civil Procedure, § 351.
33 CzeCC, § 2009 (1).

with the other party, if it is proved that it could neither have expected nor affected the change, and that the change occurred only after the conclusion of the contract, or the party became aware thereof only after the conclusion of the contract.

Eventually it is possible for the court to terminate the contract[34] (see more in Chapter XI).

2.3. Claims for supplementary performance

There is a difference between the main performance and ancillary obligations. A person who performs for consideration to another is obliged to perform without defects, in conformity with the reserved or usual properties so that the object of the performance can be used in accordance with the contract, and, also in accordance with the purpose of the contract, if known to the parties.[35] If a debt is discharged defectively, the recipient has rights arising from a defective performance.[36] In such cases the creditor may choose a supplementary performance.[37] As to ancillary duties, e.g., to send information on dispatch of goods, there is a claim for damages only, no supplementary performance can be claimed.

The criterion for determining the rights arising from a defective performance lies in the nature of the defect – whether it can be removed or not, and whether it prevents the proper use of the performance. Generally, a creditor may demand either a repair or the delivery of a missing part, or a reasonable price reduction. If it is not repairable and prevents the proper use of the object, the creditor may either cancel the contract or demand a reasonable price reduction.[38] A right arising from a defective performance does not exclude damages. However, what can be achieved by asserting the right from a defective performance may not be claimed for any other legal cause.[39]

The CzeCC recognizes special rules for the purchase contract and the contract for works. The criterion for determining the right arising from a defective performance lies in the nature of the defect as well, but it is necessary to assess, whether a defective performance constitutes a fundamental breach of contract. If so, the buyer has the right to have the defect removed by having a new, defect-free thing or a missing thing supplied, to the removal of the defect by having the thing repaired, to a reasonable reduction of the purchase price, or to cancel the contract.[40] If not, the buyer has the right to have the defects removed, or to a reasonable reduction of the purchase price.[41] If the seller fails to remove a defect of a thing in due time or refuses to remove the defect, the buyer may then request a reduction of the purchase price or cancellation the contract.[42]

34 CzeCC, § 1766.
35 CzeCC, § 1914 (1).
36 CzeCC, § 1914 (2).
37 Kötz, 2017, p. 210.
38 CzeCC, § 1923.
39 CzeCC, § 1925.
40 CzeCC, § 2106 (1).
41 CzeCC, § 2107 (1).
42 CzeCC, § 2107 (3).

Regarding the notification of the defect and notification of the chosen right, the CzeCC sets rigorous time limits.

When deciding whether the party has rights arising from a defective performance, it is also important to evaluate another aspect (e.g., whether the defect is obvious and already evident at the conclusion of the contract, or if a defect can be ascertained from a public register, whether the transferor employed trickery to conceal the defect or expressly assured the other party that the thing is free from that defect, or from any defects etc.).

3. Hungary

3.1. Performance in kind as a structural rule

As to the available remedies for breach of contract, the foundations of the current law had been laid with the HunCC (1959) which clearly rested on the principle of performance in kind. The idea of the legislator was that monetary compensation shall replace the enforced performance only if performance in kind is impossible or if it would be against the interests of the creditor.[43] The original policy behind this principle was that this would have been in accordance with state intervention and planning and was needed because of the shortage of resources. After the economic reform of 1968 the principle has not been abandoned but a new understanding has been given to it and this new meaning of the principle of real performance has been the general rule of enforced performance (performance in kind).[44] The principle of 'real performance' meant that the general rule of Hungarian law was the availability of specific performance. The original ideological background of 'real performance' became obsolete by the economic reforms started in 1968 and the new idea of performance in kind has become the doctrine of specific performance. This general rule is in accordance with developments which can be recognized on the international level, as manifested in soft (model) laws like the PECL and the DCFR.

In Hungarian contract law, the claim for performance in kind is a remedy available to the aggrieved party. This means that the party shall have a for the enforcement of the contractual obligation, as it had been stipulated in the contract. Breach of contract means a failure to perform any of the obligations according to the contract. Contractual obligations whether explicit or implied are to be performed as they are stipulated. That is, a situation which does not comply with the content of the contract is to be qualified as a breach of the contract. As a main rule, the aggrieved party shall be entitled to claim performance in so far as it is possible. Thus, structurally, claim for performance in the strict (or narrow) sense is the primary remedy for non-performance of the other party.

43 It was expressly stated by the reasons of the draft of the HunCC (1959). Reasons of the Draft of the Hungarian Civil Code, 1963, p. 295.

44 For more details see Harmathy in Harmathy, 1991, pp. 27–39.

In contrast, the system and the rules of further remedies available for the aggrieved party also can be seen as supporting this goal. Beyond the general concept of breach of contract, there are specific types of breach addressed with specific rules and remedies. These specific types of breach are delay, defective performance, impossibility and the refusal to perform the contract. The primary consequence of the obligor's delay is that the obligee has the right to claim the performance (in so far as it is possible). The obligee has the right to terminate the contract unilaterally if he or she proves that his or her interest in performing the contract has lapsed or, he or she previously provided an adequate additional deadline for performance which expired without result.

Performance is defective if, at the time of performance, the service does not comply with the quality requirements laid down in the contract or by law. The obligor's performance shall not be deemed defective if the obligee was or should have been aware of the defect at the time of the conclusion of the contract. The system and rules covering defective performance are harmonised with Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. Under a claim for warranty for material defects, the remedies available for the obligee are repair, replacement, price reduction and termination of the contract. The obligee shall have the right to terminate the contract if the obligor failed to undertake repairs or replacement or was unable to comply with this obligation in an appropriate time, or if the obligee's interest in repair or replacement had lapsed. The obligee may switch from the chosen remedy for breach of warranty for material defects to another, but he shall pay the costs caused to the obligor with such a switch, unless the obligor caused the switch, or the switch was otherwise justified.

3.2. Substituting juridical acts

As a specific remedy for performance in kind, the court shall substitute the juridical act of the parties by a judgment if the party was obliged to make such juridical act under a contract and failed to perform this obligation. It has been discussed whether such judgment is available for substituting a consent to the resolution of a company if the shareholder of the company undertook such an obligation in a shareholders' agreement. Some of the authors are reluctant to accept the availability of such a judgment[45] while others incline to confirm that such judgment shall be available on the basis of the rules governing contracts as a form of performance in kind.[46] It has been accepted and confirmed by the Supreme Court, that the endorsement for transferring shares,[47] bills of exchange and other securities is a juridical act that can be substituted by judgment of the court as enforcing the contractual obligation to transfer the ownership of such securities.

45 Sárközy in Sárközy and Vékás, 2002, pp. 173–190
46 Menyhárd, 2009, pp. 247–257.
47 Unificatory Resolution of Hungarian Supreme Court No. 1 of 2000 on transfer of shares.

3.3. Impossibility and claim for performance

Impossibility of performance after conclusion of the contract is addressed in the system of Hungarian contract law as a breach of contract. Impossibility shall be interpreted widely and in court practice it covers, beyond the case of physical impossibility, also legal and economic impossibility, and impossibility in purpose as well. From this follows that if performance becomes impossible, illegal, or becomes so hard for the promisee that it is unreasonable to expect him or her to fulfill the obligation, the consequence is liability for damages instead of enforced performance. Thus, changes of physical, legal and economic circumstances as well as frustration of purpose may lead to such impossibility. If performance became impossible, the contract shall terminate.

Although the rules on judicial enforcement make it possible to enforce conducts ordered by the courts, the ultimate tool for that is the fine imposed on the obligor who failed to comply with such a judgment.[48] Non-compliance with such an order does not trigger consequences in criminal law.

From this also follows that if the claimed performance requires a personal service, it does not seem to be guaranteed for the court that the judgment would be actually enforceable. Thus, if performance of services or work has a personal character, it seems to be reasonable to reject performance in kind and[49] have the claim converted into damages via establishing the impossibility of performance, which, as we have said, is a form of breach of contract in Hungarian contract law, that can trigger liability for damages.

It seems to be reasonable to exclude the right to claim performance if the aggrieved party can more easily obtain performance from other sources. This corresponds also to such general principles of contract law as the duty to cooperate, the requirement of good faith and fair dealing and also with the duty to mitigate the loss. One also could argue that in such a situation the claim for enforced performance is an abuse of rights or is against the maxim of *nemo suam turpitudinem allegans*.

4. Poland

4.1. Overview

Polish contract law fully subscribes to the *pacta sunt servanda* principle. That means the debtor is expected to deliver as promised. So, in principle, the creditor may claim for specific performance or, generally at his or her discretion, for damages.

48 The court shall determine by way of a ruling the manner of enforcement, such as 1. ordering the obligor to pay the cash equivalent of the specific act; 2. granting authorization to the judgment creditor to perform or to cause to be performed the specific act at the cost and risk of the obligor, and at the same time ordering the obligor to advance the estimated costs of such; 3. to impose a fine upon the obligor up to HUF 500.000; 4. enforcing the specific act with police assistance. Act No. LIII of 1994 on Judicial Enforcement, § 174.

49 Principles of European Contract Law, Article 9.102 paragraph 2 point (c).

The justification for such a regulatory solution is simple, at least at the theoretical level: the creditor is interested in having the contract performed, and pecuniary damages should be his or her second choice. In contrast, had the debtor not performed at all or was not performing properly, there is little chance that the court judgment will make him or her perform in an efficient way (pecuniary performance excluded). The claim for a specific or, in kind performance is, on the other hand, a good choice for the creditor in the case of economic crisis or something that in the centrally planned socialist economies was known as the 'shortages economy.' This term denotes an economic system where shortages in supplies of goods are a built-in feature. So technically, the creditor could – in theory – obtain the merchandise from another supplier. In practice, because of the ever-present shortages, however it would be connected with additional hardships. In such cases specific performance transfers all the risks and additional transactional costs onto the debtor.

The binding force of a contract is somewhat weakened by the party's right to rescind the contract. This can be either a statutory or a contractual right. The statutory right to rescind the contract is for instance a systemic part of liability for non-performance of a synallagmatic contract. These are *do ut des* contracts where both parties are at the same time debtor and creditor and performance by one party is the economic equivalent of the counter-performance of the other party.[50] Pursuant to article 492 of the PolCC if the party is in arrears the counterparty may stipulate a new date for performance and either rescind the contract or claim for performance and damages. A novel and unusual way of terminating the contract is inevitable non-performance of the contract.[51] This rule is limited to the cases where one party declares in advance that he or she will not perform. In such cases the other party can rescind the contract immediately.

The right to rescind can also be included in a contract. It allows the parties to rescind the contract at will within a specified period[52] or rescind in exchange for a specific lump sum of money.[53] This right, if applied correctly may be used as a gateway to apply the theory of efficient breach of contract in practice.

4.2. Performance in kind vs damages

The debtor who did not perform as agreed upon or performed incorrectly is liable for the damages incurred, unless these resulted from circumstances the debtor is not responsible for.[54]

The general rule is that in case of non-pecuniary obligations the debtor has to restore the *status quo ante* or pay damages. It is the creditor's right to choose between these two remedies. If, however, restitution would be impossible, too difficult or too

50 PolCC, Article 487.
51 PolCC, Article 492[1].
52 PolCC, Article 395.
53 PolCC, Article 396.
54 PolCC, Article 471.

costly for the debtor, the creditor's right is limited to pecuniary compensation.[55] This rule applies both to obligations based on a contract or on extra-contractual liability. However, in the case of contractual obligations the creditor's rights are limited to the claim for damages if he or she decided not to accept a delayed performance and claim damages only.[56] It is disputed Polish legal literature and case law whether it is possible to claim restitution in case of improper fulfillment of an obligation. Part of the literature opts for pecuniary compensation only, why the minority view, although largely accepted by courts, is that the creditor has the choice between these two claims.[57] It is also possible to claim mixed compensation composed of both restitution and a supplementary claim for damages.[58] Specific rules for this are contained in Article 477 § 1 of the PolCC.

If the debtor is obliged to deliver fungible goods, like, for instance, a certain number of bottles of lemonade and is in arrears, the creditor may either buy the same number of bottles at the debtor's expense or sue for performance. In either case the creditor is entitled to damages.[59] This allows the creditor to get the required goods fast without the need to get a prior court order. In the case of standard objects, with a calculable average price range, this is a good compromise between the creditors' needs and the need to protect the debtor against abuse (e.g., buying said goods at excessive prices).

In the case of *facere* obligations (a duty to do something) with the debtor being in arrears, the creditor may obtain a court order authorizing him or her to do what the debtor was supposed to, at the debtor's cost and expense.[60] Similar rules apply to *non-facere* obligations.[61] In exceptional circumstances the creditor may act even without a court order.[62]

In the case of pecuniary obligations, the creditor has the right to claim the amount of money owed, with interest. This interest serves as a simplified compensation of any incurred losses.[63] There is no need to prove the actual loss, the mere fact that the debtor is delayed with payments is enough to demand interest. The interest rates can be either statutory or contractual, by no means can they exceed the maximum amounts set forth by law. Of course, the difference between damages and specific performance does not apply here.

In the case of synallagmatic contracts, if one party does not decide to rescind the contract, he or she has the right to claim both damages and specific performance of the contract.[64]

55 PolCC, Article 363 § 1.
56 PolCC, Article 477 § 2.
57 Machnikowski in Gniewek and Machnikowski, 2021, at 33.
58 Zagrobelny and Gniewek in Gniewek and Machnikowski, 2022, at 3.
59 PolCC, Article 479.
60 PolCC, Article 480 § 1.
61 PolCC, Article 480 § 2.
62 PolCC, Article 480 § 3.
63 PolCC, Article 482.
64 PolCC, Article 491 § 1.

4.3. Other claims for performance

In the case of non-performance, the debtor is obliged to deliver as agreed. In the case of partial or defective performance the debtor can be obliged to repair or replace the object of the performance. As mentioned above, in the case of synallagmatic contracts the creditor may, alternatively, also rescind the contract. In some of the specific nominate contracts there are separate rules on performance claims. One of the most obvious cases is liability for the sale of defective goods, called *rękojmia* in Polish.[65] If the goods do not conform with the contract, the buyer may have three alternative claims against the seller: to lower the price, to deliver undamaged goods or to repair the damaged goods. Alternatively, unless the defects are minor, the buyer may also rescind the contract.[66] Similar rules apply to some other contracts like a contract for production and delivery of goods (*dostawa)* or a contract for a specific task.

5. Romania

5.1. Preference for enforcement in kind

Enforcement in kind means the actual achievement of the performance to which the debtor is obliged, as opposed to indirect enforcement, which refers to the payment of damages in Romanian civil law.

If performance does not take place voluntarily, the creditor is entitled to legal recourse to enforce his or her rights.[67] The legal basis for enforcement is the so-called enforceable title: in general, a court judgment or other document recognized as such by law. In certain cases, a contract may constitute an enforceable title in itself, meaning that the contract can be enforced directly, without the need to resort to a court.[68]

65 PolCC, Article 556 et seq.

66 PolCC, Article 560.

67 For a monographic overview, see Diaconiță, 2017.

68 Several contracts have *per se* this characteristic of enforceability. Just as examples: 1. a document authenticated by a notary public establishing a certain claim, in a fixed amount, shall be enforceable as of the date on which it falls due (Act on Notaries Public and Notarial Activity No. 36/1995, Article 101). 2. Credit agreements, including collateral or personal guarantee agreements, concluded by a credit institution constitute enforceable titles (Government Emergency Ordinance No. 99/2006 on Credit Institutions and Capital Adequacy, Article 120). 3. Credit agreements concluded by non-banking financial institutions, as well as real and personal guarantees assigned to secure the credit constitute enforceable titles (Act No. 93/2009 on Non-banking Financial Institutions, Article 52). 4. Mortgage contracts are enforceable titles (RouCC, Article 2431). 5. Agricultural lease contracts are enforceable titles for the payment of rent at times and in the manner provided for in the contract if the contract has been concluded in authentic form or by private deed registered with the local authorities (RouCC, Article 1845). With this special provision, the legislator protects the landlord, who is no longer obliged to go through the court proceedings in order to obtain a judgment against the tenant but can enforce the clause on the rents from the agricultural lease, which, according to the law, is an enforceable title. 6. Lease contracts concluded by private deed and registered with

Where, without justification, the debtor fails to perform his or her obligation and is in default, the creditor may, at his or her option and without forfeiting his right to damages, if due:

— request or, as the case may be, proceed to enforcement in kind of the obligation,
— have the contract rescinded or terminated or, as the case may be, to have his own related obligation reduced,
— where appropriate, to take any other legal remedy provided for the enforcement of his right.

The creditor may always request that the debtor be compelled to perform the obligation in kind unless such performance is impossible.[69] We can see that in the system of the RouCC, enforcement in kind is possible even if it would be very onerous or inconvenient for the debtor, except for the impossibility of performance.

The right to performance in kind includes, where appropriate, the right to repair or replacement of the goods and any other means of remedying defective performance.

5.2. Claims for performance in the context of the typology of obligations

In general, in the case of claims for performance, Romanian legislation distinguishes the three classical forms of obligations: *dare*, *facere*, *non-facere*[70] and designs the regulation based on this division.

5.2.1. Dare

In the case of non-performance of the obligation to transfer some right or to deliver something (*dare*), three situations must be distinguished.

1. If the obligation is to pay a sum of money, performance in kind is always possible. Under a general lien (joint security of all creditors), the creditor may be paid from the (forced sale of the) debtor's assets.[71]

the tax authorities, as well as those concluded in authentic form, shall constitute enforceable titles for the payment of rent at times and in the manner laid down in the contract or, failing that, by law (RouCC, Article 1798). With regard to the obligation to return the leased property, the contract concluded for a fixed term and incorporated in an authentic instrument shall, under the law, constitute an enforceable title at the end of the term. These rules shall also apply to a contract concluded for a fixed period by private deed and registered with the competent tax authority (RouCC, Article 1809). The same rule applies for the lease contracts made without determination of the term, either party may terminate the contract by notice in a reasonable term, and on expiry of the period of notice, the obligation to return the property shall become due, and the lease agreement respecting the above-mentioned requirements constitute an enforceable title in respect of that obligation (RouCC, Article 1816). 7. Although they are not contracts in themselves, bills of exchange and promissory notes are enforceable titles (Act No. 58/1934, Articles 61 and 106). For further details, see Veress, 2015a, pp. 70–79; Veress, 2015b, pp. 42–51.

69 RouCC, Article 1527.

70 Veress, 2020, pp. 15–17.

71 For further details, see Veress, 2012. pp. 141–150.

2. If the obligation relates to an individually determined asset, both the obligation to transfer the title, and the transfer of possession can in principle be enforced in kind. Of course, there may be exceptions. If the seller of a movable hides it before it could be handed over, even if under Romanian law the consent of the parties has transferred title over the movable, the claim will be effective if that asset reappears, because only in this way can it be removed from the debtor's possession and placed in possession of the creditor. Against such a seller of bad faith, who after the sale successfully conceals the object sold, the buyer has only an action for damages.[72]

Suppose the enforceable title (generally, a court judgment) does not specify the amount to be paid as the equivalent of the asset's value in the event of the impossibility of attainment (by the bailiff). In that case, the court supervising enforcement shall, at the creditor's request, determine this amount by a judgment (pertaining to the merits of the claim) rendered in an urgent procedure, during which the parties must be summoned. In all cases, at the creditor's request, the court will also take into account the damages caused by non-performance of the obligation before it became impossible to perform.[73]

3. If the obligation relates to fungible assets, enforcement in kind is also possible if the debtor owns such assets. An alternative solution is for the creditor to purchase these assets from a third party and then claim from the debtor only the damages caused (e.g., the price difference, if he or she has purchased these assets at a higher price than initially contracted).

5.2.2. Facere

In the event of non-performance of an obligation to do something (*facere*), the creditor may, at the debtor's expense, perform the obligation himself or have it performed by other(s). In order to do so, the creditor does not have to ask the court for authorization. However, unless the debtor is in default *ex lege*, the creditor may exercise this right only after due notice is given to the debtor, either together with the notice regarding default, or subsequently.

According to the case law, the obligation to do something does not have an alternative character because it has a single object: the promised performance. Therefore, as long as performance in kind is possible, the debtor can only be discharged by accomplishing the promised performance. As such, the performance of the obligation is in kind, and the alternative exists only if the performance in kind is no longer possible.[74] We supplement the court's correct opinion with the idea that the creditor – and only the creditor – will have the right to choose between enforcement in kind

72 Micescu, 2004, p. 111.

73 Romanian Code of Civil Procedure, Article 892. This first instance judgment is enforceable and subject only to appeal. The enforcement of the judgment can only be suspended with the deposit of the amount determined.

74 Cluj Court of Appeals, Civil Section, Decision No. 1954 of September 20, 2001, published in Rusu, 2007, p. 1.

and enforcement by equivalent. If enforcement in kind is no longer in the creditor's interest, he or she can seek enforcement by equivalent (damages).

As a specific application of this rule, we can mention the case of the sales contract. Where the buyer of the movable asset fails to fulfill his or her obligation to take delivery or to pay, the seller has the right to place the asset sold in a warehouse at the buyer's disposal and expense, or to sell it to another person. This sale shall be made by public auction or even at the current price if the asset is priced at a stock exchange or at another market established by law. The sale must take place through a person authorized by law for such acts (e.g., a bailiff) and with the right for the seller to payment of the difference between the price agreed at the first sale, and the price actually obtained, as well as damages.[75]

Intuitu personae obligations to do something cannot be enforced in kind (*nemo potest praecise cogi ad factum*); the creditor is only entitled to enforcement by equivalent (damages). However, even in this case, the court can levy penalties upon the debtor and indirectly force performance.

5.2.3. Non-facere

In case of the non-performance of an obligation to refrain from a certain action, i.e., an obligation not to do something (*non-facere*), the creditor may apply to the court for an injunction to eliminate or remove what the debtor has done in breach of the obligation, at the debtor's expense, within the limit fixed by the court order. In this situation, enforcement in kind is not possible, given the nature of the obligation (to refrain from a certain conduct). Enforcement is basically the removal of the consequences of the breach of the obligation not to do. Penalties may also apply in this case.

5.3. Penalties and the interdiction of punitive damages

According to the High Court of Cassation and Justice, the penalties analyzed here can be applied to the debtor of a strictly personal obligation to perform only within the framework of the enforcement procedure that begins with the granting of the enforcement order.[76]

In the last two hypotheses, i.e., the debtor does not perform the obligation to do something (*facere*) or the obligation to refrain from doing something (*non-facere*) which cannot be performed by another person, according to Article 906 of the Romanian Code of Civil Procedure, within 10 days from the date of the service of the court decision authorizing the enforcement, the debtor may be compelled to perform the obligation to do or not to do by applying penalties by the court. As it was stated above, these penalties are applicable where the performance of the obligation involves a personal act of the debtor.

75 RouCC, Article 1726.

76 Decision No. 3/2011 given in the procedure for the unification of case law and published in the Monitorul Oficial No. 372 of 27 May 2011.

Where the obligation is not assessable in money, the court seized by the creditor may oblige the debtor, by a final judgment given with prior summons to the parties, to pay the creditor a penalty of between 100 lei and 1.000 lei,[77] fixed per day of delay until the obligation laid down in the enforceable title has been performed. Where the obligation has an object that can be valued in money, the court may set the penalty at between 0.1% and 1% per day of delay, calculated as a percentage of the value of the object of the obligation.

If the debtor fails to perform the obligation laid down in the enforceable title within three months of the date of service of the judgment imposing the penalty, the enforcement court shall, at the request of the creditor, fix the final amount because of him or her under that title by a judgment given with summons to the parties. Enforcement in kind is transformed into indirect enforcement.

The creditor may request that the final amount be fixed after the expiry of each period of three months, during which the debtor fails to perform the obligation laid down in the enforceable title until the claim has been fully discharged. The High Court of Cassation and Justice decided that this text should be interpreted to mean that it is not permissible to make more than one application to fix the final amount owed by the debtor by way of penalties.[78]

The penalty may be removed or reduced by means of contestation against enforcement if the debtor performs the obligation laid down in the enforceable title and proves that there are good reasons for the delay in performance. The award of such penalties does not exclude the payment of damages, but the sum of the penalties is included in the total amount of damages.

In contrast, the law prohibits the awarding of punitive damages (in other terms, vindictive damages) for obligations to do and not to do.[79] Punitive damages are sums of money which the debtor of an obligation to do or not to do would be obliged by a court judgment to pay to his creditor for each day of delay until the date of performance in kind. Punitive damages are prohibited because their function is not compensation but a means of constraint, independent of any loss and which may be combined with performance in kind of the obligation. Moreover, the mechanism of punitive damages was designed to ensure that the person who receives the damages (the creditor) must repay them to the debtor if the debtor performs the obligation, reduced by the amount of compensation for the damage effectively caused. However, the amounts collected under this title could exceed the value of the unperformed obligation or the value of the damage caused, which would be unfair.[80] Instead of punitive damages, the Romanian legislative solution uses the penalties discussed above, which are levied on the damage resulting from non-performance.

77 Between approximatively 20 and 200 Euros.
78 Decision No. 16 of March 6, 2017 on a preliminary judgment raised by the Cluj Tribunal and published in the Monitorul Oficial No. 258 of 13 April 2017.
79 Romanian Code of Civil Procedure, Article 906.
80 Veress, 2020, p. 217.

6. Serbia, Croatia, Slovenia

6.1. Serbia

The SrbLO explicitly states that the in case of non-performance the other party may request either the performance of the obligation or may repudiate the contract.[81] Even if the creditor opts for repudiation, he or she must grant to the debtor an additional time limit for voluntary performance,[82] which additionally supports the idea of specific performance.

