Chapter XII

Claims for Performance

1. General considerations
by Attila Menyhárd
2. The Czech Republic
by Milan Hulmák and Markéta Zimnioková
3. Hungary
by Attila Menyhárd
4. Poland
by Piotr Stec
5. Romania
by Emőd Veress
6. Serbia, Croatia, Slovenia
by Attila Dudás
7. Slovakia
by Milan Hlušák
8. Concluding remarks
by Attila Menyhárd

1. General considerations

1.1 The binding force of contracts

Contracts are legally binding promises. That is, legal enforcement is the *differentia specifica* of the contract as a promise. Whether a promise is legally binding or not depends on the qualification of the promise. The preconditions of such qualifications are addressed in Chapter IV. The binding force of contract implies that if the party failed to perform the contract, there are remedies provided to the aggrieved counterparty. The remedies for breach of contract aim at bringing the aggrieved party into a position, as if the contract had been performed. The most important factor determining the structure of remedies for breach of contract is the availability of performance in kind for the aggrieved party. Historically, legal systems could follow two paths and, accordingly, two different paradigms in developing the system of remedies for breach of contract. The initial paradigm of English common law was that the remedy for breach of contract could only be liability for damages, but the courts rejected in kind performance on the ground that they would not interfere with party autonomy.[1] This system was similar to that of Roman law. This was later changed by introduction of the notion of equity. Specific performance has become available as an equitable remedy. The Chancery, however, has never developed any coherent doctrine or clear

1 Holmes, 1991, p. 301.

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guidelines for ordering specific performance. It seems likely that the Chancellor granted specific performance simply because it was in accordance with a good conscience to do so and never attempted to decree specific performance of all contracts: the granting of this relief might vary with the circumstances of each case[2] and thus, it remained exceptional. This origin of specific performance in English law determined its nature: it remained a discretionary remedy granted only upon the plaintiff's request, and only if the court found it just to do so, but the plaintiff was not entitled to claim specific performance as of right.[3] One could assume that specific performance is, in the light of the aim and function of remedies for breach of contract, the proper method of enforcing contracts since it provides the promisee the performance he or she had bargained for. There are, however, some restrictions applied in legal systems on specific performance. These limits may be because of the fact that courts try to conserve resources and are reluctant to order specific performance if supervision of performance would be too difficult or costly. Another policy for implementing such limits may come from protecting individual liberty. This may be the case where the performance of the contract involves personal services.[4]

In continental legal systems, the binding force of contract means that if a party to a contract failed to keep its promise, the aggrieved counterparty has the right to claim the enforcement in kind. This approach was the result of elevating the principle of performance in kind, originally provided by the law of Justinian for *dare*[5] obligations (the transfer of real rights), to the level of a general remedy. This approach complies with the moral principle stating, that promises are to be kept simply because they are promises and the choice of the debtor to buy off its duty to keep its promise would be incompatible with this moral tenet. This would not take into account the interests of the promisee either, who surely had the good reason to request the contractual promise as a counter-value for its own obligation. Unavailability of specific performance would also compromise the mutual trust inherent to society since the interests of the promisee in many cases would not be protected properly by an obligation to pay. There are idiosyncratic values and there are transactions where the aim of the parties is not purely to make a profit. In absence of the possibility of enforcing performance in kind, the promisee would not be able rely on that he or she can claim, and also get what he or she has bargained for, if the promisor failed to perform his or her obligations voluntarily.[6] This was also the main consideration that led the Chancery to amend the remedies provided by common law and award specific performance in certain cases. In commercial transactions, the interests of the promisee can for the most part be protected properly with awarding monetary remedies either by enabling him or her to gain a substitute performance on the market with a cover transaction or by awarding him or her the net gains that he or she lost because of non-performance.

2 Jones and Goodhart, 1996, pp. 6, 8.
3 Jones and Goodhart, 1996, pp. 6, 8.
4 Collins, 1993, p. 392.
5 Szászy, 1943, p. 17; Zimmermann, 1996, p. 772.
6 Fried, 1981, p. 17.

1.2. Performance in kind vs damages

In spite of the completely different paradigms, legal systems developed – and continue to point – in the same direction. Specific performance shall be awarded when idiosyncratic values underlie the protection of interests of the obligee via awarding performance in kind. Damages should be awarded if there are no such values involved or when enforcing performance is not possible. In common law the line of development points from damages (considered a main rule as opposed to specific performance, as an exception) while in continental law from specific performance to damages. In continental legal systems the doctrines of impossibility of performance or frustration of purpose convert the claim for performance into a claim for damages. If the promised performance is available on the market, an obligation can be imposed upon the obligee to cover its needs by a substitute transaction which also results in the claim being restricted to damages instead of performance in kind.

The CISG provides a compromise solution as to specific performance. According to Article 28 of the CISG if, in accordance with the provisions of the Convention, one party is entitled to require performance of any obligation of the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by the Convention. This is a compromise, which does not solve the issue of specific performance by substantive rules but simply shifts it, to be resolved by the *lex fori* and the courts. Both the UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law provide explicit provisions regarding the performance of non-monetary obligations. Article 7.2.2 of the UNIDROIT principles provides, that where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless performance is impossible in law or in fact; the performance or, where relevant, enforcement is unreasonably burdensome or expensive; when the party entitled to performance may reasonably obtain performance from another source; when performance is of an exclusively personal character; or the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance. Article 9.102 of the PECL provides that the aggrieved party is entitled to specific performance of an obligation other than one to pay money, including having a defective performance remedied. Specific performance cannot, however, be obtained where the performance would be unlawful or impossible; or the performance would cause the obligor unreasonable effort or expense; or the performance consists in the provision of services or work of a personal character or depends upon a personal relationship, or the aggrieved party may reasonably obtain performance from another source. Paragraph 3 of Article 9.102 provides that the aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance. Both the UNIDROIT principles and the PECL seem to find a compromise in a solution admitting enforced performance as a main rule and creating exceptions for specific cases.

1.3. Performance in kind and efficient breach of contract

Availability of performance in kind is an important factor of assessing efficient breach of contract. The availability of specific performance may prevent the efficient breach. From a point of view of economic analysis, breach of a contract in some cases may be more efficient than performing it. The breach is more efficient than performance when the costs of performance exceed the benefits to all parties. According to the theory of efficient breach, a unilateral breach of contract shall not only be permitted but even encouraged where the party in breach found a more profitable opportunity to invest the resources that would otherwise be dedicated to the performance provided that he or she is able to compensate the aggrieved party. According to this theory, the precondition of allowance of a breach is that the breaching party has to be willing and able to compensate the promisee for his full expectancy loss and still be able to realize gains from the new opportunity. All of this infers that the breach is Pareto superior, that is to say, as the result of the breach nobody is worse off and some are better off.[7] The breach is still efficient if the breaching party is in the position to compensate the aggrieved party while still being better off (Kaldor–Hicks efficiency). Even if there are also strong arguments against the doctrine of efficient breach,[8] in commercial transactions this is a reality, which seems to be quite logical and inevitably makes some sense.[9] One of the main suggested strong limitations of this doctrine is the protection of interests based on idiosyncratic non-market values or non-compensable preferences which is also the main policy behind the availability of performance in kind.

