Chapter XI

Changes in Circumstances: Frustrated Contracts and Legislative or Judicial Modification of the Contract

1. General remarks

1.1. Overview

In some instances, the performance of the contract in the conditions expected by the parties is not possible because of changes in the circumstances in which it was concluded. Occasionally these changes in circumstances justify even the adjustment of contracts by the legislator itself. Sometimes the law allows courts to intervene in contracts to rebalance them if the economic conditions in which they were concluded had changed radically. A special case is when the contract can no longer be performed because of an external event (frustration of contract). It was stated that 'it is sometimes difficult to draw a line between circumstances that render the performance of the contract impossible and those that render it more onerous or more costly or frustrate the purpose of the transaction.'[1] The challenge for national legislators is to establish a set of conditions reflecting the specificity of very different cases, which can appear at an individual level, or on a larger scale, at the social level.

1 Kötz, 2017, p. 279.

Veress, E., Hulmák, M., Balliu, A., Tomczak, T., Dudás, A., Hlušák, M. (2022) 'Changes in Circumstances: Frustrated Contracts and Legislative or Judicial Modification of the Contract' in Veress, E. (ed.) *Contract Law in East Central Europe.* Miskolc-Budapest: Central European Academic Publishing. pp. 347–388. https://doi.org/10.54171/2022.ev.cliece_chapter11

1.2. Legislative modification of contracts

The legislative modification of the contract is a particular and extraordinary way of intervening in the private law relationship between the parties.[2] In this case, the contract is amended by an act, justified by changes in circumstances. The classical theory of the autonomy of will denies the possibility of legislative intervention in contracts, but the political practice exists despite the complexity. For example, there are cases in which the law provides for the legal extension of certain contractual terms; the legislator can choose the forced extension of certain contracts. 'The legal extension of the contract consists in the forced postponement of its existence with a certain time interval, after the fulfillment of the extinctive term established by the agreement of the contracting parties.'[3]

The state protected, for example, in some Central and Eastern European countries, the lessees of the buildings nationalized by the communist regime who were subject to restitution to former owners (or their heirs). The law maintained the lease agreements concluded by the state with these lessees before the restitution of the building, extending their duration, even several times, and also establishing the amount of rent due after restitution to the owners based on the income of the lessee.

In other cases, states may institute a moratorium through legislative means. For example, the restitution of bank loans in case of economic crises or the COVID-19 pandemic.

1.3. Judicial modification of contracts for unforeseen changes in circumstances

According to the classical theory of contractual freedom and autonomy of will, courts cannot intervene in contracts. They cannot modify agreements because only the consensus of the contracting parties can amend and adapt a contract. The role of the court is manifested in the interpretation (construction) and the enforcement of the contract, the latter by coercing the party that does not perform its obligations willingly. Classical civil law recognizes the court's right to grant grace periods to the debtor. In general, any judicial intervention in contracts is incompatible with the traditional concept regarding the binding force of the contract.[4] Nevertheless, there are situations in which 'the infinite diversity of the contractual phenomenon makes the mechanical application of the law difficult and demanding,' and the initial contractual balance is broken 'because of changing economic, political, monetary or social context,' consequently one of the contracting parties is prejudiced.[5]

For example, a lease is concluded with a predetermined rent for three years. In the first year, rampant inflation occurs, which significantly reduces the actual value of the rent. Alternatively, an individual takes out a loan in Swiss Francs at a time when the exchange rate is favorable. He or she then realizes that his or her income is

2 Vékás, 2019, p. 192.
3 Pop, 2009, p. 531.
4 Veress, 2020, p. 60.
5 Pop, 2009, p. 533.

payable in the national currency. After a while, the exchange rate is altered abruptly because of shifting economic conditions and he or she is forced to buy Swiss Francs, which results in paying a much higher percentage of his or her income than when the loan was contracted. In such situations, judicial intervention in contracts restores contractual balance. There are, of course, other, less energetic methods of restoring the contractual balance which is more compatible with the classical conception of the binding force of the contract. According to the theory of contractual solidarity, the parties may even be obliged to proceed with the adaptation of the contract to the new realities. Another method is to insert an indexation clause, i.e., a clause which automatically pegs the contract price to the inflation index or other indexation factors. The parties may also establish review clauses (hardship clauses), which oblige the contracting parties to renegotiate the contract if there are objective changes in economic or monetary circumstances. By such a clause, the parties may even empower the court or arbitrator to restore the contractual balance if the rebalancing negotiations fail.

There is a fundamental difference between unforeseen changes and imbalance because of *laesio enormis*.[6] In the case of *laesio enormis*, the contractual imbalance is contemporaneous with the conclusion of the contract. In contrast, in the case of unforeseen changes in circumstances, the imbalance occurs after the conclusion of the contract, during the execution of the agreement in time. A distinction must also be drawn between *force majeure* and unforeseen changes. *Force majeure* results in the suspension or termination of the contract. The first difference is that in the event of *force majeure*, the adaptation of the contract, the main consequence of unforeseen changes, is not possible. Another difference is that in the case of force majeure, the contract is impossible to execute, while in case of unforeseen changes, the contract can be performed, but it becomes excessively onerous for the debtor.

A judicial modification of the contract is based on the idea that the parties expressed their consent to the contract based on the existing circumstances (*rebus sic stantibus*) at the moment of conclusion of the contract. Even with the current development of civil laws, when the binding force of the contract is not treated with extraordinary rigidity, judicial modification of the contract remains a controversial institution.

Generally, the conditions for judicial modification of the contract are the following:[7]

— the performance of the contract on the part of the debtor has become excessively onerous, so there is now a serious imbalance between it and the consideration received,
— the exceptional change of circumstances occurred after the conclusion of the contract,

6 For this issue, see Chapter V above.
7 Vékás, 2019, p. 191; Veress, 2020, pp. 62–63.

— the change of circumstances, as well as its extent, were not and could not reasonably have been considered by the debtor at the time of concluding the contract,
— in most jurisdictions, there is also a substantive and procedural preliminary requirement according to which the debtor should first try to renegotiate the contract to avoid overloading the courts with such cases and cooperate with the creditor in rebalancing the contractual relationship.

In a situation where the performance of the contract has become excessively onerous because of an exceptional change of circumstances that would make it manifestly unfair to oblige the debtor to perform the obligation, the court has two options. First, it may order the contract's adaptation to distribute the losses and benefits resulting from the change of circumstances equitably between the parties. The notion of adaptation also includes the possibility of suspending the performance of the contract. Second, it may decide to terminate the contract at the time and under the conditions it deems fit.

1.4. Frustration of contract

In some cases, the performance of the contract can become impossible. The impediments that lead to this can be physical (a good is destroyed), legal (international sanctions instituted after the conclusion of the contract prohibit performance), or economic (changes in economic conditions which make the performance impossible). A comparison is possible in the case of unforeseen changes in the circumstances, but the dissimilarity is also essential: unforeseen changes leave the performance possible, but unfairly onerous for the debtor. The difference is basically in the intensity of the changes. Commonly, it is a *vis maior* (act of God) that frustrates a contract. However, national legislation can recognize other legitimate causes of frustration, such as fortuitous circumstances (*casus fortuitus*). Acts of God and fortuitous circumstances frustrate the contract if these circumstances do not result in a simple delay or suspension of the parties' duties.

In case of frustration, the contract shall terminate. National legal rules can impose information duties (the first party to become aware that the performance has become impossible must inform the other party without delay).

2. The Czech Republic

2.1. Legislative modification of contracts

Legislative intervention in contracts is not very common in the Czech Republic. Historically, Czech law only exerted such legislative modifications on two occasions. One being the transformation of the economy after the fall of the communist regime and the second being the COVID-19 pandemic.

As in other post-communist states, the Czech legislator concerned itself, *inter alia*, with legal relations between the lessees and the owners of the leased premises. Even more so since in 1991, the communist concept of the right of personal use of apartments was transformed into the more traditional concept of the lease.[8] Pursuant to the previous CzeCC adopted in 1964, the lessor was entitled to unilaterally raise the rent, while the particulars of this measure were supposed to be set out in a special legislative act. To protect the lessees against sudden political and economic changes (or so they proclaimed), the Czech Government consecutively adopted special regulations to sustain very low and gradual raises of the rent. All these regulations had a substantial impact on ongoing lease agreements, preventing the lessor from unilaterally increasing the rent beyond the limit set out in the respective regulation and, at a certain point in time, even depriving the lessor of any right to unilaterally raise the rent. The Czech Constitutional Court declared all of these unconstitutional, mainly because they were disproportionately unfavorable to the rights of the owners, and struck them down.[9]

To mitigate the economic consequences of the COVID-19 crisis, the Czech legislator adopted several special acts modifying contracts concluded before their adoption. These acts either deprived the lessor of his or her right to unilaterally terminate the lease agreement for the lessee's delay with payment of the rent[10] or entitled a loan debtor to postpone the due date of his/her installments.[11] Of course, both cases were subject to the fulfillment of several conditions set out in the respective act. Privation of a right to unilaterally terminate the lease agreement (in cases where the lease referred to flats) has already been subject to review by the Czech Constitutional Court. This regulation was found proportionate and in compliance with the Czech Constitution.[12]

2.2. Judicial modification of contracts for unforeseen changes in circumstances

Changes in circumstances (*změny okolností*) are generally regulated for all types of contracts in §§ 1764 – 1766 of the CzeCC, albeit with separate modifications for some types of contracts (usually having less severe preconditions and different legal consequences).[13] For changes in circumstances to have any relevance to the contract under the sections cited, the following conditions must be fulfilled. First, there must be a change in circumstances (usually originating in a natural or socio-economic event but may also be constituted by changes in regulation). Second, the changes in circumstances must be substantial, i.e., they must create a gross disproportion in the rights and duties of the parties leading to an imbalance of performances on one side,

8 Act No. 501/1991 Coll.
9 See decisions Ref. No. Pl. ÚS 3/2000, Pl. ÚS 8/02, and Pl. ÚS 2/03. Herc, 2009, pp. 601–611 (see also Kuloglija Podivínová, 2012, pp. 494–499).
10 Act No. 209/2020 Coll., and Act No. 210/2020 Coll.
11 Act No. 177/2020 Coll.
12 See Decision Ref. No. Pl. ÚS 21/20.
13 See e.g., CzeCC, §§ 1788 (2), 2000, 2059 or 2287.

such as a disproportionate rise of the costs to render performance or a disproportionate diminution in the value of the subject of the performance. There must be a causal link between the changes in circumstances and the gross disproportion in the rights and duties of the parties. Third, the changes in circumstances must have occurred only after the conclusion of the contract or the party became aware of it only after the conclusion of the contract. Forth, the party to the contract must prove that it could not have foreseen the changes in circumstances. What the party could or could have not foreseen is assessed by the standard of an average person or, in the case of professionals, by the standard of a professional. Fifth, the party must prove that it could not have affected the changes in circumstances.[14]

If all the conditions above are fulfilled, then the affected party has the right to renegotiate the contract with the other party. Asserting this right does not entitle the affected party to suspend performance. Upon failure to reach an agreement within a reasonable time limit, a court may, on the application of any of the parties, decide to change the contractual obligation by restoring the balance of rights and duties of the parties or to extinguish it as of the date under the conditions specified in the decision. The court is not bound by the applications of the parties. A court will dismiss an application to change an obligation if the affected party fails to assert the right to renew contractual negotiations within a reasonable time after it ascertained the change in circumstances (this time limit is presumed to be two months).[15]

There is an unfinished discussion in the Czech legal literature as to whether the court may modify the contract also for the past. Traditionally decisions instituting changes in contracts had only *ex nunc* effects.[16] Yet, there are some exceptional *ex tunc* effects (back to the initiation of the proceedings), e.g., the change of rental conditions under § 2249 of the CzeCC. Nowadays, there is a tendency to allow *ex tunc* effects, but not earlier than the moment when the change of circumstances occurred.[17] There is, unfortunately, no case law on the matter.