However, if timely performance is considered as an essential element of the contract, the contract is considered repudiated at the time the debtor defaults.[83] However, even in this case the creditor still may opt for specific performance if without undue delay he or she notifies the debtor that the performance of the obligation will be requested.[84]

The question, however, remains how to enforce specific performance against the debtor's will. Fortunately, the SrbLO contains detailed rules on this issue, in the part pertaining to the legal effects of obligations, under the heading titled a bit awkwardly 'Creditor's rights in some special cases.' First, it specifies that if the debtor defaults with the performance of an obligation consisting of handing over (*dare*) fungible assets (things designated by their kind), contingent on the notification of the debtor, the creditor may opt between acquiring the same things from another and requesting that the price be reimbursed, with compensation for any damages from the debtor, or, requesting from the debtor the value of the things the debtor was obliged to hand over, and also claim damages.[85] If, however, the debtor defaulted with the performance of an obligation to render a service (*facere*), the creditor may, after having notified the debtor, accomplish the service promised but not performed by that debtor, and then request reimbursement of the costs of accomplishing the service, as well as compensation for damages accrued because of the default by the debtor, or any other damage accrued in relation to such means of performing the obligation.[86] The issue becomes more complicated when the obligation of the debtor is to refrain from an action (*non-facere*). For such a case, the SrbLO prescribes that the creditor is entitled to claim damages for the mere fact of the debtor's infringement of the duty not to act.[87] However, if a building or any construction has been erected contrary to the debtor's duty to refrain from an action, the creditor may request its removal at the expense of the debtor and claim compensation from the debtor for the damage suffered in connection with the building and removal of the

81 SrbLO, Article 124 (1).
82 SrbLO, Article 126 (1).
83 SrbLO, Article 125 (1).
84 SrbLO, Article 125 (2).
85 SrbLO, Article 290.
86 SrbLO, Article 291.
87 SrbLO, Article 292 (1).

construction.[88] The court may, however, refuse the removal and award the creditor pecuniary compensation, if it finds this to be obviously more expedient, taking into account the social interest and the legitimate interest of the creditor.[89] There is a special rule governing the case when the debtor's obligation has been established by a final court decision. In such case the creditor may request the debtor to perform the obligation in an additional appropriate deadline and declare that after the expiry of such a deadline he or she will not request performance, but damages because of non-performance.[90]

The most important rule in relation to specific performance is the one relating to so-called judicial penalties (*sudski penali*), which were in the former federal law shaped under the influence of *astreinte* from French Law.[91] The SrbLO provides that if the debtor fails to perform a non-monetary obligation determined by a final decision, the court may, at the request of the creditor, set an additional appropriate deadline for the debtor and order the debtor to pay to the creditor a certain amount of money for each day of delay, or for any other unit of time, starting from the expiration of the deadline.[92] This is done to apply pressure (in the form of vindictive damages) on the debtor, and regardless if any real damages were incurred. If the debtor eventually performs the obligation, the court may decrease the amount of the judicial penalties, taking into account the purpose for which they have been ordered.[93] This penalty is qualified in the literature as a private fine, since it is not payable to the state but, to the creditor.[94] The SrbLO does not envisage guidelines for the calculation of the penalty, which means that the court determines it according to its discretion.[95] The detailed rules and the procedure of obliging the debtor to judicial penalties are regulated in the Law on Enforcement and Securities.[96] In addition, to this the SrbLO provides several other means for the enforcement procedure to compel the debtor to specific performance. The most important ones are the rules concerning the possibility of the court to mandate the debtor to pay monetary fines (*novčana kazna*) for refusing to perform an obligation that can be realized only personally by that debtor, or for infringing on an obligation to refrain or forbear.[97] There is a clear distinction between these fines and judicial penalties. Whereas judicial penalties are paid to the creditor, the monetary fines are payable to the state.[98] What is however most striking, is that the law on Enforcement and Securities in its effective form, introduced the possibility of conversion of unpaid monetary fines into the measure of incarceration (a criminal law

88 SrbLO, Article 292 (2).
89 SrbLO, Article 292 (3).
90 SrbLO, Article 293.
91 Dika, 2002, p. 3.
92 SrbLO, Article 294 (1).
93 SrbLO, Article 294 (2).
94 Možina, 2020, p. 148.
95 Možina, 2020, p. 148.
96 Law on Enforcement and Securities, Articles 339–342.
97 Law on Enforcement and Securities, Articles 363–364.
98 Možina, 2020, p. 148.

penalty). Namely, the court may decide to convert any unpaid fines into incarceration in the proportion of 1000 RSD (roughly 8 EUR) per day, up to at most 60 days.[99] The controversial aspect of this, is that at the moment there are two different means of defeating the debtor's reluctance to perform an obligation that may be performed only personally: the *astreinte*-type judicial penalties payable to the creditor, and the monetary fines payable to the state and convertible to incarceration.[100] One of the possible ways for overcoming this state of regulation is by abolishing the judicial penalties, that seem to be a foreign body in Serbian (former Yugoslav) civil law, and preserve monetary fines, as a means of sanctioning the debtor for the contempt of the court.[101]

The Law on Enforcement and Securities addresses other issues as well, in which the problem of debtor's performance of non-pecuniary, or even non-replaceable obligations surfaces. Thus, the law specifies that if the debtor is obliged to make a statement of will in relation to an unconditional claim, it shall be considered that the statement has been given at the time when the decision determining such obligation became final.[102] If, however, the issuance of the statement of will depends on the fulfillment of an obligation of the creditor or fulfillment of a condition, it is deemed that the debtor has provided the statement once the creditor has fulfilled his obligation or once the condition has occurred.[103]

The idea of primacy of specific performance over damages for non-performance comes to expression clearly in relation to material defects as well. The liability for material defects (*odgovornost za materijalne nedostatke*) in the SrbLO is regulated in relation to the contract of sale,[104] but its application is extended to all contracts concluded for consideration.[105] In case of material defects the first-tier remedies are repair or replacement. Only after these prove unsuccessful, may the acquirer request the reduction of price or cancellation of the contract because of defective performance. In addition, in all these cases the buyer is entitled to damages.[106]

Directive 1999/44/EC was transposed into Serbian law not by amending the SrbLO, but by means of the Consumer Protection Act. The rules on conformity of goods (*saobraznost*) in consumer sales contracts also give priority to specific performance (repair or replacement) over price reduction and cancellation of the contract.[107]

6.2. Croatia

The HrvLO retained the rules of the former federal law on creditor's right to choose between specific performance and repudiation of contract, differentiating the

99 Law on Enforcement and Securities, Article 132 (4).
100 Knežević, 2015, p. 1907.
101 Knežević, 2015, p. 1908.
102 Law on Enforcement and Securities, Article 390 (1).
103 Law on Enforcement and Securities, Article 391 (1).
104 SrbLO, Articles 478–515.
105 SrbLO, Article 121 (1) and (3).
106 SrbLO, Article 488.
107 SrbCPA, Article 51.

consequences depending on whether or not the time of performance was an essential element of the contract.[108] Similarly, the rules on creditor's rights in special cases have been retained, but systemized into different parts of the HrvLO.[109] However, the HrvLO did not take over the rules on judicial penalties (*sudski penali*) from the former federal law. Though it is regulated in a more detailed way in the Law on Enforcement.[110] Similarly, it regulates the specific performance of the obligor's duty to provide a statement of his or her will (*ostvarenje tražbine davanja izjave volje*), differentiating unconditional claims from ones that are dependent on a condition.[111] In terms of enforcement of claims for the obligor's duty to refrain or forbear another's actions, the Croatian Law on Enforcement also envisages the possibility of sentencing the debtor to monetary fines (*novčana kazna*) and to incarceration (*kazna zatvora*).[112] A key difference in relation to the Serbian regulation seems to be, however, that while in Serbia the incarceration is a substitute remedy, applicable only, when the obligor failed to pay monetary fines, under Croatian laws the court may directly sentence the obligor to incarceration.

As in Serbian law, the HrvLO also gives preference to specific performance over repudiation of the contract and damages in terms of defective performance of a contract. In case of material defects of performance (*odgovornost za materijalne nedostatke*) the creditor may first request repair and replacement, and if they prove unsuccessful, may request a price reduction or repudiate the contract.[113] The Croatian Consumer Protection Act, however, does not have a special set of rules concerning consumer rights in case of lack of conformity because of material defects, but in general, prescribes the application of the rules of the HrvLO on liability for material defects.[114] It contains special rules on conformity mainly relating only to contracts for the supply of digital content and digital services.[115]

6.3. Slovenia

The SvnCO when regulating the right of the creditor to choose between specific performance and repudiation of contract because of non-performance has not departed from the former federal law; different rules are, however applicable when the time of performance is an essential element of the contract as opposed to when it is not.[116] Similarly, the rules on the creditor's right to specific performance in special cases have also been retained, including the rules on judicial penalties (*sodni penali*).[117] The Slovenian Law on Enforcement and Securities specifies further rules on the procedure

108 HrvLO, Articles 360–362.
109 HrvLO, Articles 76–79.
110 Croatian Law on Enforcement, Articles 247–248.
111 Croatian Law on Enforcement, Articles 276–277.
112 Croatian Law on Enforcement, Article 263.
113 HrvLO, Articles 410 and 412.
114 HrvCPA, Article 47 (2). See. Mišćenić in Josipović, 2014, p. 287.
115 HrvCPA, Article 47 (4) to (9).
116 SvnCO, Articles 103–105.
117 SvnCO, Articles 265–269.

for obliging the debtor to pay judicial penalties.[118] Furthermore, this law enables the court to oblige the debtor to pay monetary fines (*denarni kazni*) if he or she fails to perform an act that can be performed only by him or her, or fails to observe a duty to refrain from some conduct or to forbear another's actions.[119]

The rules of the SvnCPA on the lack of conformity of goods in consumer contracts also give primacy to special performance over the means of compensation of the consumer.[120]

7. Slovakia

The Slovak legal system is based on the principle of real (i.e., in kind) performance of contracts (*zásada reálneho splnenia zmlúv*).[121] This principle – valid for both commercial and non-commercial contractual relations – means that the delay or failure of the debtor to fulfill the obligation does not lead to the termination of the obligation or the duty to perform.

Consequently, even following default, the creditor is entitled to continue to require the debtor to fulfill his or her obligation as agreed, regardless of whether the obligation is monetary or non-monetary.[122] This consequence is expressly enshrined in mandatory § 324 (1) of the SvkCommC ('The obligation is also extinguished by a late performance by the debtor unless before such performance the obligation has already been extinguished by the creditor's withdrawal from the contract.') and in dispositive § 366 of SvkCommC ('Unless the law provides otherwise for particular types of contracts, the creditor may, in the event of default by the debtor, insist on the due performance of the obligation.').

However, the principle of real performance does not only mean that the creditor is entitled, even after default, to demand the proper performance of the obligation as agreed in the contract. It also means that – on the contrary – the creditor *cannot* claim damages in lieu of performance of the obligation. Thus, while the performance of the obligation is possible, the creditor can, in principle, only claim the performance of the obligation. This is based on the view that the obligation to perform is also a right of the debtor and therefore his or her consent is required for the waiver of the right to proper performance of the obligation.[123]

The principle of real performance also implies that the debtor cannot 'buy out' of his or her obligation to perform by paying damages for non-performance without prior agreement.

It thus follows that the principle of real performance is manifested in three areas:

118 Slovenian Law on Enforcement and Securities, Article 212.
119 Slovenian Law on Enforcement and Securities, Articles 226 and 227.
120 SvnCPA, Article 37c.
121 Jurčová, 2018, p. 54.
122 Ovečková, 2017.
123 SvkCC, § 574. Knapp, 1955, p. 45 and 60; Luby, 1952, p. 331.

— the creditor may, even after the debtor has fallen into default, demand proper performance of the obligation,
— the creditor cannot, without the debtor's consent, claim damages in lieu of performance of the obligation; and
— the debtor may not, without the creditor's consent, discharge the obligation to perform by compensating the creditor, in lieu of performing the obligation, for the damage caused by the failure to perform.

There are, however, several exceptions to the principle of real performance of contracts.

Firstly, the creditor cannot claim the performance of the obligation if such performance has become impossible, either in fact or in law. In such a case, he can only claim compensation for the damage suffered as a result of the non-performance of the obligation. Of course, he may do so only if the conditions for a claim for damages are fulfilled (see Chapter XI). This exception applies in both commercial and non-commercial relationships.

Secondly, if requiring real performance of the obligation would entail an exercise of a right contrary to good morals within the meaning of § 3 (1) of the SvkCC the creditor cannot claim such performance. This would be the case when the performance of the obligation would be extremely burdensome, extremely costly, etc.[124] In such cases, the right to perform the obligation would not enjoy legal protection. However, part of the legal literature subordinates these cases to the first exception, i.e., the consequent impossibility of performance.[125] In commercial relations, such situations could be subsumed under § 265 of the SvkCommC, according to which the exercise of a right that is contrary to the principles of fair commercial dealing does not enjoy legal protection.

Thirdly, the principle of real performance of contracts does not apply in the case of so-called fixed contracts (*fixné zmluvy*). These are contracts where it is clear from the contract (commercial relations) or also from the nature of the matter (non-commercial relations) that the creditor has no interest in delayed performance. In such a case, if the creditor does not notify the debtor that he or she insists on performance, the contract is extinguished; however, the right to damages is not affected.

Fourthly, a special exception to the principle of real performance is also provided for in § 486 of the SvkCommC, which relates to the sale of a business. If all the things that constitute the capital of the business have not been handed over to the buyer, such buyer has no right to insist on their handover, i.e., on the proper performance of the obligation, having only the right to a discount on the purchase price.[126]

So, in the absence of such exceptions or if the law does not provide otherwise, the creditor – as stated – cannot claim damages in lieu of the performance of the

124 Fekete, 2018.
125 Sedlačko, 2019.
126 Ovečková, 2017; Ďurica, 2016b, p. 1233.

obligation. To do so, he or she must first withdraw (*odstúpiť*) from the contract. By withdrawing from the contract (canceling the contract), his or her right to performance of the obligation is extinguished, but the right to compensation for damage caused by non-performance is not affected by the withdrawal.

In contrast, because of the principle of individual autonomy of the parties, it is not excluded that the parties to the contract may agree, for example, so that, after default, the creditor can choose whether he or she wants proper performance or damages, or so that the default in itself extinguishes the right to performance.

If the obligation has been performed but not properly, claims from defective performance arise in the case of contracts for consideration. Therefore, in such cases, the creditor cannot claim the proper performance of the obligation, but only the performance of the obligations arising from defective performance (e.g., repair, price reduction).

8. Concluding remarks

8.1. Performance in kind

All the relevant jurisdictions rest on the principle of performance in kind. It seems, that this principle, inherent to the structure of legal systems in Europe was also an answer to the shortage economy. That is, beyond the ordinary policy underlying the doctrine of specific performance there was a further economic goal supporting this: the 'shortage economy.' The rather limited availability of economic resources and the absence of markets did not make it possible for enterprises to buy substitute performance if the other party failed to deliver. Thus, performance in kind was a tool for addressing the shortage economy in the socialist era and has been maintained after the transition to the market economy.

It has only been stressed in the report for Romania, but it holds true generally for the relevant jurisdictions that the obligor shall not be entitled to turn its own obligation from performance in kind into damages. If the obligee accepts a substitute performance (including money) of its own initiative, then the substitute performance as a *datio in solutum* will be a performance of the contractual obligation. It has been stressed in the Czech report that the debtor can also offer *datio solutionis causa*. *Datio solutionis causa* is a tool for satisfying the claim of the creditor but does not discharge the debt as such. Even if *datio solutionis causa* was offered, the debt is discharged by performance.

The availability of performance in kind, as a remedy for breach of contract depends primarily upon the nature of the obligation. If the performance promised was of a *dare* nature, performance in kind is just the logical remedy but only in so far as it is available by the defendant. That is the case also in Romanian law where ownership is transferred by the contract. Thus, this conclusion does not depend on the structure of transfer of ownership (title) over movables. If the object of performance

is not available by the defendant, performance in kind is impossible and the plaintiff may claim damages.

If the performance promised was of a *facere* nature, the need for personal involvement and cooperation of the debtor in performing the obligation is a limit of availability of performance in kind. In such cases, establishing impossibility and a claim for damages is the ordinary consequence. In contrast, there are two types of monetary sanctions provided by the law to create incentives for the debtor to perform such an obligation provided that the performance is not available from other resources from the market. One of them is a penalty that can be imposed on the debtor by the court (Romania, Serbia, Croatia, Slovenia) similarly to the French *astreinte*. This amount of money, if ordered by the court, is to be paid to the creditor, not to the state or public funds. The other is the fine imposed on the debtor if it failed to comply with the order of the court to perform the *facere* obligation in kind. This fine is to be paid to the state and ordered at the stage of enforcing the judgment of the court. In the laws of Serbia, Croatia, and Slovenia the penalty imposed by the court on the debtor and the fine imposed on the debtor in the process of enforcing the judgment are parallel legal instruments creating incentives for the debtor to perform. In some jurisdictions (Serbia, Croatia) the penalty of incarceration may also be associated with the fine, or even applied separately.

If the obligation of the debtor is to perform a juridical act (e.g., to give consent to something) the court may hand a judgment down substituting the juridical act and this way providing performance in kind. The possibility of such a substitution is explicitly provided in Hungarian statutory law.

It can also be concluded that none of the relevant jurisdictions create incentives for – or would support – efficient breach of contract.

8.2. Performance in kind and other remedies

Beyond the direct claim for performance, the relevant jurisdictions provide similar remedies to bring the obligee into the position as if the obligor performed the obligation properly. Beyond the claim for repair or replacement, the right is provided to the creditor to purchase the substitution of performance in the market and then claim damages. As a main rule, the obligee can exercise this right only after giving the opportunity to the obligor to perform. While such a notice according to Romanian law seems to be sufficient, in other legal systems it is required to terminate the contract to get the claim for damages that occur because the obligor failed to perform, and the obligee acquired substitute performance at its own expense. No additional time is required for termination or to acquire substitute performance if the time-factor was an essential element of the contract.

That is, the obligee does have a choice of terminating the contract or claiming performance in so far as performance is possible and the preconditions of terminating the contract are met. The oblige shall not claim damages 'in lieu' of performance.

8.3. Consequences of hardship and impossibility

Impossibility of performance is a natural limit of the claim for performance in kind. Impossibility or hardship occurred after the conclusion of the contract may result in termination of the contract, or in it being upheld, but with modified content. A claim for damages for the obligee may also result, in so far as the obligor shall be held responsible for the impossibility.

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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.

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Chapter XIV

Unilateral Termination of Contracts and Rights of Withdrawal

1. General considerations

1.1. Overview

In general, as it is based on the mutual consent of the parties, a contract can be terminated by a mutual dissent, practically by a new, destructive contract. Also, there are several cases of exceptions. In some instances, the law provides the possibility for unilateral termination of the contract, based on various reasons addressed below. In other cases, the parties may include in their contract a clause that permits the termination of the contract by one of the parties.

1.2. Unilateral termination of contracts concluded for an indefinite period

Contracts concluded for an indefinite period may be terminated unilaterally by either party, subject to a reasonable period of notice. Generally, this possibility is established through mandatory norms.[1]

There is no necessity to include a termination clause, as the possibility to terminate the contract concluded for an indefinite period arises in general directly from the law. In the case of these contracts, any clause to the contrary or the stipulation of a

1 Vékás, 2019, p. 358; Veress, 2020, p. 59.

Veress, E., Hulmák, M., Zimnioková, M., Stępkowski, Ł., Dudás, A., Hlušák, M. (2022) 'Unilateral Termination of Contracts and Rights of Withdrawal' in Veress, E. (ed.) *Contract Law in East Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 461–503. https://doi.org/10.54171/2022.ev.cliece_chapter14

benefit in exchange for the termination of the contract must be considered contrary to the law and therefore null and void. Perpetual contractual ties are not allowed by law because they limit individual freedom. The right to terminate the contract concluded for an indefinite period belongs to either party. The parties can determine the notice period; for example, a six-month notice period gives specific stability to the contract concluded for an undetermined period.

1.3. Legal rights to unilateral termination of a contract not conditioned to a breach of contract by the debtor

In some cases, the law itself grants a right to unilateral termination. Usually, it is the case of mandate. The mandate contract may be terminated by the revocation of the mandate by the principal (mandator) or by the resignation of the agent (mandatory). The fact that the mandate can be denounced unilaterally is explained by the *intuitu personae* character of this contract, where, if those special relations of trust between the contracting parties no longer exist, the law makes it possible for either party to terminate the contractual relations by unilateral expression of this intent.

Notable cases of unilateral termination of contracts were introduced in the civil law of East and Central European countries, which are member states of the EU (and not just, such as in the case of Serbia) through EU consumer protection norms. For example, the consumer rights directive (Directive 2011/83/EU) necessitated that all concerned national legislations introduce 14 days (a so-called 'cooling-off period') for withdrawal from a distance or off-premises contract.[2] Such right of withdrawal:

— is not conditioned to giving any reason,
— is recognized only in favor of the consumer, the trader has no such right, being bound by the *pacta sunt servanda* principle,
— in general, is not conditioned to the payment of any costs by the consumer (but the consumer shall bear the direct cost of returning the goods unless the trader has agreed to bear them or the trader failed to inform the consumer that the consumer has to bear them),
— practically, such a consumer contract is concluded under the condition of the non-exercise of the right of withdrawal,
— this legal right to termination (withdrawal) is not applicable in some specific cases, for example, in case of goods made to the consumer's specifications or clearly personalized (customized); goods which are liable to deteriorate or expire rapidly; sealed goods which are not suitable for return because of health protection or hygiene reasons and were unsealed after delivery; contracts concluded at a public auction; service contracts after the service has been fully performed if the performance has begun with the consumer's prior express consent, and with the acknowledgment that he or she will forfeit the right of withdrawal once the contract has been fully performed by the trader, etc.

2 If the trader has not provided the consumer with the information on the right of withdrawal, the withdrawal period shall expire in 12 months from the end of the initial withdrawal period.

— the exercise of the right of withdrawal terminates the contract,
— the trader shall reimburse all payments received from the consumer (including, if applicable, the costs of delivery) without undue delay and in any event not later than 14 days from the day on which he or she is informed of the consumer's decision to withdraw from the contract; the trader shall not be required to reimburse the supplementary costs if the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the trader;
— unless the trader has offered to collect the goods himself or herself, with regard to sales contracts, the trader may withhold the reimbursement until he or she has received the goods back, or until the consumer has supplied evidence of having sent back the goods, whichever is the earliest,
— the consumer is liable for any diminished value of the goods only resulting from the handling of the goods other than what is necessary to establish the nature, characteristics, and functioning of the goods; the consumer shall in any event not be liable for the diminished value of the goods where the trader has failed to provide notice of the right of withdrawal.

Another field where national legislation may permit unilateral termination to maximize the value of the debtor's assets is insolvency law. The insolvency specialist conducting the affairs of a debtor may unilaterally terminate ongoing contracts concluded by the insolvent debtor.

1.4. Legal right to unilateral termination of a contract conditioned to a breach of contract by the debtor

If the debtor does not perform the contractual obligations, then the creditor may request enforcement. However, if the execution is no longer of interest to the creditors, they may unilaterally terminate the contract and obtain damages.[3]

The creditor has the right to choose between performance and termination: the right to request performance derives from the law which obliges the debtor to fulfill the obligations taken precisely; the right to termination is given as an immediate remedy to exit a difficult situation that no longer offers the security of the consideration for the creditor. Thus, termination, in this case, is a sanction for the breach of the synallagmatic contract, consisting of its retroactive cancellation and the restoration of the parties to the previous situation. The basis of termination is the reciprocity and interdependence of the performances in the synallagmatic agreement. The creditor has the interest to terminate the contract not accomplished in whole or in part by the debtor, not to remain legally bound. Moreover, in many cases, the creditor has performed his or her own obligations; thus, the restoration to the previous situation (restitution of the creditor's performances) and the payment of damages is the solution per the interests of the creditor.

3 For the problem of damages, see Chapter XIII.

For example, A and B entered into a sales contract for a car. The total price was 20,000 euros. At the date of concluding the contract, B paid an advance of 8,000 euros, and they agreed that the rest would be paid within three months. Ownership of the car was transferred from A to B, and the car was delivered to B. Nevertheless, B did not pay the rest of the price. A has the option to request the performance of the contract: to sue B, asking the court to oblige B to pay the amount of 20,000 euros, and can also request damages. However, A may also terminate the contract: maybe he or she has another buyer lined up for the car, who offers a higher price or is more reliable than B. By termination, the contract will end, A will become the owner again, and B must return the car. In turn, A must also reimburse the advance payment received but may claim damages for the harm suffered.

To serve as a basis for unilateral termination, the breach of contract must be severe enough to justify this sanction.[4] If the breach is of minor significance, then the creditor has no right to termination. In many cases, national legislation may condition the right to unilateral termination to formal notification of the debtor and granting an additional time for performance when this is perceived fair by the legislator.

There is also a possibility for judicial termination of the contract. This is relevant when national legislation provides that a particular type of contract can be terminated only by a court or when there is litigation regarding the breach of contract, or the party wants to obtain a court decision to restore the previous situation.

The effects of termination can be summarized as follows:

— the terminated contract is considered never to have been concluded; termination produces retroactive (*ex tunc*) effects,
— unless otherwise provided for by law, each party is required to return to the other party the benefits received,
— termination does not produce effects on the clauses related to the settlement of disputes (for example, an arbitration clause, clauses determining territorial jurisdiction, or choice of laws) or on those that are intended to produce effects even in case of termination (for example, the clause on damages).
— termination may be cumulated with the damages claimed by the creditor.

Termination also takes a specific form applicable to contracts with successive performance. In this case, the contract terminates only for the future (*ex nunc*). For example, A and B entered into a 36-month lease for an industrial hall. The monthly rent was set at 5,000 euros. After the first three months, B no longer pays the rent. After waiting two months, A unilaterally terminates the contract. In this case, termination can only take effect for the future because – with regard to the performed part of the contract – A and B cannot be returned to the situation before the conclusion of the contract. The use of the building by B for its own activities and consequently the value of that use (the rent) can no longer be returned. Thus, termination produces effects for the future. If B vacates the building following the declaration of unilateral termination,

4 Vékás, 2019, p. 231.

A will be entitled to the rent value for the two months in which B used the hall without paying for it. If B does not leave the industrial hall after A's contract has been terminated, A can ask the court to order B's eviction from the building. In the case of contracts with successive performance, the creditor has the right to terminate, even if the non-performance is of minor significance but has a repeated character. The creditor, in this case, likewise has the right to damages.

There is also a possibility to regulate by contractual norms the termination of the contract by the parties, which is helpful in certain situations because it can detail and specify the general norms or can declare the contracted moment of performance essential and provide for automatic termination of a contract if such a time is not respected.

1.5. Contractual right to terminate a contract

The law generally recognizes the validity of the clauses by which the contracting parties reserve the right to unilaterally terminate their contract, called unilateral termination or simply termination clauses.

If the parties have included in the contract a termination clause, then the binding force of the contract resulting from the initial agreement of wills ensures the possibility for the party to terminate the contract through a unilateral manifestation of will.

The right to termination may be recognized in favor of both parties, or only in favor of one of the contracting parties (asymmetrical termination clause). For example, in a lease contract concluded for three years, the right to terminate the contract can be provided only in favor of the lessee, the lessor being bound by the contractual period. Thus, the lessee can terminate the contract (for example, if he or she found a similar property for rent for a more advantageous rent) and has the security of maintaining the current contract from the lessor for three years (who has no right to terminate the agreement).