Thus, efficient breach may be supported in commercial transactions where mostly the loss of the aggrieved party can be compensated in money and where, in most of

7 Trebilcock, 1997, p. 142. A widely cited and discussed four-players-example for the illustration of the paradigmatic situation of efficient breach has been created by Peter Linzer as follows. Assume that Athos owns a woodworking factory capable of taking one or more major projects. He contracts to supply Porthos with 100,000 chairs at $10 per chair, which will bring Athos a net profit of $2 per chair, or $200,000 on the contract. Before any works takes place, Aramis, who sells tables, approaches Athos. Although there are several chair factories in the area, only Athos's factory can make tables too. If Athos will supply Aramis with 50,000 tables, Aramis will pay him $40 per table. Athos can produce the tables for $25, so he can make a net profit of $750,000 if he uses his factory for Aramis's tables. But to do so, he must breach his contract with Porthos. There are other chair factories, and Porthos will be able to get the chairs from one of them – for example, from D'Artagnan's. Let us assume that because of his distress situation Porthos will have to pay D'Artagnan 20% more than Athos's price for comparable chairs, and that Porthos will sustain $100,000 in incidental administrative costs and consequential costs such as damages for delay to his customers. Even with these costs, Porthos will lose only $300,000 because of Athos's breach, and Athos can reimburse him in full and still make $450,000 profit, over twice the profit from his contract with Porthos. Linzer, 1981, pp. 114–115.

8 One objection to this theory is that it 'encourages uncivil, unilateral, uncooperative attitudes towards contractual relationship' and that 'it deprives the non-breaching party of the possibility of sharing in the gains from the new opportunity presented to the breaching party, which a negotiated release from an entitlement to specific performance would probably engender.' Trebilcock, 1997, p. 142.

9 Macneil, 1982, p. 957; Collins, 1999, p. 119.

the cases, there is a substitute performance available on the market. That is why there is a two-step approach suggested in legal scholarship, where in each of the cases, the courts first shall compare the efficacy of monetary damages with that of specific performance paying attention especially to idiosyncratic interests. In commercial transactions involving tangible assets this test normally results in favoring monetary damages contrasting to specific performance. In non-commercial transactions, the promisee often has idiosyncratic values that are to be protected by the law. The recognition of such values should result in preferring specific performance to monetary damages because that is the more efficient solution.[10]

1.4. Specific performance and other claims for performance

Specific performance, that is, imposing an obligation with a judgment upon the defendant to act as it was required by the contract is not the only way of claiming performance. If the obligation, the defendant failed to comply with, was to give a declaration, such a declaration can be replaced by the judgment of the court. In a way, the replacement of a juridical act with a judgment may be seen as a specific form of performance in kind, because as the result of such a judgment the situation is the same as if the contract had been performed.

In context of defective performance, legal systems normally provide remedies like repair and replacement for the obligee either with a general rule or as a remedy in the context of sale of goods. Repair and replacement also aim at providing performance to the party, as it had been promised by the obligor, even though they are not means of specific performance, at least not in the narrow sense.

2. The Czech Republic

2.1. Overview

Under an obligation, a creditor has the right to a particular performance as a claim from the debtor, and the debtor has the duty to satisfy that right by discharging the debt.[11] The creditor may claim such particular performance.

2.1.1. Performance

A creditor may not be forced to accept any performance, other than what pertains to his or her claim, and a debtor may not be forced to render, against his or her will any performance, other than what he or she owes according to the contract. The same applies to the place, time and manner of discharge of contractual obligations.[12]

There are some exceptions to above mentioned principle. Pursuant to § 1930 paragraph 2 of the CzeCC if a debtor offers a partial performance, the creditor must

10 Linzer, 1981, p. 131.
11 CzeCC, § 1721.
12 CzeCC, § 1910.

accept it, unless it is contrary to the nature of the obligation or the purpose of the contract, provided that such a purpose was at least obvious to the debtor. Another example is § 2628 of the CzeCC. A client does not have the right to refuse to take over a structure because of small, isolated defects which, by themselves or in conjunction with others, neither functionally or aesthetically prevent the use of the structure, nor substantially hinder its use.

However, the creditor may agree to accept something other than what pertains to his or her claim (*datio in solutum*). It is unclear what the nature of *datio in solutum* is under Czech law. Some authors conclude it is an agreement on a change in the content of the obligation, while others are of the opinion that it is an agreement on a specific manner of performance. We adhere to the opinion that the will of the parties is not to agree on any change in their rights and duties, it rather signifies the extinction of the obligation by a performance that is different to the one initially stipulated.[13]

The debtor can also endeavor to offer something other than what pertains to the claim of the creditor by *datio solutionis causa*. *Datio solutionis causa* is not an alternative to what the debtor owes, instead it is an instrument by which the creditor may satisfy his or her claim. The debt is not discharged by such an offer. It is discharged when the creditor obtains the target performance.[14]

2.1.2. Right to withhold performance

Where the parties are to perform mutually and concomitantly, a performance may only be required by the party which has already discharged the debt or is willing and able to discharge the debt simultaneously with the other party.[15]

A party who is to perform in advance in return for a counter-performance may withhold such a performance until the counter-performance is discharged or ensured to him or her, but only if the counter-performance is jeopardized by circumstances which occurred in respect of the counterparty, of which he or she was not, and should not have been, aware at the conclusion of the contract.[16] It is also possible to cancel the contract upon the expiry of the additional time limit within which the debt is not discharged or performance is not ensured.[17]

2.2. Exclusion of a claim for performance

Any particular performance may be impossible. In such a case it is obvious that it cannot be required. In some other cases, the creditor may require certain performance, but it is impossible to enforce such performance directly (e.g., when personal performance is involved). There is no exception from the binding force of contracts when circumstances change to the extent that the performance arising from the

13 Šilhán in Hulmák et al., 2014, p. 848.
14 Šilhán in Hulmák et al., 2014, p. 849.
15 CzeCC, § 1911.
16 CzeCC, § 1912 (1).
17 CzeCC, § 1912 (2).

contract becomes more onerous for one of the parties[18] unless there is so-called hardship involved (see more below).[19]

2.2.1. Impossibility of performance

A claim for performance is excluded if it is impossible for the debtor to perform the contract. The CzeCC recognizes two types of impossibility – initial impossibility (*počáteční nemožnost plnění*) and subsequently occurring impossibility (*následná nemožnost plnění*).

Initial impossibility results in the contract being null and void (*absolutní neplatnost*), while subsequently occurring impossibility results in the extinction of the obligation.

2.2.1.1. Initial impossibility

If the contract requires the provision of a performance which is impossible from the outset, that contract is null and void.[20] The knowledge of parties in this respect is irrelevant. It is questionable whether parties may conclude the contract contingent on an initially impossible performance becoming possible in the future. This would mean that the impossibility was not permanent, and there is no need to apply the sanction of considering the contract null and void.[21]

2.2.1.2. Subsequently occurring impossibility

If, after the creation of an obligation, a debt becomes impossible to discharge, the obligation is extinguished because of the impossibility of performance (*ex lege* with *ex nunc* effect). Impossibility is to be evaluated objectively[22] and must be of a permanent nature.[23] A debt also becomes impossible to discharge when such discharge would be illegal.[24] Such illegality must be based on a regulation which took effect after the creation of the obligation.[25] Otherwise the obligation was initially impossible.

A performance is not impossible if the debt can be discharged under more difficult conditions, at higher costs, with the help of another person or only after a determined period.[26] However, under some circumstances, unreasonably high costs can lead to

18 CzeCC, § 1764.
19 Supreme Court Ref. No. 28 Cdo 4454/2011.
20 CzeCC, § 588.
21 Melzer and Piechowiczová in Melzer and Tégl, 2014, p. 734. A different view is found in Výtisk in Petrov et al., 2019, p. 642 ('from the beginning' means before the planned force).
22 Výtisk in Petrov et al., 2019, p. 2164; Šilhán in Hulmák et al., 2014, p. 1222; Kindl in Švestka et al., 2014, Sec. 2006.
23 Výtisk in Petrov et al., 2019, p. 2165; Šilhán in Hulmák et al., 2014, p. 1222; Kindl in Švestka et al., 2014, Sec. 2006.
24 Výtisk in Petrov et al., 2019, p. 2165; Šilhán in Hulmák et al., 2014, p. 1223.
25 Výtisk in Petrov et al., 2019, p. 2165.
26 CzeCC, § 2006 (1).

the application of provisions regarding the change in circumstances.[27] In such cases, after renewed negotiation or a subsequent court decision (see below), the contract can be modified or even (partially or completely) terminated. Moreover, in other cases totally unreasonable costs of performance result in subsequently occurring impossibility, i.e., when it is not justifiable to ask the debtor to perform, e.g., search for a lost ring in the sea.[28]

If one of several performances left to the debtor's choice become impossible, the obligation is restricted to the remaining performances. However, if the person who did not have the right to choose caused the impossibility, the other party may cancel the contract.[29] Where only part of a performance is impossible to be provided, the obligation is extinguished in full if the nature of the obligation or the purpose of the contract of which the parties were aware at its conclusion indicate that the performance of the rest is irrelevant for the creditor. Otherwise, the obligation is extinguished only to the extent of the affected part.[30]

2.2.1.3. Personal performance

Personal performance excludes discharge of the debt by someone different from the debtor. This is the case in which performance is linked to the debtor's personal characteristics or abilities, or when it is directly dependent on a personal relationship with the other party. It can be caused by the nature of the performance (e.g., an artistic performance), by the arrangement of the parties or it can be determined by regulations.