The rules of changes in circumstances are excluded if the affected party assumed the risk of such a change. The same must apply accordingly to the contracts that presuppose some aspect of risk in their very nature, e.g., to aleatory contracts (contracts where the extent of the performance or the counter-performance to be rendered by at least one party is contingent on a factor not known to that party at the moment the contract is concluded and is therefore uncertain).[18]

Under Czech law, the court has no right to grant a grace period to the debtor. The only exception is when the court finds the maturity date grossly unfair to the creditor under § 1964 of the CzeCC. However, an excessively high amount of contractual penalty can be reduced.[19]

14 Petrov et al., 2019, pp. 1835–1836. See also Hulmák et al., 2014, p. 222.
15 CzeCC, §§ 1765 and 1766.
16 Králík and Lavický, 2012; Hulmák et al., 2014, p. 237.
17 Melzerová, 2018, S. 179; Petrov et al., 2019, p. 1837.
18 Hulmák et al., 2014, p. 222.
19 CzeCC, § 2051.

2.3. Frustration of contracts

The frustration of the contract is regulated in §§ 2006 et seq. of the CzeCC. If the contract becomes frustrated, the obligation is extinguished *ex lege* with an *ex nunc* (non-retroactive) affect.[20] The debtor is obliged to inform the creditor about the frustration of the contract without undue delay after he or she is aware of the frustration. If the debtor fails to inform the creditor, he or she is liable for all the damages arising to the creditor as a result of not having been made aware of the frustration. If only a part of the performance becomes unrealizable, the obligation is extinguished only to the extent of the affected part, unless the nature of the obligation or the purpose of the contract of which the parties were aware of indicate that the performance of the rest is useless for the creditor.[21]

The conditions under which the contract may be considered as frustrating are as follows. The first condition is when the performance becomes unrealizable (*nesplnitelný*). It is of no relevance whether the performance becomes unrealizable as a result of *vis maior* (act of God – *vyšší moc*) or merely as a result of *casus fortuitus* (*náhoda*). The performance must become unrealizable after the conclusion of the contract. If the performance is unrealizable at the moment of the conclusion of the contract, the contract is null and void because of the initial impossibility of the performance (*počáteční nemožnost plnění*). In general, the objective unrealizability of the performance is required for the frustration of the contract to occur (if the performance is impossible for anyone) – regardless of whether there is a factual or legal objective impossibility to render performance. Thus, if the debtor is able to render the performance under more difficult conditions at higher costs with the help of another person or only after a given period, the contract will not be considered frustrated. However, the subjective unrealizability of performance can, under some conditions, acquire the quality of an objective one, i.e., if the debtor would have to put forth completely excessive costs or effort to render performance. The last condition for the contract to become frustrated is that the performance is permanently (not temporarily) unrealizable.[22]

The Czech Supreme Court concluded that the contract is frustrated for example if 1. the individually designated subject of the performance is destroyed;[23] 2. the performance to be provided has been already rendered by someone else;[24] or 3. the performance cannot be rendered in the way and the place agreed in the contract and the contract precludes the performance in another way or place.[25]

In this context, it is important to note that despite the individually designated subject of the performance being destroyed, the contract will not become frustrated in case of *mora creditoris* (unless the subject is destroyed by the debtor himself). In such a case, the creditor will remain obliged to pay the price for the performance, etc.[26]

20 Hulmák et al., 2014, p. 1219.
21 CzeCC, §§ 2006–2007.
22 Petrov et al., 2019, pp. 2163–2167.
23 Ref. No. 25 Cdo 4850/2009.
24 Ref. No. 23 Cdo 4092/2007.
25 Ref. No. 33 Cdo 2726/2009. Petrov et al., 2019, pp. 2163–2167.
26 Petrov et al., 2019, pp. 2126.

3. Hungary

3.1. Legislative modification of contracts

The amendment of a contract by the legislator is exceptional. This is explained by the fact that the contracting parties are in a position of equality, instituted by the will of the parties. State intervention cannot be interpreted as anything other than a bias in favor of one party to the detriment of the other. State interference is also a restriction of contractual freedom. In consequence, legislative modification of a contract before entry into force of the law is exceptional. On the one hand, judicial amendment of contracts is a way of dealing with individual situations. On the other hand, when a mass crisis affecting a high number of contracts occurs, it is not the courts but the legislature that can make the appropriate adjustments for a generally equitable effect.

The HunCC indirectly recognizes the possibility of amending contracts by legislation since it contains provisions protecting the contracting parties in such a case. Article 6:60 of the HunCC provides that if a law changes the content of a contract concluded before its entry into force and the changed content of the contract is prejudicial to the essential legal interests of either party, that party may apply to the court to modify the contract or may withdraw from the contract.

The Constitutional Court also chiseled the issue of legislative modification of contracts:

> 'the requirements of legal certainty, freedom of contract, and confidence in the performance of the contract are met if the legislator is unable to amend individual contracts by judicial means when amending a large number of contracts. Long-term private legal relationships can be shaped by legislation applying the *clausula rebus sic stantibus*. Judicial amendment of contracts is a means of rebalancing the divergent interests of private parties by weighing up all the circumstances of the case. A legislative modification of a contract must also take into account, as much as possible, the equitable interests of each party, i.e., such a modification must also seek to achieve a balance of interests in the changed circumstances.'[27]

So, the possibility of legislative modification of a contract is not limitless, and the strict requirements prescribed for judicial modification of contracts presented below must be observed.

The most recent case where the legislature amended a contract occurred in the 1990s with changes to interest rates on home loans. The Constitutional Court ruled that

> 'circumstances unforeseen at the time of the conclusion of the contract may substantially alter the situation of the contracting parties, the relationship between

27 Constitutional Court decision No. 8/2014. (III. 20.) 91.

> rights and obligations, and may make it extremely onerous or even impossible for one of them to maintain the contract unchanged or to perform it. In such cases, therefore, public intervention, reassessment and modification of contractual obligations, and possibly termination of contracts, are clearly necessary.'[28] Recently, a series of acts modifying loan contracts was passed, in which the loans were contracted in foreign currency (Act XCVI of 2010, Act LXXV of 2011, Act CXVI of 2011, Act CXXI of 2011, Act XVI of 2012, Act XXXVIII of 2014, Act XL of 2014, etc.). The Constitutional Court maintained its jurisprudence since the circumstances justified legislative intervention while there was general adherence to the principles dictated by the *clausula rebus sic stantibus*.[29]

3.2. Judicial modification of contracts

In Hungary, the judicial modification of the contract is legislated by Article 6:192 of the HunCC. The principle here is also the binding force of the contract: the contract is applied and enforced by the court and is binding on the court. Therefore, judicial modification of a contract is only possible within the narrow limits set by law. According to the legal text, either party may request the court to amend the contract if, because of a circumstance that occurred after the conclusion of the contract, the performance of the contract with unchanged conditions would harm their substantial legal interests in the long-term legal relationship between the parties, and

- the possibility of a change in the circumstances was not foreseeable at the time when the contract was concluded,
- the change in circumstances was not caused by the party; and
- the change in circumstances falls outside the party's normal business risk.

The text of the law indirectly but explicitly excludes the possibility of amending the contract *ex officio*. The second condition is that the contract must be of a longer duration. In practice, for example, leases, long-term financial contracts, maintenance contracts, and even service contracts can be considered durable. The change of circumstance must occur unexpectedly and after the conclusion of the contract, while also substantially harming their legal interests. However, the court will reject the request to amend the contract if the change in circumstances falls within the party's normal business risk, or if the changes were caused by the party or were foreseeable. For example, a change in supply and demand is a business risk factor that does not give either party the right to request a contract modification.[30] The law also does not allow for retroactive judicial amendment of the contract. The legislator allows the contract to be modified from the date of the court filing of the action at the very earliest, but judicial discretion may allow a later date.

28 Constitutional Court decision No. 32/1991. (VI. 6.) 3.
29 Constitutional Court decision No. 3048/2013. (II. 28.) 33. For further details, see Juhász, 2019, 247–254.
30 BH1988. 80.

If these conditions are fulfilled, the court may amend the contract from the date determined by it. The judicial modification aims to prevent the change in circumstances from harming the substantial legal interests of any of the parties. It is also very important to note that the Curia (the supreme court of Hungary) has ruled that judicial contract modification is not a suitable legal instrument to remedy the consequences of economic changes on a societal scale when changes in circumstances are affecting a large number of similar contracts in a similar way but to the detriment of only one party. Such changes require legislative intervention. If the adverse consequences have been remedied by the legislature by means of an act, legislative intervention in this area precludes individual judicial amendment of contracts.[31]

3.3. Frustration of contracts

Hungarian contract law has an interesting approach[32] toward the frustration of contracts: it envisages frustration as a breach of contract. In this context, if performance has become impossible after the conclusion of the contract, this shall terminate. If performance was impossible at the time the contract was concluded, the contract is null and void.[33] However, an agreement – the performance of which was impossible at the time the contract was concluded – is valid if the conditions for performance are created in due time by one of the parties. For example, the mere fact that the seller is not the owner of the subject matter of the contract at the time of its conclusion (the absence of ownership) does not preclude the conclusion of the contract.[34] If the non-owner seller undertakes in the contract of sale, at the time of its conclusion, to transfer ownership of the property, but physical or legal reasons preclude him or her from acquiring ownership of the property at a later date, the contract contains an impossible purpose and is therefore null and void.[35]

The party who gains awareness of the fact that the performance has become impossible is required to inform the other party of it without delay. Damage arising from failure to provide information shall be compensated by the party who was at fault with respect to that failure.[36]

There are three possible situations:

— If neither of the parties is liable for the performance becoming impossible (objective frustration of contract), monetary reimbursement shall be provided for the (partial) performance rendered before the termination of the contract. If the other party did not provide the consideration corresponding to the monetary service already performed, the monetary service shall be returned.
— If one of the parties is liable for the performance becoming impossible, the other party shall be released from the performance obligation arising from the

31 Civil judgement for unity of the jurisprudence No. 6/2013, point 7.
32 HunCC, Article 6:179–182.
33 HunCC, Article 6:107.
34 EBH 2003. 867.
35 BDT 2004. 1055.
36 Vékás, 2019, pp. 299–300.

contract and may claim compensation for the damage caused as a result of the breach of contract.
— If both parties are liable for the performance becoming impossible, the contract shall terminate and the parties may claim damages from each other *pro rata* to their contribution.