Very importantly, the right to unilaterally terminate the contract may also be recognized for consideration (i.e., the person exercising this right must pay a certain amount to the other party). If a benefit has been stipulated in exchange for the termination, in general, termination takes effect only when this service (commonly, a payment) is performed.

As it was stated before, these clauses are valid only in fixed term contracts (because in the case of contracts for an indefinite duration, the stipulation of consideration in exchange for termination of the contract is void). The right to termination recognized for consideration implies the performance of a payment, which is intended to prevent the prejudice of the other party by exercising this right. For example, the lease contract concluded for a fixed term of 3 years, but which can be terminated unilaterally by either party with a 30-day notice, and with the payment of 10% of the rent calculated for the rest of the contract period.

The right to terminate a contract unilaterally – once recognized by the agreement – cannot be exercised abusively or in bad faith. Being an optional right, the faculty

to exercise it can be based on any subjective premise.[5] The exercise of the right of cancellation has nothing to do with the breach of contract by any of the parties.

2. The Czech Republic

2.1. Unilateral termination of contracts

Czech legislation recognizes various ways of unilateral termination of contracts. The common feature is that the will of one party is exercised regardless of that of the other one. Termination will have *ex nunc* effects (the obligation is extinguished for the future) or *ex tunc* effects (the contract itself is extinguished retroactively). It is necessary to fulfill the conditions stated in the general law of obligations or the legal norms applicable to specific contract types.

The CzeCC recognizes so-called termination (*výpověď,* in German *Kündigung*), withdrawal (*odstoupení,* in German, *Rücktritt*), but in special cases also cancellation (*zrušení*), or revocation (*odvolání*) (e.g., in the case of a mandate agreement).

2.2. Termination and withdrawal

Termination and withdrawal are essential. Both termination and withdrawal are juridical acts so rules for any other juridical acts shall apply to them. They may be employed if stipulated by the parties in advance or provided for by statute.[6]

2.2.1. Termination

In the case of termination, it is not necessary to state the grounds for termination in the notice for termination,[7] but such condition may be stipulated by a contract or by the legal regulation of certain types of contracts.[8] No period for termination must be included in the termination notice.[9]

In some cases, the CzeCC introduces special rules for termination, e.g., the termination of the usufructuary lease is linked to the usufructuary lease year.[10]

2.2.2. Withdrawal

Withdrawal rules are similar to the ones applicable for termination – giving any grounds for withdrawal is not a requirement for the validity of such an act.[11] Grounds for withdrawal must exist though (and any other preconditions must be met) when the withdrawal takes effect. It is of no significance if these grounds and preconditions later ceased.

5 Veress, 2020, p. 59.
6 CzeCC, § 1998 (1) and § 2001.
7 Supreme Court Ref. No. 32 Cdo 750/2009.
8 E.g. CzeCC, § 2310 (1) of the for the unilateral termination of the lease of business premises.
9 Supreme Court Ref. No. 20 Cdo 2685/99.
10 CzeCC, § 2339 (1).
11 Supreme Court Ref. No. 32 Cdo 4459/2011.

In contrast, the CzeCC explicitly allows withdrawal because of delayed performance even if the additional time lapses only later.[12] In such a situation the withdrawal enters into force at that time.

2.2.3. Distinctions between termination and withdrawal

Regarding the distinction between these institutions, the moment from which the effects of termination take effect may differ. In the case of termination, the obligation is terminated with *ex nunc* effects, while in the case of withdrawal, the obligation is terminated with *ex tunc* effects. Therefore, while the obligation is terminated, in case of withdrawal the contract itself ceases to exist. However, the parties can agree on a different rule.[13]

The general rule is that in respect of continually performed obligations, termination is preferred to withdrawal.[14] Retrospective effects of withdrawal are limited to a certain extent,[15] e.g., due penalties, damages, and other terms shall remain in effect even after withdrawal. Moreover, withdrawal for contracts on permanent, continuing, or partial performance may have only prospective effects[16] if the performance, which has been rendered, had some utility to the creditor. The differences between termination and withdrawal can thus be often wiped out.

While distinguishing between these two institutions, binding the effects of the termination to the expiration of a certain period is also not a determining tool, because even in the case of termination, the obligation may extinguish already at the moment of a unilateral juridical act.[17]

2.3. Grounds for termination

2.3.1 Contracts concluded for an indefinite period

According to § 1998 paragraph 1 of the CzeCC, a party may terminate an obligation if so stipulated by the parties or provided by a statute. If a party terminates an obligation, the obligation is extinguished upon the expiry of the notice period. However, if an obligation may be terminated without a notice period, the obligation is extinguished on the date the notice of termination becomes effective.[18]

Contracts concluded for an indefinite period can be terminated under § 1999 of the CzeCC unless otherwise provided for by law. According to § 1999 paragraph 1 of the CzeCC, if such a contract obliges at least one party to perform a continuous or successive (recurrent) activity or obliges at least one party to tolerate such an activity, the obligation may be extinguished by the end of a calendar quarter with at least three

12 CzeCC, § 1979.
13 Výtisk in Petrov et al., 2019, p. 2160.
14 CzeCC, § 1999.
15 CzeCC, § 2005.
16 CzeCC, § 2004 (3).
17 CzeCC, § 1998 (2).
18 CzeCC, § 1998 (2).

months' notice of termination. Pursuant to § 1999 paragraph 2 of the CzeCC, this rule does not apply if a party has agreed to refrain from a certain activity and the nature of the obligation clearly shows that the duty is not limited in time.

The CzeCC provides parties with a certain kind of protection against a contract concluded for a long, definite period of time, e.g., 100 years. If a contract has been concluded for a definite period without a serious reason in a way that it obliges an individual for his or her entire life or obliges anyone for more than ten years, extinction of the obligation may be claimed after ten years from its creation. A court shall also extinguish an obligation if the circumstances on which the parties apparently relied when the obligation was created have changed to such an extent that the obligor cannot be reasonably required to be further bound by the contract.[19] If a party waives its right to claim extinction of an obligation in advance, the waiver is disregarded, unless the obligor is a legal person.[20]

Regarding leases, the CzeCC establishes a special rule stating that if the parties do not stipulate the period of a lease or the date when the lease ends, the lease is conclusively presumed to be a lease for an indefinite period.[21] If the parties agree on a lease for a definite period exceeding fifty years, the lease is presumed to have been stipulated for an indefinite period; during the first fifty years, the lease may only be terminated on the stipulated grounds for termination and within the stipulated notice period.[22]

2.3.2 Consumer protection

The regulation of contracts concluded between an entrepreneur and a consumer contains special rules for unilateral withdrawal. Taking into account the specific circumstances of contract formation the consumer is given a right to withdraw from the contract without any specific reason.

We can mention § 1829 paragraph 1 of the CzeCC according to which a consumer has the right to withdraw from a contract concluded at a distance or off-premises within fourteen days in some special cases even within thirty days. If he or she has not been advised of his right to withdraw per § 1820 paragraph 1 f) of the CzeCC, the period in which he or she may withdraw is longer.[23] Another example is the rules for termination of time-sharing.[24] The consumer has this right also with regard to consumer credit under Act No. 257/2016 Sb.

2.3.3 Obligations based on mutual trust

The right to terminate the contract unilaterally can be justified in contracts based on mutual trust, e.g., the mandate.

19 CzeCC, § 2000 (1).
20 CzeCC, § 2000 (2).
21 CzeCC, § 2204 (1).
22 CzeCC, § 2204 (2).
23 CzeCC, § 1829 (4).
24 CzeCC, §§ 1861–1865.

A mandatary may terminate a mandate no earlier than before the end of the month following the month in which a notice of termination was delivered.[25] If a mandatary terminates a mandate before arranging the matter for which he or she was specifically authorized or the arrangement of which he or she commenced under a general authorization, he or she shall compensate the resulting damage according to the general provisions for payment of damages.[26]

Pursuant to § 2443 of the CzeCC, the mandator may revoke a mandate at will; however, he or she shall compensate the mandatary for the costs which that mandatary has incurred until that time, and also for any damage incurred, where applicable, as well as paying the mandatary a part of the remuneration appropriate to the effort made. If a mandate is extinguished by revocation, the mandatary shall arrange everything which cannot be delayed until the mandator or his or her successor expresses another intention.[27]

Similar rules are applicable to contractual representation. An authorization is extinguished if revoked by the principal or terminated by the agent.[28] Until the agent becomes aware of the revocation, his or her juridical acts have the same effect as if the authorization were still effective. This, however, may not be invoked by the party which knew or should and could have known of the revocation of the authorization.[29] If the agent terminates the authorization, the agent shall still do everything that cannot be postponed to prevent any harm being incurred by the principal or his or her legal successor.[30]

2.3.4 Unilateral termination of a contract conditioned to a breach of contract

The CzeCC gives the opportunity to unilaterally terminate the contract in the case of a breach of contract. Generally, it is allowed to withdraw from any contract when there is a fundamental breach of contract.[31] The CzeCC also recognizes a preventive preliminary withdrawal for the party after the conduct of the counterparty undoubtedly indicates that such a counterparty is about to commit a fundamental breach of contract and fails to provide reasonable security after being requested to do so by the party.[32]

Specific regulation can be found in relation to certain types of breach of contract – e.g., delay, defects, breach of information duties, etc. – and also in relation to particular contractual types, e.g. sale, lease, contract for works etc.

As far as defects are concerned there is generally a possibility to withdraw from the contract if the defect cannot be removed and prevents the proper use of the

25 CzeCC, § 2440 (1).
26 CzeCC, § 2440 (2).
27 CzeCC, § 2442.
28 CzeCC, § 448 (1).
29 CzeCC, § 448 (2).
30 CzeCC, § 449 (1).
31 CzeCC, § 2002 (1).
32 CzeCC, § 2002 (2).

performance.[33] The CzeCC also enables withdrawal from the contract in the case of delayed performance, if the delay is a substantial breach of the contract or the obligation is not performed in an appropriate additional time.[34]

Special rules for termination conditioned to a breach of contract can be found among the specific contract types. For example, the regulation of the contract of sale states that if a defective performance constitutes a fundamental breach of contract, the buyer has the right to withdraw from the contract,[35] while if a defective performance constitutes a non-fundamental breach of contract, there is no possibility to unilaterally terminate the contract, unless the seller fails to remove a defect of a thing in time or refuses to remove the defect.[36]

2.4. Limitations

If it is possible to terminate the obligation by the effect of law or by contract for the entire duration of the contract, the limitation does not occur.[37]

Some authors believe that in cases where the right to terminate the contract arises causally only because of a certain fact, from a certain clearly definable moment when it can be used for the first time, the right to terminate the contract is limited. However, this approach is not general.[38]

3. Hungary

3.1. Termination in lack of breach

Under Hungarian law, dissolution of the contract, in general, is based on the agreement of the parties. The contract is formed by the parties: they create it and therefore it is only logical that they can also terminate it if they wish.[39] Practically, by their mutual agreement, the parties may dissolve (*megszüntetés*) the contract for the future (*ex nunc*), or rescind it (*felbontás*) with retroactive effect (*ex tunc*) as from the date of its conclusion.[40] In the event of the contract's dissolution, the parties shall owe no further performance and shall be required to settle with each other for the services already performed before the dissolution. In the event of the rescission of the contract, the services already performed shall be returned. If the original situation cannot be restored in kind (irreversible service) then the contract shall not be rescinded.[41] Instead, dissolution of the contract is possible.

33 CzeCC, § 1923.
34 CzeCC, § 1969.
35 CzeCC, § 2106 (1) d).
36 CzeCC, § 2107 (3).
37 Šilhán in Hulmák et al., 2014, p. 1175; Hadamčík, 2020, pp. 590.
38 Výtisk in Petrov et al., 2019, p. 2152; Supreme Court, Ref. No. 33 Cdo 3037/2019.
39 Vékás, 2019, p. 355.
40 For details, Veress, 2019b, pp. 307–308.
41 HunCC, § 6:212.

The contract shall be terminated by mutual consent if the parties make a declaration to that effect, even if expressed by implied conduct. According to case law, if the debtor terminates the contract against the applicable legal rules, dismantles the equipment owned by the creditor which is necessary for the performance of the contract, the creditor's conduct in removing this property, belonging to him or her, cannot in itself be regarded as an implied termination of the contract by mutual consent, nor as acceptance of the termination without legal consequences.[42]

Of course, in some cases dissolution by unilateral juridical act is possible.[43] This right can be based directly on a provision of the law, or on a contractual clause permitting unilateral dissolution.

The person entitled to unilaterally terminate or cancel the contract by virtue of law or based on the contract may dissolve the contract by a juridical act addressed to the other party. In the event of unilateral termination (*felmondás*) of the contract, the rules on the dissolution of the contract, while in the event of cancellation (*elállás*), the rules on the rescission of the contract shall apply, with the proviso that the party shall only be entitled to cancel the contract if he offers the simultaneous return of the service he received.

Practically, the party is only entitled to cancellation in the case of reversible services, on condition that it offers to return the service it received at the same time if such service was performed. That party also must be able to effectively return the service. The party entitled to cancellation under the contract cannot exercise this right if, as a result of a change in circumstances, the other contracting party is no longer able to return the goods.[44]

Effects:	*ex tunc* (retroactive)	*ex nunc* (non-retroactive)
Mutual agreement:	rescission (*felbontás*)	dissolution (*megszüntetés*)
Unilateral declaration:	cancellation (*elállás*)	termination (*felmondás*)

Cancellation is a unilateral statement addressed to the other party. It is not, however, necessary to state the reason or title of the withdrawal. Notice of withdrawal may also be given by fax.[45]

When the basis of cancellation or unilateral termination is given by a contractual clause, the consent of the other party is in concordance with this terminability of the contract.[46]

If the parties set forth the right of cancellation subject to the payment of a certain amount of money (forfeit money, *bánatpénz*), the court may, at the request of the debtor, reduce the amount of excessive forfeit money. As the Kúria stated, to determine whether the amount of the forfeited money is excessive, the courts must consider the

42 BH 2006. 256.
43 HunCC, § 6:213.
44 BH 2004. 320.
45 BH 2005. 393.
46 For a detailed analysis, see Veress, 2019b, 319–323.

amount of the penalty in relation to the value of the service provided. Forfeit money is manifestly excessive if its amount substantially exceeds the monetary value of the other party's pecuniary interest in the performance of the contract, including the damages caused by non-performance.[47]

Forfeit money practically is the 'price' paid for cancellation.[48] It constitutes an absolute amount, being payable even if no damage can be shown or if the damage suffered by the party affected is less – or more – than the sum determined as forfeit money in the contract. In this sense, case law established that where the parties have agreed to exercise the right of cancellation in return for the payment of forfeit money, the cancellation is lawful conduct that does not constitute a breach of contract and no damages in excess of the forfeit money may be claimed.[49] This demonstrates the fundamental difference between forfeit money on the one hand and penalty on the other, the latter, under Hungarian law, being compatible with proof of greater damage than the one expressed in the penalty clause.

The forfeit money provides the party exercising the right of cancellation with an alternative power to perform the contract or to withdraw from the contract in exchange for the loss or payment of the forfeit money. Cancellation in exchange for a payment of a sum is lawful conduct and therefore cannot give rise to any obligation to pay damages. The opposing party to a contract who has undertaken to pay a penalty may not claim the penalty if the other party has not exercised its right of withdrawal but may instead bring an action so that the contract is performed. In contrast to forfeit money, a penalty is not an entitlement to unilateral release from contractual obligations, but an incentive to perform the contract and the other party may claim the penalty as a lump sum in damages. If the entitled party has not exercised his or her right of cancellation within the time limit laid down in the contract, he or she may subsequently withdraw from the contract only if he or she proves that his or her interests have been prejudiced (for details, see the analysis below on the cancellation for breach of contract).[50]

Cancellation or unilateral termination is possible also in the case of a preliminary breach of contract.[51] A preliminary breach of contract is the situation when it becomes obvious before the expiry of the time limit for performance that the debtor will be unable to perform his or her service when it will become due, and because of this the performance no longer serves the interests of the creditor, the creditor may exercise his or her rights arising from the default. If it becomes obvious before the expiry of the time limit for performance that the performance will be defective then, after the expiry of the time limit set for repairing the defect or for replacement with no result, the creditor may exercise his or her rights arising from defective performance.

47 EBH 2014. P9.
48 Vékás, 2019, p. 357.
49 BH 2005. 173.
50 BDT 2009. 1982.
51 HunCC, § 6:151.

A contract is not a perpetual handcuff on the hands of the parties.[52] Unless otherwise provided by the HunCC, contracts giving rise to permanent legal relationships and concluded for an indefinite period of time may be unilaterally terminated by any of the parties while observing an appropriate period of prior notice. Any clause excluding the right of unilateral termination shall be null and void.

3.2. Termination for breach of contract

Cancellation and unilateral termination are possible also as sanctions of a breach of contract.

If, as a consequence of the breach of contract, the creditor's interest in the performance of the contract has ceased, he may cancel the contract, or if the situation that existed before the conclusion of the contract cannot be restored in kind, he may unilaterally terminate the contract unless otherwise provided for by law.[53] Cancellation or unilateral termination both are addressed declarations of law, which must be received by the opposing party to be effective.[54]

For the creditor's juridical act to be valid, he or she shall be required to indicate the reason for cancellation or unilateral termination, if he or she is entitled to do so on more than one ground. The creditor may switch from the indicated reason for cancellation or unilateral termination to another one.

The debtor shall not claim the monetary reimbursement of the service that remained without consideration if the creditor proves that he is unable to reimburse the service provided to him for a reason for which the debtor is liable. If the creditor has paid consideration for the service, he or she may request its reimbursement, even if he or she is unable to reimburse the service provided to him or her, and proves that the reason for it can be traced back to a circumstance for which the debtor is liable.

Minor, insignificant breaches of contract which do not jeopardize the creditor's interests and do not cause a cessation of interest do not confer the right to avoid the contract.[55] The case law has established that a lender abuses his or her right if he or she unilaterally terminates the loan contract because of the non-payment of one month's installment and the short delay of some installments instead of using the available security to satisfy his or her claim.[56] Similarly, it was stated that the immediate termination of the bank loan contract, thus rendering the entire debt overdue, and the loss of the possibility to repay the loan in periodic installments, puts the debtor in a serious economic situation. The principle of proportionality requires a reasonable relationship between the harm and its consequences. If there are no serious consequences for a party's failure, the aggrieved counterparty cannot undertake measures that would result in drastic legal consequences.

52 Vékás, 2019, p. 359.
53 HunCC, § 6:140.
54 Vékás, 2019, p. 357.
55 Veress, 2019b, p. 310.
56 EBD 2015. P4.

Therefore, unilateral, and immediate termination of the contract can only be applied in the event of a serious breach of contract, where there is a credible threat or a real and present danger that the loan won't be repaid. Any other termination right for any other, less serious default or other less serious breach of contract is unfair and invalid.[57]

In the practice of the courts, it has also been established that, from the point of view of cessation of interest, the creditor must prove not that he or she has no interest in general in the performance, but that his or her interest lapsed in the further performance of the contract by the debtor in question.[58]

Unfounded cancellation or termination is unlawful conduct, practically a breach of contract, which gives rise to liability for the wrongful exercise of the right of cancellation or termination by the contracting party.[59]

An important regulation in the HunCC refers to substitute transactions.[60] In the event of his cancellation or unilateral termination, the creditor is permitted to conclude a new, substitute contract capable of achieving the objective pursued by the initial contract, and he or she may claim from the debtor, per the rules on compensation for damages, the reimbursement of the difference between the value determined in the initial contract and the one determined in the substitute transaction, as well as the costs arising from the conclusion of the substitute transaction.

As was stated before, if the obligor is in default (delay), the obligee may claim performance or if, as a consequence of the default, the obligee's interest in the contract performance has ceased, the obligee may cancel the contract.[61]

The cessation of his or her interest in the performance does not need to be proved for the cancellation by the creditor, if

— according to the agreement between the parties or the recognizable purpose of the service, the contract should have been performed at the specified time for performance, and not at another time; or
— the creditor set an adequate grace period for subsequent performance, and this grace period expired without any result.

The debtor shall compensate the creditor's damage arising from the default or, in the case of a pecuniary debt, the damage exceeding the default interest, unless the debtor provides an excuse for his default.

In case of material defects, an insignificant defect shall not give rise to cancellation.[62]

57 BDT 2011. 2571.
58 EBD 2013. 09. P15.
59 Veress, 2019b, p. 312.
60 HunCC, § 6:141.
61 HunCC, § 6:154.
62 HunCC, § 6:159 (3).

4. Poland

On the issue of unilateral termination of contracts and the rights of withdrawal according to Polish law, it must be said first that the PolCC indeed recognizes the concepts of termination of a contract – as a general term (*rozwiązanie umowy*), withdrawal from a contract (*odstąpienie od umowy*), and termination by notice or denunciation of a contract (*wypowiedzenie umowy*).[63] At times, any of those may be unilateral, either according to a stipulation included in a contract, a legal rule found in the PolCC, or a specific statute. The PolCC does not introduce a general power to unilaterally terminate a contract, however. Where it does refer to unilateral powers, the PolCC also does not provide a uniform approach to the issue, and the specific grounds therefore may differ between the PolCC proper, the specific statutes, and a given rule in a contract.[64] This omission from the PolCC certainly does not help any counsel that wishes to render legal aid unto their clients; as such, a party to a contract must consider his or her specific circumstances when attempting to unilaterally absolve themselves of a contract, in whatever way which would be applicable.

4.1. Termination

Termination (*rozwiązanie*) is referred to in the PolCC 43 times as of the time of writing, albeit none of those rules provide a legal definition of what termination ought to mean.[65] As to the letter of the law, Article 77 § 2 of the PolCC on the form of contracts provides that where the contract was concluded according to law in the written form, the documentary form, or the electronic form, its termination by consent of the parties, as well as withdrawal therefrom and its termination by notice or denunciation shall require observance of the documentary form, unless the law or the contract would reserve a different form. The wording of this rule implies that termination (at least by consent of the parties) qualitatively differs from withdrawal and denunciation. Nevertheless, the Polish Supreme Court has at times provided that, strictly speaking, 'termination' means setting a contract aside by means of a new contract; where the term is used generally, it is to be taken to mean the cessation of the binding nature of the contract because of

63 To make this rule distinct from general termination, this text shall employ the term 'denunciation' for *wypowiedzenie*.

64 Outside termination, withdrawal, and denunciation, a contract may be unilaterally avoided by invoking a defect of a statement of intent (*wada oświadczenia woli*).

65 It might be said here that not only contracts may be 'terminated' according to the PolCC; according to Article 42^1 § 2 of the PolCC, whereunder a court-appointed representative (*kurator*) may, in the event that his or her actions have not resulted in a legal person – whose representative organs are missing – to be put in order or to be liquidated, petition the court of registration to terminate such a legal person.

'various events,'[66] including, but not limited to the action of (one of) the parties to a contract. Thus, according to the view of the Supreme Court, 'termination' is the general term for what may happen to a contract, rescinding its binding nature, including because of withdrawal or denunciation[67]. Such a view remains at a tension with the wording of the PolCC, which refers to termination, withdrawal, and denunciation as separate issues. In addition, some rules of the PolCC refer only to some, or only to one of those three, making 'termination' hardly something that should encompass the other two every time.

In my view and as regards contracts, at its most basic, termination is the cessation of the contract's binding nature. This is done normally without affecting the contract's prior existence and legal effects already brought about thereby.[68] This cessation may be caused by a contract provided for in a prior contractual stipulation, or by a separate, self-standing agreement (an *actus contrarius*), which are classic instances of termination. However, termination may occur also by a unilateral juridical act (*jednostronna czynność prawna*) made out by one party to another, in cases provided for in a statute or a prior agreement between the parties. Termination may also be ordered by a court seized with an appropriate petition.[69] For this analysis, unilateral modes of termination shall be considered.

Unilateral powers of a party to terminate a contract are the exception to the rule that both parties may frame their contractual relationship pursuant to the rule in Article 353^1 of the PolCC (freedom to contract), as they grant one of the parties the power to affect the other party. No such general statutory rule on unilateral termination is present in the PolCC. However, a contractual power to unilaterally terminate a contract is alluded to in Article 385^3 § 14 of the PolCC, in that it is, in the case of doubt, an instance of an unfair contractual term to the detriment of a consumer to deprive only him or her of a power to terminate a contract, withdraw from it, or to denounce it. In my view, it is thus not inconceivable that the parties might introduce a unilateral contractual[70] power to terminate a contract into that very contract, save where Article 385^3 § 14 of the PolCC, a rule from a specific statute, or

66 According to judgment of the Polish Supreme Court of March 22, 2012, case Ref. No. V CSK 84/11, reported in Wolters Kluwer's LEX no 1214611, wherein among those 'various events' of termination the Supreme Court lists consent of the parties, denunciation, judicial termination, termination by death of one of the parties, and termination by passage of pre-set time.

67 This approach is taken by Article 446 (4) 2 of the Act of September 11, 2019 – Public Procurement Law (the PZP), as the contracting authority is obliged to draft an *ex post facto* report on the contract within one month from 'termination of the contract due to the making of a statement to denounce it, or due to withdrawal from it'.

68 See below for the rules applicable to so-called 'bilateral contracts' (*umowy wzajemne*), which are synallagmatic contracts and PolCC, Article 497.

69 See e.g., Article 632 § 2 of the PolCC: Where the performance of a specific work would cause the party accepting the work to incur a grave loss due to a change of relationships that could not have been foreseen, a court may increase the lump sum or terminate the contract.

70 Something that has been noted in the literature, Koch in Gutowski, 2019, on PolCC, Article 479 § 2 '*niekiedy również jednostronne oświadczenie jednej z nich*'.

the limits to the freedom of contract would preclude it. However, that power would have to be explicit to be effective,[71] and its fairness vis-à-vis consumers is by definition suspect.

Furthermore, as regards bilateral contracts (*umowy wzajemne*),[72] the PolCC in Article 497 provides that 'the preceding rule [i.e., Article 496 of the PolCC] shall be applied *mutatis mutandis* in the event of termination or nullity of a bilateral contract.' Article 496 of the PolCC in turn states that if the parties are to affect a return of mutual performances because of withdrawal from a contract, each of them is entitled to the right of retention until the other party would offer the return of the performance received or offer security for the claim to return. The Polish Supreme Court has opined that a reference to 'withdrawal' in Article 496 of the PolCC 'indirectly' refers further to Article 494 of the PolCC,[73] in that where the parties have terminated the contract *ex tunc*, their performances are to be returned per Article 494 of the PolCC applied *mutatis mutandis*. Be that as it may, that view of the Supreme Court implies that termination of non-bilateral contracts does not cause this effect, and thus termination of all those other contracts does not require the restitution of performances. In addition, that court has also provided in a later case that where bilateral contracts involve permanent (i.e., continually rendered) obligations (*zobowiązania trwałe*), an instance of which is the lease agreement (*umowa dzierżawy*), the parties cannot terminate any such obligations *ex tunc*[74].

