| Chapter VI |

Illegal and Immoral Contracts. Usury. Good Faith in Contract Law

1. General considerations

Free will is man's most prized asset in today's world. The principle of freedom of contract is deduced from this general liberty. Freedom of contract has always been—and will always remain—the linchpin of contract law. The parties may shape the content of the contract by their mutual consent in a way they think will best accommodate their economic interests. Without this principle, contracts would lose their primary purpose of being tools by which the supply and demand for all products and services in the market eventually meet.[1] However, as a vehicle for the accommodation of the private interest of the contracting parties, the legal institution of contract is always under supervisory (and normative) control exerted in the name of public interest in any given society. No contract may be considered valid, even though all preconditions are met, if it is disapproved of by the will of society manifested in the law. 'By private agreements the parties may not derogate from the rules of public law' (*Privatorum conventio iuri publico non derogat*), as the well-known Latin maxim states.[2]

1 Zweigert and Kötz, 1998, p. 326.
2 Ulpianus, from Digesta Book XXX on Edicts. D. 50.17.45.1.

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Society may express its displeasure toward private arrangements that are contrary to the public interest in different forms. In this respect the constraints on freedom of contract,[3] the very boundaries of lawfulness in contract law, are rather different and vague compared to criminal law. While in criminal law, which rests on the principle of strict legality, all acts are to be considered lawful unless explicitly prohibited, such an approach, although it might seem attractive, is simply not applicable to contract law. There is in the law of contracts, beside transactions infringing on statutory prohibitions, a wide gray zone in which contracts do not contradict any rules incompatible with derogation by the parties yet are still contrary to the general opinion regarding what is appropriate or inappropriate in a given society. The former may be defined as illegal, the latter as immoral contracts.

There are different legislative techniques for establishing the legal limits of the freedom of contract. In this regard the French Code Civil and its German equivalent, the BGB, may be considered legislative models for laying down the boundaries between lawfulness and unlawfulness in contract law for many other European legal orders. According to the emblematic Article 6 of the French Civil Code, individual agreements may not derogate from the laws concerning public order (*l'ordre public*) and good morals (*bonnes moeurs*). The other legislative beacon is the German BGB, which speaks simply of the immorality of juridical acts (contracts).[4] It sets out in § 138 (1) that juridical acts contrary to good morals (*gute Sitten*) are null and void. In addition, it prescribes in the following § the nullity of usurious juridical acts. Contracts by which one of the parties aims to secure for himself or herself an excessive benefit at the prejudice of the other party, taking advantage of the other party's economic distress, urgent needs, lack of bargaining skills, inexperience, or any other specific predicament, are regularly beyond the boundaries of lawfulness. In most jurisdictions they are statutorily prohibited or, as the case may be, considered contrary to public policy or good morals. Usurious contracts rely on the existence of a meaningful discrepancy between the values of performance and counter-performance. In modern societies, increasingly dominated by liberalism and relying on an acquisitive attitude by its members, general judicial control of equality in transactions would be considered excessively paternalistic and prejudicial to legal certainty.[5] For these reasons intervention into the economic equilibrium of the contract devised by the parties' consent is exceptional. *Laesio enormis* has already been mentioned in the chapter pertaining to defects of contractual intent. The basic common feature between *laesio enormis* and usury is that they are both based on the egregious inequality between performance and counter-performance. However, unlike to *laesio enormis*, in the case of usury the disadvantaged party is not necessarily in (a presumable) mistake concerning the true value of the performance or the counter-performance, while the counterparty regularly acts in bad faith. For usury to exist, the better-positioned party must abuse

3 Zweigert and Kötz, 1998, p. 327.
4 (Von) Bar and Clive, 2009, p. 537.
5 Kötz, 2017, p. 112.

a circumstance on the side of the disadvantaged party in order to obtain unfair gain from the transaction. For this reason, usury always evokes a harsher reaction from the legal order in the form of nullity, whereby the specific legal consequences vary from one jurisdiction to the other.

Different institutions of law may contribute to determining whether a contract is illegal or immoral in any given legal order. In jurisdictions that adopted the German legal tradition, the lawfulness of a contract is determined primarily by scrutinizing its content. On the other hand, in legal systems following the tradition of the French Civil Code, beside the content of the contract (as *instrumentum*), the lawfulness of a contract is also determined based upon the legality and morality of the cause of contract (*causa*), that is, by the direct legal purpose the parties intended to achieve by concluding the contract. The theory of *causa*, one of the crown jewels of French contract law, has exerted great influence in many countries, including some in Central and Eastern Europe.[6] However, it is likely that the legal function of the concept of *causa* will be redefined after the French Code Civil itself relegated it to desuetude in the long-prepared amendments eventually adopted in 2016. The text of the French Civil Code currently in effect simply provides that a contract must have a lawful content and must not infringe on public order.[7]

Determining the legal consequences of non-existent contracts is quite a challenging issue in all legal systems. These do not infringe on statutory prohibitions nor good morals, but at least one of the preconditions for their existence is not fulfilled. They are merely purported contracts.[8] Most legal orders do not provide for a specific legal regime applicable only to non-existent contracts, although they may use wording implying a differentiation from invalid contracts. The rules on the invalidity of contracts are usually two-pronged: An invalid contract is either null and void or voidable. Non-existent contracts have at least the pretense of a valid contract; hence it must be established that they have not been concluded validly at all. The purported contract must be invalidated in order to eliminate any possible false impression by third parties (and quite often by the contracting parties themselves) that a valid contract has been concluded. In a bipolar logic of null and of voidable contracts, non-existent contracts are usually declared as such under the rules applicable to nullity.

A judicial decision establishing that a contract is null and void is of a declaratory nature (i.e., the contract is deprived of its effects from the very moment it was concluded). This means that a contract has not become null and void 'because' the court decided so, but because the required statutory conditions were not met at the moment of contracting; their absence is merely established during a judicial procedure. A court decision is required, as it removes the ambiguity concerning the validity of the contract. Such judicial declaration of the invalidity of a contract has profound legal consequences that differ to some extent in various legal orders. Some common

6 Dudás, 2012a, pp. 92–96.
7 Kötz, 2017, p. 109.
8 (Von) Bar and Clive, 2009, p. 454.

features may still be identified, however. The parties are relieved from their obligations arising from a null and void contract: No party may demand performance from the other party, nor may damages be claimed for non-performance.[9] If the parties have already executed their obligations, they are entitled to reclaim what they have performed under the contract. In this context the question arises whether the party to whom the invalidity of the contract is attributable is entitled to restitution. According to the rule embodied in the adage *nemo auditur propriam turpitudinem allegans*, a dishonest party is barred from restitution. Today this principle has lost much of its edge,[10] but is still present in some jurisdictions in Central and Eastern Europe, where the judge is entitled to decline restitution to a party who acted in bad faith. Extraordinarily, in cases where the contract egregiously violates good morals, in some legal orders the court may order the party who acted in bad faith to transfer to the state or to some public entity the object of his or her performance. This legal institution still exists in some Central and Eastern European countries or has only recently been abolished. Finally, in cases where one party acted in bad faith, the other in good faith, in most jurisdictions the liability of the party acting in bad faith arises for the damage the other party sustained due to the invalidity of the contract.[11]

In the light of the *favor contractus* principle, in many legal systems various institutions exist with the aim of 'salvaging' the null and void contract, thus enabling the transactions to 'convalesce' under specific conditions.[12] The most notable are partial invalidity and the so-called conversion or re-qualification of the contract. By the former the null and void or voidable contract becomes valid after the part carrying the cause of its invalidity is removed, provided the remainder of the contract still represents a reasonable and executable consent of the parties.[13] By the latter, the court re-qualifies the parties' consent as another type of contract, if it may be presumed that they would have concluded that contract had they known of the invalidity of their initial contract.[14] A special case of 'salvaging' a usurious contract is the right of the aggrieved party to demand performance as if there were no inequality between the obligations of the parties. In this case the elimination of inequality removes the cause of the invalidity of the contract regardless of the other party's bad faith.[15]

Finally, a short overview of the statutory regulation of the principle of good faith and fair dealing will be given in this chapter, since it is the other principle having, among others, the function of channeling the application of the principle of freedom of contract. There is no legal order in Europe that does not apply the principle of good faith and fair dealing in its contract law regulation. However, its meaning might remain rather vague if one considers only the interpretation of the statutory

9 Kötz, 2017, p. 125.
10 Kötz, 2017, p. 128.
11 (Von) Bar and Clive, 2009, pp. 552–553.
12 Zimmermann, 1996, p. 682.
13 Kötz, 2017, p. 122.
14 Zimmermann, 1996, p. 684.
15 (Von) Bar and Clive, 2009, pp. 514–515.

declaration of this principle.[16] As usually it gains its precise meaning when it is applied in relation to specific institutions of law, it is thus a sort of 'open norm.'[17] One such application has already been mentioned in relation to null and void contracts: the right to claim damages from the party who acted in bad faith, that is, the party to whom the invalidity of contract is attributable. There are, however, many more such applications. The principle of good faith and fair dealing is endowed with several layers of meaning in the context of precontractual negotiations, exclusion of contractual liability, contractual waiver of the application of judicial intervention into the contract due to the *clausula rebus sic stantibus*, etc.

2. The Czech Republic

2.1. Illegal contracts

Pursuant to § 580 (1) of the CzeCC, a juridical act is invalid if it is contrary to good morals or contrary to the law, if required by the sense and purpose of a statute. By the term 'contrary to the law' we must understand not only a contract contravening statutes, but also one contrary to other legislative acts (e.g., a regulation).[18] In particular, contrariety to the law may mean a breach of an enforceable constitutive decision implementing a given statute.[19] Also, the bad faith circumvention of the law (*in fraudem legis*) needs to be qualified as being contrary to the law.[20] Moreover, the term 'illegal contract' needs to be interpreted in a broader sense—a non-existent contract can also be illegal (see below).