If, in the event of the provision of an asset subject to performance becoming impossible, the residue of the good or a part of it remaining in the possession of the obligor, or which the obligor received, or the replacement value an obligor would be entitled to claim from someone else, may be demanded by the obligee, who may request their transfer in exchange for the *pro rata* part of the consideration.

4. Poland

4.1. Overview

Under Polish law there are different provisions regulating:
— extraordinary changes in circumstances,[37]
— a significant change in the purchasing power of money,[38]
— the situation in which performance has become impossible (frustration of contract in general),[39]
— the situation in which performance – in case of a synallagmatic contract – has become impossible.[40]

4.2. Extraordinary changes in circumstances

Clausula rebus sic stantibus was regulated in Article 269 of the Ordinance of the President of the Republic of Poland of October 27, 1933 – the Polish Code of Obligations. However, after the Second World War, Poland became a socialist state. The legislator's assumption was that such an economic system would be resistant to any crises or economic breakdowns, therefore such provisions were not required in the PolCC.[41] This assumption did not stand the test of time and after the regime change in 1989, a new Article 357[1] was introduced into the PolCC on October 10, 1990.[42] The original version of this regulation stated that:

> '§ 1. If, owing to an extraordinary change of circumstances, the performance would be faced with excessive difficulties or threaten one of the parties with a gross loss, which the parties did not predict when concluding the contract, the

37 PolCC, Article 357[1] § 1.
38 PolCC, Article 358[1] § 3 and § 4.
39 PolCC, Article 475.
40 PolCC, 493 and 495.
41 Radwański and Olejniczak, 2010, p. 305.
42 Compare Radwański and Olejniczak, 2010, 305.

court may, after considering the interests of the parties, in accordance with the principles of social coexistence, determine the way in which the obligation will be performed, the amount of the obligation and/or even decide upon termination of the agreement. When terminating the contract, the court may, whenever needed, decide upon a settlement between the parties, bearing in mind the principles set out in the previous sentence.
[Currently repealed] § 2. The party running an enterprise may not request a determination of the way in which the obligation will be performed, the amount of the obligation and/or termination of the contract, if the performance is related to the running of such enterprise.'

The above quoted § 2 was repealed on December 28, 1996 but § 1 keeps the same text to this day.

Article 357[1] § 1 of the PolCC, according to its wording, should apply only to contractual obligations, which would differentiate it from Article 358[1] § 3 of the PolCC elaborated on below. However, some judgments by the Polish Supreme Court have attempted to extend the scope of the respective provision to non-contractual obligations as well.[43]

For the discussed regulation to be applicable, the following conditions have to be met:

— an extraordinary change of circumstances,
— a performance being faced with excessive difficulties or threatening one of the parties with a gross loss,
— the parties did not predict the influence of such extraordinary change on their relations.[44]

These conditions have to be fulfilled cumulatively and are of strict interpretation.[45]

The mentioned extraordinary change must have a universal nature, i.e., as a rule, it may not refer to the situation of a certain, particular party.[46] The term 'extraordinary' is understood broadly in Polish case law and refers, for example, to an unexpected change of the tax rates.[47] However, *clausula rebus sic stantibus* is distinguished from the institution of *vis maior*.[48]

In reference to the second premise, there must be a causal link between an extraordinary change and the above indicated excessive difficulties or potential gross loss.[49]

43 See for example judgment of the Polish Supreme Court, 26.11.1992, III CZP 144/92, LEX No. 5374 or judgment of the Polish Supreme Court, 30.5.2017 r., IV CSK 445/16, Lex No. 2348538.
44 Radwański and Olejniczak, 2010, p. 306.
45 Machnikowski, 2021, commentary to Article 358[1] PolCC paragraph II.1.
46 Radwański and Olejniczak, 2010, p. 306.
47 Judgment of the Polish Supreme Court, 16.05.2007, III CSK 452/06, LEX No. 334987.
48 Brzozowski, 2018, p. 1283.
49 Radwański and Olejniczak, 2010, p. 307.

Note that if the contract has been fully performed, its modification by the court is not allowed.[50]

The last condition is the most difficult to interpret.[51] The wording of the discussed article indicates that unpredictability must refer to the influence of an extraordinary change of circumstances on their relation, not to the extraordinary change on its own.

If the above premises are fulfilled, the court may:

— alter the way in which the obligation will be performed,[52]
— alter the amount of the obligation, or
— terminate the agreement.

In the framework of the first type of judgment, the court may grant a grace period. In case of terminating the agreement, the court may decide upon a settlement between the parties. Furthermore, the term 'even' included in the provision suggests that termination should be the last resort.[53] The court, when deciding to apply any of these measures, shall consider the interests of the parties and take into account the principles of social coexistence. It seems that even in case of permanent obligations (*zobowiązań trwałych*), the court may decide that the contract be modified with *ex tunc* effects (retroactively).[54]

The discussed provision constitutes *ius dispositivum* (i.e., a non-mandatory rule, permissive of derogation), therefore parties may modify or exclude its application.[55]

The COVID-19 pandemic led to the introduction of special legislation, the so-called anti-crisis shield (*tarcza antykryzysowa*), on the basis of which many contractual relations were modified by statute.[56]

4.3. Significant change in the purchasing power of money

Article 358[1] of the PolCC entered into force on the same day as Article 357[1] of the PolCC and its wording remains unchanged to this day. The relevant paragraphs state as follows:

> '(...) § 3. In the case of a substantial change of purchasing power of money after the arising of the obligation, the court may, after considering the interests of the parties and in accordance with the principles of social coexistence, change the amount or the manner of performance of the pecuniary obligation, even if these were fixed in a judgment or a contract.

50 Compare Judgment of the Polish Supreme Court, 9.4.2003, I CKN 255/01, LEX No. 78890 and see the remarks below.
51 Radwański and Olejniczak, 2010, p. 307.
52 For example: time or place of the performance. See: Radwański and Olejniczak, 2010, p. 308.
53 Radwański and Olejniczak, 2010, p. 309.
54 Machnikowski, 2021, commentary to Article 357[1] PolCC paragraph III.4.
55 Machnikowski, 2021, commentary to Article 357[1] PolCC paragraph I.5.
56 The Act of March 2, 2020 on Special Solutions Related to the Prevention, Protection Against and Combating of COVID-19, other Infectious Diseases and Crisis Situations Caused by Them ('*Ustawy z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych*'), Polish Journals of Laws from 2021, item. 1842 as amended.

§ 4. Change of the amount or the manner of rendering the pecuniary obligation is not available for a party running an enterprise, if the performance is related to the running of such enterprise.'

Notably, § 4 of Article 358[1] in the PolCC was not repealed. Therefore, we can conclude that this type of reevaluation is not available to entrepreneurs. Such a legislative solution is based on the assumption that professional entities shall protect their own interests by including the appropriate indexation clauses in their contracts.[57] Furthermore, only pecuniary obligations in a strict sense can be valorized based on the discussed provision.[58] However, the wording of the article did not limit its scope only to contractual obligations. It is disputable in Polish legal literature whether the discussed provision may be applicable in cases in which the amount of pecuniary obligation was determined via the contractual valorization clause.[59] What is more, judicial modification may be excluded on the basis of special provisions.[60] Notably, Article 358[1] § 3 PolCC is not applicable to bank loans and amounts deposited in bank accounts.[61]

Article 358[1] § 3 PolCC may be applied if there is a substantial change in the purchasing power of money after the obligation arises. Whether the change is substantial or not shall be decided by a court on a case-by-case basis.[62] The provision does not specify any specific reason for such a change, therefore it is irrelevant.[63] Such valorization is not allowed if the obligation was extinguished as a result of its fulfillment.[64] However, according to Polish case law, if the debtor provides the agreed performance, the creditor shall promptly express that he or she does not consider the obligation extinguished and promptly take appropriate court action to avoid losing the discussed right to valorization.[65]

If the above conditions are fulfilled, the court may change the way in which the obligation will be performed and/or the amount of the obligation.

In the framework of the first judgment, the court may grant a grace period. The court may decide on both the mentioned types of changes simultaneously, but it is not allowed to terminate the agreement.[66] Per the case of Article 357[1] of the PolCC,

57 Radwański and Olejniczak, 2010, p. 71.
58 Radwański and Olejniczak, 2010, pp. 69–70.
59 Machnikowski, 2021, commentary to Article 358[1] PolCC paragraph III.2.
60 Machnikowski, 2021, commentary to Article 358[1] PolCC paragraph III.2.
61 Machnikowski, 2021, commentary to Article 358[1] PolCC paragraph III.2.
62 Radwański and Olejniczak, 2010, p. 69 and the resolution of the Polish Supreme Court, 10.04.1992, III CZP 126/91, LEX No. 3743.
63 Machnikowski, 2021, commentary to Article 358[1] PolCC paragraph III.6.
64 Radwański and Olejniczak, 2010, 69. This remark applies also to the above elaborated *rebus sic stantibus* clause.
65 The judgment of the Polish Supreme Court, 30.05.2017, IV CSK 445/16, LEX No. 2348538. This judgment was provided in the context of Article 357[1] PolCC, but it seems that such a standpoint may be provided also in reference to the discussed provision.
66 Radwański and Olejniczak, 2010, p. 71.

the court, when deciding to apply any or both of these measures, shall consider the interests of the parties and take into account the principles of social coexistence.

There is a dispute in the literature as to whether Article 358^1 § 3 PolCC constitutes *lex specialis* in reference to Article 358^1 PolCC. It seems that in this case, we are not dealing with the *lex generalis – lex specialis* situation and, if the premises of both provisions are fulfilled, the interested person may choose the legal basis of his/her right.[67]

4.4. Impossible performance (general case)

The basic Polish provision regarding the subsequent impossibility to perform is Article 475 PolCC, which states:

> '§ 1. If the performance becomes impossible because of the circumstances for which the debtor is not liable, the obligation expires.
> § 2. If the good which is the object of the performance has been disposed of, lost or damaged, the debtor is obliged to release everything, what he/she obtained in return for this good or as compensation for damage.'