On specific statutory unilateral powers to terminate a contract, while the PolCC and specific statutes may link such termination with prior unilateral denunciation,[75] specific statutes are also known to provide for unilateral termination without referring to prior denunciation and any periods of notice. Those statutory unilateral

71 See judgment of the Appellate Court in Warsaw of November 8, 2007, case Ref. No. I ACa 652/07, reported in Wolters Kluwer's LEX no 516525, wherein that Court provided *obiter dictum* that a statement of unilateral termination of a contract must have substantive grounds in order to be effective (i.e., must have an express legal basis).

72 I.e., contracts where the parties oblige themselves in such a manner that the performance rendered by one party onto another shall be the equivalent of the performance by that other party (PolCC, Article 487 § 2).

73 Judgment of the Polish Supreme Court of October 7, 1999, case Ref. No. I CKN 262/98, reported in OSNC 2000/4/71.

74 This is allegedly due to the features of the lease contract, its purpose, and because a performance of the lessor consisting in making the object of lease available for use and for collection of proceeds to the lessee 'cannot be deemed nonextant', according to judgment of the Polish Supreme Court of November 15, 2002, case Ref. No. V CKN 1374/00, reported in OSNC 2004/3/45.

75 According to Article 730 PolCC: 'Termination of a contract for a bank account concluded for an indefinite period may occur at any time due to denunciation by any of the parties; however, a bank can denounce such an agreement only due to important reasons'. According also to the Act of February 12, 2009 on Special Rules on Preparing and Carrying Out Investments in the Area of Public-Use Airports, Article 27 (3), which links termination with prior denunciation of contracts for lease, usufruct, tenancy, or lending in the event of constructing an airport on land previously contracted out.

powers to terminate a contract are likely to be vested in public authorities,[76] but may also be available to private parties that have concluded certain long-term contracts.[77] In my view, a self-standing power to terminate a contract directly affects the obligation between the parties; this is done by way of a unilateral juridical act (*jednostronna czynność prawna*). If one were to point to a difference between the power to terminate and the entitlement to denunciate a contract (itself carried out by a unilateral juridical act), then unlike denunciation,[78] a self-standing power to terminate, in my view, does not necessarily have to be exercised vis-à-vis the other party where it does not involve prior denunciation. While it is expedient to make the exercise of that power known to the other party, the difference between a self-standing power to terminate a contract and the entitlement to denounce a contract (which eventually leads to termination) is, in my view, that the effect is immediate when a unilateral juridical act is made in the case of the former. The power to terminate may also work *ex tunc* e.g., in case of bilateral contracts (*ex* Article 497 PolCC applicable *mutatis mutandis*) or elsewhere when the parties so intended. Denunciation on the other hand, while also effected by a unilateral juridical act, requires making an effective statement of intent vis-à-vis the other party, works *ex nunc* and requires completing the periods of notice, if any, to effectively end the binding nature of the contract.

4.2. Right of withdrawal

The PolCC recognizes the concept of withdrawal from a contract (*odstąpienie od umowy*), although it must be said that there are several instances of rights of withdrawal: general contractual rights of withdrawal, wherein such a right is stipulated in a contract;[79] a variation of the former, where withdrawal is effected by payment of an agreed sum (*odstępne*);[80] rights of withdrawal as regards bilateral

76 According to Article 10 of the Act of June 15, 2007 on the Court Physician, whereunder the President of a Regional Court may terminate a contract for the performance of acts carried out by a court physician with immediate effect, where he or she would entertain reasonable doubt as regards honesty of a certificate issued by a court physician. According also Article 45c (1) 3 of the Act of September 25, 1981 on Public Undertakings, whereunder the founding authority may terminate a contract to manage a public undertaking *inter alia* where the manager has committed a material breach of the contract to manage a public undertaking.

77 According to Article 71a of the Act of July 16, 2004 – the Law on Telecommunications, whereunder in the event of a carryover of a public phone number, a user may terminate a service agreement with a service provider outside any period of notice.

78 According to the judgment of the Polish Supreme Court of May 23, 2019, case Ref. No. II CSK 159/18, reported in LEX no 2672922: 'Denunciation constitutes a unilateral juridical act of a right-defining power [*uprawnienie prawo-kształtujące*] in its nature, which, in the event of reaching the other party of the obligatory relationship (taking account of the rule of PolCC, Article 61) leads to setting that relationship aside, with an *ex nunc* effect.' The original text reads as follows: '*Wypowiedzenie stanowi jednostronną czynność prawną o charakterze prawokształtującym, która w przypadku dotarcia do drugiej strony stosunku zobowiązaniowego (przy uwzględnieniu dyspozycji Article 61 k.c.) prowadzi do zniesienia tego stosunku ze skutkiem prawnym na przyszłość.*'

79 PolCC, Article 395.

80 PolCC, Article 396.

contracts that can be either contractual or statutory;[81] rights of withdrawal that may be conferred by rules applicable to specific contracts (e.g. contract of sale);[82] and rights of withdrawal provided for in specific statutes other than the PolCC (e.g. the right of withdrawal pursuant to Article 27 of the Act of May 30, 2014 on Rights of Consumers, where a contract is a long-distance contract or a contract concluded outside the premises of an undertaking). Those rights may vary in that there may be a time limit during which they may be exercised or that they would be independent of any such time limit; they could quash the contract *ex tunc* as if it were never concluded and make the parties return their performances, or they could only work *ex nunc*; they could be available immediately for use or require a prior procedure or a set of circumstances (e.g., a statement of the other party that they shall not perform the contract).[83] In my view, what is shared between all of the above is that the right of withdrawal must be made by a statement of intent (*oświadczenie woli*) to the other party.

A contractual right to withdraw from a contract is generally governed by Article 395 of the PolCC. This provision provides[84] that it may be stipulated that one or both parties shall be entitled to a right to withdraw from a contract within a specified time limit. That right shall be exercisable through a statement made to the other party. In addition,[85] in the event of exercising the right to withdrawal, the contract shall be deemed not to have been concluded. That, which the parties have already rendered as performance shall be returned in an unaltered state unless alteration has been necessary within the limits of ordinary management. Appropriate remuneration is owed to the other party for services provided and for the use of property.

It has been a staple of case law on the rule in Article 395 PolCC of the Polish Supreme Court that a contractual right to withdraw pursuant to the rule in Article 395 of the PolCC requires a time limit during which it must be exercised. Where there is no such time limit prescribed by the parties, the stipulation is null and void.[86] Nevertheless, the court has also opined that the time limit needs not to be shorter than the duration of the contract itself,[87] that the parties may freely define causes and effects of withdrawal should they so intend while providing for a time limit[88] and that the parties may frame a stipulation akin to the 'genuine' right to withdrawal that 'may draw close to denunciation in its nature' while omitting a time

81 PolCC, Articles 494–495.
82 PolCC, Article 552.
83 PolCC, Article 492^1.
84 PolCC, Article 385 § 1.
85 PolCC, Article 385 § 2.
86 According to the judgment of the Polish Supreme Court of July 6, 2016, case Ref. No. IV CSK 687/15, reported in Wolters Kluwer's LEX no 2109482.
87 Order of the Polish Supreme Court of May 21, 2020, case Ref. No. V CSK 592/19, reported in Wolters Kluwer's LEX no 3028840.
88 Judgment of the Polish Supreme Court in IV CSK 687/15 above.

limit provided for in Article 395 of the PolCC.[89] Even if a contractual right to withdrawal expires or is null and void, the parties still can avail themselves of statutory rights to withdraw.[90]

Apart from the rule above, it is possible to include a right to withdraw encompassing a withdrawal compensation (*odstępne*). According to the rule in Article 396 of the PolCC, where it has been stipulated that one or both parties may withdraw from a contract by payment of a specified amount (withdrawal sum), the statement of withdrawal is only effective when made concurrently with the payment of the withdrawal sum. Thus, by paying the withdrawal sum, the party may free himself or herself from the obligation.

The PolCC provides for statutory rights to withdraw from a contract as regards bilateral contracts. There are several grounds for statutory rights to withdraw from such contracts, beginning with Article 491 of the PolCC.

Article 491 of the PolCC associates a statutory right to withdrawal with culpable delay (*zwłoka*) of performing an obligation arising out of a bilateral contract. According to its § 1, where one of the parties incurs culpable delay in performing an obligation arising out of a bilateral contract, the other party may set an appropriate and additional time limit for that party to perform, on pain that they would be entitled to withdraw from a contract in the event of expiry thereof. In addition, that party may, either without setting an additional time limit or after its expiry, demand the performance of the obligation and redress of damage resultant from that culpable delay. According to § 2, where the performances of both parties are divisible, and one of the parties incurs culpable delay only as to a part of the performance, the right to withdraw from a contract to which the other party is entitled is restricted, per the choice of that party, either to that part or to the entire remainder of the performance not rendered. That party may also withdraw from the entire contract where partial performance would be meaningless for that party because of the features of the obligation or because of the purpose of the contract intended by that party and known to the party incurring a such culpable delay.

Pursuant to Article 492 of the PolCC, where the right to withdraw from a bilateral contract was reserved for the case of failure to perform the obligation within strictly defined time, the entitled party may, in the case of culpable delay of the other party, withdraw from the contract without setting an additional time limit. The same applies to the case where the performance of the obligation by one of the parties after the date originally set would be meaningless for that party because of the features of the obligation or because of the purpose of the contract intended by that party and known to the party incurring such culpable delay.

89 Judgment of the Polish Supreme Court of October 12, 2018, case Ref. No. V CSK 493/17, reported in Wolters Kluwer's LEX no 2577357.
90 Judgment of the Polish Supreme Court of September 12, 2019, case Ref. No. V CSK 328/18, reported in Wolters Kluwer's LEX no 3122455.

Article 492[1] of the PolCC provides in turn that if a party obliged to render the performance declares that they shall not render it, the other party may withdraw from the contract without setting an additional time limit, including before the set date of performance for that obligation.

According to Article 493 § 1 of the PolCC, if one of the mutual performances became impossible as a result of the circumstances for which the party obliged is responsible, the other party may, according to their choice, either demand the redress of the damage resulting from the non-performance of the obligation or withdraw from the contract. Pursuant to § 2 of that rule, in the case of a partial impossibility to render performance by one party, the other party may withdraw from the contract if partial performance would be meaningless for that party because of the features of the obligation or because of the purpose of the contract intended by that party and known to the party whose performance became impossible in part.

Article 494 § 1 of the PolCC sets the consequences of withdrawal as regards bilateral contracts. According to that text, the party which withdraws from a bilateral contract shall be obliged to return to the other party all that which they received from the latter by virtue of the contract, whereas the other party is obliged to accept it. The party which withdraws from the contract may demand not only the return of what the performance consisted of but also the redress, pursuant to general rules, of the damage resulting from the non-performance of the obligation. In addition, Article 494 § 2 of the PolCC states that the performance shall be immediately returned to the consumer.

Article 495 of the PolCC governs the impossibility to perform an obligation as regards withdrawal where none of the parties is liable. According to § 1, if one of the mutual performances has become impossible as a result of circumstances for which neither party is liable, the party who was to make that performance cannot demand the counter-performance, and if they received it already, that party then shall be obliged to return it in accordance with the provisions on unjust enrichment. Pursuant to § 2, if the performance by one of the parties became impossible only in part, that party shall lose the right to the appropriate part of the counter-performance. However, the other party may withdraw from the contract if partial performance would be meaningless for that party because of the features of the obligation or because of the purpose of the contract intended by that party and known to the party whose performance became impossible in part.

The Polish Supreme Court has offered on withdrawal from bilateral contracts that such withdrawal generally applies *ex tunc*, with the contract deemed not to have been concluded at all.[91] Where there would be outstanding parts of the performance to be rendered by the parties unto another, then the parties would be released from doing

91 In other words, Article 395 § 2 of the PolCC is to apply *mutatis mutandis*, according to the Order of the Polish Supreme Court of August 10, 2018, case Ref. No. III CZP 17/18, reported in Wolters Kluwer's LEX no 2604061.

so; nevertheless, permanent obligations (obligations that are continuous or successive) may be withdrawn from only *ex nunc*.[92]

Apart from the above rules applicable either to withdrawal in general or to withdrawal in the context of bilateral contracts, the PolCC provides for withdrawal as regards specific contracts.[93] Some of those contracts are mutual (bilateral, or synallagmatic) contracts (e.g., sale, supply, contract for a specific work, contract for construction works, carriage), and thus Article 494 of the PolCC would apply to the extent it is not precluded by specific rules on a given contract.[94]

Specific statutes may include special rules on withdrawal; such rules are subject to the *lex specialis* relationship with the PolCC. The rule in Article 27 of the Act on Rights of Consumers referred to above, often applicable as regards sale, provides that the consumer is entitled to withdrawal 'without bearing the costs,' save the costs specified in Articles 33, 34 (2), and 35 of the Act.

4.3. Denunciation

Self-standing termination and withdrawal are not the only possibilities for the unilateral end of a contract. The third option to make the contract cease to bind is to denounce it, leading to the concept of denunciation (or termination by notice – *wypowiedzenie*) which is recognized in the PolCC (e.g., in Articles 365^1, 384^1, 385^3 § 14, 664 § 2, 673, 698 § 2, 709^{11}, and 723 of the PolCC). Nevertheless, the PolCC does not precisely define the concept or the effects of denunciation. It is common ground that this rule is often associated with the cessation of continuous, permanent obligations, although the parties may include a power to denounce a contract concluded for a specific period; either the parties or a statute may also specify periods of notice for denunciation.[95] Polish law precludes the existence of perpetual obligations (*zobowiązania wieczyste*), i.e., obligations that would bind the parties forever; continuous or successive obligations must be capable of being denounced.[96] According to the Polish Supreme Court – in II CSK 159/18 above –, denunciation constitutes a unilateral juridical act

92 Judgment of the Polish Supreme Court of May 15, 2007, case Ref. No. V CSK 30/07, reported in OSNC 2008/6/66; resolution (*uchwała*) of the Polish Supreme Court of November 20, 2019, case Ref. No. III CZP 3/19, reported in OSNC 2020/5/35. There is some literature which appears to criticize this approach (Panfil, 2018, Ch. VIII, para. 1), advocating for the possibility of withdrawal from continuous contracts. The Polish Supreme Court appears to be unmoved as of the time of writing, however.

93 E.g. contract for sale: PolCC, Article 552; warranty as regards sale: PolCC, Article 560 § 1; contract for supply (*dostawa*): PolCC, Article 610; contract for a specific work (*umowa o dzieło*): PolCC, Articles 631 and 644; contract for construction works: PolCC, Article 6494; loan: PolCC, Article 721; contract for carriage: PolCC, Article 783; insurance contract: PolCC, Article 812 § 4.

94 The clarity of those specific rules may vary. For instance, the Polish Supreme Court has provided that withdrawal pursuant to Article 644 of the PolCC (specific work) is effective *ex nunc* (according to the judgment of the Polish Supreme Court of January 24, 2017, case Ref. No. V CSK 219/16, reported in Wolters Kluwer's LEX no 2237427).

95 See Gniewek and Machnikowski, 2021, PolCC, Article 365^1 § 3.

96 See e.g., the Resolution of the Polish Supreme Court of December 9, 2021, case Ref. No. III CZP 16/21, reported in Wolters Kluwer's LEX no 3268910.

of a right-defining power in its nature (*uprawnienie prawo-kształtujące*), which, in the event of reaching the other party of the obligatory relationship (taking account of the rule of Article 61 of the PolCC) leads to setting that relationship aside, with an *ex nunc* effect. According to the Supreme Court, this *ex nunc* effect applies even where the contract being denounced is a bilateral contract, e.g., a lease (*dzierżawa*),[97] franchising contract,[98] a mandate (*zlecenie*) where it is for consideration,[99] and leasing.[100] As such, denunciation causes different effects than general termination, even as regards bilateral contracts where Article 497 PolCC would apply to termination.[101] In my view, this differentiates denunciation from a general power to terminate a contract, especially a bilateral contract, and thus it cannot be said that denunciation is a mere instance of (or only a reason for) termination.

While the possibility of denouncing contracts producing continuous or successive obligations may not be precluded, the parties may stipulate that the power to denounce a contract would be impeded for a set period, making denunciation possible only after the expiry thereof. The Polish Supreme Court has hitherto accepted a yearly period of such an impediment as not directly precluded by Article 365^1 of the PolCC.[102]

As is the case with general termination and withdrawal, specific statutes may also provide for denunciation of contracts and contain special rules on denunciation. The Act of March 8, 2013 on Counteracting Excessive Delays in Commercial Transactions (*Ustawa o przeciwdziałaniu nadmiernym opóźnieniom w transakcjach handlowych*) provides in Article 7 (3a) and (3b) respectively that a creditor may withdraw from a contract or denounce it where the time limit for payment specified in the contract exceeds 120 days calculated from the service of an invoice or a bill on the debtor, confirming the supply of goods or performance of a service, and such a period has been set with a breach of Article 7 (2) of the act. Where the creditor has denounced the contract pursuant to (3a), pecuniary performances (*świadczenia pieniężne*) due from the debtor regarding goods already supplied or services already performed shall become due within the time limit of 7 days from the day of denouncing the contract. When the creditor would not receive a pecuniary payment within that time limit, he or she shall be entitled to interest referred to in Article 7 (1) of the act.

97 Judgment of the Polish Supreme Court of April 8, 2011, case Ref. No. II CSK 434/10, reported in Wolters Kluwer's LEX no 1027169.

98 Judgment of the Polish Supreme Court of June 23, 2005, case Ref. No. II CK 739/04, reported in Wolters Kluwer's LEX no 180871.

99 E.g., commercial real property management: Judgment of the Polish Supreme Court of October 9, 2013, case Ref. No. V CSK 472/12, reported in Wolters Kluwer's LEX no 1396517.

100 Resolution of the Polish Supreme Court of September 16, 2015, case Ref. No. III CZP 52/15, reported in OSNC 2016/9/99.

101 It might be added here that the legal basis for this, according to the Polish Supreme Court, is the 'nature' of the permanent relationship of the parties (II CK 739/04, II CSK 434/10), apart from the rule in PolCC, Article 365^1 (II CSK 159/18).

102 Judgment of the Polish Supreme Court of June 13, 2013, case Ref. No. V CSK 391/12, reported in OSNC 2014/2/22.

5. Romania

5.1. Termination not conditioned to breach of contract

It follows from the binding force of the contract that the parties can normally only modify or terminate the contract jointly by their common will (in practice, by a new contract – in the latter case, we may speak of a contract of termination). Unilateral modification or termination of a contract is exceptional.

A very important case is a contract concluded for an indefinite period, which may be terminated unilaterally by either party, subject to reasonable prior notice. Any clause to the contrary and any clause providing for consideration in exchange for termination of the contract shall be deemed unwritten (i.e., non-existent).[103]

Another case of crucial importance is the unilateral termination clause included in contracts by the parties themselves.[104] If the contract provides for the possibility of unilateral termination of the contract (*denunțarea contractului*) in favor of one of the parties, this right (power) may be exercised until the performance has begun.[105] A contractual relationship that can be unilaterally terminated at any time, without any reason, is much weaker than a normal contractual relationship that cannot be terminated without a reason specified in the legislation. A unilateral termination clause weakens the binding force of the contract and renders the obligation vulnerable.

Unilateral termination can be exercised as follows:

— the parties may set a time limit for the exercise of this right (the exercise of the right to unilateral termination is usually subject to a time limit in practice since no one will allow the possibility of unilateral termination to hover over the obligation for an indefinite period of time),
— if no time limit has been specified, this right may be exercised until performance has begun,
— in the case of a contract for continuous or successive performance, that right may be exercised after performance of the contract has begun, provided that a reasonable period of notice is observed, but termination of the contract may have effects only in respect of the future.

If the party terminating the contract is required to perform a service as a consideration for the termination, the unilateral termination of the contract can only have legal effect from the moment of performance of that service (in general, payment of a certain amount of money on compensation). That is to say, the party who has promised to pay compensation may terminate the contract by paying it, and the party who has given it may terminate the contract by losing it. The possibility to exit the contract by simply paying compensation weakens the obligation: if such a clause has

103 RouCC, Article 1277; Veress, 2020, p. 59.
104 Veress, 2020, pp. 55–59.
105 RouCC, Article 1276.

been included in the agreement for the benefit of one or both parties, the contract may be terminated by one of them by a unilateral declaration of intention and the payment of compensation.

The rules of the RouCC on unilateral termination of a contract are dispositive in nature, and the parties may include different private rules in their contract.

The right to terminate the contract unilaterally – once recognized – in our opinion cannot be exercised abusively or in bad faith. Being a potestative right (a right subject solely to the will of the entitled party, which may be exercised without restriction, and without giving, or even having a reason), the faculty to exercise this right can be based on any subjective premise. The exercise of the right to terminate the contract has nothing to do with a culpable breach of contract by the other party, in which case the sanction of resolution *ex tunc* or *ex nunc* on the part of the creditor applies.

However, termination clauses are not compatible with those contracts which are declared irrevocable by law. Thus, a donation contract is not valid when it contains clauses allowing the donor to revoke it.[106]

5.2. Termination conditioned to breach of contract

A party enters into a synallagmatic (bilateral, mutual, or reciprocal) contract because it expects the counterparty to counter-perform in exchange for its own performance. If the counterparty breaches the contract and fails to counter-perform, then termination is one possible way of resolving the conflict. However, the creditor may also choose to demand performance in kind. Either way, he or she is entitled to damages.

Resolution *ex tunc* (*rezoluțiune*) or resolution *ex nunc* (*reziliere*, from the French *résiliation*, with no direct English equivalent) constitute a sanction for breach of a synallagmatic contract.[107] Resolution *ex tunc* or resolution *ex nunc* terminate the valid contract (repudiate the obligation) according to the will of the creditor, in the first case with retroactive effect from the date of the conclusion of the contract, and the second case only with prospective effect, on cases when the debtor has breached the contract. Breach of contract is also sometimes possible in unilateral contracts: for example, a loan on interest can be the object of resolution.[108] In another unilateral contract, the *commodatum* (loan for use),[109] the RouCC allows the lender to recover the object of the loan when the borrower breaches his or her obligations,[110] for example when he or she does not use the object properly. This is also an implicit recognition that resolution of contract is also possible in case of unilateral contracts.

Resolution *ex tunc* and resolution *ex nunc* are a declaration of the creditor's intent to terminate the contractual relationship, a type of civil sanction. If Primus is the seller and Secundus is the buyer, and Primus does not deliver the property for which ownership has been transferred by the contract within the deadline, Secundus may

106 RouCC, Article 1015 (1).
107 RouCC, Articles 1549–1554.
108 Baudouin, Jobin and Vézina, 2013, p. 1026.
109 A loan of an article for a certain time, to be used by the borrower, without paying for it.
110 RouCC, Article 2156.

decide on the resolution of the contract. The otherwise valid contract will be terminated *ex tunc*, and therefore if Secundus has paid the price or part of the price, Primus will have to pay it back. Or, another example, when a tenant does not pay the rent for three months, the lessor can opt for the resolution *ex nunc* of the contract. Resolution *ex nunc* is a sanction for breach of contracts performed continuously or successively, where returning to the situation before the conclusion of the contract is excessively difficult or outright impossible (e.g., it is not possible to return the use of the dwelling made by the tenant, and therefore it would be pointless to return the rent previously paid). Resolution *ex nunc*, therefore, terminates the lease from the day it occurred.

In addition to resolution *ex tunc* and *ex nunc*, the broader category of termination for breach of contract also includes the situation where termination occurs automatically, the effects of the contract being ceased without any specific expression of the will of the creditor, usually based on a specific contractual clause.

A clear distinction must be drawn between invalidity, on the one hand, which includes nullity (*nulitate absolută*), voidability (*nulitate relativă*), and non-existent (unwritten) clauses (*clauze luate ca nescrise*), and resolution *ex tunc* or *ex nunc*, on the other hand, as both have very similar legal effects, but also present fundamental differences:

— Invalidity can arise in relation to any legal transaction; resolution *ex nunc* or *ex tunc* can only occur in the case of synallagmatic contracts, termination by resolution being a specific sanction for breach of a contract.
— Invalidity is caused by reasons existing at the moment of the conclusion of the juridical act (breach of the norms governing the valid formation of the contract), whereas resolution can only be considered in the case of valid bilateral contracts, because of the default of the debtor after the conclusion of the agreement.
— The cause of the civil sanction is also different: in the case of invalidity, the cause is the breach of the law, and in the case of resolution the cause is the breach of contract.

Also, a distinction has to be made in regard to unilateral termination of the contract not conditioned to a breach of contract. It is clear, that under Romanian law resolution is a sanction for breach of contract. In contrast, unilateral termination of a contract does not imply a breach, but:

— the right to terminate is granted by law temporarily (for example, in the case of consumer contracts that can be terminated by the consumer for 14 days),
— the law may recognize this right permanently and definitively, by virtue of the nature of the type of contract in question (for example, in the case of a contract of mandate); in both the cases referred to above, the law effectively weakens the binding force of the contract,
— or the parties themselves institute this right of termination in their contract (either free of charge or in exchange for a consideration, for the benefit of one or both of them – i.e., asymmetrically, or symmetrically).

Thus, we can draw the following conclusions regarding the compared tools for termination:

- their causes are different: in the case of resolution, the fundamental condition is breach of contract, whereas in the case of termination this is not conditioned to a breach, it is a right exercisable in practice according to the discretion of the entitled party, without the need to state any reasons,
- they also differ in that the right of resolution may be linked to any sufficiently serious breach of a synallagmatic contract, whereas the right of unilateral termination – being exceptional in nature, as an exception to the binding force and irrevocability of the contract, which is instituted by law for certain types of contract (consumer contracts, contracts of mandate) or by the express agreement of the parties – may only be exercised based on prior, specific authorization;
- they are similar in their legal effects (ending the contractual obligation), with the important difference that the unilateral termination of a contract, not conditioned to a breach is not usually accompanied by damages (except in the case of the payment of the consideration referred to above), whereas the right of resolution does not preclude the right to claim damages from the party in breach of contract.