In such cases a creditor is not obliged to accept a performance offered by a third person.[31] If the debtor does not perform, the creditor may sue for personal performance. However, the performance is enforced only by court penalties.[32] A claim for personal performance is excluded (with *ex nunc* effect) in case of the debtor's death.[33]

2.2.2. Hardship

Exclusion of a claim for performance can also arise when there is a change in circumstances (so-called hardship).

Pursuant to § 1765 paragraph 1 of the CzeCC, if such a substantial change in circumstances occurs, that it creates a gross disproportion in the rights and obligations of the parties by disadvantaging one of them either by disproportionately increasing the cost of the performance or disproportionately reducing the value of the counter-performance, the affected party has the right to claim the renegotiation of the contract

27 CzeCC, §§ 1764–1766.
28 Šilhán in Hulmák et al., 2014, p. 1225, Výtisk in Petrov et al., 2019, p. 2164, Melzer and Piechowiczová in Melzer and Tégl, 2014, p. 734.
29 CzeCC, § 1927 (2).
30 CzeCC, § 2007.
31 CzeCC, § 1936 (1).
32 Czech Code of Civil Procedure, § 351.
33 CzeCC, § 2009 (1).

with the other party, if it is proved that it could neither have expected nor affected the change, and that the change occurred only after the conclusion of the contract, or the party became aware thereof only after the conclusion of the contract.

Eventually it is possible for the court to terminate the contract[34] (see more in Chapter XI).

2.3. Claims for supplementary performance

There is a difference between the main performance and ancillary obligations. A person who performs for consideration to another is obliged to perform without defects, in conformity with the reserved or usual properties so that the object of the performance can be used in accordance with the contract, and, also in accordance with the purpose of the contract, if known to the parties.[35] If a debt is discharged defectively, the recipient has rights arising from a defective performance.[36] In such cases the creditor may choose a supplementary performance.[37] As to ancillary duties, e.g., to send information on dispatch of goods, there is a claim for damages only, no supplementary performance can be claimed.

The criterion for determining the rights arising from a defective performance lies in the nature of the defect – whether it can be removed or not, and whether it prevents the proper use of the performance. Generally, a creditor may demand either a repair or the delivery of a missing part, or a reasonable price reduction. If it is not repairable and prevents the proper use of the object, the creditor may either cancel the contract or demand a reasonable price reduction.[38] A right arising from a defective performance does not exclude damages. However, what can be achieved by asserting the right from a defective performance may not be claimed for any other legal cause.[39]

The CzeCC recognizes special rules for the purchase contract and the contract for works. The criterion for determining the right arising from a defective performance lies in the nature of the defect as well, but it is necessary to assess, whether a defective performance constitutes a fundamental breach of contract. If so, the buyer has the right to have the defect removed by having a new, defect-free thing or a missing thing supplied, to the removal of the defect by having the thing repaired, to a reasonable reduction of the purchase price, or to cancel the contract.[40] If not, the buyer has the right to have the defects removed, or to a reasonable reduction of the purchase price.[41] If the seller fails to remove a defect of a thing in due time or refuses to remove the defect, the buyer may then request a reduction of the purchase price or cancellation the contract.[42]

34 CzeCC, § 1766.
35 CzeCC, § 1914 (1).
36 CzeCC, § 1914 (2).
37 Kötz, 2017, p. 210.
38 CzeCC, § 1923.
39 CzeCC, § 1925.
40 CzeCC, § 2106 (1).
41 CzeCC, § 2107 (1).
42 CzeCC, § 2107 (3).

Regarding the notification of the defect and notification of the chosen right, the CzeCC sets rigorous time limits.

When deciding whether the party has rights arising from a defective performance, it is also important to evaluate another aspect (e.g., whether the defect is obvious and already evident at the conclusion of the contract, or if a defect can be ascertained from a public register, whether the transferor employed trickery to conceal the defect or expressly assured the other party that the thing is free from that defect, or from any defects etc.).

3. Hungary

3.1. Performance in kind as a structural rule

As to the available remedies for breach of contract, the foundations of the current law had been laid with the HunCC (1959) which clearly rested on the principle of performance in kind. The idea of the legislator was that monetary compensation shall replace the enforced performance only if performance in kind is impossible or if it would be against the interests of the creditor.[43] The original policy behind this principle was that this would have been in accordance with state intervention and planning and was needed because of the shortage of resources. After the economic reform of 1968 the principle has not been abandoned but a new understanding has been given to it and this new meaning of the principle of real performance has been the general rule of enforced performance (performance in kind).[44] The principle of 'real performance' meant that the general rule of Hungarian law was the availability of specific performance. The original ideological background of 'real performance' became obsolete by the economic reforms started in 1968 and the new idea of performance in kind has become the doctrine of specific performance. This general rule is in accordance with developments which can be recognized on the international level, as manifested in soft (model) laws like the PECL and the DCFR.

In Hungarian contract law, the claim for performance in kind is a remedy available to the aggrieved party. This means that the party shall have a for the enforcement of the contractual obligation, as it had been stipulated in the contract. Breach of contract means a failure to perform any of the obligations according to the contract. Contractual obligations whether explicit or implied are to be performed as they are stipulated. That is, a situation which does not comply with the content of the contract is to be qualified as a breach of the contract. As a main rule, the aggrieved party shall be entitled to claim performance in so far as it is possible. Thus, structurally, claim for performance in the strict (or narrow) sense is the primary remedy for non-performance of the other party.

43 It was expressly stated by the reasons of the draft of the HunCC (1959). Reasons of the Draft of the Hungarian Civil Code, 1963, p. 295.

44 For more details see Harmathy in Harmathy, 1991, pp. 27–39.

In contrast, the system and the rules of further remedies available for the aggrieved party also can be seen as supporting this goal. Beyond the general concept of breach of contract, there are specific types of breach addressed with specific rules and remedies. These specific types of breach are delay, defective performance, impossibility and the refusal to perform the contract. The primary consequence of the obligor's delay is that the obligee has the right to claim the performance (in so far as it is possible). The obligee has the right to terminate the contract unilaterally if he or she proves that his or her interest in performing the contract has lapsed or, he or she previously provided an adequate additional deadline for performance which expired without result.

Performance is defective if, at the time of performance, the service does not comply with the quality requirements laid down in the contract or by law. The obligor's performance shall not be deemed defective if the obligee was or should have been aware of the defect at the time of the conclusion of the contract. The system and rules covering defective performance are harmonised with Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. Under a claim for warranty for material defects, the remedies available for the obligee are repair, replacement, price reduction and termination of the contract. The obligee shall have the right to terminate the contract if the obligor failed to undertake repairs or replacement or was unable to comply with this obligation in an appropriate time, or if the obligee's interest in repair or replacement had lapsed. The obligee may switch from the chosen remedy for breach of warranty for material defects to another, but he shall pay the costs caused to the obligor with such a switch, unless the obligor caused the switch, or the switch was otherwise justified.