Polish law does not specify what the performance having become 'impossible' actually means. In the literature, the accepted view is that circumstances have be altered to such an extent, that performance, as a rule, becomes impossible to be discharged by the obliged party (the objective concept).[68] The causes may be physical, legal, but controversially also economical i.e., from the economic perspective the performance is irrational.[69] The impossibility should have a permanent, not temporary character.[70]

Article 475 § 1 of the PolCC refers specifically to a situation in which neither party is liable for the performance becoming impossible. In such a case, a contract is extinguished *ex nunc*.[71] However, the contract will not terminate if the performance became impossible because the good has been disposed of, lost, or damaged. In such case, the creditor may demand surrogates (buying performance) from the debtor[72] and the obligation will simply demand a different object.[73] The debtor is obliged to provide surrogates even if their value is higher than the amount of the obligation.[74] In case the obligation became impossible after the due date, the debtor may be liable for not rendering performance when it was still possible.[75]

67 Radwański and Olejniczak, 2010, pp. 309–310 and the resolution of the Polish Supreme Court, 29.12.1994 r., III CZP 120/94, LEX No. 4152.
68 Radwański and Olejniczak, 2010, p. 328.
69 Radwański and Olejniczak, 2010, pp. 330–331. However, the issue of „economic impossibility' is disputable in the Polish doctrine.
70 Radwański and Olejniczak, 2010, pp. 329–330. Differently: Kondek, 2021, commentary to Article 475, paragraph 6.
71 Kondek, 2021, commentary to Article 475, paragraph 10.
72 PolCC, Article 475 § 2.
73 Radwański and Olejniczak, 2010, p. 331.
74 Kondek, 2021, commentary to Article 475, paragraph 20.
75 Kondek, 2021, commentary to Article 475, paragraph 11.

If performance becomes impossible because of the circumstances for which the debtor is liable, the obligation shall still exist however albeit the object of it is now transformed into a compensation claim.[76] The prevailing view is that the creditor may claim surrogates.

The article discussed above is not applicable in case of synallagmatic contracts.[77]

4.5. Impossible performance (synallagmatic contract)

In Polish civil law, special rules regarding the impossibility of performance are provided for in case of synallagmatic contracts. Consequences are determined differently depending on whether the debtor is responsible for the impossibility[78] or not.[79] The indicated provisions state:

> 'Art. 493 § 1. If one of the reciprocal performances became impossible as a result of the circumstances for which the party obliged is liable, the other party may, according to his/her own choice, either claim compensation for the damage resulting from non-performance of the obligation, or withdraw from the contract.
> Art. 495 § 1. If one of the reciprocal performances became impossible as a result of the circumstances for which neither party is liable, the party who was to render the performance may not claim the reciprocal performance, and if it was already received, he/she is obliged to return it in accordance with the provisions on the unjust enrichment.'

If the debtor is responsible for the impossibility, the creditor may:

- claim compensation for the damage resulting from non-performance of the obligation, or
- withdraw from the contract.

In the first case, the obligation still exists albeit the object is transformed into a claim for compensation.[80] That means that the creditor is still obliged to render his or her synallagmatic obligation if it was not rendered already.[81]

In the second case (withdrawal from the contract), the creditor will also have a compensation claim.[82] However, such a claim must take into account that the creditor is released from his or her performance.[83] Furthermore, if the creditor obtained

76 Radwański and Olejniczak, 2010, p. 332.
77 Kondek, 2021, commentary to Article 475, paragraph 17.
78 PolCC, Article 493.
79 PolCC, Article 495.
80 Radwański and Olejniczak, 2010, p. 333.
81 Radwański and Olejniczak, 2010, p. 333.
82 PolCC, Article 494 § 1.
83 Radwański and Olejniczak, 2010, p. 333.

something on the basis of such a contract, he or she is obliged to hand it over to the debtor.[84] The agreement is terminated, as a rule, *ex tunc*.[85]

The situation looks different if the debtor was not liable for the impossibility.[86] In such cases, the creditor is released from his or her reciprocal performance. If such performance was already received by the debtor, he or she is obliged to return it in accordance with the provisions on unjust enrichment.[87] In such a case, the whole contract expires.[88] However, the creditor may demand surrogates in place of the impossible performance. In such a case, the obligation does not expire but the object is changed.[89]

Art. 493 § 2 of the PolCC and Article 495 § 2 of the PolCC refer to the partial impossibility of performance. However, their detailed elaboration exceeds the scope of this book.[90]

5. Romania

5.1. Modification of the contract by legislative means

Legislative modification of a contract is exceptional. After the collapse of the Soviet-type dictatorship, there were cases where the law provided for the legal extension of contractual periods, i.e., the forced extension of lease contracts. 'Legal extension of a contract consists in the forced prolongation of its existence for a certain period of time after the expiry of the extinctive term established by agreement of the contracting parties; this procedure has been and is used for the extension of tenancies' against the will of the owners and the protection of certain categories of tenants (e.g., successive extensions of leases under Act No. 17/1994, Act No. 112/1995 and Article 2 of Government Emergency Ordinance No. 40/1999 on the protection of tenants and the fixing of rents for residential premises).

Another situation of legislative modification of contracts can result from the succession of laws over time. Thus, the contract may affect the future in unintended ways which were not – and could not have been – foreseen by the contracting parties.

84 PolCC, 494 § 1.
85 Kondek, 2021, commentary to Article 493, paragraph 5.
86 PolCC, Article 495.
87 PolCC, Articles 405–414.
88 Radwański and Olejniczak, 2010, p. 332.
89 Radwański and Olejniczak, 2010, p. 332.
90 Those articles read as follows:
'Article 493 § 2. In case of partial impossibility to render performance by one of the parties, the other party may withdraw from the contract if partial performance would have no significance for him/her due to the nature of the obligation or due to the purpose of the contract intended by that party, known to the party whose performance has become partly impossible.'
'Article 495 § 2. If the performance of one of the parties has become only partially impossible, that party loses the right to an appropriate part of the reciprocal performance. However, the other party may withdraw from the contract if a partial performance would have no significance for him/her due to the nature of the obligation or due to the purpose of the contract intended by that party, known to the party whose performance has become partly impossible.'

For example, the RouCC introduced regulation of a particular practical interest for the enforcement of installments on life annuity contracts.[91] In the event of non-fulfillment of the obligation to pay the installments due, the creditor may request the seizure and sale of the debtor's assets up to an amount sufficient to ensure payment of the annuity for the future. Once the amount has been obtained from the sale of the debtor's assets, it shall be deposited with a credit institution and paid to the creditor in accordance with the amount and the due dates agreed in the annuity contract. These provisions shall also apply to annuity contracts concluded before the date of entry into force of the RouCC in the event of non-payment of annuity installments due after that date. This special effect of life annuity contracts also affected the contracts under performance.

5.2. Judicial modification of the contract

In the case of Romania, the RouCC in force from 2011 introduced a new legal institution: the possibility of judicial modification of contracts. This was a powerful form of intervention in the private autonomy of the parties. The possibility of judicial contract modification can be extremely important in times of economic crisis, as the parties entered a contract taking into account the state of affairs extant at the moment the contract was concluded (*rebus sic stantibus*), which can change fundamentally during the performance in time of the contract.

We can see this in times of economic crisis when an obligation is 'distorted by external influences, its equilibrium is upset, its lines of force are disturbed and, as a consequence, the debtor's interests are affected, the sacrifice of which was not the intention of the transaction.'[92] In such and similar cases, a judicial modification of the contract may be required. External economic circumstances may upset the (initial) balance of values existing at the time of the conclusion of the contract. A correctly established balance of values cannot be distorted fundamentally by external influences, which is why the legislator has created a legal framework for rebalancing the agreement. The current RouCC regulates judicial contract modification in Article 1271, literally translated under the subheading '*imprevizіune*,' meaning unforeseeability.

The first paragraph of that article reaffirms the principle of the binding force of contracts, stating that 'the parties are bound to perform their obligations even if performance has become more onerous because of an increase in the cost of performing their own obligations or a decrease in the value of the consideration.' The fact that the rules on judicial modification of contracts begin with this provision, which is essentially a re-emphasizing of the binding force of the contract, indicates the exceptional nature of judicial intervention in contracts. Under market conditions, a change of circumstances is natural and should be anticipated by both parties. If possible, the necessary mechanisms to mitigate this risk (indexation clauses, etc.) should already be included in the contract.

91 RouCC, Article 2250.
92 Kelemen, 1941, p. 59.

Judicial modification of the contract is possible if the performance of the contract has become not just simply more onerous, but 'overly' – grossly, egregiously more – onerous because of an extraordinary change of circumstances, and it would be manifestly unfair to require the debtor to perform under such circumstances.

In such cases, the courts may modify the contract to restore the upset contractual equilibrium or, if they consider it necessary, terminate the contract. The court is given considerable power and discretion here if the conditions are met. Thus, the RouCC has thus created a very important exception to the binding force of contracts. In our view, the modification of a contract has an advantage over the termination of a contract, because the court must refrain as far as possible from interfering in private autonomy and must choose the least direct method of intervention, provided that it is appropriate to restore contractual equilibrium.

The cumulative conditions for judicial intervention are as follows:

— the extraordinary change of circumstances occurred after the conclusion of the contract,
— the change in circumstances or the extent of the change was not and could not have been foreseen by the debtor at the time of the conclusion of the contract,
— the debtor did not assume the risk of the change in circumstances and could not reasonably be expected to have assumed that risk,
— performance of the obligation by the debtor has become manifestly unfair,
— the debtor tried in good faith and within a reasonable time to negotiate an adaptation of the contract to the changed circumstances (prior consultation with the creditor is a precondition for exercising the right of action).

The question arises as to whether the risk of a change of circumstances can be assumed by the debtor in advance by means of a general contractual clause. This will be decided by court practice. In our view, the validity of overly-general clauses that pass the risk of a change of circumstances onto one party as a preventive measure is questionable.

Other cases when a court can intervene in contracts under Romanian law are the following:

— a court may order the contract to be supplemented by additional (secondary) elements where the contract has been concluded only by agreement of the parties on the essential elements, taking into account the current circumstances, the nature of the contract, and the intention of the parties,[93]
— a judge may fix a time limit for acceptance in the matter of option agreements if the parties have omitted to provide such a time limit,[94]
— in the case of pre-contracts, if the promisor refuses to conclude a promised contract, the court may render a judgment in lieu of a contract, which supersedes the will of the party who failed to perform the pre-contract where the nature

93 RouCC, Article 1182.
94 RouCC, Article 1278.

of the contract permits it and the requirements of the law for the validity of the promised contract are met,[95]
— a court may reduce the amount of the excessive contractual penalty[96] if the main obligation has been performed in part and this performance has benefited the creditor or if the penalty is manifestly excessive in relation to the damage that could have been foreseen by the parties at the conclusion of the contract.

5.3. Frustration of contract

The initial impossibility of the contract, which existed at the time of the conclusion, resulted, according to the classical understanding, in the transaction being null and void (*ad impossibilium, nulla obligatio*). On the contrary, the contract is valid under the current RouCC despite the initial impossibility of the object of the obligation, unless otherwise provided for by law. Such initial impossibility occurs, for example, when the seller is not the owner of the asset sold. In this case, the rules on breach of contract apply in practice with the clarification that it is not possible to enforce the contract in kind. Nonetheless, there are remedies at the disposal of the claimant, such as breach of contract and compensation for the damage caused, since the seller may acquire ownership of the asset in the meantime, meaning that the impossibility is only temporary.