In the case of illegal contracts, the invalidity does not occur without further ado—it is indispensable to examine the meaning and purpose of the statute employing the teleological form of interpretation. For example, the operation of a retail shop during a public holiday listed in the Act No. 223/2016 Col. on Retail Sales Hours is an offense. However, there is no need to declare the purchase agreements concluded during such public holiday in the retail shop invalid. The meaning and purpose of the prohibition of retail sale during certain days or hours lies in the protection of staff (imposing proper working hours). The potential invalidity of purchase agreements will not help to achieve such a purpose.

Historically, not all courts examined the meaning and purpose of statutory requirements. They often concluded that any conflict with the law results in some

16 In this respect the DCFR seems quite revolutionary, since it defines the meaning of the principle of good faith and fair dealing. It refers to a standard of conduct characterized by honesty, openness, and consideration for the interests of the other party to the transaction or relationship in question. As an example of acting against this requirement, the DCFR mentions one party acting inconsistently with his or her prior statements or conduct when the other party has reasonably relied on them to its own detriment. DCFR I:103.

17 Zimmermann and Whittaker, 2000, p. 31.

18 Supreme Court Ref. No. 29 Odo 344/2002.

19 Supreme Court Ref. No. 23 Cdo 472/2008.

20 Supreme Court Ref. No. 26 Cdo 273/2018.

form of invalidity of the contract concluded, e.g., in a situation in which the object of the sale was a good not approved for sale by an authority, even though the sale should have been approved, the court found that the purchase agreement was invalid due to breach of the law. However, the buyer had claims arising out of defects that allowed his situation to be resolved—it was not necessary to declare the purchase agreement invalid for that reason.[21] Now this approach is changing due to explicit regulations in the CzeCC.

2.2. Consequences of illegal contracts

Regarding the consequences of illegal contracts, these may vary. The contract or contractual term may be null and void, voidable, or ineffective. A breach of law can lead generally to the payment of damages.[22]

2.2.1. Non-existence of the contract

A contract is deemed non-existent (*nicotnost, zdánlivost*) if it does not fulfill the characteristics of a juridical act (e.g., a manifestly non-serious act, uncertain obligations, or the existence of coercion), or the CzeCC qualifies it as non-existent in certain other cases (e.g., an unfair contractual term included in consumer contracts, or a term deviating from the flat lease regulation to the detriment of the lessee). It is indispensable to draw a distinction between a non-existent and an invalid juridical act. Only an existing contract may be invalid (e.g., null and void, or, as the case may be, voidable in whole or in part).[23] Notwithstanding that, the difference in consequences compared to null and void or voidable contracts is not substantial (e.g., rules on conversion, partial invalidity, or pre-contractual liability apply differently).

2.2.2. Invalidity

In other cases, the contract may be declared invalid when a statute explicitly imposes invalidity as a sanction for a given infringement,[24] or such a consequence may be derived from the purpose and meaning of the legal norm that had been breached.

Nevertheless, juridical acts are to be preferably considered valid rather than invalid.[25] Moreover, partial invalidity has priority whenever the invalid part of the contract is separable from other parts and we may reasonably assume that the parties would have concluded the contract without such a part had they known about its invalidity.[26] Czech law also knows the institution of 'reduction' in order to preserve the validity of the contract.[27] If the ground for invalidity is constituted only by the unlawful determination of the quantitative, temporal, territorial, or other scope, the

21 Regional Court in Hradec Králové Ref. No. 25 Co 355/2001.
22 CzeCC, § 2910.
23 Supreme Court Ref. No. 21 Cdo 2862/2019.
24 E.g., CzeCC, § 581—lack of legal capacity.
25 CzeCC, § 574.
26 CzeCC, § 576.
27 CzeCC, § 577.

court shall amend the scope so that it corresponds to a fair arrangement of the rights and obligations of the parties. The court shall not be bound by the proposals of the parties but shall consider whether they would have proceeded with the legal action at all if they had recognized the invalidity in time.

The CzeCC—as does some of the other legal systems in Central and Eastern Europe—differentiates between two kinds of invalidity, both possibly resulting in partial or complete annulment, it being necessary to assess every single case specifically. An illegal juridical act may be null and void (literally, it may be affected by 'absolute nullity,' *absolutní neplatnost*) or voidable (literally, it may be affected by 'relative nullity,' *relativní neplatnost*). The impact of a juridical act being null and void is that it does not produce any of the intended legal consequences *ex tunc* and *ex lege*. The courts must consider such a situation *ex officio*.[28] A juridical act being voidable means that it exists and produces all the intended legal consequences unless the aggrieved party explicitly objects its invalidity. Such an objection requires a mere juridical act by the aggrieved party addressed to the counterparty, a court decision is not necessary. In such a case, the juridical act is also invalid *ex tunc*. Nevertheless, the right to object the invalidity of the juridical act may be limited.

The contract is null and void not only when it infringes on the law but also when it manifestly disrupts public order.[29] Public order comprises basic rules that are essential to society and its functioning and that must be obeyed by individuals. It is primarily a matter for the legislator to establish which norms govern and are pertinent to public order. Whether a rule protects public order (and therefore may be considered as part of public policy) is determined primarily by its meaning and purpose.[30] For example, in rules protecting third persons, not only contractual parties may be considered as such.

In other cases of breach of the law resulting in invalidity, the contract shall only be voidable—typically if the invalidity of a juridical act is prescribed to protect the interest of a given person,[31] such as error[32] or duress.[33]

2.2.3. Ineffectiveness

The law sometimes prescribes ineffectiveness as a consequence of the breach of law. This may be the case when surprising clauses (e.g., clauses permitted by law but detrimental to some categories of parties) are included in the standard terms.[34] Relative ineffectiveness (not to be confused with voidability) is also a regular consequence of the *actio Pauliana*.[35] It should be apparent from the law whether such ineffectiveness

28 CzeCC, § 588.
29 CzeCC, § 588.
30 Supreme Court Ref. No. 31 ICdo 36/2020.
31 CzeCC, § 586 (1).
32 CzeCC, § 583.
33 CzeCC, § 587.
34 CzeCC, § 1753.
35 CzeCC, § 589 et seq.

must be invoked by someone or is taken into account *ex officio* (e.g., in the case of surprising terms).

2.3. Immoral contracts

The term 'good morals' is interpreted as rules that must be unconditionally upheld in society; these rules at times originate not from particular norms of law (like public order), but from the ethical tenets of society.[36] Immoral contracts are prohibited.[37]

In some cases, the concept of good morals is misunderstood and extended. In practical terms, any action particularly advantageous to a contracting party itself (e.g., an advantageous purchase contract) or a time of performance depending on a third party was at some time described as immoral in older case law. Nowadays the Supreme Court of the Czech Republic adopts a more lenient approach. There must be some other circumstances, not only an egregious discrepancy in performances, that render the contract immoral.[38]

2.4. Consequences of immoral contracts

An immoral contract is null and void if it is manifestly contrary to good morals.[39] As there is intense public interest in the preservation of good morals, it is then without any doubt that such preservation cannot be left solely to individuals. Violations of these rules must be taken into account by the public authorities, even if neither of the parties objects.[40]

2.5. Usury

Usury is regulated by § 1796 (1) of the CzeCC, according to which if a person exploits distress, inexperience, mental weakness, agitation, or carelessness of the other party when concluding a contract and causes the other party to promise or provide to him or her or to another person a performance the economic value of which is in gross disproportion to the counter-performance (consideration) received, such a contract is invalid. An entrepreneur who concluded a contract in the course of his or her business activity may not invoke the invalidity of the contract under § 1796 CzeCC.[41]

The list of subjective features of usury mentioned above is not limited; to qualify a juridical act as usurious, it is sufficient to meet at least one of them.[42] As for the requirement of a 'gross disproportion,' the rules of *laesio enormis* apply. A gross disproportion is a disproportion that is obvious and without any doubt. As the CzeCC

36 Constitutional Court Ref. No. II. ÚS 249/97.
37 CzeCC, § 580.
38 Supreme Court Ref. No. 30 Cdo 21/2012, 29 Cdo 3467/2016, 23 ICdo 56/2019.
39 CzeCC, § 588.
40 Melzer and Piechowiczová in Melzer and Tégl, 2014, p. 721; Beran in Petrov et al., 2019, p. 641; Handlar and Dobrovolná in Lavický et al., 2014, p. 2087.
41 See also CzeCC, § 1797.
42 Supreme Court Ref. No. 30 Cdo 4582/2014.

does not state any specific limit, it is necessary to assess every single case differently, but the general rule is that the threshold for usury is double the value of the performance when compared to the consideration.[43] Thus, for example, in case of a credit agreement, an interest rate of 30% makes it usurious.[44]

In order to speak of usury, some authors are of the opinion that the greater the disproportion between the performance and the counter-performance, the lower the threshold for exploitation required to ascertain usury, and *vice versa*.[45] However, it can be concluded that a higher-than-normal price in and of itself does not represent a provision contrary to good morals.[46]

There is a debate in the legal literature about the consequences of usury. Some authors argue that renders the juridical act voidable.[47] The reasons cited are the following: The CzeCC mentions invoking by an entrepreneur, the objection being required for *laesio enormis*, undue influence, or unfair contractual penalty as well; voidability gives the weaker party the choice of whether to invoke usury. Moreover, usury makes the contract voidable in Austria or Switzerland. Some other authors state that the juridical act is null and void,[48] because a different solution would lead to the consequence that public authorities would authoritatively impose immoral obligations and, moreover, enforce immoral arrangements through state coercion (in case the aggrieved party does not object to the otherwise voidable juridical act and enforcement then takes place against him or her). Moreover, there is the example of German regulation. A third opinion states that generally it is not possible to determine whether the juridical act is null and void or voidable in all cases of usury, it being necessary to assess such a consequence on a case-by-case basis.[49]

It is indispensable to distinguish between usury and *laesio enormis*. *Laesio enormis* is regulated by § 1793 (1) of the CzeCC. If the parties undertake to provide each other with a mutual performance and the performance provided by one of the parties is grossly disproportionate to the counter-performance provided by the other party, the aggrieved party may request that the contract be avoided and the original state restored, unless the other party reimburses him or her for the injury resulting from the disproportion, keeping in view the usual price at the time and place at which the contract was concluded. This rule does not apply if the disproportion between the performances is based on a fact that the other party neither knew of, nor was required to know of.

