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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