Otherwise, the rule discussed above is worth nuancing. If the seller is aware that he or she is not the owner, the buyer can challenge the transaction on the grounds of error or even deceit as to the other party's ownership. The consequence of this is the invalidity of the contract. Similarly, when the seller is mistaken about his or her ownership and the buyer knows that this is lacking, the transaction is voidable (the seller may choose to avoid the contract). If both parties are in error, then the issue of invalidity also arises. In other words, a contract concluded in an original situation of impossibility is valid if both parties were aware that the seller was not the owner and the seller effectively assumed the risk of the impossibility of performance. The seller may try to obtain ownership from the third party (the effective owner) and transfer it to the buyer or may try to persuade the third party to approve the transaction and thus transfer ownership directly to the buyer. If these attempts are unsuccessful, the original obligation to transfer ownership will be converted into an obligation to compensate for damages.

Besides initial impossibility, the impossibility of performance occurs after the conclusion of the transaction (intermediate impossibility). While the validity of the transaction is not affected by this form of impossibility, if it prevents the transaction from being performed, the contract is frustrated. The impossibility of performance may be permanent or temporary.

95 RouCC, Article 1279. For further details, see Chapter III of this book.
96 RouCC, Article 1541.

Impossibility of performance, if it is final (absolute) or affects a substantive contractual obligation, terminates the contract *ope legis* from the moment the impossibility occurred.

The legal effects of permanent impossibility are:

— If the impossibility of performance affects a less significant contractual obligation, only a proportionate reduction of the counter-performance may be requested.

— In case of a debtor's default (if the debtor has been formally put in default – i.e., notified of being in default – or the debtor is in default *ope legis*), the risk of destruction of the goods is borne by the debtor and he or she cannot be released, even if he or she proves that the goods would have also perished if the obligation to hand them over had been performed on time.

— If the impossibility is caused by a circumstance for which the debtor is liable (the impossibility is attributable to the debtor), he or she owes damages to the creditor; in such a case, the obligation of compensation takes precedence over the original performance (for example, the seller sold a movable to a first buyer, who handed it over to a second buyer in good faith; in this case, the seller owes damages to the first buyer).

— If the impossibility is caused by a circumstance for which the debtor is not responsible (*force majeure* or other similar events), the obligation is terminated. It is for the debtor to prove that he or she is not responsible for the frustration of the contract. However, the debtor is discharged if the event causing the frustration of contract occurred before the debtor was put in default. The debtor shall also be discharged, even if in default, if the creditor would not have been able to benefit from performance of the obligation unless the debtor has taken upon himself or herself the risk thereof. The debtor must notify the creditor of the event causing the impossibility of performance. If the notification does not reach the creditor within a reasonable time after the debtor knew or ought to have known about the impossibility of performance, the debtor is liable for the damage caused thereby to the creditor. The legislative solution is described as 'illogical and unfair,' because if the non-performance itself – being fortuitous – cannot be blamed on the debtor, then the debtor should not have to bear the consequences of failing to comply with a formality.[97]

— The fact of impossibility does not imply the absence or existence of imputability: for example, if the horse has died or the goods have been stolen, only the fact of impossibility is clear (the cause for which is to be sought). The question is whether resulting from what fact (circumstances) did the horse die, or whether the debtor could have avoided the theft, i.e., whether there is imputability on behalf of the debtor for the occurrence of the impossibility to perform.

— In the absence of imputability, the debtor is discharged, regardless of whether the service has become impossible in general (objective impossibility) or only

97 Vasilescu, 2012, p. 67.

for the person in question (subjective impossibility). Subjective impossibility cannot relate to solvency, because the debtor is necessarily responsible for it. A general lack of assets is not a ground for an exemption.

If the impossibility of performing a contract is only temporary, the creditor may suspend the performance of his own obligations for a reasonable time or even can initiate the termination of the contract.

Consequently, termination of contract because of frustration may include the permanent and not imputable impossibility of performance. If the debtor is not at fault for the impossibility of performance, if performance becomes impossible because of circumstances for which he is not responsible, the debtor is released from the contract. This legal consequence only applies if the impossibility affects a substantial part of contractual obligation, otherwise the impossibility through no fault of the debtor only modifies the obligation (the possibility of a proportionate reduction of the performance is opened). In the case of imputability, the contract is not terminated, but the original performance is transformed into damages, and only the performance of the compensation extinguishes the contractual obligation. Attributable impossibility is not a fact that terminates the contract but a fact that modifies it.

6. Serbia, Croatia, Slovenia

6.1. Serbia

6.1.1. Modification of contracts by law

Legislative intervention into an already concluded and existing contractual relationship should be a rare legal phenomenon, prompted only by serious problems threatening to cause grave social implications. In Yugoslavian and Serbian law, intervention into the privity of contract was present but rare. For instance, such laws were enacted in socialist Yugoslavia to combat inflation, and later on in the last decade of the 20th century to address the restitution of citizens' savings in foreign currencies and compensation for seized property.[98]

In recent Serbian legal history (pre-COVID-19 era), the most notable such legislative attempt was the Law on Conversion of Housing Loans Indexed to Swiss Francs adopted in 2019, the declared political aim of which was to finally resolve the issue housing loans indexed to that currency. In short, the Law imposed a *post facto* obligation on banks to convert loans denominated in CHF into loans denominated in EUR at the exchange rate applicable on the day the contract was concluded, to apply a discount of 38% on the amount of the remainder of the debt, and to apply an interest

98 See in more detail Andrejević, 1999, pp. 221–227.

rate not higher than the rate fixed by the Law on Conversion. The law obliged the state to take over from the banks 15% of the costs of conversion.[99]

As in all countries, the National Bank of Serbia introduced a 90-day payment moratorium at the onset of the COVID-19 pandemic, immediately after the special legal order was introduced on March 16, 2020. The addressees were banks and lessors in financial leasing transactions. On the same day, the Government also banned the export of medicines and basic products essential to the population.[100] It was followed by the next decision of the National Bank, by which the moratorium was extended to a period of 60 days from August 1 till September 30, and to payment obligations that became due in July, but with which the debtor was in default.[101] Finally, additional loan repayment facilities were introduced in December, comprising mainly special rules for reprogramming and refinancing loans.[102] In addition, the problem of citizens' frozen prepayments for vacations also surfaced. To address it, the Government adopted a Decree near the end of April that entitled the organizers of travel arrangements to offer replacement packages in lieu of reimbursement that could be used by the traveler until the end of 2021 at the latest.[103]

These recent pieces of emergency legislation were viewed negatively by the literature. In all these cases, the legislature did not apply the regular rules of contract law. Due to what the legislature saw as grave social and political problems, their application was suspended by rules tailor-made to such particular cases.[104] This 'interventionist attitude' of the legislature has been gaining a foothold in recent years, as seen by the increasing number of legislative acts aiming to intervene in the application of laws and regulations.[105] A similar critique can be found present in the literature in relation to the Government Decree on the replacement of travel packages as well.[106]

6.1.2. Judicial modification of contracts (general case)

Outside the context of the *clausula rebus sic stantibus*, judicial intervention into the privity of a contract should be a rarity despite the rules in the SrbLO enabling the court to modify or specify the content of the contract. These prescribe that if the parties agreed on essential elements and left the non-essential elements to agree upon at a later point in time, but failed to reach an agreement subsequently, the court may determine the non-essential elements of the contract, taking into account the parties' prior negotiations and the practice established in their preceding transactions and

99 The Law on Conversion, Articles 4 and 11.
100 See these acts in the Official Gazette No 33/2020. For the comprehensive analysis of the governmental measures introduced in the light of COVID-19 pandemic in the field of contract law see. Đurđević, 2020, pp. 457–475; Mišković, 2020, pp. 587–619; Mišković, 2021, pp. 239–259.
101 See these Decisions of the National Bank in the Official Gazette No. 103/2020.
102 See these Decisions in the Official Gazette No. 150/2020.
103 See this Decree in the Official Gazette No. 63/2020.
104 See. Karanikić Mirić, 2020b, pp. 116–117.
105 For the detailed list of such laws See Karanikić Mirić, 2020b, p. 117.
106 See Karanikić Mirić, 2020c, pp. 102–115.

customary rules.[107] Concerning earnest money, the court may upon the request of the debtor, decrease the amount if it is considered to be excessively high.[108] The court may uphold the usurious contract, upon the request of the aggrieved party, by reducing his or her obligation to a level that the court considers just.[109] Similarly to earnest money, the court may, upon the request of the debtor, decrease the amount of contractual penalty if it is considered excessively high after taking into account the value and importance of the object of the obligation.[110] If one of the parties is entitled to set the time limit for the performance of the obligation and fails to do so, the counterparty may request the court to determine a reasonable time limit for performance.[111] In alternative obligations, the parties may authorize a third party to choose the object by which the obligation will be performed. In case of his or her failure, the choice shall be made by the court.[112] In a wide range of contracts, the court may determine the price (remuneration) if the parties fail to agree thereupon or reduce it if the court considers it too high. This applies to commercial sales contracts,[113] contracts for works,[114] commission agency contracts,[115] commercial agency contracts,[116] brokerage contracts,[117] and shipping contracts.[118] The SrbLO does not have a general rule enabling the court to grant a defaulting debtor an additional deadline or grace period for the performance. However, in case of an installment sale, the court may at the request of the buyer, when it is justified by the circumstances of the case, extend the deadlines for the payment of installments of which the buyer is in default, if he or she provides security for the performance of his or her obligations and if the seller does not suffer damage because of the extension of deadlines.[119]

The possibility of judicial intervention into the parties' consent appears in relation to life-long maintenance contracts as well, which are not regulated in the SrbLO but in the Law on Inheritance. It prescribes that in the case of a maintenance provider's death, his or her spouse and descendants may take over his or her position in the contract. If they refuse, the contract is repudiated and they may claim compensation for the maintenance provided by the deceased. The amount of compensation shall be determined by the court on its own free judgment, taking into account the financial position of both the beneficiary of the maintenance and the heirs of the deceased

107 SrbLO, Article 32 (2).
108 SrbLO, Article 80 (4).
109 SrbLO, Article 141 (3).
110 SrbLO, Article 274.
111 SrbLO, Article 317.
112 SrbLO, Article 406.
113 SrbLO, Article 462 (2) and (3).
114 SrbLO, Article 623 (2).
115 SrbLO, Article 783 (2).
116 SrbLO, Article 806 (2).
117 SrbLO, Article 822 (2) and (3).
118 SrbLO, Article 839.
119 SrbLO, Article 547.

maintenance provider.[120] In the case of altered circumstances, the court may convert the contract on life-long maintenance into an annuity contract for life.[121]

6.1.3. Judicial modification of contracts because of changed circumstances

By the adoption of the Law on Obligations in 1978, the former Yugoslavia became part of the group of legal systems which in the 20th century enacted detailed statutory rules on the repudiation or modification of contracts because of changed circumstances (*rebus sic stantibus*) in the part pertaining to the general rules of contract law.[122] These rules are still being applied in Serbia.