43 Janoušek in Petrov et al., 2019, p. 1874.
44 Janoušek in Petrov et al., 2019, p. 1874.
45 Janoušek in Petrov et al., 2019, p. 1875; Petrov in Hulmák et al., 2014, p. 337.
46 Supreme Court Ref. No. 29 Cdo 3467/2016.
47 Janoušek in Petrov et al., 2019, p. 1878; Petrov in Hulmák et al., 2014, p. 340.
48 Melzer in Melzer and Tégl, 2014, p. 785.
49 Zuklínová in Švestka et al., 2014, Sec. 1796.

2.6. Good faith in contract law

In the Czech Republic's legal system, good faith is used both in an objective meaning (fairness) and a subjective meaning (as a person's mental state based on an excusable belief in the existence of a fact, a claim, or a legal relationship e.g., that between a parent and a child). This chapter deals with the objective meaning of good faith: Everyone is obliged to act fairly in a legal transaction.[50]

Good faith should not be confused with good morals. Violation of the principle of good faith does not necessarily mean a violation of good morals, while any conflict with good morals always constitutes a violation of the good faith principle.

Good faith may manifest itself during the conclusion and interpretation of a contract or during its performance. The CzeCC contains some special rules regarding good faith as well (e.g., precontractual liability).

2.7. Consequences of infringement of the principle of good faith

The CzeCC states that no one may benefit from acting unfairly or unlawfully. Furthermore, no one may benefit from an unlawful situation that the person caused or over which he or she had control.[51]

In some cases, the CzeCC regulates consequences specifically (e.g., damages in precontractual liability). There is no general rule dealing with the consequences of breaching the good faith principle. However, the general belief is that this does not lead to the invalidity of the contract. Some exceptions may be found in the regulation of unfair contractual terms[52] or standard terms that the other party could not have reasonably expected,[53] if these are considered a display of bad faith.

3. Hungary

Contracts that are unlawful, circumvent the law, or violate good morals are null and void in Hungarian contract law.

3.1. Illegal transactions

As far as unlawfulness is concerned, violation of or incompliance with statutory provisions renders the contract null and void, insofar as the statutory provision interfered with does not provide for other specific consequences. Despite these other consequences, the contract also shall be null and void if this sanction is explicitly provided for by law, or if the purpose of the statutory law is to prohibit the legal effect intended to be achieved by the contract.[54] This rule is interpreted as a kind of teleologi-

50 CzeCC, § 6 (1).
51 CzeCC, § 6 (2).
52 CzeCC, § 1814.
53 CzeCC, § 1753.
54 HunCC, § 6:95.

cal reduction in court practice.[55] That is, violation of legal provisions results in nullity of contracts only insofar as the presumed intent of the legislator with the statutory prohibition was to deprive the contract of its legal effects if the contracting parties interfered with such a prohibition. If the contract interfered with a legal norm that addresses private law relationships, the contract shall be null and void except where the norm explicitly provides for applying consequences other than nullity. If the legal norm that had been interfered with does not address a private law relationship, it is to be assessed by interpretation of that norm, whether the legislator might have attempted to deprive the contract of its legal effect.

If, e.g., the party is entitled to operate a business on the basis of a permit, the absence of such a permit does not render the contract concluded by the party null and void.[56] Another aspect of this approach is that if rules of tendering were infringed (e.g., the contract had been concluded not with the highest bidder or any of the bidders had been unlawfully advantaged) but the content of the contract does not interfere with statutory norms, its nullity shall not be established on the grounds of illegality.[57] On the other hand, if the contract was concluded by entirely omitting the bidding procedure that was compulsory on the grounds of statutory law (e.g., the public procurement procedure), the contract shall be null and void. Compliance with statutory law shall be assessed at the time of conclusion of the contract. If the contract is valid at the time of conclusion but interferes with statutory laws due to changes that occurred later in the legal environment, this shall be assessed as a hardship or impossibility of performance that emerged after contracting.

A contract shall qualify as null and void due to circumventing the law even if it does not violate statutory laws directly, but its actual effect is not compatible with statutory laws. The Supreme Court established that if the parents undertook obligations in the name of the minor to be performed after such minor comes of age, the contract shall be null and void as circumventing statutory laws.[58]

3.2. Contrariety with good morals

Contracts incompatible with the values generally accepted in society are null and void as being contrary to good morals. Such contrariety includes incompatibility with public policy as well. Contracts are null and void that are oppressive, excessively restrict personal freedom, are concluded with the intent to cause harm to others, are detrimental to the public interest, or are incompatible with basic professional and commercial standards, family values, or other basic social and economic values.

In a socio-economic distribution system based on market mechanisms, it is essential to guarantee the freedom of choice of market players, in terms of both the voluntary nature of the choice and the information available to them. Where market

55 Vékás in Vékás, 2020, p. 1596.
56 Supreme Court, Legf. Bír. Pfv. III. 21.463/1995. BH 1997. No. 391.
57 Supreme Court, Legf. Bír. Gfv. X. 31.147/2000. BH 2001. No. 234.
58 Legf. Bír. Pfv. IV. 22.342/2003. EBH 2004. 1019.

conditions do not apply, the restriction of contractual freedom may be appropriately achieved by rejecting the validity of contracts infringing good morals and public policy: The law may reject enforcement of transfer of *res extra commercium*. The same applies to family relations, which determine the basic structure of society. There are interests that are not economic or family-related, but ensure social coexistence in the long term, such as personal and political freedoms. Restrictions on them may also be an accepted minimal limit to contractual freedom in a society where these freedoms are a precondition for its continued functioning. Within this framework, the values reflected in the provisions of the constitution (the Fundamental Law of Hungary) are points of reference for determining the content of morality, because the primary source of such basic values is the constitution itself.

Contracts restricting the economic freedom or the commercial autonomy of the other party are the most relevant cases of immoral contracts in commercial relations. Contracts distorting competition are null and void as illegal contracts, but other forms of interference with freedom and autonomy in commercial relationships are covered by the general clause of immoral contracts. The restriction may be excessive because of the duration of the contract (restriction) or because of the disproportionate nature of the stipulated rights and obligations, or even because it gives one party a broad right of control or influence over the conduct of the other. This may be achieved, for example, by a disproportionate allocation of risks in the transaction. It also includes contracts whose object is to exploit the position of the economically weaker party in a morally reprehensible manner, to obtain an undue advantage over him or her, to make his or her performance economically impossible, or to 'overburden' him or her. In judging such cases, economic policy considerations may also play an important role.

A contract whereby a creditor over-secures himself or herself against a debtor also may be void as contrary to good morals. These situations are considered by the courts to constitute an unacceptable restriction on the economic freedom of the other party. Thus, the transfer of property for purposes of providing a security, the assignment of all the debtor's claims to the creditor for the purposes of providing a security, and the reservation of title for an extended or enlarged period or 'global' assignment are considered contrary to good morals if the party providing the security would thereby restrict its own economic freedom to an unacceptable extent. Contracts that have as their object to deceive or to defraud third parties may also be regarded as manifestly unfair and interfering with good morals. It is generally accepted that the mere fact that a contract is detrimental to the interests of third parties does not in and of itself render it null and void as unfair, especially since in a market context a certain degree of detriment to the interests of third parties is inevitable in a competitive situation. In a social and economic model based primarily on the pursuit of individual interests, which is typical of the market economy, there can be only a limited requirement to take account of the interests of other persons with an adverse interest in economic transactions. Therefore, only exceptionally, in well-defined cases that seriously violate the essential requirements of economic transactions, can a contract be declared null

and void as violating good morals on the grounds that it is detrimental to the interests of third parties.

3.3. Good faith in contract law

The requirement of good faith and fair dealing is a generally recognized principle of private law and is one of the fundamental principles of the HunCC as well (§ 1:3). The requirement of good faith and fair dealing is a general clause, just like the provision rendering null and void a contract contrary to good morals. However, while the legislator lays down the consequence of interference with good morals in contract law, that is, rendering the contract null and void, the requirement of good faith and fair dealing is not only open-ended in its content but also in the legal consequence of interference. The principle of good faith and fair dealing sets out a general standard of requirements with a moral content, which is therefore equivalent in its content to moral values. The distinction between the nullity of contracts violating good morals on the one hand, and contracts contrary to the principle of good faith and fair dealing on the other, can be defined primarily in terms of a functional difference rather than with reference to their content.