3.2. Substituting juridical acts

As a specific remedy for performance in kind, the court shall substitute the juridical act of the parties by a judgment if the party was obliged to make such juridical act under a contract and failed to perform this obligation. It has been discussed whether such judgment is available for substituting a consent to the resolution of a company if the shareholder of the company undertook such an obligation in a shareholders' agreement. Some of the authors are reluctant to accept the availability of such a judgment[45] while others incline to confirm that such judgment shall be available on the basis of the rules governing contracts as a form of performance in kind.[46] It has been accepted and confirmed by the Supreme Court, that the endorsement for transferring shares,[47] bills of exchange and other securities is a juridical act that can be substituted by judgment of the court as enforcing the contractual obligation to transfer the ownership of such securities.

45 Sárközy in Sárközy and Vékás, 2002, pp. 173–190
46 Menyhárd, 2009, pp. 247–257.
47 Unificatory Resolution of Hungarian Supreme Court No. 1 of 2000 on transfer of shares.

3.3. Impossibility and claim for performance

Impossibility of performance after conclusion of the contract is addressed in the system of Hungarian contract law as a breach of contract. Impossibility shall be interpreted widely and in court practice it covers, beyond the case of physical impossibility, also legal and economic impossibility, and impossibility in purpose as well. From this follows that if performance becomes impossible, illegal, or becomes so hard for the promisee that it is unreasonable to expect him or her to fulfill the obligation, the consequence is liability for damages instead of enforced performance. Thus, changes of physical, legal and economic circumstances as well as frustration of purpose may lead to such impossibility. If performance became impossible, the contract shall terminate.

Although the rules on judicial enforcement make it possible to enforce conducts ordered by the courts, the ultimate tool for that is the fine imposed on the obligor who failed to comply with such a judgment.[48] Non-compliance with such an order does not trigger consequences in criminal law.

From this also follows that if the claimed performance requires a personal service, it does not seem to be guaranteed for the court that the judgment would be actually enforceable. Thus, if performance of services or work has a personal character, it seems to be reasonable to reject performance in kind and[49] have the claim converted into damages via establishing the impossibility of performance, which, as we have said, is a form of breach of contract in Hungarian contract law, that can trigger liability for damages.

It seems to be reasonable to exclude the right to claim performance if the aggrieved party can more easily obtain performance from other sources. This corresponds also to such general principles of contract law as the duty to cooperate, the requirement of good faith and fair dealing and also with the duty to mitigate the loss. One also could argue that in such a situation the claim for enforced performance is an abuse of rights or is against the maxim of *nemo suam turpitudinem allegans*.

4. Poland

4.1. Overview

Polish contract law fully subscribes to the *pacta sunt servanda* principle. That means the debtor is expected to deliver as promised. So, in principle, the creditor may claim for specific performance or, generally at his or her discretion, for damages.

48 The court shall determine by way of a ruling the manner of enforcement, such as 1. ordering the obligor to pay the cash equivalent of the specific act; 2. granting authorization to the judgment creditor to perform or to cause to be performed the specific act at the cost and risk of the obligor, and at the same time ordering the obligor to advance the estimated costs of such; 3. to impose a fine upon the obligor up to HUF 500.000; 4. enforcing the specific act with police assistance. Act No. LIII of 1994 on Judicial Enforcement, § 174.

49 Principles of European Contract Law, Article 9.102 paragraph 2 point (c).

The justification for such a regulatory solution is simple, at least at the theoretical level: the creditor is interested in having the contract performed, and pecuniary damages should be his or her second choice. In contrast, had the debtor not performed at all or was not performing properly, there is little chance that the court judgment will make him or her perform in an efficient way (pecuniary performance excluded). The claim for a specific or, in kind performance is, on the other hand, a good choice for the creditor in the case of economic crisis or something that in the centrally planned socialist economies was known as the 'shortages economy.' This term denotes an economic system where shortages in supplies of goods are a built-in feature. So technically, the creditor could – in theory – obtain the merchandise from another supplier. In practice, because of the ever-present shortages, however it would be connected with additional hardships. In such cases specific performance transfers all the risks and additional transactional costs onto the debtor.

The binding force of a contract is somewhat weakened by the party's right to rescind the contract. This can be either a statutory or a contractual right. The statutory right to rescind the contract is for instance a systemic part of liability for non-performance of a synallagmatic contract. These are *do ut des* contracts where both parties are at the same time debtor and creditor and performance by one party is the economic equivalent of the counter-performance of the other party.[50] Pursuant to article 492 of the PolCC if the party is in arrears the counterparty may stipulate a new date for performance and either rescind the contract or claim for performance and damages. A novel and unusual way of terminating the contract is inevitable non-performance of the contract.[51] This rule is limited to the cases where one party declares in advance that he or she will not perform. In such cases the other party can rescind the contract immediately.

The right to rescind can also be included in a contract. It allows the parties to rescind the contract at will within a specified period[52] or rescind in exchange for a specific lump sum of money.[53] This right, if applied correctly may be used as a gateway to apply the theory of efficient breach of contract in practice.

4.2. Performance in kind vs damages

The debtor who did not perform as agreed upon or performed incorrectly is liable for the damages incurred, unless these resulted from circumstances the debtor is not responsible for.[54]

The general rule is that in case of non-pecuniary obligations the debtor has to restore the *status quo ante* or pay damages. It is the creditor's right to choose between these two remedies. If, however, restitution would be impossible, too difficult or too

50 PolCC, Article 487.
51 PolCC, Article 492[1].
52 PolCC, Article 395.
53 PolCC, Article 396.
54 PolCC, Article 471.

costly for the debtor, the creditor's right is limited to pecuniary compensation.[55] This rule applies both to obligations based on a contract or on extra-contractual liability. However, in the case of contractual obligations the creditor's rights are limited to the claim for damages if he or she decided not to accept a delayed performance and claim damages only.[56] It is disputed Polish legal literature and case law whether it is possible to claim restitution in case of improper fulfillment of an obligation. Part of the literature opts for pecuniary compensation only, why the minority view, although largely accepted by courts, is that the creditor has the choice between these two claims.[57] It is also possible to claim mixed compensation composed of both restitution and a supplementary claim for damages.[58] Specific rules for this are contained in Article 477 § 1 of the PolCC.

If the debtor is obliged to deliver fungible goods, like, for instance, a certain number of bottles of lemonade and is in arrears, the creditor may either buy the same number of bottles at the debtor's expense or sue for performance. In either case the creditor is entitled to damages.[59] This allows the creditor to get the required goods fast without the need to get a prior court order. In the case of standard objects, with a calculable average price range, this is a good compromise between the creditors' needs and the need to protect the debtor against abuse (e.g., buying said goods at excessive prices).

In the case of *facere* obligations (a duty to do something) with the debtor being in arrears, the creditor may obtain a court order authorizing him or her to do what the debtor was supposed to, at the debtor's cost and expense.[60] Similar rules apply to *non-facere* obligations.[61] In exceptional circumstances the creditor may act even without a court order.[62]

In the case of pecuniary obligations, the creditor has the right to claim the amount of money owed, with interest. This interest serves as a simplified compensation of any incurred losses.[63] There is no need to prove the actual loss, the mere fact that the debtor is delayed with payments is enough to demand interest. The interest rates can be either statutory or contractual, by no means can they exceed the maximum amounts set forth by law. Of course, the difference between damages and specific performance does not apply here.

In the case of synallagmatic contracts, if one party does not decide to rescind the contract, he or she has the right to claim both damages and specific performance of the contract.[64]

55 PolCC, Article 363 § 1.
56 PolCC, Article 477 § 2.
57 Machnikowski in Gniewek and Machnikowski, 2021, at 33.
58 Zagrobelny and Gniewek in Gniewek and Machnikowski, 2022, at 3.
59 PolCC, Article 479.
60 PolCC, Article 480 § 1.
61 PolCC, Article 480 § 2.
62 PolCC, Article 480 § 3.
63 PolCC, Article 482.
64 PolCC, Article 491 § 1.