The SrbLO specifies that if, after the formation of the contract, circumstances emerge making the performance of the obligation of either party more difficult, or if because of them the purpose of the contract cannot be realized, in both cases to such a degree that it becomes evident that the contract does not meet the expectations of the contracting parties anymore or it would be unjust to maintain it unchanged – the party having difficulties in performing the obligation or the party being unable to realize the purpose of contract may request its repudiation.[123] The changed circumstances (supervening events), therefore, distort the prospects of performing the obligation as the parties envisaged it at the time of the conclusion of the contract, but do not render it impossible,[124] or frustrate the realization of the cause of contract.[125] However, the party whose position is aggravated (debtor) may not request repudiation of the contract if he or she needed to take into account the possibility of the change of circumstances or could have avoided or surmounted them.[126] The application of the rules on the repudiation of contracts because of supervening events is, therefore, based on the principle of good faith, fair dealing, and the requirement that the debtor act with due diligence.[127] A restriction of major significance is imposed by the rule prescribing that the debtor is declined the right to request repudiation if the supervening events emerged after the time limit for the performance of his or her obligation had lapsed.[128] This rule is also in line with the principle of good faith and fair dealing. In addition, it represents the implementation of a principle developed by Roman law, according to which the default of the debtor makes his or her obligation 'eternal' (*perpetuatio obligationis*), in the sense that the debtor is liable even for a supervening event rendering the performance impossible.[129] However, the SrbLO states that the contract shall not be repudiated if the other party agrees to or proposes an equitable modification

120 Law on Inheritance, Article 205 (2).
121 Law on Inheritance, Article 202 (2).
122 Dudaš, 2015, p. 210.
123 SrbLO, Article 133 (1).
124 Karanikić Mirić, 2020a, p. 49.
125 Dudaš, 2010, p. 161.
126 SrbLO, Article 133 (2).
127 Đurđević in Perović, 1995, p. 262.
128 SrbLO, Article 133 (3).
129 Zimmermann, 1996, 785.

of the relevant terms of the contract.[130] This rule raises the question of whether the court is entitled to intervene in the parties' consent and adjust it to the effect of the supervening events. The wording of the rules implies that the court cannot do that *ex officio*. Neither can the debtor request the modification of the contract directly. The claim of the debtor may only be directed at the repudiation of the contract since it is the primary consequence of supervening events. This means that litigation may not be initiated by the plaintiff's claim for modification of the contract.[131] In the course of the proceedings, the counterparty or respondent may lodge such a request, or it may come from the plaintiff.[132] In fact, the court may also invite the parties to agree on the modification of the contract because of supervening events according to the rules of civil procedure and help them reach a settlement. Moreover, it can offer concrete proposals as to which terms and to what extent they ought to be modified. However, the prerogatives of the court are merely of providing initiative and assistance. The court cannot impose any modification of the contract, and can only confirm the agreement of the parties on the modification of the contract. That, though, requires their cooperation. The debtor cannot force the counterparty to a modification of the contract. Without the agreement of the parties, the only remedy for the aggrieved party is the repudiation of the contract.[133] In the main article of the SrbLO pertaining to the effects of supervening events, the last section, however, fundamentally limits the prospects of repudiating the contract. It prescribes that, upon the request of the counterparty, the court may oblige the plaintiff to compensate the counterparty for an equitable portion of the damage he or she has sustained because of the repudiation of the contract.[134]

The debtor is obliged to notify the counterparty about his or her intention to repudiate the contract without undue delay after he or she is aware of the supervening event. Failing to notify the counterparty does forfeit the right to repudiation, but it does trigger an obligation to compensate the counterparty for the damage he or she might have sustained as a consequence of the failure of the notification.[135]

The SrbLO lists circumstances relevant for the repudiation or modification of the contract: the court bases its decision upon the principles of fair dealing, especially taking into account the purpose of the contract, normal risks of the contract of the kind, public interests, and the private interests of the parties.[136]

Finally, the SrbLO sets out that the default rules on the repudiation of contract because of supervening events: the parties may exclude their application unless it is done contrary to the principle of good faith and fair dealing.[137] It shall be consid-

130 SrbLO, Article 133 (4).
131 Đurđević in Perović, 1995, p. 264.
132 Đurđević in Perović, 1995, p. 265.
133 Karanikić Mirić, 2020d, p. 314.
134 SrbLO, Article 133 (5).
135 SrbLO, Article 134.
136 SrbLO, Article 135.
137 SrbLO, Article 136.

ered that the party acted contrary to this principle if, for example, he or she was in a stronger bargaining position that enabled him or her to adjust the content of the contract in his or her own interest, whereby he or she should have been aware of the prospects of supervening events. The purpose of this rule is, therefore, to enable the parties to exclude the application of the rules on supervening events, which they can do so in the confines of the normal contractual risks.[138]

6.1.4. Frustration of contract

As for the effect of the impossibility of performance on the existence of the contract, the SrbLO differentiates cases of impossibility that are caused by *force majeure* events from the cases that are attributable to either party.

If neither party is at fault for the impossibility of performing the obligation of one party, the obligation of the other party also ceases. However, if the other party performed the obligation or part thereof, he or she is entitled to restitution according to the rules of unjustified enrichment.[139] In case of partial impossibility, the other party may request partial repudiation of the contract if partial performance of the first party's obligations has no interest to him or her. Otherwise, the contract struck by partial impossibility remains effective albeit the other party has a claim to decrease his or her obligation proportionately.[140]

If, however, the impossibility of performing one party's obligation is attributable to the other party, the first party is released from his or her own obligation, but retains his or her claim against the other party, though it shall be decreased by the value of the benefits from the release of his or her own obligation.[141] In addition, the first party is obliged to transfer to the counterparty all rights having effects toward third parties, in relation to the object of his or her obligation that became impossible.[142]

The general rules on the performance of an obligation specify when the performance is considered to have become impossible. The SrbLO prescribes that the obligation ceases when its performance becomes impossible for a reason outside the debtor's scope of liability.[143] The burden of proof for such reasons lies with the debtor.[144] It further specifies that when the object of the obligation is generic property, the obligation does not cease even when all of such property in the debtor's possession perishes for a reason for which he or she is otherwise not liable (the *genera non-pereunt* rule).[145] Nevertheless, if the object of the obligation is generic property that should have been sorted out from a specific quantity of such property, the obligation ceases

138 Đurđević in Perović 1995, 266.
139 SrbLO, Article 137 (1).
140 SrbLO, Article 137 (2).
141 SrbLO, Article 138 (1).
142 SrbLO, Article 138 (1).
143 SrbLO, Article 354 (1).
144 SrbLO, Article 354 (2).
145 SrbLO, Article 355 (1).

if such a specific quantity has perished entirely.[146] If the impossibility is attributable to a third party, the debtor must cede to the creditor the rights he or she may have against the third party.[147]

6.2. Croatia

6.2.1. Modification of contracts by law

Similarly to Serbia, the most important emergency regulation in the pre-COVID-19 period was the 2015 Amendment to the Consumer Credit Act, known as the Law on Conversion. The aim of the Law on Conversion was to exchange the amounts of loans denominated in CHF into loans denominated in EUR at the exchange rate applicable at the time of loan disbursement.[148] The application of the Law on Conversion allegedly caused losses to banks, because of which they initiated arbitration proceedings before the ICSID.[149] During mid-summer 2021, a settlement was reached between the Croatian Government and the majority of the banks which initiated arbitral proceedings.

Croatia also introduced protective measures when the COVID-19 pandemic broke out. The legislator first intervened in the subject matter of travel package arrangements and tourist services, taking into account the importance of tourism for the Croatian economy.[150] The legislator therefore amended the Act on Provision of Tourism Services, enabling travelers to terminate travel package contracts that should have been performed after March 1, 2020 and the issuance of vouchers for non-performed contracts. At the same time, the amendments also included protections for tour operators, since they suspended the travelers' right to terminate the contract upon the expiry of 180 days following the cessation of special circumstances, a special legal regime introduced because of the pandemic.[151] Interestingly, no special legislative measures of compulsory nature have been introduced in other areas of private law albeit different forms of state subsidies were available to overcome hardships.[152] However, all bankruptcy and enforcement procedures were suspended and no legal interest would accrue during the duration of special circumstances.[153]

6.2.2. Judicial modification of contracts (general case)

According to the HrvLO, the court may intervene in the content of the contract in relation to the same legal institutions as those listed in Serbian law. These are the

146 SrbLO, Article 355 (2).
147 SrbLO, Article 356.
148 Law on Conversion, Article 19.c.
149 Ilić, 2019, pp. 509–512; See Mišćenić and Petrić, 2020, pp. 332–350; Mišćenić, 2020, pp. 226–235.
150 Josipović, 2020, pp. 68–69.
151 Josipović, 2020, p. 70.
152 Josipović, 2020, p. 73.
153 Josipović, 2020, p. 71; See COVID-19 Consumer Law Research Group, 2020, pp. 437–450.

choice of object of the performance in alternative obligations,[154] stipulation of the time limit for performance if the entitled party fails to do so,[155] determination of non-essential elements of the contract,[156] reduction of the amount of the earnest money[157] and contractual penalty,[158] convalidation of a usurious contract by equitably reducing the aggrieved party's obligation,[159] extension of time limits for payment of overdue installments in an installment sale contract,[160] and determination or reduction of the price/remuneration in commercial sale contract,[161] contract for work,[162] brokerage contracts[163] and shipping contracts.[164] Finally, the court shall determine the reimbursement to the spouse and descendants of the provider if they cannot take over his or her obligations in a life-long maintenance contract[165] in case of his or her demise.[166]

6.2.3. Judicial modification of contracts due to changed circumstances

The rules[167] of the HrvLO on the right to repudiate a contract because of supervening events are predominantly the same as in the SrbLO. However, there are some major differences. First, Croatian law abandoned frustration with the purpose of the contract as one of the two situations in which supervening events are considered to have legal relevance.[168] Instead, besides the inequality between the performance and counter-performance, the contract may be repudiated if the performance of either party's obligations because of supervening events causes overly high loss.[169] In this regard, the HrvLO slightly differs from the former federal law, in which it sufficed that the performance became more difficult. The HrvLO requires that the performance become excessively onerous.[170]

In contrast, it modified the order of legal remedies. Whereas in the former federal law, as in the effective SrbLO, the party prejudiced by the supervening events may lodge a claim only for the repudiation of the contract, whereby the parties may agree to modify it in the course of the proceedings; under the HrvLO, the aggrieved party's

