| Chapter X |

Contracts for the Benefit of Third Parties and *Action Directe*

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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.

References

Arndts, K L (1868) *Lehrbuch der Pandekten* 6th, München: Cotta.

Dobrovodský, R (2019) 'Komentár k § 50' [Commentary on § 50] in Števček, M et al. *Občiansky zákonník. Komentár,* Vol. I, 2nd, Praha: C. H. Beck (online).

Drapała, P, Kubas, A, Osajda, K, Szlęzak, A (2020) in Osajda, K (ed.) *Prawo zobowiązań – część ogólna. System Prawa Prywatnego* [The Law of Obligations – General Part. The System of Private Law], Vol. V, 3rd, Warszawa: C. H. Beck.

Fekete, I (2018) *Občiansky zákonník. Veľký komentár* [Civil Code. Great Commentary], Vol. I, 3rd, Bratislava: Eurokódex (online).

Hanga, V (1977) *Drept privat roman. Tratat* [Roman Private Law. Treatise], București: Editura Didactică și Pedagogică.

Heyrovský, L (1910) *Dějiny a system soukromého práva římského* [History and System of Roman Private Law] 4th, Prague: Jan Otto.

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

Jhering, R von (1858) 'Mitwirkung für fremde Rechtsgeschäfte', *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts,* No. 2, pp. 67–180.

Kemenes, I (2018) 'A szerződés teljesítése' [Performance of a contract] in Vékás, L, Gárdos, P (eds.) *Kommentár a Polgári Törvénykönyvhöz,* Vol. 2, Budapest: Wolters Kluwer, pp. 1622–1642.

Machnikowski, P (2017) in Gniewek, E, Machnikowski, P (ed.) *Komentarz KC* [Commentary of the Civil Code] 8th, Warszawa: C. H. Beck.

Mazák, J (2010) in Vojčík, P et al. *Občiansky zákonník. Stručný komentár* [Civil Code. Commentary] 3rd, Bratislava: Iura Edition.

Perović, S (1986) *Obligaciono pravo* [Law of Obligations] 6th, Beograd: Službeni list SFRJ.

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

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

Popa, I F (2020) 'Statutul actual al acțiunilor directe' [The Current Status of *Action Directe*], *Revista Română de Drept Privat*, No. 1, pp. 204–221.

Radwański, Z (1981) 'Umowa na rzecz osoby trzeciej' [Contract for the Benefit of a Third Party] in Radwański, Z (red.) *System prawa cywilnego*, Vol. III, Part 1, *Prawo zobowiązań–część ogólna* 1st, Wroclaw: Ossolineum.

Radwański, Z (2009b) *Prawo cywilne – część ogólna* [Civil Law – General Part] 10th, Warszawa: C. H. Beck.

Radwański, Z and Olejniczak, A (2010) *Zobowiązania – część ogólna* [Liabilities – General Part] 9th, Warszawa: C. H. Beck.

Sedláček, J (1924) *Obligační právo. Obecné nauky o právních jednáních obligačních a o splnění závazků* [Law of Obligations. General Theory of Juridical Acts of Obligation and the Fulfillment of Obligations], Brno: Akademický spolek „Právník'.

Unberath, H (2003) *Transferred Loss. Claiming Third Party Loss in Contract Law*, Oxford, Portland: Hart Publishing.

Veress, E (2013) 'Discuţii privind titularii acţiunii directe a lucrătorilor în materia contractului de antrepriză după intrarea în vigoare a noului Cod civil' [Discussions on the Beneficiaries of *Action Directe* of Workers in the Field of the Contract of Undertaking After the Entry into Force of the New Civil Code], *Dreptul*, No. 7, pp. 81–88.

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