4.3. Other claims for performance

In the case of non-performance, the debtor is obliged to deliver as agreed. In the case of partial or defective performance the debtor can be obliged to repair or replace the object of the performance. As mentioned above, in the case of synallagmatic contracts the creditor may, alternatively, also rescind the contract. In some of the specific nominate contracts there are separate rules on performance claims. One of the most obvious cases is liability for the sale of defective goods, called *rękojmia* in Polish.[65] If the goods do not conform with the contract, the buyer may have three alternative claims against the seller: to lower the price, to deliver undamaged goods or to repair the damaged goods. Alternatively, unless the defects are minor, the buyer may also rescind the contract.[66] Similar rules apply to some other contracts like a contract for production and delivery of goods (*dostawa)* or a contract for a specific task.

5. Romania

5.1. Preference for enforcement in kind

Enforcement in kind means the actual achievement of the performance to which the debtor is obliged, as opposed to indirect enforcement, which refers to the payment of damages in Romanian civil law.

If performance does not take place voluntarily, the creditor is entitled to legal recourse to enforce his or her rights.[67] The legal basis for enforcement is the so-called enforceable title: in general, a court judgment or other document recognized as such by law. In certain cases, a contract may constitute an enforceable title in itself, meaning that the contract can be enforced directly, without the need to resort to a court.[68]

65 PolCC, Article 556 et seq.

66 PolCC, Article 560.

67 For a monographic overview, see Diaconiță, 2017.

68 Several contracts have *per se* this characteristic of enforceability. Just as examples: 1. a document authenticated by a notary public establishing a certain claim, in a fixed amount, shall be enforceable as of the date on which it falls due (Act on Notaries Public and Notarial Activity No. 36/1995, Article 101). 2. Credit agreements, including collateral or personal guarantee agreements, concluded by a credit institution constitute enforceable titles (Government Emergency Ordinance No. 99/2006 on Credit Institutions and Capital Adequacy, Article 120). 3. Credit agreements concluded by non-banking financial institutions, as well as real and personal guarantees assigned to secure the credit constitute enforceable titles (Act No. 93/2009 on Non-banking Financial Institutions, Article 52). 4. Mortgage contracts are enforceable titles (RouCC, Article 2431). 5. Agricultural lease contracts are enforceable titles for the payment of rent at times and in the manner provided for in the contract if the contract has been concluded in authentic form or by private deed registered with the local authorities (RouCC, Article 1845). With this special provision, the legislator protects the landlord, who is no longer obliged to go through the court proceedings in order to obtain a judgment against the tenant but can enforce the clause on the rents from the agricultural lease, which, according to the law, is an enforceable title. 6. Lease contracts concluded by private deed and registered with

Where, without justification, the debtor fails to perform his or her obligation and is in default, the creditor may, at his or her option and without forfeiting his right to damages, if due:

— request or, as the case may be, proceed to enforcement in kind of the obligation,
— have the contract rescinded or terminated or, as the case may be, to have his own related obligation reduced,
— where appropriate, to take any other legal remedy provided for the enforcement of his right.

The creditor may always request that the debtor be compelled to perform the obligation in kind unless such performance is impossible.[69] We can see that in the system of the RouCC, enforcement in kind is possible even if it would be very onerous or inconvenient for the debtor, except for the impossibility of performance.

The right to performance in kind includes, where appropriate, the right to repair or replacement of the goods and any other means of remedying defective performance.

5.2. Claims for performance in the context of the typology of obligations

In general, in the case of claims for performance, Romanian legislation distinguishes the three classical forms of obligations: *dare*, *facere*, *non-facere*[70] and designs the regulation based on this division.

5.2.1. Dare

In the case of non-performance of the obligation to transfer some right or to deliver something (*dare*), three situations must be distinguished.

1. If the obligation is to pay a sum of money, performance in kind is always possible. Under a general lien (joint security of all creditors), the creditor may be paid from the (forced sale of the) debtor's assets.[71]

the tax authorities, as well as those concluded in authentic form, shall constitute enforceable titles for the payment of rent at times and in the manner laid down in the contract or, failing that, by law (RouCC, Article 1798). With regard to the obligation to return the leased property, the contract concluded for a fixed term and incorporated in an authentic instrument shall, under the law, constitute an enforceable title at the end of the term. These rules shall also apply to a contract concluded for a fixed period by private deed and registered with the competent tax authority (RouCC, Article 1809). The same rule applies for the lease contracts made without determination of the term, either party may terminate the contract by notice in a reasonable term, and on expiry of the period of notice, the obligation to return the property shall become due, and the lease agreement respecting the above-mentioned requirements constitute an enforceable title in respect of that obligation (RouCC, Article 1816). 7. Although they are not contracts in themselves, bills of exchange and promissory notes are enforceable titles (Act No. 58/1934, Articles 61 and 106). For further details, see Veress, 2015a, pp. 70–79; Veress, 2015b, pp. 42–51.

69 RouCC, Article 1527.

70 Veress, 2020, pp. 15–17.

71 For further details, see Veress, 2012. pp. 141–150.

2. If the obligation relates to an individually determined asset, both the obligation to transfer the title, and the transfer of possession can in principle be enforced in kind. Of course, there may be exceptions. If the seller of a movable hides it before it could be handed over, even if under Romanian law the consent of the parties has transferred title over the movable, the claim will be effective if that asset reappears, because only in this way can it be removed from the debtor's possession and placed in possession of the creditor. Against such a seller of bad faith, who after the sale successfully conceals the object sold, the buyer has only an action for damages.[72]

Suppose the enforceable title (generally, a court judgment) does not specify the amount to be paid as the equivalent of the asset's value in the event of the impossibility of attainment (by the bailiff). In that case, the court supervising enforcement shall, at the creditor's request, determine this amount by a judgment (pertaining to the merits of the claim) rendered in an urgent procedure, during which the parties must be summoned. In all cases, at the creditor's request, the court will also take into account the damages caused by non-performance of the obligation before it became impossible to perform.[73]

3. If the obligation relates to fungible assets, enforcement in kind is also possible if the debtor owns such assets. An alternative solution is for the creditor to purchase these assets from a third party and then claim from the debtor only the damages caused (e.g., the price difference, if he or she has purchased these assets at a higher price than initially contracted).

5.2.2. Facere

In the event of non-performance of an obligation to do something (*facere*), the creditor may, at the debtor's expense, perform the obligation himself or have it performed by other(s). In order to do so, the creditor does not have to ask the court for authorization. However, unless the debtor is in default *ex lege*, the creditor may exercise this right only after due notice is given to the debtor, either together with the notice regarding default, or subsequently.

According to the case law, the obligation to do something does not have an alternative character because it has a single object: the promised performance. Therefore, as long as performance in kind is possible, the debtor can only be discharged by accomplishing the promised performance. As such, the performance of the obligation is in kind, and the alternative exists only if the performance in kind is no longer possible.[74] We supplement the court's correct opinion with the idea that the creditor – and only the creditor – will have the right to choose between enforcement in kind

72 Micescu, 2004, p. 111.

73 Romanian Code of Civil Procedure, Article 892. This first instance judgment is enforceable and subject only to appeal. The enforcement of the judgment can only be suspended with the deposit of the amount determined.

74 Cluj Court of Appeals, Civil Section, Decision No. 1954 of September 20, 2001, published in Rusu, 2007, p. 1.

and enforcement by equivalent. If enforcement in kind is no longer in the creditor's interest, he or she can seek enforcement by equivalent (damages).

