| Chapter IV |

Interpretation

1. General considerations

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

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

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

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

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

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

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

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

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

2 Spencer, 1973, pp. 108–113.

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

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

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

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

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

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

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

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

1.4. Merger clauses

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

1.5. Smart contracts

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

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

2. The Czech Republic

2.1. Overview

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

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

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

2.3. Priority of the empirical interpretation over the normative one

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

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

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

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

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

2.4. Normative interpretation

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

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

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

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

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

2.5. Gap-filling by interpretation

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

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

2.6. Merger clauses

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

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

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

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

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

2.7. Smart contracts

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

3. Hungary

3.1. The role of declaration theory and objective interpretation

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

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

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

3.2. Gap-filling by general clauses

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

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

3.3. The 'contra proferentem' rule

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

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

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

3.4. Merger clauses

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

3.5. Smart contracts

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

32 HunCC, § 6:86 (2).

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

4. Poland

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Romania

5.1. General context

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

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

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

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

5.2. General rules of contract interpretation

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

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

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

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

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

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

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

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

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

5.3. Subsidiary rules of interpretation

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

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

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

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

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

6. Serbia, Croatia, Slovenia

6.1. Serbia

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

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

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

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

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

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

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

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

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

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

6.2. Croatia

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

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

6.3. Slovenia

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

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

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

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

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

7. Slovakia

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8. Concluding remarks

8.1. Consent and interpretation

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

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

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

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

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

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

8.2. Will, declaration, and consent

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

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

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

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

8.3. Specific rules and doctrines

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

8.4. Gap-filling by interpretation

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

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