The scope of the prohibition of contracts contrary to good morals is limited to controlling the validity of the contract and entails the nullity of the transaction as a legal consequence. It does not apply to situations arising in connection with the conclusion, performance, or enforcement of a contract, nor does it apply to changes in the circumstances in which the contract was concluded or regarding its termination. However, the requirement of good faith and fair dealing, in addition to constituting a fundamental principle that also applies outside the law of contract, is relevant in all aspects of the contract and is flexible in its consequences, since the court is not bound by invalidity or any other determined legal consequence in enforcing the principle. Good morals, good faith, and fair dealing reflect a common set of moral standards and values, with no perceivable qualitative or quantitative difference.[59] However, an interference with good morals does not necessarily render a contract null and void: It results in the nullity of the contract if the moral standard interfered with was intended to have that consequence and nothing else. If nullity cannot be inferred for the purposes of the moral standard, the contract may be found to be contrary to the requirements of good faith and fair dealing. The breach of the fundamental principle of good faith and fair dealing may be subject to another consequence than nullity. Such a situation arises, for example, where the violation of good morals is not obvious, i.e., it does not necessarily or directly follow from the content of the contract, circumstances of contracting, or goal of the contracting parties.

3.4. Correction of the consequences

In the context of the legal consequences of invalidity, the party providing performance under the contract can recover it by means of a claim for restitution on the

59 Földi is of a different opinion. See Földi, 2001, p. 102.

grounds of unjust enrichment (if a proprietary claim is not available) or a specific rule of restitution (as provided in the HunCC). There are, however, policy considerations that would justify rejecting restitution in the case of illegal or immoral contracts. The principle that no one shall be allowed to rely on his or her own wrongful conduct to obtain an advantage is a traditional principle of private law. If this principle is to be applied to the legal consequences of invalidity of the contracts, the court will reject the claim for restitution of the party who (also) caused invalidity. The refusal to grant restitution is also justified by the fact that otherwise there would be little preventive effect of the legal or moral prohibition (or other grounds for invalidity). The party violating a moral or legal norm would not risk anything, since at most he or she would get back what he or she has performed. Thus, the policy underlying the prohibition of such transactions cannot prevail. It would therefore seem obvious for the court to reject restitution for the party who has caused the invalidity, as this would prevent a party of bad faith from concluding such a contract. The disadvantage of this solution, however, is that rejecting restitution results in the unjust enrichment of the aggrieved party. To remedy this situation, the HunCC of 1959 introduced into Hungarian law the right of retention in favor of the state, which was finally abolished by the HunCC of 2013. Courts are disinclined to restrict the right of invoking nullity on the grounds of the lack of good faith and fair dealing or other doctrines, even if it was clear for the party concerned that he or she was party to an illegal transaction. Thus, nullity can also be invoked by the party that caused it, and such party is not barred from claiming restitution. In the case of 'bilateral turpitude,' the result may hardly be satisfactory, since either the refusal to return the performances or the full or partial granting of the claim for restitution contradicts the requirement of good faith and fair dealing, and therefore undermines the preventive effect of the sanction. In certain situations, this is not in line with substantive justice as perceived at the social level, and therefore reduces the effectiveness of the enforcement of the law.[60]

4. Poland

The PolCC deals with the illegality and immorality of contracts in two separate parts of the code: the General Part proper and the General Part of the Law of Obligations. The first provision is Article 58 of the PolCC, which sets out general rules as to the validity of all juridical acts (both contracts and unilateral acts), including contracts. Another is Article 353^1 of the PolCC dealing with the limits of contractual freedom. These two provisions are supplemented by the rules on simulated transactions (*pozorność*) and acts performed by persons unable to foresee the results of their actions.

There is a reason for this two-tier system. Initially, the PolCC did not include provisions on contractual freedom because that would have been contrary to the socialist vision of private law. Article 353^1 of the PolCC was added to the Law of Obligations in

60 Kelemen, 1937, p. 142.

the PolCC after the fall of communism in Poland in 1989. Another peculiarity of this system is the existence of two different terms denoting immoral acts—the classical *contra bonos mores* (*sprzeczny z dobrymi obyczajami*) clause, and the 'rules of social coexistence' clause (formerly referring to the 'rules of social coexistence of the People's Republic of Poland'). The latter is the original term used by the drafters of the PolCC, who wanted to break with the bourgeois traditions of the older civil law and replace it with a new set of rules fit for the new, socialist society. After 1989 the lawmakers decided to leave the original term almost intact (the reference to the People's Republic of course is now repealed) and use the *good morals* clause in newly added or completely changed articles of the PolCC. Although a minority of authors stresses that if you use two different terms in an act, they must necessarily have two different meanings, the majority believes that both *good morals* and rules of social coexistence are used in an identical meaning.[61]

According to Article 58 § 1 of the PolCC, juridical acts that are illegal or contradict the rules of social coexistence are null and void by virtue of the law (*ex lege*). Illegality is understood as undertaking an action that violates a statute or an act of equal standing, such as an EU Regulation.[62] It would be hard to provide the readers with an exhaustive list of cases where a contract would be illegal, but the following list of examples should give a good overview of the current practice. Contracts for committing a crime are evidently illegal and thus null and void. The same goes for contracts relating to *res extra commercium,* or goods covered by various trading restrictions (e.g., archaeological finds, human organs, various psychoactive compounds, or military equipment). Illegality may also occur as a sanction for disregarding requirements of form or including a clause explicitly prohibited by law. Thus, if the law requires the contract to be notarized, concluding it in any other form will lead to nullity. If, for instance, someone buys archaeological finds or ivory (illegal to trade on the grounds of international agreements on the protection of endangered species) on eBay, the contract will also be null and void.[63] The same sanction applies to contracts concluded by persons placed under guardianship and therefore lacking the exercise of their rights, or by a person who, due to a mental condition, serious illness, or any other personal reason, was not able to fully comprehend the consequences of his or her actions at the given time.[64]

A good example is a COVID-19 patient with a high fever signing documents without reading them beforehand because he or she cannot do it but feels bound to sign. Even if he or she has not read them carefully, he or she will not be bound by his or her apparent consent, as the action of granting such consent was vitiated by a psychological condition.

61 Sala-Szczypiński, 2007, pp. 66 et seq. For a detailed analysis see Zaradkiewicz, 2013, pp. 22 et seq.
62 Gutowski, 2021, pp. 211 et seq.
63 Szafrański, 2019, p. 56.
64 PolCC, Article 83.

Another atypical case of nullity is constituted by simulated contracts.[65] This type of defective expression of will happens when the parties pretend to enter into an apparent contract without intention to perform. Typically, this happens if the parties intend to delude the general public or creditors. Thus, if a debtor 'sells' his or her car to a friend in a bogus contract to present an apparent state of insolvency to any creditors that such a debtor may have, this contract will be invalid. The same applies to bogus sales at auction, where the auctioneer colludes with the owner of the goods sold and his or her cronies to accept fake bids. The purpose of such an auction might be, for example, to generate a market for an otherwise worthless article. The sale itself is bogus and void, but the 'sales price' will be published and the bidding public will be convinced that an artist's works are worth buying.[66]

The 'principles of social coexistence' are not defined by law. This is an umbrella term covering all the cases where there is no law against a contract or its provision but the contract should not be upheld due to morality or public policy reasons. What is or what is not against the rules of social coexistence or *contra bonos mores* depends largely on what society considers immoral or improper. In a particular case, it is all in the eyes of the judge.[67] A good example is contracts relating to sex, love, and romance. In the 1930s, a claim for commission owed to a professional matchmaker was declared immoral (apparently you can help people to find their significant other only for free). In the times of Tinder and matchmaking portals, this case law seems somewhat exaggerated. Promises to marry, once enforceable, are today held as non-binding, and a judge confronted with an engagement contract would probably declare it null and void because being contractually bound to choose a romantic partner is contrary to all the concepts of human freedom we now cherish. At this particular moment, we are probably seeing the shattering of one more iron-clad example of an immoral contract: the typical textbook example of a contract for sexual services rendered for money, or a contract for having sex in public.[68] However, there is currently a strong movement for acknowledging sex workers as part of the labor force, and one cannot deny the existence of pornographic theaters, skin businesses, and the adult movie industry. Classifying these contracts as null and void could lead to discrimination against the performers. Moreover, if such businesses exist and are socially accepted, they seem to fall out of the *contra bonos mores* group. Article 58 § 1 of the PolCC covers not only juridical acts containing clauses contravening rules of social coexistence, but also acts committed with an impure intent. For instance, the Supreme Court of the Republic of Poland has held that a buyer who paid a significantly lower price for goods in the knowledge that the seller has not paid the price for such goods to their former owner and has no intent to do so concludes an immoral contract.[69]

65 PolCC, Article 84.
66 Gutowski, 2021, pp. 104 et seq.
67 Radwański and Zieliński, 2012, pp. 395 et seq.
68 Radwański and Trzaskowski, 2019, p. 319.
69 Judgement of the Supreme Court of February 10, 2010 V CSK 267/09.

The invalidity of a juridical act can be total or partial, depending on the gravity and scope of the infringement of the rules. So, an act can be invalid as a whole or contain illegal or immoral clauses. In the latter case, only these clauses are invalid and simply fall out of the scope of the act. If, however, the act would be meaningless without these clauses, the whole act would be invalid.[70]

The invalidity of a contract or any other juridical act occurs *ex lege* and the court must invoke such invalidity, the juridical act being null and void, *ex officio*. However, Polish law also knows cases of voidability where the act is valid unless one of the parties contests its validity, either by an attempt to rescind it or have it invalidated by court. An example of the former is an essential error, where one can rescind a contract by simple declaration made in writing to the other party. An example of the latter would be the action for invalidation of a contract concluded at a rigged auction.[71]

As far as the illegality of a contract goes, the general framework is similar to that applied in cases of the illegality of any other juridical act described above. So, having a contractual clause contravening a statutory provision leads to the nullity of a contract or a part thereof. This limitation has to be read in connection with other provisions of the PolCC, in particular rules on clauses unfair to consumers.