As a specific application of this rule, we can mention the case of the sales contract. Where the buyer of the movable asset fails to fulfill his or her obligation to take delivery or to pay, the seller has the right to place the asset sold in a warehouse at the buyer's disposal and expense, or to sell it to another person. This sale shall be made by public auction or even at the current price if the asset is priced at a stock exchange or at another market established by law. The sale must take place through a person authorized by law for such acts (e.g., a bailiff) and with the right for the seller to payment of the difference between the price agreed at the first sale, and the price actually obtained, as well as damages.[75]

Intuitu personae obligations to do something cannot be enforced in kind (*nemo potest praecise cogi ad factum*); the creditor is only entitled to enforcement by equivalent (damages). However, even in this case, the court can levy penalties upon the debtor and indirectly force performance.

5.2.3. Non-facere

In case of the non-performance of an obligation to refrain from a certain action, i.e., an obligation not to do something (*non-facere*), the creditor may apply to the court for an injunction to eliminate or remove what the debtor has done in breach of the obligation, at the debtor's expense, within the limit fixed by the court order. In this situation, enforcement in kind is not possible, given the nature of the obligation (to refrain from a certain conduct). Enforcement is basically the removal of the consequences of the breach of the obligation not to do. Penalties may also apply in this case.

5.3. Penalties and the interdiction of punitive damages

According to the High Court of Cassation and Justice, the penalties analyzed here can be applied to the debtor of a strictly personal obligation to perform only within the framework of the enforcement procedure that begins with the granting of the enforcement order.[76]

In the last two hypotheses, i.e., the debtor does not perform the obligation to do something (*facere*) or the obligation to refrain from doing something (*non-facere*) which cannot be performed by another person, according to Article 906 of the Romanian Code of Civil Procedure, within 10 days from the date of the service of the court decision authorizing the enforcement, the debtor may be compelled to perform the obligation to do or not to do by applying penalties by the court. As it was stated above, these penalties are applicable where the performance of the obligation involves a personal act of the debtor.

75 RouCC, Article 1726.

76 Decision No. 3/2011 given in the procedure for the unification of case law and published in the Monitorul Oficial No. 372 of 27 May 2011.

Where the obligation is not assessable in money, the court seized by the creditor may oblige the debtor, by a final judgment given with prior summons to the parties, to pay the creditor a penalty of between 100 lei and 1.000 lei,[77] fixed per day of delay until the obligation laid down in the enforceable title has been performed. Where the obligation has an object that can be valued in money, the court may set the penalty at between 0.1% and 1% per day of delay, calculated as a percentage of the value of the object of the obligation.

If the debtor fails to perform the obligation laid down in the enforceable title within three months of the date of service of the judgment imposing the penalty, the enforcement court shall, at the request of the creditor, fix the final amount because of him or her under that title by a judgment given with summons to the parties. Enforcement in kind is transformed into indirect enforcement.

The creditor may request that the final amount be fixed after the expiry of each period of three months, during which the debtor fails to perform the obligation laid down in the enforceable title until the claim has been fully discharged. The High Court of Cassation and Justice decided that this text should be interpreted to mean that it is not permissible to make more than one application to fix the final amount owed by the debtor by way of penalties.[78]

The penalty may be removed or reduced by means of contestation against enforcement if the debtor performs the obligation laid down in the enforceable title and proves that there are good reasons for the delay in performance. The award of such penalties does not exclude the payment of damages, but the sum of the penalties is included in the total amount of damages.

In contrast, the law prohibits the awarding of punitive damages (in other terms, vindictive damages) for obligations to do and not to do.[79] Punitive damages are sums of money which the debtor of an obligation to do or not to do would be obliged by a court judgment to pay to his creditor for each day of delay until the date of performance in kind. Punitive damages are prohibited because their function is not compensation but a means of constraint, independent of any loss and which may be combined with performance in kind of the obligation. Moreover, the mechanism of punitive damages was designed to ensure that the person who receives the damages (the creditor) must repay them to the debtor if the debtor performs the obligation, reduced by the amount of compensation for the damage effectively caused. However, the amounts collected under this title could exceed the value of the unperformed obligation or the value of the damage caused, which would be unfair.[80] Instead of punitive damages, the Romanian legislative solution uses the penalties discussed above, which are levied on the damage resulting from non-performance.

77 Between approximatively 20 and 200 Euros.
78 Decision No. 16 of March 6, 2017 on a preliminary judgment raised by the Cluj Tribunal and published in the Monitorul Oficial No. 258 of 13 April 2017.
79 Romanian Code of Civil Procedure, Article 906.
80 Veress, 2020, p. 217.

6. Serbia, Croatia, Slovenia

6.1. Serbia

The SrbLO explicitly states that the in case of non-performance the other party may request either the performance of the obligation or may repudiate the contract.[81] Even if the creditor opts for repudiation, he or she must grant to the debtor an additional time limit for voluntary performance,[82] which additionally supports the idea of specific performance.

However, if timely performance is considered as an essential element of the contract, the contract is considered repudiated at the time the debtor defaults.[83] However, even in this case the creditor still may opt for specific performance if without undue delay he or she notifies the debtor that the performance of the obligation will be requested.[84]

The question, however, remains how to enforce specific performance against the debtor's will. Fortunately, the SrbLO contains detailed rules on this issue, in the part pertaining to the legal effects of obligations, under the heading titled a bit awkwardly 'Creditor's rights in some special cases.' First, it specifies that if the debtor defaults with the performance of an obligation consisting of handing over (*dare*) fungible assets (things designated by their kind), contingent on the notification of the debtor, the creditor may opt between acquiring the same things from another and requesting that the price be reimbursed, with compensation for any damages from the debtor, or, requesting from the debtor the value of the things the debtor was obliged to hand over, and also claim damages.[85] If, however, the debtor defaulted with the performance of an obligation to render a service (*facere*), the creditor may, after having notified the debtor, accomplish the service promised but not performed by that debtor, and then request reimbursement of the costs of accomplishing the service, as well as compensation for damages accrued because of the default by the debtor, or any other damage accrued in relation to such means of performing the obligation.[86] The issue becomes more complicated when the obligation of the debtor is to refrain from an action (*non-facere*). For such a case, the SrbLO prescribes that the creditor is entitled to claim damages for the mere fact of the debtor's infringement of the duty not to act.[87] However, if a building or any construction has been erected contrary to the debtor's duty to refrain from an action, the creditor may request its removal at the expense of the debtor and claim compensation from the debtor for the damage suffered in connection with the building and removal of the

81 SrbLO, Article 124 (1).
82 SrbLO, Article 126 (1).
83 SrbLO, Article 125 (1).
84 SrbLO, Article 125 (2).
85 SrbLO, Article 290.
86 SrbLO, Article 291.
87 SrbLO, Article 292 (1).

construction.[88] The court may, however, refuse the removal and award the creditor pecuniary compensation, if it finds this to be obviously more expedient, taking into account the social interest and the legitimate interest of the creditor.[89] There is a special rule governing the case when the debtor's obligation has been established by a final court decision. In such case the creditor may request the debtor to perform the obligation in an additional appropriate deadline and declare that after the expiry of such a deadline he or she will not request performance, but damages because of non-performance.[90]

The most important rule in relation to specific performance is the one relating to so-called judicial penalties (*sudski penali*), which were in the former federal law shaped under the influence of *astreinte* from French Law.[91] The SrbLO provides that if the debtor fails to perform a non-monetary obligation determined by a final decision, the court may, at the request of the creditor, set an additional appropriate deadline for the debtor and order the debtor to pay to the creditor a certain amount of money for each day of delay, or for any other unit of time, starting from the expiration of the deadline.[92] This is done to apply pressure (in the form of vindictive damages) on the debtor, and regardless if any real damages were incurred. If the debtor eventually performs the obligation, the court may decrease the amount of the judicial penalties, taking into account the purpose for which they have been ordered.[93] This penalty is qualified in the literature as a private fine, since it is not payable to the state but, to the creditor.[94] The SrbLO does not envisage guidelines for the calculation of the penalty, which means that the court determines it according to its discretion.[95] The detailed rules and the procedure of obliging the debtor to judicial penalties are regulated in the Law on Enforcement and Securities.[96] In addition, to this the SrbLO provides several other means for the enforcement procedure to compel the debtor to specific performance. The most important ones are the rules concerning the possibility of the court to mandate the debtor to pay monetary fines (*novčana kazna*) for refusing to perform an obligation that can be realized only personally by that debtor, or for infringing on an obligation to refrain or forbear.[97] There is a clear distinction between these fines and judicial penalties. Whereas judicial penalties are paid to the creditor, the monetary fines are payable to the state.[98] What is however most striking, is that the law on Enforcement and Securities in its effective form, introduced the possibility of conversion of unpaid monetary fines into the measure of incarceration (a criminal law