The main common features of resolution *ex tunc* and resolution *ex nunc* are:[111]

- Both resolution *ex tunc* and resolution *ex nunc* are based on the debtor's material breach of contract. The breach of contract may be either non-performance (negative breach) or insufficient performance, in the latter case, the performance does not correspond to the content of the service owed. A debtor who performs, but not at the time, place, or in the manner it should have performed (positive default) is also in breach of contract. For example, a contractor is negligent, careless, or incomplete in his or her performance and is not performing adequately. In such a case, as it was shown, the creditor may also choose to enforce the performance in kind (so that the creditor can demand that the performance should be satisfactory or even have the performance corrected by another party at the expense of the debtor). If the positive breach of contract is substantial, the creditor may use his or her right to resolution *ex nunc*. This will have legal effects for the future, i.e., the contractor will have to be held to account for his or her activities to date. However, the contractor will also be liable for any damages caused.
- As a general rule, the debtor must be summoned to perform before termination for breach of contract may occur and must be granted an appropriate grace period.[112] This is the default (*punere în întârziere*). There are statutory cases where default occurs by operation of law, or the parties may provide in a clause that the default is automatic, without the need to give the debtor notice and a grace period.

111 Veress, 2020, 98–100.
112 RouCC, Articles 1522 and 1516.

— Resolution *ex nunc* or *ex tunc* takes place by a unilateral declaration of the creditor's will: the creditor has the choice of demanding the performance of the contract or terminating the contract. In the case they have no more interest in in-kind performance, the creditors choose to use their right to resolution, but they dos not need to prove the lapse of interest: proving the breach is sufficient to open the creditor's right to resolution. The option to use the right to resolution or to opt for enforcement in-kind is entirely up to the creditor. A debtor in breach of contract has no right to invoke resolution.
— The creditor has the right to resolution by operation of the law, it is not necessary to include a specific clause in the contract. However, detailed rules going beyond the provisions of the RouCC may be laid down in the agreement of the parties.
— Resolution is generally a declaration to the debtor, the effect of which is generated by a notice served on the debtor, by means of a declaration of resolution.
— As resolution is a definitive declaration of intent, it cannot be revoked without the consent of the opposing party.
— Resolution is not subject to any specific formality. This rule also applies to withdrawal from a contract subject to formalities.
— Of course, resolution does not exclude contractual liability: in addition to the cancellation of the contract, the creditor can also claim damages.

The High Court of Cassation and Justice has held in a case that a condition of resolution is that the contract should not contain a clause waiving the right of termination in favor of the right to enforce the performance in-kind. In a pre-contract of sale, the following clause was included:

> 'in the event that the contract of sale is not concluded for reasons related to the will of one of the parties or because of the non-performance of an obligation contained in this agreement, the party who is not at fault may apply to the court for a decision replacing the contract of sale and, if this is not possible, may apply for the restitution of the advance payment, may request the sum included into the penalty clause and ask the payment of the costs.'

The person promising to buy has brought an action for resolution of the contract because the person promising to sell has failed to enter into the promised contract of sale. The High Court of Cassation and Justice dismissed the action because, according to the contract clause relied on, the parties had stipulated that the court decision replacing the contract was the primary sanction. Thus, the person promising to buy should have asked for it because he or she had effectively waived his or her right of resolution. The action for resolution is contrary to the will of the parties expressed by the pre-contract and the court cannot go against the validly expressed will of the parties.[113] (In my view, the decision is erroneous. The clause can be interpreted at most as an implied waiver

113 High Court of Cassation and Justice, II Civil Law Chamber, Decision No. 4046/2013.

of the right of withdrawal. The question is whether a waiver of the right of withdrawal occurring before the breach is valid. In my view, no; the law clearly provides the option for the claimant to choose between enforcement in kind or rescission.)

The most significant difference between resolution *ex nunc* and resolution *ex tunc* is that resolution *ex tunc* is retroactive, while resolution *ex nunc* has only effects toward the future. In the case of resolution *ex tunc*, each party is obliged to return to the counterparty all the assets which he or she has received under the contract (restoration of the previous situation, *restitutio in integrum*). If the previous situation cannot be restored, the rules on damages apply. In the case of a supply of fungible assets, the previous situation may be restored by the return of other assets of a similar nature. In fact, resolution *ex nunc* is a specific subtype of resolution *ex tunc*.

Resolution may only apply to a part of the contract if the service is of a divisible nature. In a multilateral contract, the non-performance of an obligation by one party does not entail the termination of the contract as against the other parties, except in the case where the non-performance of the service should have been considered fundamental.

The creditor is not entitled to resolution if the default is minor. In the case of contracts with continuous (or periodic) performance, the creditor is entitled to terminate even if the default is minor but recurrent. Any contrary clause shall be deemed to be non-existent (unwritten). However, in the case of a minor default, the creditor is entitled to a proportionate reduction of his or her performance if the circumstances so permit. If the services cannot be reduced, the creditor is only entitled to compensation.

Under Romanian law, there are three forms of termination of the contract for breach:[114]

— when the creditor exercises his or her right to unilateral resolution,
— when the court orders (approves) the resolution,
— Resolution may also occur automatically (*ope legis*) if provided for by law or agreed by the parties.

Unilateral resolution is conditional on the debtor being in default. The debtor may be in default *ope legis* (automatically) or by having been summoned to perform by the creditor (using a written notice to perform). If the creditor gives the debtor notice, an appropriate grace period for performance must also be set. In the second case, unilateral resolution is possible if the debtor has not performed within the grace period set. Default *ope legis* applies in cases where the obligation can only be usefully performed within a certain period of time. A grace period is also not necessary where the debtor is at fault for the impossibility of performing the obligation in kind; where the debtor has breached an obligation to abstain (*non-facere*); where the debtor has manifested to the creditor beyond reasonable doubt an intention to default; or where, in the case of a contract of continuous performance, the breach is of a repetitive nature. Likewise,

114 Veress, 2020, 100–102.

no grace period should be imposed in a commercial relationship where the obligation is to pay money and the debtor has not performed on time.

Romanian law does not explicitly regulate the institution of prior breach of contract. A prior breach of contract may occur if it becomes clear before the expiry of the time limit for performance that the debtor will not be able to perform the service when it is due. In such a case, however, the obligation may still be discharged immediately without granting a grace period, based on the rule of the debtor's fault described above.

The notice of resolution must be given within the limitation (prescription) period for bringing an action. In any case, the notice of withdrawal or termination shall be entered in public registers such as the Land Register or other such registers, to be enforceable against third parties.

The notice of withdrawal or termination is irrevocable from the date of its service to the debtor or, where applicable, from the expiry of the grace period for performance.

A non-performance clause (*pact comisoriu*) is a contractual clause which (if the conditions set out in the clause are met) leads to the termination of the contract ope legis. A non-performance clause has an effect if it expressly provides for the essential obligations, the non-performance of which entails the termination of the contract. In this case, too, automatic resolution is conditional on the debtor being in default, unless the parties have stipulated that this follows from a simple failure to perform. A notice to perform (to put the debtor in default) has no legal effect unless it expressly restates the conditions for the operation of the non-performance clause.

The second type, judicial resolution has multiple practical benefits. A unilateral resolution can be challenged *ex post* by the debtor, and it can be proved that the conditions for default did not exist (e.g., the default was insignificant, no adequate grace period was granted or there is no fault on the part of the debtor, etc.), i.e., the fact of unilateral termination of the contract by the creditor can be challenged by the debtor. He or she may no longer do so if the default is declared by a final court decision. Likewise, it is also advisable to opt for the judicial remedy of default if performance has been affected by the creditor and the creditor wishes to obtain an enforceable title to restore the original situation (to recover the service rendered).

There may also be cases where the law does not allow unilateral resolution of the contract, resulting in addressing a court becoming mandatory. For example, in the case of a maintenance contract, if the reason for the default is the conduct of one of the parties, which runs contrary to good morals, or which inhibits performance, or there is an unjustified failure to perform the maintenance obligations, the court has exclusive jurisdiction on resolution.[115] Any contrary provision shall be deemed as non-existent (unwritten).

Resolution in both its forms terminates the contract. In the event of resolution (regardless of its type), as a rule, each party must return the performance received

115 RouCC, Article 2263.

from the other, unless otherwise provided for by law, as the rules on resolution *ex tunc* are applicable to resolution *ex nunc* in lack of provisions to the contrary.[116] Romanian law however expressly provides,[117] regarding contracts that must be performed continuously or successively, that resolution shall only have effects *ex nunc*, unless otherwise provided for by law.

The creditor is also entitled to compensation for the damage caused to him or her. Resolution does not affect contractual clauses relating to the settlement of disputes or clauses which are intended to have effects in the event of termination of the contract (e.g., a penalty clause, clauses establishing jurisdiction, etc.).

6. Serbia, Croatia, Slovenia

6.1. Serbia

The SrbLO governs different cases when the parties are entitled to terminate the contract unilaterally. They may be classified into two groups. The first comprises cases when the unilateral termination of the contract is justified by the culpable conduct of the counterparty. This is the repudiation of the contract because of non-performance. The second group relates to cases when a party can terminate the contract unilaterally even when the counterparty performs or is willing to perform in good faith. This is usually the case with long-term contracts. In addition, the parties may agree to establish a right to terminate the contract unilaterally by paying a sum for the purpose of compensating the other party for the damage he or she sustains because of the termination of the contract. This is the forfeit money.

In case of the debtor's default in performing obligations in a contract for consideration, the creditor is entitled to request either the performance or may repudiate the contract, but in both cases retains the right to request compensation for damage.[118] The procedure for the repudiation of a contract because of non-performance (*raskidanje ugovora zbog neispunjenja*) depends on whether the timely performance of one or both of the parties' obligations is considered the contract's essential element. The time of the performance of the parties' obligations is usually not considered an essential element of the contract. It becomes an essential element if the parties agreed explicitly that the contract shall be considered repudiated if the debtor fails to perform by the expiry of the deadline, or such a conclusion can be implied from the nature of the transaction.[119] In both cases the repudiation is effectuated out-of-court, that is by the creditor's declaration of intention, which is the usual procedure of repudiation of the contract adopted in comparative law.[120] When the time of the performance is an essential element of the contract, in the case of non-performance

116 RouCC, Article 1549 (3).
117 RouCC, Article 1554 (3).
118 SrbLO, Article 124.
119 SrbLO, Article 125 (4).
120 Dudaš in Pajtić, Radovanović and Dudaš, 2018, pp. 368–369.

the contract is considered repudiated by the expiry of the deadline for performance.[121] However, the creditor may uphold the contract if he or she subsequently – after the default – notifies the debtor without delay that he or she requests performance.[122] If the creditor requested the performance of the obligation, but the debtor did not perform in a reasonable time after the notification either, the creditor may repudiate the contract.[123] The rules on the repudiation of the contract differ when the time of the performance is not an essential element of the contract. The law first declares that in this case, the creditor retains the right to request the performance and the debtor the right to perform even when the deadline for performance has expired.[124] If the creditor opts for the repudiation of the contract, he or she is required to grant the debtor an additional appropriate deadline for the performance.[125] There is no statutory definition of the appropriateness of the additional deadline, nor can there really be one. It is up to the creditor to specify a deadline in which, based on the nature of the transaction and the object of the debtor's obligation, it can be presumed that the debtor is granted a reasonable time to prepare and effectuate the performance.[126] Should the debtor fail to perform by the additional appropriate deadline, the consequences are the same as in the case of repudiation of a contract in which the time of the performance is an essential element.[127] The creditor is not required to allow the debtor an additional appropriate deadline when it may be implied from the debtor's conduct that he or she will not perform by the additional deadline either.[128] Moreover, the creditor may repudiate the contract even before the debtor's obligations became due when it is obvious that the other party will not perform.[129] This is the anticipatory breach of contract.[130]

In both cases, when the time of the performance of the debtor's obligation is an essential element and when it is not, the creditor determines whether the statutory conditions of the repudiation are satisfied and bears the consequences of his or her wrong qualification of circumstances or bad judgment. The creditor, therefore, repudiates the contract at his or her own risk.[131] The debtor may initiate a court procedure to have the unlawful repudiation set aside and declare that the contract is still effective between the parties. This is called control litigation.[132]

The only restriction the law sets for the creditor's right to repudiate the contract is that the scope of the debtor's failure to perform must not relate to a negligible portion

121 SrbLO, Article 125 (1).
122 SrbLO, Article 125 (2).
123 SrbLO, Article 125 (3).
124 SrbLO, Article 126 (1).
125 SrbLO, Article 126 (2).
126 Dudaš in Pajtić, Radovanović and Dudaš, 2018, p. 371.
127 SrbLO, Article 126 (3).
128 SrbLO, Article 127.
129 SrbLO, Article 128.
130 Dudaš in Pajtić, Radovanović and Dudaš, 2018, p. 371.
131 Dolović Bojić, 2016, p. 5.
132 Dolović Bojić, 2016, p. 81.

of the obligation.[133] Difficulties may arise in relation to the scope of the debtor's non-performance justifying repudiation in the case of successive obligations. Does the non-performance of a single obligation justify the repudiation of the contract? The SrbLO prescribes in this regard that if a party fails to perform one or more successive obligations, the other party is entitled to repudiate the contract with respect to other future obligations as well, if the circumstances imply that they will not be performed either.[134] Moreover, the creditor may repudiate the contract regarding obligations already performed as well, if he or she lost interest in the performance received, without future obligations.[135] However, in this case, the debtor may uphold the legal effect of the contract, that is to prevent the repudiation if he or she provides the creditor sufficient security for the performance of future obligations.[136] In addition to the requirement that the non-performance must not affect only a negligible part of the obligation, according to the majority opinion in the literature, the non-performance must not be attributable to the debtor's fault either, though this condition is not explicitly named in the SrbLO.[137] Finally, the SrbLO prescribes the duty of the creditor to effect all notifications to the debtor aiming to repudiate the contract without delay.[138]

The SrbLO regulates explicitly the legal consequences of the repudiation because of non-performance, which are in line with the general effects of the termination or invalidation of a contract. First, if none of the parties performed yet, both parties are relieved from their obligations, except from the duty to compensate the other party for any damage in relation to non-performance.[139] If only one party performed, he or she is entitled to restoration of the benefits conferred. If both parties performed, both are entitled to restoration, which must be realized according to the rules on the performance of a contract for consideration.[140] Both parties are obliged to pay compensation for – or return the – benefits they acquired in relation to the possession or use of the object of the other party's performance.[141] The party restoring the sum of money is obliged to pay default interest accrued from the day when he or she received the payment.[142]

The unilateral termination of a contract not justified by the debtor's failure to perform his or her obligations appears usually in relation to contracts with continuous performance, that is in contracts that are not discharged by the performance of a single obligation but oblige the parties incessantly during a certain period of time. Their duration may not be eternal, regardless of how long it otherwise may

133 SrbLO, Article 131.
134 SrbLO, Article 129 (1).
135 SrbLO, Article 129 (2).
136 SrbLO, Article 129 (3).
137 Perović, 1986, pp. 504–505.
138 SrbLO, Article 130.
139 SrbLO, Article 132 (1).
140 SrbLO, Article 132 (2) and (3).
141 SrbLO, Article 132 (4).
142 SrbLO, Article 132 (5).

be. Perpetual contracts are contrary to the principles of modern society and law.[143] Therefore, in a contract with a continuous performance the period of its duration is always considered to be an essential element, be it definite or indefinite.[144] For this reason, it is important to allow the unilateral termination of a contract with continuous performance with indefinite duration by a simple statement of either party. The SrbLO, therefore, prescribes, though not in the part pertaining to the general rules of contract law, but in the one pertaining to the general rules of discharging of obligations, that a continuous obligational relationship having a finite duration ceases when its period of duration expires unless it has been agreed upon by the parties or prescribed by a statute that its duration shall be extended to an indefinite time if the parties did not terminate it in due time.[145] If the duration of the contract is not limited, either party may terminate it unilaterally (*otkaz trajnog dugovinskog odnosa*).[146] A statement aiming at the termination of the contract must be communicated to the other party and may be given at any time, except at the time which is considered inappropriate.[147] The obligational relationship shall be deemed terminated when the notice of termination stipulated by the contract has expired. If no such deadline is stipulated by contract, the obligational relationship is considered terminated when the time period established by statute, or by custom, or lacking those when an appropriate time period has expired.[148] This is, however, a default rule. Parties may stipulate that the obligational relationship is deemed to have been terminated when the statement on unilateral termination has been delivered to the other party, that is without the requirement to observe a notice of termination.[149] Finally, the SrbLO explicitly states that the creditor is entitled to request performance of the debtor's obligation that became due before it ceased to exist by expiry of the duration of the obligational relationship or unilateral termination.[150]

The SrbLO enables the parties to determine a sum of money payable if either of them wishes to terminate the contract unilaterally. This is the so-called 'forfeit money' (*odustanica*), allowing one or both parties to terminate the contract even when the other party performs or is willing to perform in good faith by paying the other party an amount stipulated by the parties.[151] If the party entitled to withdraw from the contract declares that he or she terminates the contract by paying the forfeit money, that party loses the right to request the performance of the contract.[152] He or she is required to pay the forfeit money at the same time when the statement on withdrawal

143 Hiber, 1995, p. 69.
144 Hiber, 1995, p. 52.
145 SrbLO, Article 357.
146 SrbLO, Article 358 (1).
147 SrbLO, Article 358 (2) and (3).
148 SrbLO, Article 358 (4).
149 SrbLO, Article 358 (5).
150 SrbLO, Article 358 (6).
151 SrbLO, Article 82 (1).
152 SrbLO, Article 82 (2).

has been communicated to the counterparty.[153] If the parties failed to stipulate in the contract a deadline in which the withdrawal may be exercised, the entitled party may withdraw from the contract by paying the forfeit money until the expiry of the deadline for the performance of his or her contractual obligation.[154] The right to withdraw from the contract also ceases to exist when the entitled party commences with the performance of his or her contractual obligation or begins to receive the performance of the other party's obligation.[155] Finally, the law defines the relationship between earnest money and forfeit money, since their scope of application may overlap, when the earnest money has been stipulated with a right of the party who gave it to exercise a withdrawal from the contract. For this case the law establishes that the earnest money shall be regarded as forfeit money and both parties may withdraw from the contract by paying it.[156] Consequently, the rules on earnest money are to be applied to forfeit money in this case; if the party who gave the earnest money withdraws from the contract, he or she loses it. However, if the other party who received it withdraws from the contract, he or she shall be obliged to restore twice the amount of the earnest money to the other party.[157]

A right of withdrawal from a contract in the true meaning of the term (unilateral termination of a contract with one-time performance without indicating a legitimate reason and without prejudice for the party effecting termination) in Serbian law exists in the context of consumer law. A consumer can withdraw from a contract concluded at a distance or off-premises (*pravo potrošača na odustanak od ugovora*) within 14 days from the delivery of the goods. The consumer is not required to indicate the grounds for withdrawal, nor can he or she sustain costs in relation to the withdrawal, except the direct costs of returning of goods, provided the trader agreed to bear these costs or notified the consumer in due time that he or she bears these costs.[158] In addition, the Consumer Protection Act envisages the right of the consumer, or of the traveler to withdraw from the travel package contract[159] or the time-sharing contract.[160] The consumer also has the right to withdraw from banking loans, financial leasing, or similar contract.[161]

6.2. Croatia

Concerning repudiation of contract (*raskid ugovora zbog neispunjanja*) because of non-performance, the HrvLO[162] retained the rules of the former federal law, thus, no discrepancies may be identified in comparison to the rules of the SrbLO. Likewise, the

153 SrbLO, Article 82 (3).
154 SrbLO, Article 82 (4).
155 SrbLO, Article 82 (5).
156 SrbLO, Article 83 (1).
157 SrbLO, Article 83 (2).
158 SrbCPA, Articles 27 and 32–37.
159 SrbCPA, Article 107.
160 SrbCPA, Articles 122–125.
161 Law on the Protection of Clients of Financial Service, Article 12.
162 HrvLO, Articles 360–368.

rules on the cessation of the contract by the expiry of its duration and the rules on the unilateral termination of an obligational relationship with continuous performance (*otkaz trajnog obveznog odnosa*) are verbatim the same as in the former federal law, that is as in the SrbLO.[163] There are no differences concerning the rules on forfeit money (*odustatnina*) either.[164]

The Croatian Consumer Protection Act also enables consumers to withdraw from a contract concluded at a distance or off-premises within 14 days from the delivery of the goods (*pravo na jednostrani raskid ugovora*).[165] The consumer may not incur costs in relation to the exercise of the right of withdrawal, except the direct costs of returning the goods, if the trader did not agree to bear them, provided he or she notified the consumer that in case of withdrawal the consumer bears the costs of returning the goods.[166] Similarly, the consumer may withdraw from a distance contract for financial services[167] and time-sharing contracts.[168] A special Law on Consumer Credit also enables the consumer to withdraw from a credit/loan contract.[169] Finally, the Law on the Provision of Services in Tourism envisages the right of the consumer, or traveler to withdraw from a travel package contract.[170]

6.3. Slovenia

The Slovenian law has not departed from the rules of the former federal law on the repudiation of the contract because of non-performance (*prenehanje pogodbe zaradi neizpolnitve*) either.[171] The rules on the effect of the expiry of the duration of a contract with continuous performance, and the right of the parties to terminate it unilaterally (*odpoved trajnega dolžniškega razmerja*), are also literally the same as in the SrbLO.[172] Likewise, there are no discrepancies between the laws of Slovenia and Serbia regarding forfeit money (*odstopnina*) either.[173]

The right to withdraw from consumer contracts is not generally accepted in Slovenian law either: the consumer may withdraw from a contract only if the law so provides.[174] As in the SrbLO and the HrvLO law, the rules of Directive 2011/83/EU on the consumer's right to withdraw from a distance or off-premises contract (*pravico do enostranske odpovedi pogodbe*) have been linearly transposed into Slovenian law. According to the Slovenian Consumer Protection Act, the consumer may withdraw from a distance or off-premises contract without indicating any reasons in 14 days

163 HrvLO, Articles 211–212.
164 HrvLO, Articles 306–307.
165 See Mišćenić, 2019, p. 270.
166 HrvCPA, Article 79 (1), Article 84 (4).
167 HrvCPA, Article 95.
168 HrvCPA, Article 108 (1).
169 Croatian Law on Consumer Credits, Article 14.
170 Law on the Provision of Services in Tourism, Article 37.
171 SvnCO, Articles 103–111.
172 SvnCO, Articles 332–333.
173 SvnCO, Articles 67–68.
174 Možina in Možina and Vlahek, 2019, p. 68.

from the day of the delivery of the goods. Doing so, the consumer may incur only the costs of returning the goods to the trader, except if the trader declared that these costs shall be borne by him. The condition of the consumer's duty to bear the costs of returning the goods is that the trader notified him or her in due time that these costs are to be borne by him or her.[175] Similarly, the consumer may withdraw from an installment sales contract, life insurance contract and travel package contract.[176] Finally, the Law on Consumer Credits also envisages the right of the consumer to withdraw from a credit (loan) contract without indicating any reason.[177]

7. Slovakia

7.1. Overview

Slovak law generally recognizes three basic tools for a party to unilaterally end an ongoing contractual relationship *sine satisfactione creditoris*, i.e., in another way than by the performance of the obligation or a manner substituting for performance. These instruments are termination by a notice (*výpoveď*), withdrawal (*odstúpenie*), and a severance payment (*zaplatenie odstupného*).

7.2. Termination of the contract by a notice

As regards termination of the contract by a notice, it is the means by which the duration of a contractual relationship, the subject matter of which is an obligation to act continuously or repeatedly, or an obligation to refrain from or to tolerate a certain action, may be terminated. Termination of contracts whose subject matter is constituted by other types of obligations – i.e., obligations for a one-off activity – is generally not provided for in Slovak law.

In terms of the conditions for termination, a distinction must be made as to whether the contract is concluded for an indefinite duration or for a definite duration.

If the contract is concluded for an indefinite duration, any such contract may, in principle, be terminated within a period of three months, at the end of a calendar quarter.[178] The only general exception to this rule is the case of an obligation to refrain from a certain activity where the nature of the obligation or the contract implies that the obligation is unlimited in time (e.g., an obligation of confidentiality); such termination is legally ineffective according to § 582 (2) of the SvkCC. The provision of § 582 of the SvkCC applies in both non-commercial and commercial relationships.

The law provides for a different length of notice in some cases, e.g., in the case of the lease of movables, the notice period is one month.[179] The parties themselves may

175 SvnCPA, Article 43č (1) and Article 43d (7).
176 SvnCPA, Article 53a, 48č and 57f (1) and (2). See in more details Možina in Možina and Vlahek, 2019, p. 69.
177 Slovenian Law on Consumer Credits, Article 18.
178 SvkCC, § 582 (1).
179 SvkCC, § 677 (2).

also agree on a different length of the notice period or on a different moment of its expiry. However, they cannot agree on the exclusion of termination of the contract by a notice. In this respect, the literature considers § 582 (1) of the SvkCC as mandatory.[180] Therefore, it cannot be validly circumvented by, for example, entering into a contract for a fixed term of 100 years. If the purpose of such a long contract term was to circumvent § 582 (1) of the SvkCC, then the agreement on such a contract term is invalid under § 39 of the SvkCC for circumvention of the law.

The cited § 582 (1) of the SvkCC does not require a justification for the termination. This means that a contract concluded for an indefinite period can be terminated even without stating a reason. Exceptions are special cases, such as the lease of an apartment, where even an open-ended contract (i.e., contract concluded for an indefinite duration) can only be terminated for statutory reasons.[181]

In contrast, in the case of a fixed term contract (i.e., a contract concluded for a definite duration), the law does not generally recognize the possibility to terminate such a contract. However, in some specific cases, the law does allow it, such as in the case of a contract for the lease of an apartment.[182] However, it is not excluded that the parties themselves agree on the possibility of such termination.[183] However, contractual autonomy may be limited in this respect by mandatory provisions of the law. For example, according to § 685 (1) of the SvkCC, the list of grounds for termination of the apartment lease agreement is exhaustive and cannot be expanded by agreement.

As regards the effects of the termination, in principle it operates *ex nunc, pro futuro*. Upon expiry of the notice period, the contractual relationship shall end without the need to settle the benefits provided before the end of the contractual relationship.

7.3. Withdrawal from the contract

Pursuant to § 48 of the SvkCC '[a]party may withdraw from a contract only if this or another law so provides, or the parties have agreed.' Similarly, according to § 344 of the SvkCommC 'The contract may be withdrawn from only in cases provided for in the contract or in this or another law.' It follows from these provisions that if the right to withdraw from the contract is neither provided for by law nor by agreement, then the contract cannot be withdrawn from.