The PolCC has a general provision stating that any contractual clauses contrary to good practices shaping the position of a consumer unfavorably vis-à-vis the entrepreneur are invalid. The PolCC contains a list of so-called 'gray' clauses that are deemed unfavorable vis-à-vis the consumer unless proven otherwise. This rule does not apply to provisions individually negotiated with a consumer. A recent example of applying these rules to consumer contracts is a Judgement of the Supreme Court[72] dealing with so-called 'spread' clauses in housing credit agreements, where the amount of the credit was converted into Swiss Francs. Many banks used the spread between the buying and selling price of the CHF to raise their profit margins. The contracts contained a clause that the customer would pay the credit installments in PLN and the bank would convert it into the CHF using its own exchange rates. The banks had unlimited freedom to set exchange rates, so they set them at levels largely unfavorable to customers. The Polish Supreme Court decided that such clauses are contrary to good practices and thus invalid. On the other hand, the Court for the Protection of Competition and Customers (*Sąd Ochrony Konkurencji i Konsumenta*) held that employing a complicated algorithm incomprehensible to average consumers to calculate the CHF/PLN exchange rate is not per se abusive or *contra bonos mores*.[73]

Acting contrary to good practices can also occur in the case of contracts where the position of the parties is not equal if the contract limits personal freedom or in family life.[74]

70 PolCC, Article 58 § 3.
71 PolCC, Article 70^5.
72 Judgement of the Supreme Court of February 27, 2019 II CSK 19/18.
73 Judgement of the Court for protection of Competition and Consumers of March 22, 2021 r. XVII AmA 12/19.
74 Machnikowski, 2020, pp. 609 et seq.

The third and the most complicated limitation of contractual freedom is contradiction between the contents of the contract and the nature of contractual relationship (*sprzeczność z naturą stosunku zobowiązaniowego*). There is no good explanation of what the lawmaker intended when introducing this particular rule. The legal literature usually limits itself to stating that contracts containing clauses contradicting basic principles of private law will fall within the scope of this provision. However, the same clauses will also be illegal or contrary to good practices.[75] In the case law the following clauses have been held as contradicting the nature of a given contractual relationship: a clause excluding a partner's right to participate in the profits if particular activities of an ordinary partnership governed by said partner are not profitable;[76] a life insurance contract where part of the premium can be invested in an investment fund, but the amount of the insurance paid to the beneficiary is close to null;[77] or a credit consortium agreement where one of the members was absolved from any risk.[78]

There is no general presumption of good faith in contract law; however, there is a provision requiring negotiating parties to act in accordance with good practices, and performance of contract requires conformity with customs, the law, and the rules of social coexistence. Breach of these rules may lead to contractual or non-contractual liability. The latter is applied in the field of contracts mainly for the broadly understood situation of *culpa in contrahendo*, i.e., a breach of an implied duty to act in good faith when entering into a contract.[79] To what extent *bonos mores*, rules of social coexistence, and contractual good faith are interchangeable remains uncertain.[80]

5. Romania

5.1. Illegal contracts

5.1.1. General aspects

Contracts or contractual clauses infringing on mandatory legal norms or on public order (public policy) in general are considered illegal.[81] The contract may thus be rendered null and void *ex lege* or may be voidable by a court upon request by the aggrieved party or by the agreement of the parties, both situations resulting in invalidity. Invalidity plays both a preventive role (the parties, knowing that the contract will be invalid, should not enter into it) and a repressive, sanctioning role (if the parties do enter into an illegal contract, that agreement cannot produce the desired effects).[82] The law uses

75 Machnikowski, 2005, pp. 350–351.
76 Judgement of the Supreme Court of November 9, 2006 IV CSK 216/06.
77 Judgement of the Supreme Court of May 21, 2020, I CSK 772/19.
78 Judgement of the Supreme Court of December 15, 2005, V CK 425/05.
79 Zawistowski, 2004, pp. 381 et seq.
80 Zaradkiewicz, 2013, pp. 22–23; Radwański and Zieliński, 2012, pp. 399–400.
81 RouCC Articles 1169 and 1246.
82 Boroi and Anghelescu, 2021, p. 271; Nicolae, 2018, p. 532.

the institution of invalidity as a defense against the creation of contracts that would be contrary to the public or at the very least to private interest. A contractual clause may also be invalid, in the meaning of 'non-existent,' if it appears to exist (materially) but does not produce the legal consequences intended by the parties under the existing law, without being null and void or voidable. The reason of all the above-mentioned manifestations of invalidity must in all cases exist at the moment the contract is concluded.

Invalidity is therefore a sanction affecting a contract by depriving it in whole or in part of the legal effects for which it was concluded. The essential sanction of invalidity is that it precludes the intended legal effect: The invalid contract does not bind the parties (the invalid contract does not have to be performed), nor can the invalid contract be enforced by the state directly or by way of an enforceable court decision. It is not sufficient to identify invalidity simply with the lack of any legal effects. It must be stressed that an invalid contract also produces legal consequences, but these are not the same as those that the parties intended to achieve. For example, the object of performance under an invalid contract must be returned (*restitutio in integrum*), even if the parties intended that the performance should occur even in cases when the contract itself is invalid.

What causes a contract to be invalid? Invalidity is caused by the absence of one of the general conditions of validity of contracts (capacity, consent, a definite, permissible, and possible object, a legitimate cause, or form in the case where this represents a condition of validity). Also, invalidity may be caused by the infringement of a specific condition of validity, resulting in the breach of prohibitive and mandatory rules of law.

Invalidity under Romanian law has two general forms and one specific form. The two general forms are also degrees of invalidity according to their mode of operation (*ex lege* or upon request by the aggrieved party or agreement of the parties): nullity and voidability. The specific form is the institution of non-existent clauses called 'clauses considered as unwritten' in the Romanian legal system—a novelty introduced as of October 1, 2011. The following table illustrates the use of these notions using their Latin equivalents as guides:

Invalidity (*nulitate*)	nullity (*nulitate absolută*)	*negotium nullum*
	voidability (*nulitate relativă*)	*negotium rescissibile*
	clause considered as unwritten (*clauză considerată ca nescrisă*)	*clausa pro non scripto habetur*

5.1.2. Nullity

Nullity[83] of a contract, by which such a contract is considered null and void *ex lege*, is a civil law sanction occurring when the norms protecting the public interest have been infringed upon, and therefore the contract may have no intended legal transactional effects at all.

83 RouCC Article 1247.

A contract is sanctioned by nullity if:[84]

— there is a total absence of (legal) intent to conclude the contract, for example, if the signature on the contract is not provided by the contracting party (obviously, e.g., in cases where the signatory has no right of representation, but also if the signature is forged),
— it issues from a person who does not have the legal capacity to conclude the contract,
— it is in direct breach of a mandatory legal norm protecting a general interest, e.g., when *Primus* as seller agrees with *Secundus* as purchaser to the sale of a kidney. The contract is null because it is contrary to the RouCC (Article 66 provides that any transaction that has as its object conferring a pecuniary value on the human body, its components, or its products is null and void, except in cases expressly permitted under the law),
— it constitutes an evasion of the law (*in fraudem legis*), therefore it is in indirect breach of a mandatory norm protecting a general interest; that is to say, it is a contract that, although not directly prohibited, is intended to circumvent the purpose of a prohibitive norm,
— contracts contrary to public policy, called 'public order' (*ordinea publică*), or good morals (*bunele moravuri*). Contracts contrary to public policy include those that are not as such immoral, nor expressly prohibited, but that contravene legal principles that are generally the basis of the legal order or of certain institutions of public law. For example, a contract that excessively restricts individual freedom contradicts public policy. There is no doubt that the vagueness, indefiniteness, and elasticity of the public policy concept raises interpretation problems,[85]
— does not comply with the prescribed formalities, provided that the contract is subject to a formality, for example, the authentic, notarized form.

The following consequences characterize nullity:[86]

— A contract is null and void regardless of whether or not proceedings for having it declared as such have been brought. The nullity is independent of the will of the parties. Since the contract does not legally exist, if proceedings for a declaration of nullity have been brought, the court does not annul the contract but merely finds, with declarative effects, that it is null.
— In principle, nullity may be invoked in court, or even during extrajudicial procedures (e.g., the inheritance procedure before a public notary), by any interested person or third party, not just the aggrieved party but also those who stand to benefit in any way from the contract being null and void. The contract must be declared null even against the common will of all the parties

84 For further details, see Boroi and Anghelescu, 2021, pp. 289–294; Nicolae, 2018, pp. 552–555.
85 For contracts breaching good morals, see the following sub-chapter.
86 For further details, see Nicolae, 2018, pp. 557–560; Veress, 2021, pp. 132–133.

who may be interested in its maintenance. Nullity is also effective against all parties before the contract is declared null by a court [e.g., the invalidity of a contract of gift (*contract de donație*) in a private deed can be successfully invoked against the creditors of the donee (*donataire*)].

— The court must also establish the nullity of its own motion. This is the case even if both parties request that the nullity be disregarded.
— It follows from the aforementioned fact that the nullity of a contract cannot be remedied by the parties' subsequent confirmation of it (*quod ab initio vitiosum est, non potest tractu temporis convalescere*), since confirmation is tantamount to waiving the action for a declaration of nullity. This action belongs not only to the contracting parties. However, according to Article 1260 (1) of the RouCC, it is possible to reclassify a null contract as a valid contract of another type (*conversiunea contractului lovit de nulitate absolută*). This refers to a situation where the contract sanctioned by nullity contains the essential elements of another—valid—contract and may therefore be reclassified as valid if this is not contrary to the parties' presumed intention. For example, a contract for the sale of immovable property concluded as a private deed (which is null and void for lack of authentic form) can be reclassified as a promissory contract for the sale of the same immovable (which is also valid as a private deed). Reclassification occurs *ex lege* in all cases when the parties have not expressly excluded this effect, or its tacit exclusion does not result beyond any reasonable doubt from the contents of their contract.
— An action for a declaration of nullity of a void contract does not become time-barred.