154 HrvLO, Article 35.
155 HrvLO, Article 176.
156 HrvLO, Article 253 (2).
157 HrvLO, Article 304 (4).
158 HrvLO, Article 354.
159 HrvLO, Article 329 (3).
160 HrvLO, Article 469.
161 HrvLO, Article 384 (3).
162 HrvLO, Article 613 (2).
163 HrvLO, Article 844 (2).
164 HrvLO, Article 861.
165 HrvLO, Article 585 (4).
166 HrvLO, Article 588 (5).
167 HrvLO, Articles 369–372.
168 Petrić, 2007, pp. 143–144.
169 HrvLO, Article 369 (1).
170 Josipović and Nikšić, 2008, p. 85.

claim may initially be oriented to modification of the contract.[171] He or she can make a disposition in the claim as to whether a modification or repudiation of the contract will be requested from the court.[172] Therefore, revision of the contract has primacy over its repudiation.[173] Such a rule was envisaged by the General Trade Usages from 1954, but not by the former federal law.[174]

In comparison to the former federal law, the HrvLO enumerates somewhat different circumstances taking into account what the court decides, i.e., whether a claim for repudiation or modification of a contract shall be upheld. The court must rely in the decision on the principle of good faith and fair dealing (principles of fair trade in the former federal law), taking into account the purpose of the contract, allocation of risks according to the contract or a statute (instead of normal risks of the contracts of such kind), duration and effects of the supervening effects (not an element according to the formal federal law) and the interests of both parties (public interest is no more a circumstance that needs to be taken into account).[175]

Taking into consideration these circumstances the court modifies the contract to the least possible extent, to achieve compliance with the initial agreement of the parties to the greatest possible extent. The literature suggests that the court is mandated by the HrvLO to modify equitably the contract whenever it is possible, to avoid the repudiation of the contract.[176]

6.2.4 Frustration of contract

In terms of the effect of impossibility of performance on the existence of a contract, the HrvLO retained the structure and logic of the rules of the former federal law on obligations.[177] However, there is also a major difference here. The HrvLO explicitly states that a *force majeure* event must be an external event emerging after the formation of the contract, but before the obligation became due, that could not have been foreseen at the time of the formation of the contract, nor could the party relying on the event prevent, evade or surmount it, whereby neither party could be held responsible for its emergence.[178] Defining precisely the attributes of a *force majeure* event triggering impossibility of performance bears greater merit, thus a similar legislative consideration is advisable in relation to the SrbLO as well.

Concerning the rules when the performance of an obligation becomes impossible, the HrvLO has not deviated from the rules of the former federal law.[179]

171 Slakoper in Gorenc, 2014, p. 610.
172 HrvLO, Article 369 (1). *in fine*.
173 Josipović and Nikšić, 2008, p. 85.
174 Krulj in Blagojević, 1980, p. 354.
175 HrvLO, Article 371.
176 Slakoper in Gorenc 2014, p. 614.
177 HrvLO, Articles 373–374.
178 HrvLO, Article 373 (1).
179 HrvLO, Articles 208–210.

6.3. Slovenia

6.3.1. Modification of contracts by law

Slovenia has not yet adopted a special law by which the legislature would modify *post facto* the content of contracts on loans in CHF, which is the most notable example of legislative intervention in the privity of contract in the region in recent years. Still, a legislative draft has been made available to the public, titled Draft Law on Relations between Lenders and Borrowers Concerning Credit Agreements in Swiss Francs. It was scrutinized by the European Central bank.[180] Eventually, a special law was adopted in 2022 regulating the mandatory change of consumer loans in CHF. This is the Act on the Limitation and Distribution of Currency Risk between Lenders and Borrowers of Loans in Swiss Francs. However, even before this Act entered into force, the Constitutional Court stayed its application. It is, therefore expected, that the Act will probably also be repealed.

To mitigate the impact of the restrictions caused by the COVID-19 pandemic, the Slovenian legislature adopted the Law on Intervention Measures for the Extension of Payment Obligations of Borrowers in March 2020. The law prescribes a deference of repayment of installments for 12 months,[181] based on the nature and extent of the debtors' financial hardships and his or her plan to overcome them.[182] The same law specifies interventive measures in travel package contracts as well.[183]

6.3.2. Judicial modification of contracts (general case)

The SvnCO envisages the possibility of the courts to intervene in the content of the contract within the confines of the same legal institutions as in the former federal law. These are the determination of non-essential elements of a contract,[184] reduction of the amount of earnest money[185] and contractual penalty,[186] convalidation of a usurious contract by readjusting the value of performance or counter-performance,[187] setting an appropriate deadline for performance of the obligation, in case the party entitled to set it failed to do so,[188] choosing between the objects of performance in alternative obligations, if the entitled third party failed to,[189] setting or reducing the

180 Opinion of the European Central Bank of 18 July 2019 on the conversion of Swiss franc loans (CON/2019/27).
181 Law on Intervention Measures for the Extension of Payment Obligations of Borrowers, Article 2 (1).
182 Law on Intervention Measures for the Extension of Payment Obligations of Borrowers, Article 3.
183 Law on Intervention Measures for the Extension of Payment Obligations of Borrowers, Article 35.
184 SvnCO, Article 22 (2).
185 SvnCO, Article 65 (4).
186 SvnCO, Article 252.
187 SvnCO, Article 119 (3).
188 SvnCO, Article 292.
189 SvnCO, Article 387.

price or remuneration in commercial sales contracts,[190] contract for works,[191] commission agency contract,[192] contract on mandate,[193] brokerage contract,[194] shipping contract.[195] In addition, the court also may requalify the lifelong maintenance contract into annuity for life, if circumstance change[196] and set at its own discretion the compensation for the provided maintenance, if the contract is terminated because of the maintaining party's death, under the condition that his or her heirs do not want to take over his or her contractual position.[197]

6.3.3. Judicial modification of contract because of changed circumstances

The SvnCO for the most part took over verbatim from the former federal law the rules on repudiation and modification of a contract because of supervening events.[198] Only the list of circumstances to be taken into account by the court has changed to a smaller extent. The SvnCO prescribes that the court takes into account the purpose of the contract, the risks usual in contracts of the same kind, and the balance of the interests of the parties.[199]

The literature points out that actions for the repudiation of contracts because of changed circumstances are rarely, if ever successful.[200]

6.3.4. Frustration of contract

The rules on the effects of impossibility of performance, on the existence of bilateral contracts, have also been taken over verbatim from the former federal law into the SvnCO.[201] However, a new section has been introduced which regulates cases when the impossibility of the performance of the obligation is attributable to the debtor. It prescribes, that if the performance of the obligation of one party in a bilateral contract becomes impossible because of an event for which the same party bears responsibility, the other party may choose between a claim for compensation for damage because of non-performance or to rescind the contract and demand compensation for damage.[202]

190 SvnCO, Article 442 (2) and (3).
191 SvnCO, Article 642 (2).
192 SvnCO, Article 800 (2).
193 SvnCO, Article 824 (3).
194 SvnCO, Article 846 (2) and (3).
195 SvnCO, Article 863.
196 SvnCO, Article 562 (2).
197 SvnCO, Article 563 (4).
198 SvnCO, Articles 112–115.
199 SvnCO, Article 114.
200 See for example the judgements of the Slovenian Supreme Court No. III Ips 154/2015, and that of the High Court of Ljubljana Nos. I Cpg 573/2015 and II Cp 829/2912. In all these cases the claims for the termination of the contract have been dismissed. Cited by Možina and Vlahek 2019, point 272.
201 SvnCO, Articles 116–117.
202 SvnCO, Article 117 (3).

Similarly, the rules on the impossibility of performance also correspond literally to the rules of the former federal law.[203]

7. Slovakia

7.1. Overview

Slovak law does not regulate the effects of a change of circumstances (*zmena pomerov*) on contractual relations in a general way.[204] The impact of such a change is to some extent regulated rather casuistically.

Thus, the impact of a change of circumstances is regulated in Slovak law in particular in connection with the performance of a future contract,[205] with the subsequent impossibility of performance,[206] with the frustration of the choice of performance,[207] with the frustration of the purpose of the commercial contract[208] and with the commercial contract of deposit.[209] In these cases, the change of circumstances usually leads directly to the termination of the obligation; the court is not given the possibility to modify the contract so that it can be at least partially preserved. Outside the scope of the law of obligations, the change of circumstances is of relevance in connection with easements.

7.2. Judicial and legislative modification of contracts

As can be seen from the above, in the event of a change of circumstances, the court is not allowed to interfere with an existing contract, i.e., neither the SvkCC nor the SvkCommC provides for the court to modify the terms of an existing contract without the consent of the parties. The only exemption – which, however, relates to the law of property rather than to the law of obligations – is § 151p of the SvkCC, according to which if a change in circumstances results in a gross disproportion between the easement and the benefit of the person entitled, the court may order that the easement be limited or abolished in return for adequate compensation. If, because of the change in circumstances, the easement cannot be fairly insisted upon, the court may order that monetary compensation be provided in lieu of the easement.

In contrast, legislative interference is not excluded, e.g., the SvkCommC directly provides for it by considering a performance that was prohibited by law after the conclusion of the contract as an impossible performance.[210]

203 SvnCO, Articles 329–331.
204 Kanda, 1966, p. 154.
205 SvkCommC, § 50a; SvkCC, § 292 (5).
206 SvkCommC, § 575 et seq.; SvkCC, § 352 et seq.
207 SvkCC, § 561 para. 2.
208 SvkCommC, § 356.
209 SvkCommC, § 518.
210 Ovečková, 2017.

7.3. Frustration of contracts

As mentioned above, Slovak law regulates frustration of contract specifically in several situations. The common feature of these cases is that frustration is caused by a change of circumstances that occurred after the conclusion of the contract, with the consequence usually (although not always) being the termination of the obligation.

7.3.1. Future contract

According to § 50a (3) of the SvkCC, an obligation to enter into a future contract is extinguished if the circumstances on which the parties based the obligation have changed to such an extent that it cannot fairly be required to enter into the future contract. Similarly, according to § 292 (5) of the SvkCommC, an obligation to enter into a future contract or to make up a deficiency in the content of a contract also lapses if the circumstances on which the parties apparently relied when the obligation arose have changed to such an extent that the obliged party cannot reasonably be required to enter into the contract; however, the lapse only occurs if the obliged party has notified the change of circumstances to the party entitled without undue delay. Thus, under both regulations, the change must be material,[211] and there must be a causal link between the circumstances in which the contract was concluded and its conclusion. At the same time, it is admitted that the changed circumstances may also consist in an increase in the value of the object of the future contract.[212] However, the change in circumstances cannot consist in the impossibility of performance. If the conclusion of the future contract has become impossible, then the provisions on the termination of the obligation because of the subsequent impossibility of performance apply to the case.

7.3.2. Subsequent impossibility of performance

Subsequent impossibility of performance (*následná nemožnosť plnenia*) is one of the general grounds for the termination of an obligation under the SvkCC. This means that any obligation can be extinguished by reason of a subsequent impossibility of performance.