88 SrbLO, Article 292 (2).
89 SrbLO, Article 292 (3).
90 SrbLO, Article 293.
91 Dika, 2002, p. 3.
92 SrbLO, Article 294 (1).
93 SrbLO, Article 294 (2).
94 Možina, 2020, p. 148.
95 Možina, 2020, p. 148.
96 Law on Enforcement and Securities, Articles 339–342.
97 Law on Enforcement and Securities, Articles 363–364.
98 Možina, 2020, p. 148.

penalty). Namely, the court may decide to convert any unpaid fines into incarceration in the proportion of 1000 RSD (roughly 8 EUR) per day, up to at most 60 days.[99] The controversial aspect of this, is that at the moment there are two different means of defeating the debtor's reluctance to perform an obligation that may be performed only personally: the *astreinte*-type judicial penalties payable to the creditor, and the monetary fines payable to the state and convertible to incarceration.[100] One of the possible ways for overcoming this state of regulation is by abolishing the judicial penalties, that seem to be a foreign body in Serbian (former Yugoslav) civil law, and preserve monetary fines, as a means of sanctioning the debtor for the contempt of the court.[101]

The Law on Enforcement and Securities addresses other issues as well, in which the problem of debtor's performance of non-pecuniary, or even non-replaceable obligations surfaces. Thus, the law specifies that if the debtor is obliged to make a statement of will in relation to an unconditional claim, it shall be considered that the statement has been given at the time when the decision determining such obligation became final.[102] If, however, the issuance of the statement of will depends on the fulfillment of an obligation of the creditor or fulfillment of a condition, it is deemed that the debtor has provided the statement once the creditor has fulfilled his obligation or once the condition has occurred.[103]

The idea of primacy of specific performance over damages for non-performance comes to expression clearly in relation to material defects as well. The liability for material defects (*odgovornost za materijalne nedostatke*) in the SrbLO is regulated in relation to the contract of sale,[104] but its application is extended to all contracts concluded for consideration.[105] In case of material defects the first-tier remedies are repair or replacement. Only after these prove unsuccessful, may the acquirer request the reduction of price or cancellation of the contract because of defective performance. In addition, in all these cases the buyer is entitled to damages.[106]

Directive 1999/44/EC was transposed into Serbian law not by amending the SrbLO, but by means of the Consumer Protection Act. The rules on conformity of goods (*saobraznost*) in consumer sales contracts also give priority to specific performance (repair or replacement) over price reduction and cancellation of the contract.[107]

6.2. Croatia

The HrvLO retained the rules of the former federal law on creditor's right to choose between specific performance and repudiation of contract, differentiating the

99 Law on Enforcement and Securities, Article 132 (4).
100 Knežević, 2015, p. 1907.
101 Knežević, 2015, p. 1908.
102 Law on Enforcement and Securities, Article 390 (1).
103 Law on Enforcement and Securities, Article 391 (1).
104 SrbLO, Articles 478–515.
105 SrbLO, Article 121 (1) and (3).
106 SrbLO, Article 488.
107 SrbCPA, Article 51.

consequences depending on whether or not the time of performance was an essential element of the contract.[108] Similarly, the rules on creditor's rights in special cases have been retained, but systemized into different parts of the HrvLO.[109] However, the HrvLO did not take over the rules on judicial penalties (*sudski penali*) from the former federal law. Though it is regulated in a more detailed way in the Law on Enforcement.[110] Similarly, it regulates the specific performance of the obligor's duty to provide a statement of his or her will (*ostvarenje tražbine davanja izjave volje*), differentiating unconditional claims from ones that are dependent on a condition.[111] In terms of enforcement of claims for the obligor's duty to refrain or forbear another's actions, the Croatian Law on Enforcement also envisages the possibility of sentencing the debtor to monetary fines (*novčana kazna*) and to incarceration (*kazna zatvora*).[112] A key difference in relation to the Serbian regulation seems to be, however, that while in Serbia the incarceration is a substitute remedy, applicable only, when the obligor failed to pay monetary fines, under Croatian laws the court may directly sentence the obligor to incarceration.

As in Serbian law, the HrvLO also gives preference to specific performance over repudiation of the contract and damages in terms of defective performance of a contract. In case of material defects of performance (*odgovornost za materijalne nedostatke*) the creditor may first request repair and replacement, and if they prove unsuccessful, may request a price reduction or repudiate the contract.[113] The Croatian Consumer Protection Act, however, does not have a special set of rules concerning consumer rights in case of lack of conformity because of material defects, but in general, prescribes the application of the rules of the HrvLO on liability for material defects.[114] It contains special rules on conformity mainly relating only to contracts for the supply of digital content and digital services.[115]

6.3. Slovenia

The SvnCO when regulating the right of the creditor to choose between specific performance and repudiation of contract because of non-performance has not departed from the former federal law; different rules are, however applicable when the time of performance is an essential element of the contract as opposed to when it is not.[116] Similarly, the rules on the creditor's right to specific performance in special cases have also been retained, including the rules on judicial penalties (*sodni penali*).[117] The Slovenian Law on Enforcement and Securities specifies further rules on the procedure

108 HrvLO, Articles 360–362.
109 HrvLO, Articles 76–79.
110 Croatian Law on Enforcement, Articles 247–248.
111 Croatian Law on Enforcement, Articles 276–277.
112 Croatian Law on Enforcement, Article 263.
113 HrvLO, Articles 410 and 412.
114 HrvCPA, Article 47 (2). See. Mišćenić in Josipović, 2014, p. 287.
115 HrvCPA, Article 47 (4) to (9).
116 SvnCO, Articles 103–105.
117 SvnCO, Articles 265–269.

for obliging the debtor to pay judicial penalties.[118] Furthermore, this law enables the court to oblige the debtor to pay monetary fines (*denarni kazni*) if he or she fails to perform an act that can be performed only by him or her, or fails to observe a duty to refrain from some conduct or to forbear another's actions.[119]

The rules of the SvnCPA on the lack of conformity of goods in consumer contracts also give primacy to special performance over the means of compensation of the consumer.[120]

7. Slovakia

The Slovak legal system is based on the principle of real (i.e., in kind) performance of contracts (*zásada reálneho splnenia zmlúv*).[121] This principle – valid for both commercial and non-commercial contractual relations – means that the delay or failure of the debtor to fulfill the obligation does not lead to the termination of the obligation or the duty to perform.

Consequently, even following default, the creditor is entitled to continue to require the debtor to fulfill his or her obligation as agreed, regardless of whether the obligation is monetary or non-monetary.[122] This consequence is expressly enshrined in mandatory § 324 (1) of the SvkCommC ('The obligation is also extinguished by a late performance by the debtor unless before such performance the obligation has already been extinguished by the creditor's withdrawal from the contract.') and in dispositive § 366 of SvkCommC ('Unless the law provides otherwise for particular types of contracts, the creditor may, in the event of default by the debtor, insist on the due performance of the obligation.').