5.1.3. Voidability

The voidability[87] of a contract is a consequence of breaching legal norms protecting private interests, and therefore voidability of the contract can be invoked by the aggrieved party whose interests are protected by the violated norm.

Therefore, a voidable contract creates a contingency situation: The contract is provisionally in effect, but the law gives one of the parties (but not any third parties) the power to avoid it, with retroactive (*ex tunc*) effects. The principle of freedom of contract permeates the legal institution of voidability because the party entitled to initiate avoidance is free to choose whether to accept the voidable contract and tolerate the associated injury, or to exercise the action for avoidance.

In cases where the nature of the invalidity is not determined or is not clear from the law, the contract is considered voidable, not null and void.

A contract may be avoided if:[88]

— the will of one of the parties has been manifested in a defective manner (cases of mistake, deceit, duress, *laesio enormis*),

87 RouCC, Article 1248.
88 For further details, see Boroi and Anghelescu, 2021, pp. 294–296; Nicolae, 2018, pp. 555–556.

— the contract lacks a cause (*causa*),
— consent was given by a person who lacks the exercise of his or her rights, and therefore such consent would have been contingent on the prior approval of another person or entity,
— the law expressly provides for the sanction of voidability in the event of a breach.

Voidability has the following characteristics:[89]

— The contract exists until a court decision annuls it. However, if this happens, the contract is deemed not to have been validly concluded from the outset. If the contract is avoided, therefore, any effects such a contract hitherto acquired are retroactively extinguished (the *ex tunc* effects of avoidance). Once the contract has been avoided, voidability is thus no different from nullity. The difference between these two forms of invalidity is primarily one of degree, which is reflected in the applicable conditions, but not in the effects. Once successfully challenged, the consequences of a voidable contract must therefore be judged according to the same principles as those of a null contract. The agreement of the parties may also operate the avoidance of the contract.
— Unlike nullity, voidability, whether by action or as a plea in defense, may be raised only by the party who has suffered an infringement of his or her rights or legitimate interests as a result of the contract e.g., a person subjected to duress or deceit during conclusion of the contract. Neither the party of bad faith nor any third party may successfully request avoidance (there is one exception in this respect: The prosecutor may bring an action for avoidance to protect the interests of persons lacking capacity to exercise their rights).
— Since in such cases the invalidity of a contract depends solely on the party, the latter has the right to enforce the invalid contract by confirmation. By this, the uncertainty hanging over the contract is removed, and it is considered as if it had been valid from the moment it was concluded. The confirmation is therefore retroactive. Confirmation does not affect rights acquired by third parties in good faith.[90] Confirmation may only be valid if it is made with knowledge of the possible reasons for voidability, and only if the circumstances giving rise to the infringement of a legal norm no longer exist at the time of confirmation (otherwise, the confirmation itself may be challenged). In order to remove uncertainty, the law recognizes the possibility of requesting the person entitled to avoid the contract to confirm it. If the person does not act to avoid the contract within six months of receiving the notice, his or her right to avoid it at a later date is forfeit.[91] Confirmation may also be implied. Voluntary performance of a voidable contract after the ground for avoidance has ceased to exist also tacitly

89 For further details, see Nicolae, 2018, pp. 560–563; Veress, 2021, pp. 134–136.
90 RouCC, Article 1265.
91 RouCC, Article 1263.

confirms the contract. For example, after the cessation of the duress, the debtor may perform the contract, knowing the ground for avoidance but not asserting his or her right to challenge the contract.

— Voidability can only be raised by court action (a challenge) within the limitation period. This is usually three years. By contrast, it can be raised at any time by way of a plea (a defense) (*quae temporalia sunt ad agendum perpetua sunt ad excipiendum*). There may exceptionally be a time limit set on invoking voidability by way of a plea. For example, a plea of disproportionality (*laesio enormis*) may only be raised within the limitation period of one year.[92]

5.1.4. Further types of invalidity

Further forms of invalidity (which refer to nullity and also to voidability) are:

a. *Total invalidity (nulitate totală) or partial invalidity (nulitate parțială)*, depending on whether the invalidity deprives the contract of its legal effects in whole or in part;[93] the main rule is partial invalidity, where the contract continues to bind the parties while the invalid part is omitted. If part of the contract is illegal, the question arises whether this affects the whole contract or whether only the relevant part contrary to the law is invalidated. In other words, the question is whether the invalidity is total or partial. The invalidity of certain clauses does not make the contract void as a whole if it can be presumed that the contract would have been concluded without the invalid part being included. In such cases, a contract remains valid as a whole, and only the illegal part becomes void. The corresponding legal norms replace the illegal part, or, if possible and equitable, the invalid part is simply deemed not to exist. Total invalidity is established when it is found that there is such a relationship of interdependence between the invalid part and the rest of the contract that it is reasonable to assume that the parties would not have consented to the contract without the invalid clauses.[94]

b. *Express invalidity (nulitate expresă) or virtual invalidity (nulitate virtuală)*, where in the first case, the law expressly provides for the sanction of invalidity. However, in the second case, invalidity is not expressly provided for by the law but is undoubtedly implied from the mandatory norm governing the conditions of validity of the contract.[95]

5.2. Usury

The RouCC does not have explicit rules on usury. However, the activity of lending money at high interest is prohibited by Government Ordinance no. 13/2011. Contracts concluded against these rules are null and void as having an illegal cause (*causa*). There is no possibility to uphold the contract by decreasing the rate of the interest.

92 RouCC, Article 1223.
93 Boroi and Anghelescu, 2021, p. 273; Nicolae, 2018, p. 549.
94 RouCC, Article 1255.
95 RouCC, Article 1253. Boroi and Anghelescu, 2021, p. 275; Nicolae, 2018, p. 547.

Also, the creditor who lends money with an interest rate above the one legally permitted will lose all entitlement to any interest.

5.3. Unwritten clauses

In addition to nullity and voidability, the current RouCC also introduced a specific, transitional form of invalidity: the 'unwritten' (*pro non scripto habetur*) clauses (*clauze considerate nescrise*). Similar rules are also contained in the French, Belgian, and Swiss Civil Codes and the Civil Code of the Canadian province of Québec.

The legal nature of the unwritten clauses is disputed. According to the opinions expressed in the legal literature, such clauses are forms of partial nullity or partial voidability, and there is also a view that they are a distinct, *sui generis* type of sanction. In our opinion, unwritten clauses represent a specific form (subtype) of partial nullity (*nulitatea absolută parțială*) where a provision included in a contract that is contrary to the law, eliminated from that contract as null and void *ex lege*, is automatically replaced by the mandatory provisions of the law, thus 'salvaging' the contract and making it legal.[96] In general, partial invalidity (nullity or voidability) can only exist if the invalidity does not affect the essential elements of the contract. However, an unwritten clause may be an essential element, but it does not lead to the total invalidity of the contract because the mandatory rules of law replace the omitted provision.

Thus, for example, the following clauses are unwritten:

— the penalty provided for in the event of termination of an engagement to marry,[97]
— any clause in a contract concluded for an indefinite period that precludes its unilateral termination by either party, subject to a reasonable period of notice, or that stipulates a benefit in exchange for termination of such a contract,[98]
— an impossible condition, or one contrary to law or good morals unless it is the cause of the contract itself; in the latter case the contract shall be null and void,[99]
— any clause that precludes the tenant of a dwelling from unilaterally terminating the lease with at least 60 days of notice if the tenancy is for a fixed term;[100] in the case of the same contract, any clause under which the tenant is obliged to take out insurance with an insurer imposed by the owner is also unwritten,[101]
— in case of a partnership contract, any clause setting a guaranteed minimum level of benefits for one or some of the partners is considered unwritten,[102]

96 Veress, 2021, pp. 137–139.
97 RouCC, Article 267 (2).
98 RouCC, Article 1277.
99 RouCC, Article 1402. From this text the distinguishing criterion between nullity and the unwritten clause also follows. The unwritten clause salvages the contract by restoring the legality of the breach, eliminating the impossible condition or the condition contrary to the law or morality, but in case such a condition is the very cause of the contract, then the contract cannot be salvaged, as the destructive effects of nullity in this case are total.
100 RouCC, Article 1825.
101 RouCC, Article 1826.
102 RouCC, Article 1953 (5).

— any clause permitting unilateral termination of a contract of maintenance based on the conduct of the creditor of the maintenance to be performed that makes it impossible to perform the contract in concordance with good morals, or for unjustified non-performance of the maintenance obligation by its debtor,[103]
— any clause limiting the carrier's legal liability,[104] etc.

In the case law it has been held that unwritten clauses and nullity are similar in their effects, the distinction being based on the fact that the unwritten clause in itself constitutes a 'remedy by sanction' (*sancțiune remediu*) that does not require the intervention of the courts, and that the corresponding legal text replaces the unwritten clause *ex lege*. Consequently, if a contract contains an unwritten clause, it will not have any effect, and the relevant mandatory rule of law will inevitably take the place of the clause. The other provisions of the contract will remain in effect as if the unwritten clause had not been included in the contract. However, if the unwritten clause has been performed, the effects of the clause will be retroactively discharged, as in the case of invalidity.