7.4. The law provides for the possibility of withdrawal in several places.

In many cases, this possibility is linked to a breach of contract. For example, according to § 517 (1) of the SvkCC, if the debtor 'fails to fulfill his overdue debt even within an additional reasonable period of time granted by the creditor, the creditor shall have the right to withdraw from the contract.' A similar regulation applies in commercial relations. Under the SvkCommC, if the breach of contract is minor, the other party

180 Sedlačko, 2019; Fekete, 2018.
181 SvkCC, § 685 (1) and § 711.
182 SvkCC, § 711.
183 Sedlačko, 2019.

may withdraw from the contract after the expiry of a reasonable additional period for remedying the breach;[184] if the breach is material, the party may withdraw from the contract immediately.[185]

In commercial relations, the SvkCommC allows withdrawal from a contract before its breach in cases of anticipatory breach, i.e., where the debtor declares that he or she will not perform the contract, or where the debtor's conduct or other circumstances show beyond doubt that he or she will breach the contract in a material manner and the debtor fails to provide sufficient security on demand without undue delay.[186]

In other cases, the possibility of withdrawal is linked to facts other than the breach of contract. For example, if the price of the work (*dielo*) determined according to the budget is to be changed, the customer may withdraw from the contract.[187]

Finally, in some cases the right to withdraw from the contract is not limited by anything. For example, the customer may withdraw from the contract for works (*zmluva o dielo*) until the works are completed;[188] similarly, in a contract for the acquisition of an object, the client may withdraw from the contract until the object is acquired.[189] Or the consumer in the case of a distance or off-premises contract may withdraw from the contract within 14 days from the receipt of the goods or from the conclusion of the contract.[190]

With regard to contractually agreed cases of withdrawal from the contract, it can be concluded from the provisions of the SvkCC that it is not possible to agree on withdrawal from the contract without stating a reason, except if such withdrawal is conditional on the payment of a severance payment.[191] The impossibility to agree on withdrawal without giving a reason can also be inferred for commercial relations from the wording of § 344 of the SvkCommC, which presupposes that the contract will contain an indication of the cases in which it can be withdrawn from.[192]

As regards the effects of withdrawal, in non-commercial relations '[w]ithdrawal from a contract terminates the contract from the outset, unless otherwise provided by law or agreed by the parties.'[193] Withdrawal thus has *ex tunc* effects. However, the parties may agree otherwise. Conversely, in commercial relations '[a] contract is terminated by withdrawal when, in accordance with this Act, the expression of the intention of the party entitled to withdraw from the contract is delivered to the other party.'[194] In commercial relations, therefore, termination operates *ex nunc*. However,

184 SvkCommC, § 346.
185 SvkCommC, § 345.
186 SvkCommC, § 348.
187 SvkCC, § 635 (3).
188 SvkCC, § 642 (2).
189 SvkCC, § 735.
190 Act No. 102/2014 Coll., § 7.
191 SvkCC, § 497; Fekete, 2018.
192 According to Ďurana, 2016.
193 SvkCC, § 48 (2).
194 SvkCommC, § 349 (1).

the parties may agree otherwise.[195] In both cases, however, the parties are obliged to reimburse each other for the performance provided by the other party.[196] The difference in effects is therefore not that significant.[197]

7.5. Payment of severance pay

In both commercial and non-commercial relationships, it can be contractually agreed that the contract is terminated by the rendering of a severance payment.[198] In neither case, however, can a party cancel a contract by payment of a severance payment if it has already fulfilled even part of its obligation or has accepted even part of the other party's performance.

8. Concluding remarks

We may observe convergence in cases where national legislations permit the unilateral termination of the contract. The classification given in the introduction of the present chapter seems valid in all analyzed jurisdictions (termination of contracts concluded for an indefinite period; legal right to unilateral termination not conditioned to a breach of contract; legal right to unilateral termination not conditioned to a breach of contract; contractual right to terminate the contract, in many cases for a consideration (forfeit money). However, there are conceptual and terminological differences as well.

For example, in Hungary, *cancellation* has the consequence of terminating the contract with retroactive effects, while *unilateral termination* produces similar results, but only for the future. If we analyze Romanian legislation, we can observe that the case seems similar: *resolution* ends the contract *ex tunc,* or *ex nunc* as the case may be, according to the way on which the obligation must be discharged (at once, continuously, or periodically). Still, we cannot establish an equivalence between these notions because the terms used in Romania are specific only for breach of contract, as particular sanctions. Cancellation and unilateral termination in Hungarian law refer to a broader concept: they cover the cases where a breach of contract exists, but they cover also the cases where the right to put an end to the contract derives from the law or from a contractual clause, approaching the problem from the point of view of legal consequences, not causes. Romanian legal terminology for example uses terms like (unilateral) revocation of the contract, when this right originates in law, or (unilateral) denunciation of the contract, drawing a terminological boundary between these cases, based on the cause which serves as a ground for ending the contract. Both approaches are perfectly legitimate. Similar or other fundamental and

195 Ovečková, 2017.
196 SvkCC, § 457; SvkCommC, § 351 (1).
197 According to Trojčáková, 2019.
198 SvkCC, § 497; SvkCommC, § 355.

terminological issues can be raised in almost all cases. At this stage of the comparative research of contract law in East and Central Europe, we have decided to keep the English terminology which became common in every jurisdiction to designate the different forms of unilateral termination of contracts, although we are aware of the urgent need of a revision of the terminology used and the creation of common terminology in the future, which allows the use of English as a common intermediary legal language in this region.

Another topic worthy of comparative analysis refers to the actual conditions required to end a contract in case of breach. It is common that not any breach of contract forms a sufficient ground for termination (for example, the Czech law uses the notion of fundamental breach of contract, while the Hungarian legal system conditions unilateral termination to the cessation of the creditor's interest in performance, with the same effect while stating that a minor breach of contract does not justify cancellation or unilateral termination of the contract). Serbian legislation requires that the non-performance or defective performance must affect an essential element of the contract, and in this context, the moment of performance is not perceived as an essential element in general. Termination in Serbia is not allowed when it refers to a negligible portion of the obligation.

There are legal systems (such as the Czech Republic, Hungary, and Serbia) that permit a preventive termination of contract when there is not yet a breach of contract, but a future breach is imminent. We can call this situation anticipatory breach of contract. In this sense, for example, we can already talk about a delay, even before the contractual deadline. In such cases, the creditor is not obliged to wait until the deadline specified in the contract has elapsed, but may take preventive measures, up to and including unilateral termination of the contract.[199] Obviously, proving a prior breach of contract raises serious problems in practice, and courts must analyze the problem carefully.

It is clear that the legal systems in the region allow for unilateral termination of a contract of an indefinite duration, even if the conditions for exercising this right differ from jurisdiction to jurisdiction (for example, Slovakia has a precise norm, that such contracts may be terminated within a period of three months, at the end of a calendar quarter, while other legislations, such as Romania, require just an adequate preliminary notice period for termination, which shall be considered on a case-by-case basis. The solution offered by Czech law is worth highlighting in this context, which specifically regulates the issue of contracts concluded for an overly extensive definite period, for example, 50 or 100 years. According to the CzeCC, if a contract has been concluded for a definite period without a serious reason in a way that it obliges an individual for his or her entire lifetime, or obliges anyone for more than ten years, extinction of the obligation may be claimed after ten years from its creation. A court shall also extinguish an obligation if the circumstances on which the parties apparently relied when the obligation was created have changed to such an extent

199 Leszkoven, 2018, pp. 158–159.

that the obligor cannot be reasonably required to be further bound by the contract. A similar solution can be achieved in other jurisdictions by invoking a general clause, essentially a breach of good morals, for example, in a contract concluded for an excessively long fixed term.

It is of particular interest that abusive cases of unilateral termination of a contract also occur in the legal systems under examination, where the creditor does not respect the legal or contractual terms prescribed to end the contract unilaterally. In such cases, the contract is not in fact terminated but remains binding because the expression of the unilateral will of the creditor was not sufficient to produce the legal effect of the termination.

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| Chapter XV |

Assignment

1. General considerations

Obligation in its classical sense has always been perceived as a more or less intense personal relationship that appears on the one side as a personal right to claim (receivable), and from the other as a duty to render performance (debt). Obligation is defined by its participants and content.[1] Accordingly, it is common for a legal system to recognize changes in the participants and the content of the obligation.[2] Changes in participants can concern either the creditor, the debtor, or both. Assignment represents a change in the participants of the obligation and can in general be found in two forms: assignment of the receivable and assignment of the contract (containing all receivables, debts, and other obligations and duties of one party to the contract). While assignment of the receivable is concerned only with a change of the creditor, assignment of contract is concerned with a change on the part of both creditor and debtor. In addition to assignment of a contract, the theory recognizes assumption of debt and other similar methods as means of changing the person of the debtor.[3]

1 Zimmermann, 1990; 1992, pp. 1, 6–7. The notion of obligation also has other meanings e.g., in English, the word obligation can refer only to one's duties and not to one's rights. For the sake of simplicity, we will not address this ambiguity here.
2 For example, Articles 1375–1410 of the ABGB.
3 See e.g., Chapter 9 of the UNIDROIT Principles 2016, Chapter 5 of the DCFR, or (Von) Bar and Clive, 2009, p. 1028.

Hulmák, M., Balliu, A., Menyhárd, A., Tomczak, T., Veress, E., Dudás, A., Hlušák, M. (2022) 'Assignment' in Veress, E. (ed.) *Contract Law in East Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 505–537. https://doi.org/10.54171/2022.ev.cliece_chapter15

The roots of obligations can be traced to Roman law, specifically to the infringement of one's property sphere (the first primitive forms of obligation stemming from a delict), and has developed over centuries of Roman civilization to reach a form similar to the one known today.[4] In the early days of Roman law, a receivable was seen as an integral part of the exclusive legal relationship of a creditor and a debtor. Therefore, in classical Roman law, there were no legal means by which an obligation or its parts (receivable or debt) could be transferred from one person to another.[5] The development of society, the growing complexity of economic relations, and considerations of economic utility have gradually induced an alteration in the view of obligation as a purely personal relationship between creditor and debtor and a tendency to look upon it, and more specifically on the receivable, as on a transferable legal good comparable to tangible assets.[6] Therefore, Roman law in its late stages (during Justinian's era) recognized the possibility of assignment of a receivable in its true sense, i.e., as a complete transfer of receivable from the original creditor to the new creditor.[7] After the fall of the eastern Roman Empire, while trying to reinterpret Roman law, the glossators returned to the dogmatic approach typical of classical Roman lawyers: The obligation is strictly personal and the receivable is not by its nature intended to be subject to transfer.[8] This view prevailed with more or less significance until the late 19th century.[9] Nevertheless, modern civil codes (e.g., CC, BGB, ABGB) all without exception recognize the possibility of assigning a receivable,[10] and more than that, some European civil codes even recognize the possibility of assigning a contract as a whole.[11]

The legal notion of assignment commonly refers to assignment of a receivable, more specifically to the assignment of receivables by contract. Under most jurisdictions, a creditor (as assignor) is free to dispose of his or her receivable by a contract by which he or she transfers such a receivable or part of it to a third party regardless of the debtor's consent.[12] An assignment of a receivable can also be achieved by other means recognized by a given legal system. For instance, a legal system may include statutory rules setting out that a receivable automatically passes to a third party in case this third party performs the debt instead of the debtor.[13] This is called 'legal subrogation'.[14]

4 Mousakaris, 2012, pp. 183–185.
5 Zimmermann, 1990; 1992, p. 59.
6 Zimmermann, 1990; 1992, p. 59.
7 Zimmermann, 1990; 1992, p. 63. See also Mousakaris, 2012, pp. 276–277.
8 Zimmermann, 1990; 1992, p. 63. See also Raber, 1989, pp. 177–179.
9 Zimmermann, 1990; 1992, p. 64.
10 See Article 1321 etc. of the Code Civil, Article 398 etc. of the BGB, or Article 1392 etc. of the ABGB.
11 For example, Article 1216 of the Code Civil, Article 1406 of the Codice Civile, or Article 6:159 of the Dutch Civil Code.
12 For example, Article 398 etc. of the BGB or Article 1392 etc. of the ABGB.
13 For example, Article 268 (3) of the BGB.
14 See Regulation (EC) No 593/2008 of the European Parliament and of the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16, Article 15.

Even though the trade in receivables (factoring, etc.) is as important for the development of economy as is trade in tangible assets, the analogy between the two categories fails under several aspects. The most important one is the fact that tangible assets exist in the outside world regardless of human will, while receivables are no more than a legal construct usually arising as a manifestation of a common will of two or more persons, i.e., from a contract. Therefore, while the transfer of a tangible asset does not usually interfere with any legal interest of a third party (with several exceptions), the assignment of a receivable always interferes with the legal status of the debtor. That is because the debtor inadvertently finds himself or herself in a contractual or other obligational relationship with another person with whom he or she has never, or would never have concluded a contract or otherwise interacted, and to whom he or she is now obliged to pay his or her debt (in the place of his or her former creditor).[15] The assignment of a receivable thus represents in general terms an exception to the principle that the contract may only have *inter partes* effects, since the legal status of the debtor (a third party to the assignment) changes as a result of the agreement between the assignor and the assignee.

This specific nature of receivables precludes the mechanical application of the rules relating to the transfer of tangible assets to receivables and to some extent justifies a special approach. Individual national legislators thus consider very thoroughly which receivables shall be assignable and which not. For example, the national legislator may exclude from the scope of assignable receivables those that lapse upon the debtor's death (*intuitu personae*—strictly personal—obligations).[16] As a result, the scope of assignable receivables may vary in different jurisdictions. Moreover, even if the receivable is included in the scope of assignable receivables, individual legal systems usually allow for the debtor to agree with the creditor on a special clause prohibiting the creditor from assigning the receivable, usually referred to as an anti-assignment clause or *pactum de non cedendo*.[17] However, individual legal systems differ as to the effects of such a clause and the legal consequences of its breach. In general, three basic approaches to this problem can be traced. The first views anti-assignment clauses as a simple contractual agreement with *inter partes* effects, the breach of which only gives rise to the debtor's claim for damages.[18] The next two approaches both understand the anti-assignment clause as an agreement having *erga omnes* effects. They differ in the consequences of the breach of the anti-assignment clause where one associates with its breach invalidity of the assignment agreement,[19] the other only an ineffectiveness of assignment itself.[20] It is worth noting that the issue of the

15 Stoyanov, 2017, pp. 9–19.
16 For example, Article 1393 of the ABGB.
17 For example, Article 399 of the BGB.
18 For example, Article 6 (1) of the Convention on International Factoring, Ottawa, 1988 or Article 9 (1) of the UN Convention on the Assignment of Receivables in International trade.
19 That is for example the Austrian approach. See Decision of the Austrian Supreme Court of February 7, 1968, Ref. No. 5 Ob 12/68.
20 For example, Article 11:301 of the PECL.

effect and consequence of breach of the anti-assignment clause is very controversial and there is no consensus in legal theory and literature on how this issue should be properly regulated to fairly consider the interests of all persons concerned (mainly the creditor, the debtor, and the assignee).

Moreover, the same problems are reflected regarding other contractual clauses, such as, e.g., the no set-off clause or the arbitration clause. One must ask to what extent they should be binding on the assignee and what role good faith should play in the conclusion reached.

Individual legal systems may also vary as to the moment from which the assignment of a receivable legally occurs. In some legal systems, the assignment of a receivable legally occurs at the moment of conclusion of a valid and effective assignment agreement. Subsequent notification to the debtor only has relevance in making the assignment effective toward that debtor.[21] In other legal systems, the assignment of receivable will not legally occur until the moment the debtor is duly notified of such assignment even though the valid and effective assignment agreement is already in place.[22] Debtor protection is in fact one of several crucial points here. His or her position should remain the same. Legal orders provide the debtor with different means to achieve this aim, e.g., the right to perform to the assignor in some cases or the right to set off any receivable extant vis-à-vis the assignor against the assignee.

The legal notion of assignment of contract refers to a specific agreement by which one party to the contract transfers its whole contractual position (all its receivables, debts, and other obligations and duties) to a third party.[23] The introduction of the possibility of assigning a contract as a whole is not something surprising in some legal systems, for it is the logical outcome of the millennia-long development of the law of obligations, such that the obligation has developed from a strictly personal relationship by which the parties were bound together to more loose relationship placing emphasis on the proprietary nature of the obligation and therefore allowing assignment of receivable to a third party. The assignment of the contract as a whole represents the culmination of this historical development.

The parties are free to choose their contractual partner, to enter upon their free will into such a contract, and to formulate its content. Obviously, for it to have any meaning, the parties must be bound by such an agreement. Therefore, as a general rule, none of them may, e.g., change the contract's content, assign the contract to another person, or terminate the contract without the agreement of all participants to the contract. This is a natural consequence of the *pacta sunt servanda* rule, an old principle of Roman law, well established in all modern legal systems.[24] It is difficult to imagine the assignment of contract without the consent of other contractual parties as a general rule, as it would jeopardize the whole system of obligational law. Therefore,

21 Such is, e.g., the case of German Law, Article 398 etc. of the BGB.
22 Such was, e.g., the case in French law at the time of adoption of the Napoleonic Code Civil from 1804; see its Article 1690.
23 See e.g., Article 9.3.1 of UNIDROIT Principles 2016.
24 (Von) Bar and Clive, 2009, p. 58.

legal systems allowing the assignment of contract as a rule make such assignment subject to the consent of other parties to the contract.[25]

2. The Czech Republic

2.1. Assignment of a receivable

The assignment of a receivable is permitted under Czech law and is regulated primarily in §§ 1879–1887 of the CzeCC. The general principle is that every receivable (either present or future) is assignable unless 1. it lapses upon the debtor's death (i.e., with the exception of claims for damages); 2. it is a receivable the assignment of which would cause a change in the content of the receivable to the detriment of the debtor (this will be the case mainly where the specific scope of performance depends on the particular creditor, e.g., the sculpture of a person or custom-made works); 3. the assignment is prohibited by an anti-assignment clause; 4. the receivable stems from public law;[26] or 5. the assignment is prohibited by statutory law in other special cases. The creditor is also allowed to assign a set of receivables, whether present or future, if such set of receivables is sufficiently determined, in particular with respect to receivables of a certain kind arising at a particular time, or various receivables arising from the same legal cause.[27]

Among all the exemptions from under the assignability of receivable, the anti-assignment clause is the most subtle. Since the adoption of the CzeCC, the discussion in legal theory and literature regarding even the most basic questions related to the anti-assignment clause, i.e., to whom the effects of the clause should extend (*inter partes* or *erga omnes*) or what the consequences of its breach should be, remain unsettled. These questions are yet to be addressed by the Czech Supreme Court. Regarding the question of the effect of the anti-assignment clause, the predominant view is that it operates with *erga omnes*, not just *inter partes* effects.[28] More problematic is the issue of legal consequences of breach of the anti-assignment clause. There are currently two main approaches to interpretating this issue. One associates the breach of the anti-assignment clause with the invalidity of the assignment agreement (either nullity or voidability),[29] the other only with the ineffectiveness of the assignment of receivable itself (while maintaining the validity of the assignment agreement).[30]

The question of effects on any third party (especially the assignee) concerns also other contractual clauses, e.g., the no set-off clause, a prohibition on the pledging of

25 See e.g., Article 6:159 of the Dutch Civil Code.
26 Petrov et al., 2019, p. 2009. See also Hulmák et al., 2014, p. 222. See the decision of the Czech Supreme Court Ref. No. 20 Cdo 501/2016 and No. 29 Cdo 4474/2011.
27 CzeCC, § 1887.
28 See e.g., Remeš, 2016, pp. 39–45; Zvára, 2015, pp. 316–323; Petrov et al., 2019, p. 2010; Bezouška, 2015b, pp. 381–390.
29 See e.g., Remeš, 2016, pp. 39–45; Zvára, 2015, pp. 316–323; Petrov et al., 2019, p. 2010.
30 See e.g., Bezouška, 2015b, pp. 381–390; Balliu, 2021, pp. 381–391.

receivables, or the arbitration clause. The answer to that question is primarily contingent on the legislator's decision. For instance, an agreed prohibition on the pledging of receivable is effective vis-à-vis third parties only if the prohibition is recorded in a register of pledges or if the third party was aware (or ought to have been aware) of its existence.[31] On the other hand, unless otherwise agreed between the creditor and the debtor, an arbitration clause always binds an assignee regardless of his knowledge about its existence.[32] In some cases, there is no clear decision on the part of the legislator as to what the effect of a certain clause on a third party should be. This is true in the case of the no set-off clause. As the question of the effects of the no set-off clause on the assignee has never even been addressed by the general courts, this issue is therefore yet to be resolved.

Under Czech law, the assignment of a receivable occurs (unless otherwise agreed) simultaneously with the conclusion of a valid and effective assignment agreement. From this very moment, the assignor ceases to be the legal owner of a receivable and the ownership is transferred to the assignee. By assigning a receivable, an assignee also acquires the accessories and rights associated with the receivable, including any security.[33]

As the assignment of a receivable represents, in general, an exception to the principle that the contract has only *inter partes* effect, since the legal status of the debtor (third party) changes as a result of the agreement between the assignor and the assignee to which he or she is not a party, the Czech legislator adopted several measures to protect the debtor. First, the assignment is effective vis-à-vis the debtor only after the debtor is informed about its occurrence by the assignor or after the assignee proves to the debtor that the assignment took place. Moreover, if an assignor has assigned the same receivable to several persons, only that assignment of which the debtor first became aware is effective against the debtor.[34]

Even after the assignment, the debtor retains defenses against the receivable that he or she had at the time of the assignment (e.g., defense in the form of set-off). Mutual receivables that a debtor had against the assignor may also be invoked by the debtor against the assignee, even where they were not yet due at the time of the assignment. However, she must notify the assignee of the receivables without undue delay after becoming aware of the assignment. If a debtor acknowledges that a receivable against a fair assignee is genuine, he or she is obliged to satisfy it as his or her creditor, i.e., has no objections he or she would have against the assignor.[35]

Even after the assignment of receivable legally occurs, the assignor may enforce the satisfaction of the receivable against the debtor in his or her own name and on the

31 CzeCC, § 1309 (2). It is however unclear, and the legislator does not provide any explicit answer as to what the consequences of breach of the agreed prohibition on pledging of a receivable should be.
32 The Czech Act on Arbitration, § 2 (5).
33 Hulmák et al., 2014, p. 222.
34 CzeCC, § 1882.
35 CzeCC, § 1884.

account of the assignee provided he or she was requested to do so by the assignee. If the assignment of a receivable has already been notified or proved to the debtor, the assignor may enforce the receivable if he or she proves the consent of the assignee, and the assignee does not enforce the receivable himself or herself. The benefit for the assignee to let the assignor enforce the receivable on his or her behalf is that the debtor may invoke against the receivable only the mutual receivables (counter-performance) that he or she has against the assignor, not his or her receivables that he or she has against the assignee.[36]

2.2. Assignment of the contract

The assignment of contract is allowed under Czech law and is regulated primarily in §§ 1895–1900 of the CzeCC. Unless excluded by the very nature of the contract (i.e., articles of association), either party may, as an assignor, transfer his or her rights and duties under a contract or part thereof to a third party if the assigned party consents to it and if the contract has not yet been fully performed.[37] Where a continued or periodic performance is envisaged under a contract, the contract may be assigned with effects in respect of the part of the contract that has not yet been performed.[38]

Assignment of a contract becomes effective against the assigned party upon its consent. If such consent was granted in advance, the assignment of the contract against the assigned party becomes effective when the assignment of the contract is notified to that party by the assignor or proved to it by the assignee.[39]

When the assignment of a contract becomes effective against the assigned party, the assignor becomes liberated from any duties to the extent of the assignment.[40] Pursuant to § 1899 of the CzeCC, the assigned party may prevent these consequences by declaring, with respect to the assignor, that it refuses the assignor's liberation. In that case, the assigned party may require the assignor to perform in case the assignee fails to fulfill the duties assumed. This is obviously a very problematic concept. The whole point of the assignment is to change the person of one of the parties to the contract. Thus, the former party should no longer have anything in common with the debts and receivables arising out of the contract, even more so when one takes into consideration the need for the express consent of the assigned party to it. Fortunately, § 1899 of the CzeCC is not mandatory, and it can be assumed that the parties will usually opt out of its provisions.

The assigned party retains all the contractual defenses against the assignee. The assigned party shall retain all other defenses that it had against the assignor if such retention is reserved in the contract or in the consent to the assignment of the contract.[41]

36 CzeCC, § 1886.
37 Petrov et al., 2019, p. 2034.
38 CzeCC, § 1895.
39 CzeCC, § 1897.
40 CzeCC, § 1899.
41 CzeCC, § 1900.

3. Hungary

3.1. Assignment of claims

A claim, provided it is assignable, is a marketable asset of the right-holder that is transferable and chargeable. Where the title to the assignment is based on a contract, the legislation provides for two contractual elements in the assignment: the title and the assignment. The title is created by the contract for transferring the claim, which gives rise to a right to require the assignee to transfer the claim, that is, the assignment. The obligation to transfer the claim is governed by the rules applicable to sale,[42] or in case it is gratuitousness, to donation,[43] which shall apply accordingly. If the assignor does not perform the contract (i.e., fails to assign the claim) despite his or her contractual obligation, the assignee may claim performance of the obligor according to the rules of delay of performance. The assignment of the claim is a juridical act consisting of both the performance of the obligation to assign and the act of assignment resulting in the transfer of the claim. Assignment as such is a contract, but its legal effect is not to create an obligation but to transfer the claim and thus to bring about a change in the person of the creditor. As the assignment is also a contract, it is governed by the rules on the formation and validity of contracts. The idea of the legislator was to provide the same structure for assignment as for transfer of movable assets via the distinction between the contract, which creates the obligation as well as the title, and the delivery, which is a juridical act of performance as well as of transfer of that title.

The two logical elements of an assignment, the contract of assignment and the assignment as an act of transfer, do not necessarily have to follow each other in time in this order. The HunCC does not make the validity of a contract of assignment or of an assignment subject to a written formality. The assignment transfers the rights deriving from the pledge, security, or surety securing the claim to the assignee and also provides for the transfer of the interests. The assignment of a claim transfers both the interest on the claim and the interest on late payments to the assignee, whether due before or after the assignment. However, the parties may agree that the assignor assigns only the principal amount of the claim but not the interest receivable, or vice versa. An assignment is a specific subrogation of the legal position of the obligation. However, it is not a subrogation in the contract underlying the claim, but only in the claim arising from the contract. Therefore, the assignment of a contractual claim does not affect the existence of the contract between the original parties, and the other rights of the parties under the contract (e.g., the right of unilateral termination of the contract) remain with them.