However, the principle of real performance does not only mean that the creditor is entitled, even after default, to demand the proper performance of the obligation as agreed in the contract. It also means that – on the contrary – the creditor *cannot* claim damages in lieu of performance of the obligation. Thus, while the performance of the obligation is possible, the creditor can, in principle, only claim the performance of the obligation. This is based on the view that the obligation to perform is also a right of the debtor and therefore his or her consent is required for the waiver of the right to proper performance of the obligation.[123]

The principle of real performance also implies that the debtor cannot 'buy out' of his or her obligation to perform by paying damages for non-performance without prior agreement.

It thus follows that the principle of real performance is manifested in three areas:

118 Slovenian Law on Enforcement and Securities, Article 212.
119 Slovenian Law on Enforcement and Securities, Articles 226 and 227.
120 SvnCPA, Article 37c.
121 Jurčová, 2018, p. 54.
122 Ovečková, 2017.
123 SvkCC, § 574. Knapp, 1955, p. 45 and 60; Luby, 1952, p. 331.

— the creditor may, even after the debtor has fallen into default, demand proper performance of the obligation,
— the creditor cannot, without the debtor's consent, claim damages in lieu of performance of the obligation; and
— the debtor may not, without the creditor's consent, discharge the obligation to perform by compensating the creditor, in lieu of performing the obligation, for the damage caused by the failure to perform.

There are, however, several exceptions to the principle of real performance of contracts.

Firstly, the creditor cannot claim the performance of the obligation if such performance has become impossible, either in fact or in law. In such a case, he can only claim compensation for the damage suffered as a result of the non-performance of the obligation. Of course, he may do so only if the conditions for a claim for damages are fulfilled (see Chapter XI). This exception applies in both commercial and non-commercial relationships.

Secondly, if requiring real performance of the obligation would entail an exercise of a right contrary to good morals within the meaning of § 3 (1) of the SvkCC the creditor cannot claim such performance. This would be the case when the performance of the obligation would be extremely burdensome, extremely costly, etc.[124] In such cases, the right to perform the obligation would not enjoy legal protection. However, part of the legal literature subordinates these cases to the first exception, i.e., the consequent impossibility of performance.[125] In commercial relations, such situations could be subsumed under § 265 of the SvkCommC, according to which the exercise of a right that is contrary to the principles of fair commercial dealing does not enjoy legal protection.

Thirdly, the principle of real performance of contracts does not apply in the case of so-called fixed contracts (*fixné zmluvy*). These are contracts where it is clear from the contract (commercial relations) or also from the nature of the matter (non-commercial relations) that the creditor has no interest in delayed performance. In such a case, if the creditor does not notify the debtor that he or she insists on performance, the contract is extinguished; however, the right to damages is not affected.

Fourthly, a special exception to the principle of real performance is also provided for in § 486 of the SvkCommC, which relates to the sale of a business. If all the things that constitute the capital of the business have not been handed over to the buyer, such buyer has no right to insist on their handover, i.e., on the proper performance of the obligation, having only the right to a discount on the purchase price.[126]

So, in the absence of such exceptions or if the law does not provide otherwise, the creditor – as stated – cannot claim damages in lieu of the performance of the

124 Fekete, 2018.
125 Sedlačko, 2019.
126 Ovečková, 2017; Ďurica, 2016b, p. 1233.

obligation. To do so, he or she must first withdraw (*odstúpiť*) from the contract. By withdrawing from the contract (canceling the contract), his or her right to performance of the obligation is extinguished, but the right to compensation for damage caused by non-performance is not affected by the withdrawal.

In contrast, because of the principle of individual autonomy of the parties, it is not excluded that the parties to the contract may agree, for example, so that, after default, the creditor can choose whether he or she wants proper performance or damages, or so that the default in itself extinguishes the right to performance.

If the obligation has been performed but not properly, claims from defective performance arise in the case of contracts for consideration. Therefore, in such cases, the creditor cannot claim the proper performance of the obligation, but only the performance of the obligations arising from defective performance (e.g., repair, price reduction).

8. Concluding remarks

8.1. Performance in kind

All the relevant jurisdictions rest on the principle of performance in kind. It seems, that this principle, inherent to the structure of legal systems in Europe was also an answer to the shortage economy. That is, beyond the ordinary policy underlying the doctrine of specific performance there was a further economic goal supporting this: the 'shortage economy.' The rather limited availability of economic resources and the absence of markets did not make it possible for enterprises to buy substitute performance if the other party failed to deliver. Thus, performance in kind was a tool for addressing the shortage economy in the socialist era and has been maintained after the transition to the market economy.

It has only been stressed in the report for Romania, but it holds true generally for the relevant jurisdictions that the obligor shall not be entitled to turn its own obligation from performance in kind into damages. If the obligee accepts a substitute performance (including money) of its own initiative, then the substitute performance as a *datio in solutum* will be a performance of the contractual obligation. It has been stressed in the Czech report that the debtor can also offer *datio solutionis causa*. *Datio solutionis causa* is a tool for satisfying the claim of the creditor but does not discharge the debt as such. Even if *datio solutionis causa* was offered, the debt is discharged by performance.

The availability of performance in kind, as a remedy for breach of contract depends primarily upon the nature of the obligation. If the performance promised was of a *dare* nature, performance in kind is just the logical remedy but only in so far as it is available by the defendant. That is the case also in Romanian law where ownership is transferred by the contract. Thus, this conclusion does not depend on the structure of transfer of ownership (title) over movables. If the object of performance

is not available by the defendant, performance in kind is impossible and the plaintiff may claim damages.

If the performance promised was of a *facere* nature, the need for personal involvement and cooperation of the debtor in performing the obligation is a limit of availability of performance in kind. In such cases, establishing impossibility and a claim for damages is the ordinary consequence. In contrast, there are two types of monetary sanctions provided by the law to create incentives for the debtor to perform such an obligation provided that the performance is not available from other resources from the market. One of them is a penalty that can be imposed on the debtor by the court (Romania, Serbia, Croatia, Slovenia) similarly to the French *astreinte*. This amount of money, if ordered by the court, is to be paid to the creditor, not to the state or public funds. The other is the fine imposed on the debtor if it failed to comply with the order of the court to perform the *facere* obligation in kind. This fine is to be paid to the state and ordered at the stage of enforcing the judgment of the court. In the laws of Serbia, Croatia, and Slovenia the penalty imposed by the court on the debtor and the fine imposed on the debtor in the process of enforcing the judgment are parallel legal instruments creating incentives for the debtor to perform. In some jurisdictions (Serbia, Croatia) the penalty of incarceration may also be associated with the fine, or even applied separately.

If the obligation of the debtor is to perform a juridical act (e.g., to give consent to something) the court may hand a judgment down substituting the juridical act and this way providing performance in kind. The possibility of such a substitution is explicitly provided in Hungarian statutory law.

It can also be concluded that none of the relevant jurisdictions create incentives for – or would support – efficient breach of contract.

8.2. Performance in kind and other remedies

Beyond the direct claim for performance, the relevant jurisdictions provide similar remedies to bring the obligee into the position as if the obligor performed the obligation properly. Beyond the claim for repair or replacement, the right is provided to the creditor to purchase the substitution of performance in the market and then claim damages. As a main rule, the obligee can exercise this right only after giving the opportunity to the obligor to perform. While such a notice according to Romanian law seems to be sufficient, in other legal systems it is required to terminate the contract to get the claim for damages that occur because the obligor failed to perform, and the obligee acquired substitute performance at its own expense. No additional time is required for termination or to acquire substitute performance if the time-factor was an essential element of the contract.

That is, the obligee does have a choice of terminating the contract or claiming performance in so far as performance is possible and the preconditions of terminating the contract are met. The oblige shall not claim damages 'in lieu' of performance.

8.3. Consequences of hardship and impossibility

Impossibility of performance is a natural limit of the claim for performance in kind. Impossibility or hardship occurred after the conclusion of the contract may result in termination of the contract, or in it being upheld, but with modified content. A claim for damages for the obligee may also result, in so far as the obligor shall be held responsible for the impossibility.

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