Looking at the list of unwritten clauses mentioned in the legislation, we can conclude that the relevant provisions of the RouCC in these cases mainly protect private interests and are therefore closer to voidability.[105]

Therefore, the fundamental question concerns who may rely on the unwritten character of a contractual clause, only the protected contracting party or any interested third parties as well? In our view, when the law deems a contractual provision to be unwritten, the effects of the law in eliminating the clause, that is, in purging the contract from the unlawful provision, are automatic (*ex lege*), i.e., without any party's discretion being considered. Therefore, the unwritten character of a clause may be invoked by any interested third party so that the institution of unwritten clauses is in effect, which is closer to nullity than to voidability. However, unlike nullity, which also exists in a virtual form, a contractual clause may only be declared unwritten if there is an explicit legal basis for doing so.[106]

5.4. Immoral contracts

The Romanian Civil Code has several rules on contractual immorality, in practice creating a set of norms to ensure morality. It does not contain a definition of good morals since this concept depends on the changing values of a particular society, and it is up to the judge to define its precise boundaries at a given time. As stated, good

103 RouCC, Article 2263 (3).
104 RouCC, Article 1995 (1).
105 Mainly because in some cases, such clauses protect the general interest as well. For example, debtor protection can be an issue of general interest. Therefore, the legal text, for example, according to which 'the clause authorising the mortgagee to possess the mortgaged immovable or to appropriate its fruits or revenues until the date of the commencement of enforcement shall be deemed not to be written' (RouCC, Article 2385), is a text close to nullity and not voidability.
106 Veress, 2021, pp. 139.

morals are a set of rules imposed by a certain social morality existing at a given time and in a given place, which, together with public order, represent a norm, a standard against which human behavior is judged.[107] Good morals have been defined as 'the totality of the rules of good conduct in society, rules which have taken shape in the consciousness of the majority of the members of society and the observance of which has become obligatory, through long experience and practice, in order to ensure social order and the common good, i.e., the achievement of the general interests of a given society.'[108]

In general, the law itself expresses good morals. If such a specific mandatory rule that translates a moral value is infringed, we are in the presence of an illegal contract. Moreover, those contracts that are prejudicial to morality apart from any infringement of a specific legal text are sanctioned through the general rules on good morals. In this way, the judge will have a more comprehensive power of appreciation and will be able to declare null and void a particular provision that affects public morality even when it is not contrary to a particular mandatory rule. The judges' power of appreciation, as has been considered, could give rise to arbitrariness and abuse if judges were too rigid or too keen in assessing what is and what is not contrary to morality. It is therefore necessary to be measured and prudent in this assessment.[109]

We can classify the general rules on good morals of the RouCC into three clusters. The first set of rules is included in the general principles of civil law. In this context, no derogation may be made by agreements or unilateral juridical acts from laws concerning good morals,[110] and any natural or legal person must exercise their rights and fulfill their civil obligations in good faith and following good morals.[111] Good faith is an example of the intertwining of moral and legal norms.[112]

The second group of norms is included in the regulation of partnerships and legal persons. Every partnership must have a definite and lawful object in accordance with morality.[113] In the case of legal persons, invalidity is the sanction if the object of activity is contrary to good morals.[114]

The third set of rules refers to contracts in general,[115] even if one of these articles is situated in Book III of the RouCC, which deals with rights *in rem*. According to this legal text, the owner may consent to limit his or her right by a contract if it does not

107 Ungureanu, 2007, p. 33.
108 Pop, 2009, p. 384.
109 Hamangiu, Rosetti-Bălănescu and Băicoianu, 1928, p. 93.
110 RouCC, Article 11.
111 RouCC, Article 14. Good faith shall be presumed until proven otherwise.
112 Gherasim, 1981, p. 228.
113 RouCC, Article 1882.
114 RouCC, Article 196.
115 Complementing the general rules, Romania has a specific regulation in the case of the maintenance contract. Where the other party's conduct makes it impossible to perform the maintenance contract under good morals, the party concerned may request termination (RouCC, Article 2263).

violate good morals.[116] The other rules are also definitive for any contract. Regulating freedom of contract, the RouCC states that the parties are free to conclude any contracts and determine their content within the limits imposed by law, public policy, and good morals.[117] The subject matter of the contract must also be in accordance with good morals,[118] as the same condition is mandatory for the cause (*causa*) of the contract.[119] A contractual condition contrary to morality is considered unwritten,[120] and if it is the *causa* of the contract itself, it entails the nullity of the contract. However, as a general rule, the invalidity is partial: Clauses that are contrary to good morals shall render the contract invalid in its entirety only if they are, by their nature, essential or if, in their absence, the contract would not have been concluded.[121]

In Romanian case law, contracts of donation were qualified as immoral if the donor's purpose was to induce the recipient to enter into or continue a cohabiting relationship; such as if the donor's purpose was to induce the recipient to enter into a fictitious marriage for the sole purpose of avoiding criminal liability for the crime of rape.[122]

When criminal law leaves the possibility of pressing charges for certain offenses to the discretion of the aggrieved party, or when such party may later reconcile with the offender with the effect of the charges being dropped, or withdraw the charges pressed, the victim may waive or, as the case may be, exercise such rights only in order to make it possible for normal relations between him or her and the offender to resume. Any contract concluded in order to open up to the aggrieved party the possibility of making disproportionately large material profits in relation to the damage actually suffered by speculating in a situation in which the offender finds himself or herself has an immoral *causa*. Of course, within the limit of reasonable compensation, the aggrieved party may settle with the offender, who thus validly undertakes to cover the actual damage assessed by the parties themselves, but in this latter case the victim of the offense seeks to satisfy a legitimate interest, such a transaction having in itself nothing unlawful. The situation is quite different when, taking advantage of his or her position in the criminal proceedings, the aggrieved party obtains from the offender a sum considerably disproportionate to the actual damage, because in this case the subjective right, recognized by civil law, to obtain compensation for the damage is diverted from its economic and social purpose and can no longer enjoy legal protection.[123]

Also, the agreement by which a married man, temporarily abandoned by his wife, promised his concubine that he would marry her in case of his divorce or would

116 RouCC, Article 626.
117 RouCC, Article 1169.
118 RouCC, Article 1225.
119 RouCC, Article 1236.
120 RouCC, Article 1402.
121 RouCC, Article 1255.
122 Ionașcu et al., 1973, pp. 47–51, 62, 63.
123 Supreme Tribunal, civil decision No. 107/1960.

undertake to compensate her with a sum of money if the wife returned to the marital home was considered immoral.[124]

6. Serbia, Croatia, Slovenia

6.1. Serbia

Under the SrbLO the general limitation of contractual freedom is three-tiered: A contract must not be contrary to mandatory rules (*prinudni propisi*), public order (*javni poredak*) and good morals (*dobri običaji*).[125] The notion of mandatory rules is self-explanatory: Contracts must not infringe statutory or other regulations prohibiting derogation from their content by the parties' consent. All mandatory rules are construed as a limitation of freedom of contract, regardless of whether they are prescribed in the SrbLO or by any other statute.[126] The SrbLO itself has many regulations that are of a mandatory nature, the infringement of which makes the contract null and void in general. The most notable is the regulation pertaining to usurious contracts.[127]

Even if a contract does not infringe mandatory rules, hence it is not illegal, it still may be considered immoral if it is contrary to public order and good morals. Legal literature defines public order as the totality of written or unwritten principles that are mandatory in their nature, on which the functioning of society is based, and that stem from the spirit of the legal order.[128] Public order was incorporated in the statutory rule on the limitations of the principle of freedom of contract in 1993 by the amendments of the (then) Federal Law on Obligations, replacing the phrase 'constitutional principles of state organization,' as the rule was formulated at the outset when the former Federal Law on Obligation was adopted in 1978.[129] On the other hand, good morals are unwritten rules that emerge in a given business or trade and become generally accepted by spontaneous application throughout a longer period of time.[130] The former federal law from 1978 envisaged morals of the socialist self-governing society as the third barrier to freedom of contract.[131] It has been replaced in 1993 with good morals. Both public order and good morals have the aim of designating those explicitly not illegal contracts that still infringe on basic moral conceptions in society.[132]

124 Supreme Tribunal, civil decision No. 1912/1955.
125 SrbLO, Article 10.
126 Perović in Perović, 1995, p. 7.
127 SrbLO, Article 141.
128 Radovanović in Pajtić, Radovanović and Dudaš, 2018, p. 213.
129 Krulj in Blagojević and Krulj, 1980, p. 48.
130 Krulj in Blagojević and Krulj, 1980, p. 48.
131 Krulj in Blagojević and Krulj, 1980, p. 53.
132 Radovanović in Pajtić, Radovanović and Dudaš, 2018, p. 213.