Existence of the claim at the time of assignment is not required. Claims that would arise in the future may also be assigned, but the law requires that the legal

42 HunCC, § 6:215.
43 HunCC, § 6:235.

relationship from which the claim stems must exist at the time of assignment. Claims that qualify as personal ones cannot be assigned and are therefore unmarketable. The personal nature of the claim must be assessed on the basis of the nature of the legal relationship giving rise to that claim. Thus, even if exceptionally, even monetary claims can be qualified as personal. A claim for *solatium doloris*,[44] e.g., is not assignable because of the personal nature of inherent rights, but a claim for restitution of unjust enrichment is assignable even if the enrichment resulted from interference with such rights.[45] Nor may claims for damages in connection with criminal proceedings[46] and claims arising from entitlement to social security and pension benefits[47] be assigned. Claims arising from a public administrative law relationship should also not be deemed assignable, but it was a normal practice of tax authorities to sell claims that proved to be uncollectable.

The stipulation not to assign, that is, the *pactum de non cedendo*, is a legal instrument similar to the prohibition of alienation and encumbrance. A clause excluding the assignment of a claim is ineffective against third parties. That is, assignment can be performed with a legal effect, although it will be a breach of contract. Between the original contracting parties, the assignor shall be liable for any damages caused by the prohibited assignment to any other contracting party. Liability for damages is not an efficient remedy due to the problems of proving loss resulting from the violation of such an obligation. That is why parties try to create incentives for the other party not to breach this duty by stipulating a contractual penalty or other repressive sanctions. The legislator, however, attempted to prevent the parties form adopting such solutions. Any clause in the contract that provides for the right to terminate the contract in the event of such a breach or that provides for the obligation to pay a penalty shall be null and void.[48] The idea behind this controversial solution was that although such clauses should not be prohibited entirely, in order to support the marketability of claims it should not be allowed for the parties to create impediments to banning assignments. So far, it has not been tested in court practice whether, and if so to what extent liquidated damages clauses are enforceable in this context. The legal effect of the transfer of the creditor's position (that is, the debtor's release from his obligation only upon performance to the assignee) is conditional on the instruction issued to the debtor to perform (performance order). The performance order has the legal effect that the debtor can only validly perform toward the assignee with the effect of discharging his or her obligation. The change in the status of the assignee of the obligation becomes effective toward the debtor with the performance order.

44 *Solatium doloris* is a specific sanction provided as a consequence of unlawful interference with the rights inherent to persons introduced by the 2013 recast of the HunCC. It is functionally equivalent to non-pecuniary damages, which are no longer to be awarded under Hungarian private law.
45 HunCC, § 2:51 (1) e).
46 Supreme Court, BH 2000 No. 197.
47 Supreme Court, BH 1983 No. 361.
48 HunCC, § 6:195.

The debtor may assert its defenses and set off the counterclaims that he or she would have vis-à-vis the assignor toward the assignee if such claims and defenses had arisen against the assignor on a legal basis that already existed at the time of the notification of the assignment. The debtor may be notified of the assignment either by the assignor or by the assignee. The notification of the debtor fixes the claim in the relationship between the debtor and the assignee. If the assignor and the debtor agree to modify the contract on which the claim is based or the assignor waives the claim against the debtor, this agreement is effective and enforceable between the assignor and the debtor but not vis-à-vis the assignee.

3.2. Assignment of rights

The HunCC defines the assignment of rights as a dual transaction system similar to the assignment of claims, in which the source of the obligation to assign the right is the contract assigning the right, which also gives the title to the right assigned. The transfer is itself the performance of an obligation arising from the contract, which is also a contract. The transfer, as a contract having legal effect, results in a change in the person of the holder. The rules on assignment also apply to transfer in other respects. The marketability of the underlying rights and its limitations are primarily determined by the content of the legal norm granting that certain right. The possibility and the limits of transferability of negotiable rights must therefore be determined by the legal rules that create and designate the subject-matter right in question, and in part by the case law that must determine their transferability. The marketability of a subject right depends on the interpretation of the legal rule that creates, protects, and defines the content of that right.

Thus, it has to be assumed that the rights granted by the HunCC are negotiable if their transferability is not excluded by law or the nature of the right. The transferability of rights provided in family law and the law of succession is precluded by their personal nature, the transferability of rights arising from a contractual relationship is precluded by their relative (*in personam*) structure, and in the area of rights *in rem*, the only limited right *in rem* permitted by law to be transferred is a specific form of pledge under the rules governing separate pledges. Rights of use are not transferable. The transferability of rights relating to the operation of legal persons is excluded because of their organizational nature and relative structure.

3.3. Transfer of contractual positions

The transfer of a contract makes it possible for the parties to change the identity of the contracting parties by tripartite agreement of the parties concerned, while maintaining (continuing) the contract originally concluded. The transfer of contract is a contract between the party leaving the contract, the party remaining in the contract, and the party entering the contract, whereby all the rights and obligations of the party leaving the contract are transferred to the party entering the contract. Thus, the party that enters the contract becomes the successor in title to the party that leaves the contract. The transfer of a contract necessarily implies a change in the positions

of the parties as both beneficiaries and obligors of the obligations arising from the contract.

The transfer of a contract changes the essential content of the original contract (i.e., the identity of the contracting party). Succession to the contractual position, and thus recognition of the continuity of the legal relationship, shall not have the effect of infringing on the rights of any third parties. Thus, for example, the transfer of the contract for the sale of an asset subject to a right of first refusal creates a new situation for the holder of the right of first refusal, whose right shall be re-opened by the transfer, and who must therefore be notified of the transfer. If the contract is a transaction subject to the approval of a third party or to an official authorization, or if the contracting party requires such approval or authorization in order to acquire rights under the contract, this will again require the obtaining of such authorization or approval as a result of a change in the contractual position.

4. Poland

4.1. Overview

Polish law does not recognize the general institution of a transfer of contract (assignment of contract).[49] The PolCC established different rules regarding the change of a creditor[50] and the change of a debtor.[51]

Therefore, a person who wants to obtain the result of a contract assignment is obliged to follow the appropriate rules included in these two sections of the PolCC.[52] This chapter hereinafter will focus mainly on *stricto sensu* assignment, i.e., the assignment of receivable by contract.

4.2. Legislative basis

As was noted above, the change of a creditor is regulated in Articles 509–518 of the PolCC. The creditor may, without the debtor's consent, transfer a receivable to a third party (assignment) unless that would be contrary to law, a contractual stipulation, or the nature of the respective obligation. The assignment of a receivable transfers to the assignee all the rights related to the receivable, in particular a claim for outstanding interest.[53]

Notably, Article 517 § 1 of the PolCC states that the provisions on assignment shall not apply to receivables connected with a bearer instrument (*document na okaziciela*)

49 The possibility of assigning a contract as a whole. See Radwański and Olejniczak, 2010, p. 367.
50 PolCC, Articles 509–518.
51 PolCC, Articles 519–525.
52 Radwański and Olejniczak, 2010, p. 367. As shown in the literature, only in reference to some special legal relationships has the PolCC indicated events that may lead to joint transfer of the receivable and the debt. See Radwański and Olejniczak, 2010, p. 367, and for example PolCC, Article 678.
53 PolCC, Article 509.

or with an instrument transferable through endorsement (*document zbywalny przez indos*).[54]

4.3. General rule and exceptions

Quite obviously, the PolCC also recognizes the possibility of assigning a receivable. As a rule, a creditor is free to dispose of his receivable by a contract. However, three important exceptions to this rule exist: First, if such a juridical act would be contrary to law; second, if the nature of an obligation makes a certain receivable non-transferable; and lastly, if there is a contractual stipulation that prohibits an assignment.

The first exception refers to all the situations where there is a special provision that prohibits an assignment of certain types of receivables. For example, according to Article 595 of the PolCC, the right to repurchase (*prawo odkupu)* is non-assignable under Polish law. The situation is identical in the case of the life annuity (*prawo dożywocia*).[55] An assignment contract regarding a non-transferable receivable shall be seen as null and void.[56]

The second exception refers to the nature of an obligation. This exception is quite vague under Polish law. However, it is often indicated that strongly accessory receivables[57] or strictly personal ones are non-transferable.[58] More specific examples can be found in the literature and case law.[59] An assignment contract regarding such a receivable will usually be seen as null and void.[60]

The last exception refers to the *pactum de non cedendo.* Under Polish law parties to a contract may not only totally exclude transferability of a certain receivable but may also make such a transfer subject to the debtor's consent or limit it in many different ways.[61] The dominant view is that the elaborated clause would have an effect toward third parties.[62] It would transform the receivable into a non-transferable one.[63] In such a case the debtor's consent is required to validly assign the receivable.[64]

4.4. Assignment of future receivables and disputed receivables

Article 509 of the PolCC only contains rules regarding (extant) receivables. Therefore, the question may arise whether it is possible under Polish law to assign future ones. The long-standing rule established by the Polish Supreme Court is that future

54 For more about the non-applicability of the PolCC, Articles 509–516 to securities, see Zawada, 2018, p. 1395.
55 See PolCC, Article 912. For other examples see Zawada, 2018, pp. 1400–1401.
56 Zawada, 2018, p. 1401.
57 Like those resulting from a surety agreement.
58 Radwański and Olejniczak, 2010, p. 370.
59 Zawada, 2018, pp. 1402–1403.
60 Zawada, 2018, pp. 1403 and 1421.
61 Radwański and Olejniczak, 2010, pp. 370–371 and the judgment of the Polish Supreme Court, 25.03.1969 r., III CRN 416/68, LEX No. 967.
62 Radwański and Olejniczak, 2010, p. 370; Zawada, 2018, pp. 1403–1404.
63 Zawada, 2018, p. 1403.
64 Zawada, 2018, p. 1404.

receivables may be transferred as long as the transferred receivable is appropriately indicated and described in the assignment contract.[65] However, the notion of 'future receivable' is heavily disputed in the Polish legal literature.[66]

On the other hand, there is little doubt that it is possible to transfer contested receivables.[67]

4.5. Form of the assignment and of pactum de non cedendo

The PolCC as a rule does not require any special form in reference to an assignment contract.[68] Therefore, a receivable can be validly transferred even orally. However, if the receivable is evidenced in writing, the transfer also shall be evidenced in such a way.[69] Failure to meet this requirement does not lead to nullity of the assignment but may have evidentiary consequences.[70]

If the receivable was evidenced in writing, *pactum de non cedendo* is only effective toward an acquiring party if the instrument (*pismo*) mentions such a restriction, unless the potential assignee knew of the restriction at the time of the assignment.[71]

There are also no obstacles for the parties to a contract to reserve a special form regarding any potential assignment of rights resulting from such agreement.[72]

4.6. Moment of the assignment

Under Polish law, as a rule, the assignment occurs at the moment of conclusion of a valid and effective assignment agreement. No consent of the debtor is required.[73] Notably, Article 510 of the PolCC indicates that the situation may be different if a special statutory provision states otherwise or the parties to the contract agreed differently.[74] Exceptional cases where the parties 'agreed differently' are elaborated in the literature.[75]

4.7. The situation of the debtor

As mentioned, Polish law does not make the validity of the assignment dependent on the debtor's consent. That does not mean that the debtor is not protected under Polish law. Besides the fact that he or she should now render performance to a different

65 Resolution of the Polish Supreme Court, 19.09.1997, III CZP 45/97, LEX No. 31693.
66 Zawada, 2018, p. 1406 and the literature invoked there.
67 Zawada, 2018, p. 1406.
68 In reference to some exceptions, see Zawada, 2018, pp. 1416–1418.
69 PolCC, Article 511. Under Polish law the requirement of 'evidenced in writing' is not equivalent to a 'written form.' The receivable may be evidenced in writing even if there is no signature of a party. See, for example, the resolution of the Polish Supreme Court, 6.07.2005, III CZP 40/05, Legalis No. 69516. However, it seems that a different view also presents itself. See Zawada, 2018, p. 1405.
70 See Radwański and Olejniczak, 2010, p. 369.
71 PolCC, Article 514.
72 Compare Radwański and Olejniczak, 2010, p. 370.
73 Radwański and Olejniczak, 2010, p. 370.
74 More broadly Zawada, 2018, pp. 1411–1412.
75 See Zawada, 2018, pp. 1419–1421.

creditor, his or her situation should not change, especially to his or her detriment.[76] First, until the assignor informs the debtor about the assignment, the performance made to the former creditor is effective toward the assignee, unless at the moment of the performance the debtor knew of the assignment.[77] Thus, even if the notification of the debtor is not a condition of a valid assignment, it may be important to better protect the assignee's interests. We note that an assignor may inform the debtor about the assignment even orally.[78]

Second, Article 513 § 1 of the PolCC states that the debtor is entitled to use any defenses against the assignee that he or she had against the assignor at the time of becoming aware of the transfer.[79] The Polish Supreme Court stated that the debtor may retain even such a far-reaching right as withdrawal from the contract after the assignment.[80] Furthermore, Article 513 § 2 of the PolCC, to protect the debtor, modifies set-off rules by stating that the debtor may set off the assigned receivable with his own receivable toward the assignor even if his or her receivable becomes due after he or she received a notification of the assignment.[81]

Lastly, the debtor's good faith is also protected in another way. According to Article 515 of the PolCC, if the debtor who received a written notification from the assignor rendered performance to the assignee, the assignor (former creditor) may invoke toward the debtor the assignment's nullity or defenses resulting from its legal basis (e.g., a sales contract) only if they were known to the debtor at the time of rendering performance.[82] The issue is important since under Polish law the assignment contract is a causal agreement.[83] Additionally, it should be noted that the assignee is not protected by good faith. Thus, he or she will not obtain the receivable if it did not belong to the assignor.[84] This does not change the conclusion that the debtor will be released from his obligation if he or she performed in accordance with the rules described in the cited paragraph.

76 Radwański and Olejniczak, 2010, p. 372.
77 PolCC, Article 512. Further in the article, it states that the provision shall apply accordingly to other juridical acts between the debtor and the previous creditor.
78 Zawada, 2018, p. 1431.
79 Quite obviously a debtor may also raise defenses based on the general rules. See Zawada, 2018, pp. 1437–1438.
80 See the judgment of the Polish Supreme Court, 8.4.2009, V CSK 423/08, LEX No. 503613.
81 However, as the second part of Article 513 § 2 of the PolCC states, this does not apply if the debtor's receivable against the assignor becomes due later than the transferred receivable. As indicated in the literature, the aim of this restriction is to prevent a situation in which the debtor withholds the performance until his or her receivable becomes due. See Radwański and Olejniczak, 2010, p. 342.
82 According to the second part of Article 515 of the PolCC this provision applies accordingly to other juridical acts between the debtor and the assignee, such as an act regarding exemption of debt. See Radwański and Olejniczak, 2010, p. 373.
83 See Article 510 of the PolCC and Radwański and Olejniczak, 2010, p. 369. Very broadly on this topic, see Zawada, 2018, pp. 1413–1414.
84 There are only very minor exceptions to this rule. Radwański and Olejniczak, 2010, p. 371.

4.8. Related rights

According to Article 509 § 2 of the PolCC, the assignment of a receivable transfers to the assignee all the rights related to the receivable. The issue whether all related rights will always follow the receivable is controversial under Polish law, especially since there are doubts as to how the term 'related rights' shall be understood.[85] For example, the Polish Supreme Court stated that the rights closely related to the assignor will not transfer to the assignee on the basis of Article 509 § 2 of the PolCC.[86] In the same judgment the Court stated that the security right in the form of collateral transfer of real estate ownership will not transfer to the assignee together with the secured claim.[87] Such statement was made despite the view sometimes presented in the literature that all the security rights should transfer to the assignee unless otherwise stated by the parties.[88]

4.9. Liability of the assignor

Art. 516 of the PolCC states two rules regarding the assignor's liability (in the meaning of warranty). First, he or she is liable toward the assignee for the fact that he or she is the holder of the receivable. If the 'transferred' receivable did not exist, the assignor would be liable for the 'legal defects' of the receivable.[89] Second, as a rule, the assignor is not liable for the solvency of the debtor at the time of the assignment. He or she may, however, incur such warranty insofar as he or she assumed such liability for insolvency.[90]

4.10. Legal subrogation

Article 518 of the PolCC, i.e., the last article in the section regarding the change of a creditor, refers to legal subrogation as quite broadly understood. A third party who renders the performance owed by the debtor to the creditor acquires against the debtor the receivable that has been performed up to the amount of the performance that has been made: 1. where he or she pays someone else's debt, for which he or she was personally liable or that he or she guaranteed with some asset; 2. where he or she enjoys a right over which the performed debt has priority; 3. where he or she acts upon the debtor's consent to enter into the creditor's rights—the consent of the debtor should, under pain of nullity, be expressed in writing; and 4. where such subrogation is provided for by specific provisions.

85 The dominant view is that the notion should be understood broadly. See Zawada, 2018, p. 1442.
86 Decision of the Polish Supreme Court, 21.03.2013, II CSK 396/12, LEX No. 1324263.
87 Decision of the Polish Supreme Court, 21.03.2013, II CSK 396/12, LEX No. 1324263.
88 See Radwański and Olejniczak, 2010, p. 371. For reference to further controversies regarding the afore-mentioned decision of the Polish Supreme Court, see Tomczak, 2021, pp. 58–60. It is important to note in reference to some security rights that the sole assignment agreement is not enough to automatically transfer them; instead, for example, an entry in the appropriate register may be required. See Zawada, 2018, pp. 1425–1426.
89 For more on this topic, see Radwański and Olejniczak, 2010, pp. 371–372.
90 Zawada, 2018, pp. 1425–1430.

The above is important, since if none of the situations described in 518 § 1 of the PolCC occurs, legal subrogation cannot take place. Thus, as a rule, a third party may have only a claim based on the institution of unjust enrichment.[91]

5. Romania

The creditor's claim constitutes an active element of his or her assets (his or her so-called patrimony), of which the creditor may dispose for the purposes of its transfer. Obligations may be transferred, according to the provisions of the RouCC, by assignment of a claim, by subrogation, and by the assumption of a debt.[92] In this context, we analyze the assignment of a claim.[93]

All claims, whether certain and matured or uncertain and future, which have as their object an individually determined asset or fungible assets (such as money), or any other obligations to do or to give, may be assigned. This capacity to be assigned does not originate from the debtor's consent but from a mandatory rule of current Romanian civil law that recognizes the free circulation of claims.[94] In general, all claims are transferable. As a first exception, claims that are declared non-transferable by law cannot be assigned. Also, a claim for other performance than payment of money (it is unspecified whether this rule also refers to foreign currencies or just Romanian legal tender) can be assigned only if the assignment does not make the obligation substantially more onerous. Second, the assignment can be prohibited or limited by the assignor's agreement with the debtor by means of an inalienability (in this case non-assignment) clause. This clause is valid, but, according to the RouCC, it becomes unenforceable in three situations:[95]

- if the assigned debtor has consented to the assignment, where the clause no longer has any effect because the debtor, by accepting the assignment, waives the benefit of the clause,
- the non-assignment clause is ineffective if the prohibition is not expressly mentioned in the document establishing the claim and the assignee did not know and should not have known of the existence of the prohibition at the time of the assignment (in this situation, the law protects the assignee in good faith),
- in the last but most important case, the prohibition has no effect where the assignment of the claim relates to a sum of money. Thus, the legislator imposes the assignability of monetary claims even if the creditor and debtor have included an inalienability clause in the contract (the legislator does so because it wishes to protect the security of the 'civil circuit,' i.e., the interest of creditors).

91 Radwański and Olejniczak, 2010, p. 374.
92 For a comprehensive analysis, see Almășan, 2018.
93 RouCC, Articles 1566–1586.
94 Vivante, 1934, p. 131.
95 Veress, 2020, p. 256.

A claim to a sum of money may be assigned in part (partial assignment). A claim for a consideration other than a sum of money may be assigned in part only if the obligation is divisible and the assignment does not make it substantially more onerous for the debtor to perform it to the assignee. In the case of a partial assignment, the assignor and the assignee are paid in proportion to the amount of the claim that each of them holds. This rule applies accordingly to assignees who jointly acquire the same claim. Future claims may also be assigned.

The assignment of a claim is not a type of contract in itself but generally denotes the operations by which claims are transferred from the assignor to the assignee. The specific legal means of assignment of a claim is a special contract, such as a contract of sale, exchange contract, or even donation. In this respect, the assignment of a claim is regulated separately in order to determine the common legal regime for the assignment (transfer) of a claim, but this legal regime is supplemented by the special regime of the contract through which the assignment is made. Thus, if the assignment is for consideration, the legal provisions on the assignment of the claim are supplemented accordingly by those governing the contract of sale or, where appropriate, by those governing any other legal transaction under which the parties have agreed to perform the service consisting in the assignment of a claim (e.g., the exchange contract).

The assignment of the claim becomes effective against the assigned debtor by notification or acceptance. If the assignment of the claim becomes effective by notification, this shall require a written notice of the assignment, on paper or in electronic form, stating the identity of the assignee, reasonably identifying the assigned claim, and requiring the debtor to pay the assignee. Notice may be given by both the assignor and the assignee. Where the assignee gives notice of assignment, the debtor may require the assignee to provide written proof of the assignment. Pending receipt of such proof, the debtor may suspend payment. The communication of the assignment shall be ineffective if written proof of the assignment is not communicated to the debtor.

The other way the assignment becomes effective against the assigned debtor is for the assignment to be accepted in writing with a definite date. Acceptance is the only way in which the assignment becomes enforceable against the debtor if the claim is essentially linked to the person of the creditor, in which case it is not sufficient to achieve effectiveness by notification. In other cases, the two means by which the effectiveness of the assignment may be achieved are alternative. These formalities are essential because the debtor is only obliged to pay the assignee from the moment the assignment becomes effective against him. Before acceptance or receipt of the notification, the debtor can only discharge the debt by paying the assignor.

The main effect of the assignment is the transfer of the claim from the assignor to the assignee. The assignee becomes a creditor toward the assigned debtor. The assignment of the claim transfers to the assignee all the rights that the assignor has in relation to the assigned claim, namely also the rights of security and all other rights attached to the assigned claim. However, without the consent of the collateral provider, the assignor may not transfer possession of a pledged asset to the assignee.

If the collateral provider objects, the pledged asset shall remain in the custody of the assignor.

In the case of an assignment for consideration, the claim shall be transferred at nominal value, irrespective of the amount of the price paid by the assignor. The assignment of the claim takes effect between the assignor and the assignee as soon as the agreement is concluded, even before the formalities prescribed for effectiveness toward the debtor have been completed. The assignee may claim whatever the assignor receives from the debtor, even if the assignment has not been made effective against the debtor.

According to the Romanian High Court of Cassation and Justice, where the claim that was the subject of an assignment contract was extinguished by judicial set-off (between the assignor and the assigned debtor) after the conclusion of the assignment, the court action for declaring the assignment contract null and void should be rejected. The existence of the claim is examined at the time of the conclusion of the contract. The fact that the subject matter of the assignment disappeared after the conclusion of the contract is irrelevant.[96] Of course, the assignor must warrant the existence of the claim. In the present case, the assignment of the claim was valid, as the court correctly stated. The assignee should not have sought an affirmation of nullity by the court but rather should have sought to enforce the warranty obligation of the assignor (considered in Romanian law as being granted 'for eviction,' that is, for privation of a right as a result of judicial action against the predecessor in title).

In this context, it is also necessary to consider the assignor's legal obligations toward the assignee: a warranty for the claim's existence and the solvency of the assigned debtor, and a warranty for eviction. In the case of the warranty for the claim's existence, a distinction must be made between assignment for consideration and gratuitous assignment.

In the case of an assignment for consideration, the assignor has a legal liability toward the assignee (legal warranty) for the claim's existence in relation to the date of the assignment without, however, being liable for the solvency of the assigned debtor.

The regime of the legal guarantee may be aggravated by the agreement of the parties. In the case of a first-degree aggravation clause, the assignor expressly assumes the obligation to guarantee the solvency of the debtor assigned. If the assignor has expressly undertaken to guarantee the assigned debtor's solvency, it shall be presumed, in the absence of a stipulation to the contrary, that only the solvency at the date of the assignment has been taken into account. The second-degree aggravation clause presupposes that the obligation to provide a guarantee is also assumed in respect of solvency after the date of assignment. If there is such an aggravation clause, the assignee, if he or she does not receive payment from the assignor because of the insolvency of the assigned debtor, is entitled to a refund of the assignment price plus the costs incurred in connection with the assignment.

96 II Civil Section, Decision No. 494 of March 8, 2016.

In the case of a first-degree aggravation clause, the assignor is, of course, not obliged to return the assignment price and costs if he or she can prove that the insolvency of the assigned debtor occurred after the assignment of the claim. In our view, the legal rule limiting the assignor's liability to the assignment price and costs is mandatory, and the aggravation clause imposing the assignor's liability for the nominal value of the claim if the assignment took place at a price lower than that value is null and void.

A specific situation arises if the assignor was aware of the insolvency of the debtor assigned at the time of the assignment. In this case, the legal provisions regarding the liability (legal warranty) of the seller of bad faith for hidden defects of the goods sold are applicable *mutatis mutandis*.

In the case of gratuitous assignment, the assignor shall by law, in the absence of any stipulation to the contrary, not even guarantee the claim's existence at the time of assignment.

Regarding the assignor's liability for eviction, this liability is applicable both in the case of assignment for consideration and in the case of gratuitous assignment. The assignor is liable for eviction if, by his own act, whether alone or in conjunction with the act of another person, the assignee does not acquire the claim or is unable to enforce it against third parties. The extent of the assignor's liability shall be determined according to the legal provisions relating to the liability of the bad faith seller for hidden defects in the goods sold.

Assignment of a contract[97] is not to be confused with the assignment of a claim, as the two legal institutions have their own rules and clearly defined distinctive characteristics.[98] Assignment of a contract is a new institution regulated by the provisions of the RouCC.[99] Significant differences between the assignment of a claim and the assignment of a contract emerge. In the case of assignment of claims, rights are transferred, but the assignment of a contract transfers an entire contract, or, more precisely, a contractual position (with specific rights and obligations). From the legal nature of the assignment of claims it follows that the assignee only enters into the assignor's rights and not into the assignor's obligations. Assignment of a claim does not require the consent of the debtor assigned, whereas assignment of a contract requires such consent from the assigned party, even though consent to the assignment of the contract may be given in advance (through a transferable contract clause). In the case of assignment of the contract, the assignor is released from his or her obligations toward the assigned party from the moment the substitution takes effect vis-à-vis the latter (perfect assignment). If the assigned contracting party has declared that it shall not release the assignor (imperfect assignment), he or she may enforce the contract against that assignor should the assignee fail to perform its obligations.