Pursuant to § 575 (1) and (2) of the SvkCC, if performance becomes impossible, the debtor's obligation to perform is extinguished; however, performance is not impossible, in particular, if it can also be performed under more difficult conditions, at greater expense or only after an agreed time period has elapsed. This also applies to commercial relations. It follows from this provision that the so-called economic impossibility or subjective impossibility of performance does not constitute a case of impossibility of performance and is therefore not a ground for the termination of the obligation. In contrast, despite the text of the law, the legal literature takes the view that even such an economic or subjective impossibility of performance may exceptionally lead to the termination of an obligation if the performance of the

211 Števček, 2019; Fekete, 2018; Ovečková, 2017.
212 Fekete, 2018.

obligation would be extremely burdensome, extremely costly, etc.[213] At the same time, it is pointed out that demanding performance in such cases would be an exercise of a right contrary to good morals pursuant to § 3 (1) of the SvkCC, and thus would not enjoy legal protection.[214] Other opinions say that there is no extinction of the obligation, but demanding performance would be unsuccessful in court anyway because it would constitute an exercise of a right contrary to good morals.[215]

Thus, performance is considered impossible if its provision is objectively and permanently impossible.[216] The reason for such impossibility may be different: for example, it may be both force majeure (*vyššia moc*) or *casus fortuitus* (*náhoda*); according to case law, the impossibility may be factual as well as legal.[217] According to case-law, it is a case of impossibility of performance if the seller has undertaken to hand over an individually determined asset and subsequently alienates this asset to a third party; the alienation of the asset to the third party renders the fulfillment of his or her obligation toward the buyer impossible and thus extinguishes it.[218]

The consequence of the impossibility of performance is therefore the extinction of the obligation. If it was a mutual obligation, according to the legal literature, the obligation of the other party is also extinguished. If that party has already performed under that obligation, then it is entitled to reimbursement of the performance on the grounds of unjust enrichment (*condictio ob causam finitam*).[219] However, if the other party has borne the risk of accidental destruction of the thing (for example, if the creditor was in default), then its obligation is not extinguished.[220] In non-commercial relations, if the impossibility of performance was caused by fault, liability for damages caused by the termination of the obligation because of the impossibility of performance is not excluded. In commercial relations, the regulation of § 353 of the SvkCommC applies, according to which an obligor whose obligation has been extinguished because of impossibility of performance is obliged to compensate the other party for the damage, unless the impossibility of performance was caused by circumstances excluding liability.

If the impossibility concerns only part of the performance, a distinction must be made as to whether the nature of the contract or the obvious purpose of the performance implied that the creditor would or would not have an interest in only part of the performance.[221] In the former case, the obligation will be extinguished only in part, but the creditor has the right to rescind the entire contract. In the second case, the entire obligation is extinguished unless the creditor, without undue delay, after

213 Sedlačko, 2019.
214 Sedlačko, 2019.
215 Fekete, 2018.
216 Sedlačko, 2019.
217 R 109/1998.
218 Supreme Court of the Slovak Republic, case No. 4 Cdo 46/2009.
219 Sedlačko, 2019.
220 Fekete, 2018.
221 SvkCC, § 575 (3).

becoming aware of the impossibility of part of the performance, notifies the debtor that he or she insists on the remainder of the performance. In commercial relations, the consequence of partial impossibility is regulated differently: the creditor may withdraw from the remainder of the contract only if the remaining performance would not be of economic importance to him or her in view of its nature or in view of the purpose of the contract, which is apparent from its content or was known to the other party at the time the contract was concluded.

7.3.3. Frustration of the purpose of the contract

According to § 356 (1) of the SvkCommC in commercial relations, if, after the conclusion of the contract, as a result of a substantial change in the circumstances in which the contract was concluded, the essential purpose of the contract, which was expressly contained in the contract, is frustrated (*zmarený*), the party affected by the frustration of the purpose of the contract may withdraw from it. However, a change in the circumstances shall not be deemed to be a change in the financial circumstances of a party and a change in the economic or market situation.

The legal literature is of the opinion that the essential purpose of the contract must be frustrated, that is to say, a purpose that makes it clear that, but for its existence, the party would not have concluded the contract. It is irrelevant for what reasons the essential purpose of the contract was frustrated. At the same time, the essential purpose of the contract must be expressly stated. If this condition is not fulfilled, the contract cannot be rescinded based on § 356 of the SvkCommC. It is therefore not sufficient that such a purpose was known to the parties at the time of the conclusion of the contract or can be inferred from the nature of the obligation.[222]

Thus, withdrawal from a contract gives a party the opportunity not to perform a contract that is already impracticable for it. In contrast, for the other party not to be harmed by withdrawal from the contract by the withdrawing party, the withdrawing party must compensate it for the damage it incurs by withdrawing from the contract.[223]

7.3.4. Frustration of the choice of performance

Pursuant to § 561 (2) of the SvkCC, if an obligation can be discharged in several manners according to the choice of one of the parties and the accidental extinction of a thing has frustrated that choice, the party who had the right to choose may withdraw from the contract. According to the legal literature, this is the case where the extinction of the thing reduces the manner of performance to a single alternative, i.e., where the party entitled no longer has even the possibility of choosing between two performances.[224]

222 Ovečková, 2017.
223 SvkCommCC, § 357.
224 Fekete, 2018.

7.3.5. Contract of deposit

A special case of change of circumstances is regulated by § 518 of the SvkCommC, according to which, even if the depositee undertook in the agreement on the deposit to care for the good in a certain manner, he or she may deviate from this manner, if circumstances arise which the depositee could not foresee at the time of conclusion of the agreement, and which make the performance of the obligation unreasonably difficult for him or her. The depositee shall notify the depositor in good time of the occurrence of those circumstances. Similarly, pursuant to § 523 (1) of the SvkCommC, the depositee is entitled to require the depositor to take possession of the good deposited without undue delay even before the expiry of the agreed period of deposit if further performance of the obligation would cause the depositee undue hardship which he or she could not foresee at the time of conclusion of the contract, or if a third party seeks the delivery of the thing deposited.

8. Concluding remarks

In the classical scientific literature of civil law, it was stated the 'Every subsequent judicial modification of a contract is a deprivation of rights and a violation of the law, unless the law itself contains specific provisions which exclude or modify the legal effect of the contract in the event of certain ex post facto circumstances.'[225]

Legislative modification of contracts has an exceptional character in all the analyzed legal systems, however, every state considered here had such experiences, especially related to some crisis situation. For example, in the Czech Republic such interventions happened during transformation of the economy after the fall of the communist regime or during the pandemic crisis relating to the spread of the COVID-19 disease. Other states, such as Hungary adopted several acts to modify loan contracts, for the special cases in which the loans were contracted in foreign currency. The same happened in Serbia and Croatia, in the context of loans in Swiss Francs. We can observe that it is accepted that crisis justifies such an intervention, but this intervention is not limitless. For example, the Hungarian constitutional practice observed that the strict conditions for judicial modification of the contracts must be observed when a legal act provides for mass modification of contracts: only when an extraordinary change in circumstances occur it is acceptable to interfere in contracts by a legislative act to rebalance those contracts, otherwise such an intervention is an unjustifiable alteration of private autonomy.

Regarding judicial modification of contracts, all the legal systems, except for that of Slovakia, implemented the judicial modification of contracts for unforeseen changes in circumstances (*clausula rebus sic stantibus*), under similar conditions, even if there are slight differences between the requirements envisaged by the legislator to amend or cease contracts. In some countries (the Czech Republic, Romania) there

225 Szigeti, 1938, 567.

is an obligation for the debtor to initiate the renegotiation of the contract, before addressing the court. What is under discussion in the Czech Republic, is the question whether a judge may modify the contract also for the past, the tendency being the interpretation that the judge can alter the contract also for the past, from the moment when the circumstances have changed. On the contrary, in Hungary the modification of the contract is possible only from the moment at which the request to adapt the contract is lodged with the court or from a later date determined by the judge.

A third issue is frustration of contract, when the performance effectively becomes impossible. If neither of the parties is liable for the performance becoming impossible (objective frustration of the contract), in general monetary reimbursement shall be provided for the performance rendered before the termination of the contract. This is a just solution to keep the balance between the parties who must support equally the consequences of contract frustration. If the other party did not provide the counter-performance corresponding to the monetary service already performed, the monetary service should be returned. A specific case is when one of the parties is liable for the performance becoming impossible. In this situation, the other party shall be released from the performance of the obligation arising from the contract and may claim compensation for the damage caused to him or her because of the breach of contract.[226] If both parties are liable for the performance becoming impossible, the contract shall terminate, and the parties may claim damages from each other *pro rata* to their contribution.

Frequently objective frustration is related to the fortuitous destruction of a good. In this situation, no damages are granted because the non-performance is not because of a breach of contract. In the case of synallagmatic contracts, the reciprocity between the considerations necessarily means that, when one of the contractual obligations has forcibly become impossible to perform, the other consideration ceases to exist: in other words, the legal relationship is terminated. Each contracting party has undertaken a reciprocal and interdependent service but if one of them is impossible, the reason to maintain the corresponding obligation disappears.

In the matter of property transfer contracts, in the absence of a clause to the contrary, as long as the good is not handed over, the risk of the contract remains with the debtor of the delivery obligation (even if the property, or title was transferred to the acquirer in the legal systems which perceive the sales agreement as a consensual and not as a real contract). In case of fortuitous loss of the good, the debtor of the obligation to deliver the good loses the right to consideration, and if he or she has received one, is obliged to return it.

For example, A and B enter into a contract of sale. B paid the price. The good was to be handed over within ten days but perished fortuitously before being handed over (the sale of a painting destroyed in a fire before handing over, but after the sale is completed). According to the law, the risk of the contract is borne by the debtor of the obligation to deliver. Consequently, A bears the risk of the contract and will have to

226 See Chapter XIII for further details.

return to B the price received. The solution is justified by the fact that the seller can no longer perform its service. Therefore, it would not be reasonable to claim the price. The risk of the contract, in this context, designates a specific way of termination.

However, the overdue creditor (who disrespected the term to take over the good) assumes the risk of accidental loss of the good (*mora creditoris*). Depending on the legal system analyzed, there can be a rule that a creditor cannot be released even if he or she proves that the good would also have perished if the obligation to deliver would have been executed in time.

If in the above-described situation, B has not taken over the painting in time, being notified by A to take over the canvas because the contractual term has been exceeded, then the risk passes to B. If the good perishes, then B no longer has to return the price received. The fact that the painting was destroyed in the fire and in possession of A is of no importance. The rule can be generalized by the phrase *res perit debitori*: the risk is borne by the debtor of the obligation that has become impossible to execute. For example, A bought a theater ticket. Nevertheless, the show is cancelled because of the illness of one of the main actors. The theater is the debtor of the obligation impossible to execute because the theatrical presentation will no longer take place. A has the right to a refund of the ticket price.

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