97 RouCC, Articles 1315–1320.
98 For further details, see Veress, 2020, pp. 261–263.
99 RouCC, Articles 1315–1320.

6. Serbia, Croatia, Slovenia

6.1. Serbia

The SrbLO regulates assignment (*ustupanje potraživanja*) in the part pertaining to the change of subjects in an obligation, at the very end of the article containing general provisions. It specifies that a creditor can transfer to a third party his or her claims against the debtor, except those whose transfer is prohibited by statute, *intuitu personae* claims, and claims that due to their nature are unsuited to being transferred.[100] Claims from certain contracts, such as a contract of mandate, a contract for works, or a contract for maintenance, are unsuitable to assignment.[101]

In addition, an agreement on the assignment of a claim has no legal effect toward the debtor if the assignment has been excluded by the agreement of the initial parties or if the assignment is contingent on the debtor's consent.[102] This rule has been subject to criticism because it does not take into account whether the assignee acted in good faith.[103] By assignment the creditor's accessory rights are also transferred to the assignee, such as the right to priority collection of the claim, mortgage, pledge, claims against a surety, claims for interest, and contractual penalties.[104] The object of the pledge may however be transferred into the possession of the assignee only if the pledgor consents. Otherwise, it remains in the possession of the assignor, who keeps it on behalf of the assignee.[105] It is presumed that the assignment comprises all due but unpaid interest as well.[106]

Following the traditional logic of the law of obligations, according to which it is irrelevant to the debtor to whom he or she is indebted but it is not irrelevant to the creditor who the debtor is, the SrbLO explicitly prescribes that the validity of the assignment does not depend on the debtor's consent. However, the creditor has a duty to notify the debtor about the assignment.[107] The legal relevance of the notification is to inform the debtor to whom the performance of the obligation should be directed. A performance to the assignor before the notification on the assignment discharges the debtor from liability for non-performance, provided he or she acted in good faith, that is, he or she was not aware of the assignment.[108] The issue of notification of the debtor gains special importance in the case of multiple assignments. In that case the claim to request performance belongs to the creditor who notified the debtor first, or who requested the performance first.[109]

100 SrbLO, Article 436 (1).
101 Stanković in Perović, 1995, p. 840.
102 SrbLO, Article 436 (2).
103 Tešić, 2012, p. 176.
104 SrbLO, Article 437 (1).
105 SrbLO, Article 437 (2).
106 SrbLO, Article 437 (3).
107 SrbLO, Article 438 (1).
108 SrbLO, Article 438 (2).
109 SrbLO, Article 439.

The SrbLO does not specify a formal requirement for a contract on assignment. According to the prevailing opinion in the literature, the form of the underlying contract determines the form of the contract by which assignment occurs. If the underlying contract is consensual, so is the contract on assignment. Conversely, if the underlying contract is formal, the assignment must also be concluded in the same form.[110] As a matter of fact, this applies only to claims arising from contract.

The SrbLO clearly differentiates the legal effects of the assignment between the debtor and the assignee from those between the assignor and the assignee. In terms of the relationship between the debtor and the assignee, the SrbLO specifies that the assignee may exert the same rights against the debtor to which the assignor was entitled at the time of the assignment.[111] Conversely the debtor is entitled to raise all objections against the assignee that he or she was entitled to raise against the assignor, if these existed prior to the date at which he or she gained knowledge of the assignment. As a matter of fact, the debtor may also raise objections against the assignee that are not related to the assigned claim.[112] Regarding the relationship between the assignor and assignee, the law differentiates two categories of assignment, taking into account the scope of the assignor's warranties. In general, the assignor warrants merely that the claim exists at the time of the assignment, provided the assignment is for consideration.[113] Consequently, if the claim is assigned by a gratuitous transaction, the assignor benefits from no warranties. However, the parties to the assignment can also agree that the assignor warrants the collectability of the assigned claim (*del credere assignment*). Even so, the scope of this liability is always restricted to the consideration that has been paid by the assignee for the assigned claim.[114] Any agreement of the parties specifying a stricter liability of the assignor shall be considered null and void.[115]

Finally, the SrbLO differentiates three special types of assignment. The first is the assignment that has the purpose of performing the assignor's debt toward the assignee by assigning the claim, entirely or in part (*ustupanje umesto ispunjenja*). This is nothing less than a special case of *datio in solutum*. The claim of the assignee is considered satisfied by the mere fact of assignment, entirely or in part, depending on the value of the claim assigned.[116] The second type is when the assignor assigns the claim for the purpose of collecting it from the debtor (*ustupanje radi naplaćivanja*). In this case the claim of the assignee toward the assignor is considered satisfied not at the time of the assignment, but only when the assignee receives actual performance from the debtor.[117] In both cases the assignee is obliged to transfer to the assignor all

110 See, for example Stanković in Perović, 1995, p. 839; Radišić, 2008, p. 375.
111 SrbLO, Article 440 (1).
112 SrbLO, Article 440 (2).
113 SrbLO, Article 442.
114 SrbLO, Article 443 (1).
115 SrbLO, Article 443 (2).
116 SrbLO, Article 444 (1).
117 SrbLO, Article 444 (2).

benefits received from the debtor beyond the assigned claim, or part thereof.[118] The third is the assignment of a claim for the purpose of securing the assignee's claim toward the assignor (*ustupanje radi obezbeđenja*). In this case, the assignee manages the claim with due diligence and collects payment from the debtor. If in the meantime the assignor performed his or her obligation toward the assignee, the latter confers all benefits received from the debtor to the assignor. If, however, the assignor did not perform, the assignee transfers the benefits received from the debtor, but in the value reduced by the value of his or her claim toward the assignor.[119] This third type is qualified as a fiduciary assignment.[120]

Aside from assignment regulated in the part pertaining to general rules of obligations, the SrbLO explicitly regulates the transfer of contract, for which it uses the term 'assignment of contract' (*ustupanje ugovora*). By such agreement, a party to a contract transfers his or her complete contractual position to a third party, that is, all the rights and duties arising from the contract. Since this agreement necessarily leads to a change of the debtor, the consent of the other contracting party is required.[121] The consent may be given in any form except in the case of formal contracts, where the consent is to be granted in the same form that is prescribed for the validity of the contract.[122] This is another case of the application of the principle of parallelism of formalities. Concerning the legal consequences regarding accessory rights, warranties of the transferor and objections that the transferee may raise against the other contracting party, the SrbLO prescribes similar rules to assignment of a claim and assumption of a debt.[123]

6.2. Croatia

The HrvLO took over the rules on assignment of claim (*ustup tražbine*) from the former federal law on obligations verbatim.[124] Only the systematization of the rules changed: The rules on the assignment of claims, like the rules on other cases of change of subjects in an obligation, have been removed from the end of the general part of the former federal law on obligations into the chapter preceding the general rules of contract law in the HrvLO. One terminological change of lesser importance has been implemented. The designation of the second special type of assignment has been modified from 'assignment for collecting the claim' into 'assignment for the purpose of performance' (*ustupanje radi ispunjenja*).[125]

Recent Croatian legal literature also considers assignment a consensual contract, but if the claim arises from a contractual obligation, the assignment must be

118 SrbLO, Article 444 (3).
119 SrbLO, Article 445.
120 Pajtić in Pajtić, Radovanović and Dudaš, 2018, p. 164.
121 SrbLO, Article 145 (1).
122 SrbLO, Article 145 (3).
123 SrbLO, Article 145 (4) and Articles 146–147.
124 HrvLO, Articles 80–89.
125 HrvLO, Article 88 (2) and (4).

concluded in the same form as the basic contract.[126] There are, however, authors who regard assignment in all cases as a consensual contract.[127]

Likewise, the rules on the assignment of contract also remained intact in terms of their content. However, they have been removed from the part of the former federal law pertaining to the legal effects of bilateral contracts into the chapter comprising various cases of change of parties to an obligation.[128] Only the designation of the legal institution changed. Instead of 'assignment of contract,' which was its name in the former federal law, it bears the designation 'transfer of contract' (*prijenos ugovora*). The literature points out that the new designation is more appropriate, since the word assignment can cause confusion because the same word is used for the assignment of claims.[129]

6.3. Slovenia

The SvnCO took over verbatim most of the rules on assignment of claims (*odstop terjatve*) and transfer of contract (*prenos pogodbe*) from the former federal law, whereby their systematization also remained intact: The assignment of claim is regulated in the chapter pertaining to change of parties to an obligation, at the very end of the first part of the SvnCO comprising the general part of the law of obligations,[130] while the assignment of contract remained regulated by the rules pertaining to legal effects of bilateral contracts.[131]

Concerning the rules on assignment, however, a major novelty may be identified. Whereas the former federal law, just like the SrbLO, prescribes that an assignment contrary to the parties' agreement prohibiting it is without legal effect against the debtor, the SvnCO explicitly specifies that such an assignment has no legal effect at all.[132] Such a general sanction of nullity may be considered too strict.[133] For this reason, the SvnCO envisages two exceptions. On the one hand, the SvnCO specifies that if, at the time of the assignment, a document has been produced evidencing the existence of the claim but that does not prohibit the transfer, the assignment shall be effective if the assignee did not know and was not under a duty to know of the prohibition of the transfer.[134] By this rule the SvnCO protects the legal interest of the assignee who acted in good faith. On the other hand, if the debtor and the creditor in relation to a claim from a commercial contract have agreed that the creditor will not be allowed to assign the monetary claim to another, the assignment is nevertheless effective. In that case, the debtor is released from his or her obligation even if he or she performs

126 Gorenc in Gorenc, 2014, p. 140.
127 Klarić and Vedriš, 2014, p. 445.
128 HrvLO, Articles 127–129.
129 Gorenc in Gorenc, 2014, p. 198.
130 SvnCO, Articles 417–426.
131 SvnCO, Articles 122–124.
132 SvnCO, Article 417 (2).
133 The Commentary of the SvnCO does not consider this change from the rules of the former federal law justified. Juhart in Plavšak, 2021.
134 SvnCO, Article 417 (3).

it to the assignor of the claim.[135] By this rule the SvnCO accommodated the rules to the realities of commercial transaction, where claims are regularly assigned by creditors in large numbers.

7. Slovakia

7.1. Overview

Slovak law recognizes only the assignment of a claim (*postúpenie pohľadávky*), but not the assignment of the entire contract. However, the assignment of the entire contract could be achieved to some extent through other instruments.[136]

As regards the assignment of a claim itself, its regulation is contained in § 524 et seq. of the SvkCC. This regulation applies to both commercial and non-commercial relationships.

7.2. Prerequisites for assignment

According to § 524 of the SvkCC, a written agreement between the new and old creditor (assignor and assignee) is required for the assignment to be valid; the debtor's consent is not required. With the assigned claim, its accessories (interest, default interest, etc.) and all rights related to it are transferred to the assignee. However, according to the literature[137] and case law,[138] this does not apply if the assignor and the assignee have agreed that the accessories or related rights do not pass on to the assignee.

7.3. Non-assignable claims

The SvkCC provides for certain exceptions where assignment is not possible.[139] First, a claim that is extinguished by the death of the creditor at the latest cannot be assigned, such as a claim for compensation justified by the pain and suffering endured. Nor can a claim be assigned if the content of the claim would be altered by a change of the creditor. According to case law, such a situation involves an assignment that would worsen the debtor's position;[140] however, such a worsening cannot occur if the claim is monetary.[141] Furthermore, a claim against which enforcement cannot be sought, e.g., a claim against social benefits received by the debtor up to a certain amount, cannot be assigned. Also, public law claims of the state cannot be assigned to private entities.[142] A doubtful issue is the assignability of

135 SvnCO, Article 417 (4).
136 E.g., assumption of debt (*prevzatie dlhu*) under SvkCC, § 531 (1).
137 Sedlačko, 2019.
138 R 34/1999.
139 SvkCC, § 525.
140 Supreme Court of the Slovak Republic, case No. 4 Cdo 105/2000.
141 Supreme Court of the Slovak Republic, case No. 4 M Obdo 2/2011.
142 Sedlačko, 2019.

a claim whose assignment would violate the protection of information, e.g., medical confidentiality.[143]

The SvkCC specifically stipulates that a claim cannot be assigned if the assignment would contradict the law or an agreement with the debtor.[144] According to both the literature[145] and the case law,[146] an assignment agreement that contradicts the agreement with the debtor is null and void. This means that there was no assignment of the claim and therefore no change of creditor occurred.

7.4. Effects of the assignment agreement

In Slovak law, an assignment agreement is by its very nature a contract by which rights are disposed of, i.e., the conclusion of the agreement directly results in the assignment (transfer) of the claim without the need for any further juridical act, unless the parties agree otherwise. Although the assignment must be notified to the debtor, the assignment is already effective upon conclusion of the contract.[147]

7.5. Protection of the debtor

Given that the assignment of a claim changes the creditor without the debtor's consent, the SvkCC ensures in several ways that the debtor's position is not worsened by the assignment.

First, the debtor may, pursuant to § 526 (1) of the SvkCC, continue to perform his debt to the original creditor (assignor) with the effect of extinguishing the obligation until the assignment of the claim is notified to him or her, or until the new creditor (assignee) proves the assignment of the claim to the debtor. On the other hand, if the assignor notifies the assignment to the debtor, according to case law[148] the debtor is not entitled to examine the validity of the assignment. Of course, the assignment must concern only a claim whose assignment is not prohibited under § 525 of the SvkCC.[149]

Another mechanism by which protection is provided to the debtor is his or her right to oppose the assigned claim by invoking any objection that he or she could have invoked against the assignor at the time of the assignment.[150] This includes, for example, the objection of the statute of limitation.

In the same way, the debtor may, pursuant to § 529 (2) of the SvkCC, claim a set-off of his or her claims against the assignee, if such claims are compatible with set-off (even if not yet due) and existed against the assignor at the time when the assignment of the claim was notified or proved to the debtor. However, he or she must notify the

143 According to Csach, 2015.
144 SvkCC, § 525 (2).
145 Sedlačko, 2019; Fekete, 2018.
146 R 46/2009.
147 Sedlačko, 2019; according to Csach, 2009a.
148 R 119/2003.
149 Sedlačko, 2019.
150 SvkCC, § 529 (1).

assignee without undue delay; otherwise his or her right to set off the claims will be extinguished.[151]

7.6. Protection of the assignee

Given that the debtor may still discharge the debt to the assignor after the assignment (until the assignment is notified or proved to him or her) and that he or she may still—even after notification of the assignment—set off his or her claims against the assignor to extinguish the assigned claim, it may happen that the assigned claim is extinguished without the assignee being satisfied. Therefore, the SvkCC protects the assignee to a certain extent.

If the assignment is for consideration, then according to § 527 (1) of the SvkCC, the assignor is liable to the assignee both for the existence and for the duration or extinction of the claim (*verum nomen*). Thus, if the claim does not exist, or if it did exist but has been extinguished by performance to the assignor or by set-off of the claim against the assignor, then the assignor is liable to the assignee. The law does not stipulate the content of this liability. There are several opinions in the literature, e.g., that liability for existence of the claim is a liability for damages,[152] or a liability (warranty) for defects,[153] and that liability for the duration (extinction) of the claim is based on a claim analogous to claims for unjust enrichment[154] or on a separate claim *ex contractu*.[155]

As for the liability for enforceability of the assigned claim (*bonum nomen*), according to § 527 (2) of the SvkCC, the assignee guarantees for the enforceability of the claim only if he or she has undertaken to do so in writing and only to the extent of the consideration received with interest.[156]

8. Concluding remarks

8.1. Overview

All jurisdictions analyzed, without exception, recognize the economic importance and benefits of the free circulation of claims and therefore as a rule allow the creditor (assignor) to transfer (assign) his claim by a contract to a third party (assignee) without the debtor's consent. Some jurisdictions even go beyond that to recognize the possibility of assigning the contract as a whole or of achieving a similar result through different legal instruments (see below). It seems that all the compared jurisdictions do not consider assignment a specific type of contract beside, say, a purchase or a donation agreement, but rather as a specific operation by which the claims are transferred from the assignor to the assignee.

151 Sedlačko, 2019.
152 Fekete, 2018.
153 Sedlačko, 2019; Hlušák, 2020.
154 Sedlačko, 2019.
155 Hlušák, 2020.
156 For further details see Hlušák, 2020.

8.2. Scope of assignable claims

All jurisdictions have free assignability of claims as a rule, while regulating specific exceptions to this rule by narrowing the scope of assignable claims. These exceptions usually aim to protect the debtor or other interests (either public or private) that the respective legislator deems worth protecting.

In all jurisdictions, a claim is not assignable if it is explicitly prohibited by statute. Under some jurisdictions (the Czech Republic, Romania, Slovakia), it is explicitly stated that the claims are unsuited for assignment if they would alter the claim's content to the detriment of the debtor. The intensity of the consequent change in the content of the claim necessary for that claim to be considered non-assignable differs from jurisdiction to jurisdiction. While under Czech law any notable change of the content of the claim to the detriment of the debtor leads to such a claim being non-assignable, Romanian law requires for the same effect that the obligation become substantially more onerous for the debtor.

It is common throughout the jurisdictions at hand to exclude personal claims from the scope of assignable claims. Some jurisdictions have an explicit statutory prohibition on the assignment of personal claims (e.g., Serbia, Croatia, Slovenia, and Hungary). Other jurisdictions like the Czech Republic, Slovakia, or Poland achieve similar results indirectly by either prohibiting the assignment of claims that lapse upon the creditor's death (the Czech Republic and Slovakia) or by prohibiting the assignment of claims if doing so would be contrary to the nature of the obligation, while including personal claims in this category (Poland).

Some jurisdictions allow the assignment of a future claim or a set of future claims. For example, Czech, Polish, Romanian, and Hungarian law all allow the assignment of future claims, provided they are sufficiently determined. In the case of Czech law, it is sufficient to identify the future claims by either their current or future legal cause or by specifying the type of claims and the time period in which these claims are to arise. On the other hand, Hungarian law strictly requires a legal cause extant at the time of the assignment for a valid assignment of future claims.

There are also various other types of claims that the respective legislator has excluded from the scope of assignable claims. For example, a restrictive approach to the assignability of claims stemming from public law is common throughout the compared jurisdictions.

The greatest diversity is—unsurprisingly—seen in the solutions taken to the problem of anti-assignment clauses. The difference is not only as to the effect of the anti-assignment clause (*inter partes* or *erga omnes*) but also regarding the consequences of breaching such a clause. In most cases the anti-assignment clause has *erga omnes* effects (the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, Romania, Poland). The anti-assignment clause has only *inter partes* effects under Hungarian law, where the only sanction for breaching such a clause is liability for damages. Not only that, Hungarian law even prohibits and declares null and void any clause that would provide for the right to terminate the contract or to request payment of penalty claim in the event of breach of the anti-assignment clause. The Hungarian approach strongly supports

free circulation of claims with all its economic benefits, but might be perceived as somewhat radical and ignorant of the legitimate interests of the debtors.

In the case of Romanian, Slovenian, and Polish law, there are few exceptions to the general *erga omnes* approach to the anti-assignment clause. Under Romanian law and, in Slovenian law also insofar as commercial claims are concerned, the anti-assignment clause has only *inter partes* effect if the claim is a monetary one. The aim is obviously to protect the free circulation of assets. Another exception is in cases where the anti-assignment clause is not expressly mentioned in the document establishing the claim and the assignee did not know and should not have known of the existence of the anti-assignment clause, thus protecting the good faith of the assignee (such is the case of Romanian, Slovenian, and Polish law). Regarding the second exception, one must ask to what extent the good faith of the assignee can be derived from such a document when it is not reliable evidence of the actual content of the legal relationship or even of its existence at the time of the assignment of claim.

The most common consequence of the breach of the anti-assignment clause in jurisdictions following the *erga omnes* approach is the assignment agreement being null and void or voidable (Slovakia, Slovenia, Poland, Romania), or assignment as such being ineffective against the debtor while keeping the assignment agreement valid (Serbia or Croatia). In the case of Czech law, there are still unfinished discussions as to whether the breach of the anti-assignment clause should result in the assignment agreement being null and void or voidable, or simply in assignment being ineffective vis-à-vis the debtor, as is the case of Serbian and Croatian law. There are of course also other subsidiary consequences, such as liability for damages.

8.3. Subject matter of the transfer

Under all the compared jurisdictions, the assignment of a claim transfers not only the claim itself but also the accessories such as interest or default interest and all rights related to the claim, including its security such as mortgages and pledges. Obviously, accessories and related rights are transferred to the assignee together with the assigned claim provided there is no different agreement between the assignor and the assignee (e.g., Slovakia, Hungary).

Usually, once the claim with a pledge as its security is assigned, the possession of the object of pledge passes to the assignee without any need for the pledgor's consent. That is only logical when one considers that the assignor has opted out of the creditor-to-debtor relationship and has usually no more interest in the pledge securing someone else's claim. Nevertheless, under Serbian, Croatian, Slovenian, and Romanian law, the possession of the object of pledge does not pass to the assignee unless the pledgor provides its consent to doing so.

8.4. Form of the assignment

The formal requirements for the assignment agreement differ in individual jurisdictions. In some cases, there are no formal requirements at all, meaning that the assignment agreement can be concluded in writing, orally, or in any other form deemed

admissible by the respective jurisdiction (for example, Hungarian or Czech law). In other cases, the assignment agreement must be compulsorily concluded in written form (see the Slovakian subchapter above). A specific solution can be found in Serbian or Croatian law, where the literature concludes that the form of the assignment agreement follows the form of the underlying contract.

The purpose of a written or firmer requirement of form is unclear. If it is to protect the debtor, then such protection is already sufficiently provided by other means, e.g., by the duty to notify the assignment to the debtor (see below). If it is to protect the assignor's creditors, then they can usually satisfy their own claims from the renumeration paid by the assignee, since the assignment agreement is usually a contract for pecuniary interest, or, in the case of gratuitous contracts, through the court declaring the assignment agreement ineffective vis-à-vis the creditor in some cases.

8.5. Moment of the assignment

Under all compared jurisdictions, the assignment of claim occurs simultaneously with the conclusion of a valid and effective assignment agreement unless the parties agree otherwise. From this very moment, the assignee is the rightful owner of the assigned claim. The subsequent notification to the debtor is relevant not for the transfer of ownership but for the assignment to become effective against the debtor (see below). Therefore, if the debtor discharges the debt by payment to the assignor before the assignment became effective against him or her, the assignee may have a claim against the assignor for whatever he or she received from the debtor based on unjust enrichment.

8.6. Protection of the debtor

The general principle underlying regulation of the assignment of a claim under all jurisdictions at hand is the protection of the debtor, whose position should not change due to the assignment of the claim.

Under all these jurisdictions, the assignment becomes effective vis-à-vis the debtor only after the debtor is notified of the assignment. It is also common in these jurisdictions that the notification can be made either by the assignor or the assignee. However, in the latter case the assignee is usually required, beside the notification itself, to prove the assignment to the debtor (e.g., Romania, the Czech Republic, Slovakia). Until the assignment becomes effective against the debtor, he or she is free to perform his or her debt to the original creditor (assignor), with the effect of extinguishing the obligation.

In some jurisdictions, the notification also has a special purpose in case of multiple assignments, resting in the fact that only the assignment that has been notified to the debtor first shall have effects vis-à-vis the debtor (e.g., Serbia, Croatia, Slovenia, the Czech Republic).

There are generally no formal requirements for the notification, so it may be done in any form deemed admissible by the relevant jurisdiction, with the exception of Romanian law, which requires a written form. Unusually, Romanian law also

regulates other means for the assignment to become effective against the debtor through the written acceptance of the debtor.

Under Slovakian law, the legislator also seeks to protect the creditor by taking away the debtor's right to examine the validity of the assignment if the assignment is duly notified by the assignor. The rationale behind this solution is that the debtor will discharge his or her debt by performing to the notified assignee even if the assignment agreement is invalid, and should therefore not consider such agreement's validity. However, this is already achieved by the notification when the debtor is discharged if he or she performs to the notified person (assignee), regardless of the validity of the assignment agreement. On the other hand, there are cases where a debtor has a justified interest in having the assignment agreement declared null and void.

The debtor is commonly also protected under the jurisdictions at hand by retaining all the defenses against the claim (e.g., invoking set-off or the statute of limitations) that he or she had at the time the assignment became effective against him or her. It is also common in these cases to modify the set-off rules so as to allow the debtor to use for the set-off all outstanding claims against the assignor, even if they were not yet due at the time the assignment became effective against the debtor (for details see, e.g., the Slovakian, the Czech, and with certain exceptions the Polish subchapters).

8.7. Protection of the assignee

In all the compared jurisdictions, if the assignment is for consideration, the assignor might be liable for legal or factual defects of the assigned claim. Analogously to tangible assets, the assignor should be primarily liable for defective performance if the attributes of the claim do not correspond to the agreed ones. However, it seems that individual jurisdictions (except for Czech law) are not explicitly concerned with this kind of liability. Instead, they all deal with the assignor's liability for existence of the claim at the time of the assignment (in the Slovakian case also for the duration of the claim) or for the solvency of the assigned debtor (or also 'collectability of the assigned claim'); in some cases, it is still under discussion whether this kind of liability should be considered liability for damages, for unjust enrichment, or for defective performance (Slovakia).

It seems that while liability for the claim's existence is automatic under all the compared jurisdictions (unless agreed otherwise), liability for the debtor's solvency needs to be explicitly stipulated except in Czech law, where even such liability is automatic. Either both or one of these liabilities (usually the liability for the debtor's solvency) is commonly capped up to the amount of consideration paid by the assignee, including, in some cases, interest or other costs (Slovakia, the Czech Republic, Serbia, Croatia, Slovenia, Romania). What is worth mentioning is that it is not possible under some of these jurisdictions to agree on stricter liability than what is regulated by statutory law, and agreement to the contrary would be considered null and void (e.g., Serbia, Croatia, Slovenia).

In the case of gratuitous assignment of a claim, the assignor is either not liable at all for existence and defects of the claim or for the debtor's solvency (collectability of the claim), or is liable only under special rules and to a very limited extent.

8.8. Assignment of contract

Most of the compared jurisdictions recognize not only the assignment of claim but also the assignment of contract (the Czech Republic, Serbia, Croatia, Slovenia, Hungary, Romania), which they obviously make subject to the consent of the assigned party. In other cases, similar results can be achieved by combining assignment of all the claims with assumption of all the debts under the contract (Slovakia, Poland).

Usually, the assignor should be released from its obligations arising out of the contract at the moment the assignment of the contract becomes effective against the assigned party. However, under both Czech and Romanian law, the assigned party can declare that it does not release the assignor from its obligations and as a result can request the assignor to perform obligations under the contract should the assignee fail to do so.

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