The qualification of contracts as illegal and immoral under the SrbLO is done through the institutions of the object and the cause (*causa*) of the contract.[133] The SrbLO prescribes that if the object (*predmet*) of a contractual obligation is impossible, unlawful, unspecified, or undeterminable, the contract is null and void.[134] The object is unlawful if it is contrary to mandatory rules, public order, or good morals.[135] Similarly, a contract must have a lawful cause (*osnov*). The cause is considered unlawful if it is contrary to mandatory rules of law, public order, or good morals. It is presumed that a contract has a valid cause even if it is not directly discernible from its content.[136] This means that even so-called 'abstract contracts' must have a valid cause, although it may not be visible *prima facie*. The requirement of the existence of a valid cause applies to contracts establishing obligations (in the German legal tradition called *Verpflichtungsgeschäft*), but not necessarily to contracts by which the parties dispose of existing and valid obligations (*Verfügungsgeschäft*).[137] The SrbLO further states that a contract is null if its cause does not exist or is unlawful.[138] An example of the distinction between illegal and immoral contracts, based on the rules on the cause of contract, is the contract on fiduciary transfer of ownership for the purpose of securing a claim, which has been used as a functional equivalent to the mortgage (hypothec).[139] The case law took the standpoint that although it is not explicitly prohibited (illegal), it should be rendered null and void since its cause is unlawful.[140] Finally, the law explicitly regulates the legal relevance of cause in the subjective meaning (*pobude*), that is the reasons that drove parties to conclude a contract. First, it sets out clearly that such reasons do not affect the validity of the contract. This applies to lawful reasons. Unlawful reasons essentially influencing one party to conclude a contract for consideration render the contract null and void if the counterparty knew or should have been aware of them. However, in a gratuitous contract unlawful reasons of one party make the contract null and void regardless of whether the counterparty knew or should have been aware of them.[141]

Contracts infringing mandatory rules, public order, or good usages of trade according to the SrbLO are null and void (*ništav*), unless the purpose of the infringed rule implies or a statute prescribes a different sanction.[142] The SrbLO, however, states that if the conclusion of the contract is forbidden only to one party, the contract remains valid, but the party who concluded it against the prohibition shall face appropriate legal consequences.[143] This is usually the case with consumer contracts, where

133 Dudás, 2022, 53.
134 SrbLO, Article 47.
135 SrbLO, Article 49.
136 SrbLO, Article 51.
137 Dudaš, 2012b, p. 414.
138 SrbLO, Article 52.
139 Dudaš, 2014, pp. 219–221.
140 Decision of Supreme Court of Serbia No. Rev. 3708/2002.
141 SrbLO, Article 53.
142 SrbLO, Article 103 (1).
143 SrbLO, Article 103 (2).

the prohibition has legal effect regularly only toward the trader. In case the trader infringed a prohibition but the contract is otherwise in line with the interests of the consumer, these prevail, but the trader may be sanctioned for a misdemeanor.[144]

The basic legal consequence of the declaration of invalidity of a contract under the SrbLO is that the parties are released from their obligations. If they have already performed, they will be obliged to restore the performances conferred. However, if restitution is impossible, or the nature of the performances makes them incompatible with restitution, an adequate pecuniary compensation is owed according to the prices applicable at the time when the judicial decision was delivered, unless a statute provides otherwise.[145]

The SrbLO explicitly enables the courts to decline restitution. It provides that in the case of a contract that according to its content and purpose is contrary to mandatory rules, public order, or good morals, the court may decline the claim for restitution of the party who acted in bad faith.[146] Therefore, in light of the *nemo auditur* principle, the court rejects the claim of the party who acted in bad faith to reclaim the object of his or her performance, and allows the counter-party who acted in good faith to keep it, while the latter retains a claim to restitution of the object of his or her counter-performance.[147] In addition, the SrbLO enables the court to oblige the party who acted in good faith to have the object of the performance of the party who acted in bad faith handed over to the municipality on the territory of which the other party has his or her residence or domicile.[148] This is in effect a sort of confiscation, the most severe sanction that may be applied in the case of a contract rendered null and void. It is applied extremely rarely, only in the case of contracts considered null and void for gravely infringing good morals. This interpretation is supported by the SrbLO, which provides that in deciding whether to apply this measure, the court takes into account whether either or both parties acted in good faith, the relevance of the values and interests endangered by the contract, and general conceptions of morality.[149] The SrbLO laid down clear criteria for establishing liability for damage sustained because the contract has been declared null and void: The party to whom the conclusion of a null and void contract is attributable is liable to the other party for the damage accrued in relation to the invalidity of the contract, provided the other party did not know of and should not have been aware of the existence of the cause of invalidity.[150]

A null and void contract might still survive complete invalidation if the conditions of *partial invalidity* (*delimična ništavost*) are met. The SrbLO prescribes that the invalidity of a certain clause of a contract must not necessarily lead to the invalidity of the entire contract if it may be preserved without the invalid clause, provided that

144 Draškić in Blagojević and Krulj, 1980, p. 103.
145 SrbLO, Article 104 (1).
146 SrbLO, Article 104 (2).
147 Salma, 2004, p. 491.
148 SrbLO, Article 104 (2). *in fine*.
149 SrbLO, Article 104 (3).
150 SrbLO, Article 108.

the clause was not a condition of the contract or the decisive reason why the parties concluded it.[151] The first condition relates to the question whether the remainder of the contract still represents a coherent consent of the parties once the invalid clause has been removed. The other two requirements are applied alternatively. On the one hand, the invalid clause must not have the function of a condition on which the legal effect of the contract depends.[152] On the other hand, it must not be the cause of contract in its subjective meaning (the motive).[153]

The other legal tool for salvaging a null and void contract is the so-called *conversion* (*konverzija*) or requalification (reclassification) of the contract. The SrbLO specifies that if a null and void contract meets the conditions for the validity of another contract, it will be deemed that the latter has been concluded, provided it matches the purpose the parties had in mind at the time of the conclusion of the invalid contract and if it could be presumed that they would have concluded the other contract had they known the invalidity of the form they adopted.[154] In relation to conversion, the question arises as to how the phrase 'purpose the parties had in mind' should be construed. In the view of the majority of authors in the literature, it should be interpreted as the cause of contract in its objective meaning, and not the subjective reasons that drove the parties to conclude the contract.[155]

Finally, the SrbLO regulates the consequences of *subsequent cessation of the reason of invalidity*. First, it states that a null and void contract does not become valid merely because the prohibition or any other cause of invalidity subsequently ceased to exist. However, if the prohibition was of lesser importance and the contract is executed, the declaration of invalidity of the contract cannot be requested.[156] The court declares the null and void contract invalid *ex officio*, but the initiative may come from any person demonstrating legal interest in the invalidation of the contract, including the parties themselves. In addition, the SrbLO states that the prosecutor is also entitled to initiate the declaration of invalidity of a null and void contract.[157] The right to initiate the invalidation does not lapse with the passage of time, and therefore it does not become time-barred according to the statute of limitations.[158]

The SrbLO explicitly regulates the legal consequences of *usurious contracts* (*zelenaški ugovor*). It provides that a contract by which a party, while taking advantage of the counterparty's state of need or poor material situation, inexperience, recklessness, or state of dependence, stipulates for him- or herself or for a third party a benefit that is in obvious disproportion to what has been performed for the counterparty, or what has been promised be performed to such counterparty

151 SrbLO, Article 105 (1).
152 SrbLO, Article 105 (1).
153 Dudaš, 2010, p. 156.
154 SrbLO, Article 106.
155 Dudaš, 2010, p. 154.
156 SrbLO, Article 107.
157 SrbLO, Article 109.
158 SrbLO, Article 110.

in return, shall be null and void.[159] It stipulates the appropriate application of the rules on invalidity and partial invalidity.[160] However, the aggrieved counterparty may request the court to reduce his or her performance to a just level. The court will in that case approve the request, whereby the contract becomes valid.[161] The aggrieved counterparty may exercise his or her remedies as *facultas alternativa*, having a right to opt between invalidation of the contract or upholding it with the reduction of the counter-performance to a level where the equality of performance and counter-performance is re-established, in a preclusive period of five years from the conclusion of the contract.[162]

Along with freedom of contract with its associated limitations, the other basic principle of the SrbLO is the principle of good faith and fair dealing (*načelo savesnoti i poštenja*). It prescribes that in establishing obligations and in exercising the rights and performing the duties deriving from such obligations, the parties must observe the principle of good faith and fair dealing.[163] As a derivative of this principle, the SrbLO further prohibits the abuse of rights arising from obligations (*načelo zabrane zloupotrebe prava*), that is their exercise contrary to the purpose for which they have been established or recognized by law.[164] The meaning of the principle of good faith and fair dealing, as declared by the SrbLO in the part pertaining to basic principles of the law of obligations, is rather abstract. It obtains its true legal meaning in relation to the application of specific legal institutions. This means that the legal meaning of the principle of good faith and fair dealing becomes fully fledged, for instance, in relation to legal consequences of null and void contracts, as already indicated, precontractual negotiations, or termination or modification of contracts due to supervening events (*clausula rebus sic stantibus*).

6.2. Croatia

Croatian law limits the principle of freedom of contract by the Constitution (*Ustav Republike Hrvatske*), mandatory rules (*prisilni propisi*), and morals of society (*moral društva*).[165] Whereas the SrbLO kept the amendments of the former federal law from 1993, when the constitutional principles of state organization and morals of socialist self-governing society were renamed to public order and good usages of trade, respectively, the HrvLO replaced the former with the 'Constitution of the Republic of Croatia' and the latter with the wording 'morals of society.' The literature offers a reasoning according to which there is no need to name public order specifically as one of the boundaries to freedom of contract, since the Constitution comprises all those

159 SrbLO, Article 141 (1).
160 SrbLO, Article 141 (2).
161 SrbLO, Article 141 (3).
162 SrbLO, Article 141 (4).
163 SrbLO, Article 12.
164 SrbLO, Article 13.
165 HrvLO, Article 2.

values that are embodied in the notion of public order. Hence, it is enough to state that the parties' disposition of will must not infringe the Constitution.[166]

The primary tool for delineating lawful from unlawful contracts is through the object of the contractual obligation. The wording of the respective article in the HrvLO is for the most part the same as in the SrbLO, with the necessary accommodation to the formulation of the general constraints on the principle of freedom of contract. The contract is thus null and void if the object of the obligation is impossible, unlawful, unspecified, or undeterminable;[167] the object is considered unlawful if it is contrary to the Constitution of the Republic of Croatia, mandatory rules, and morals of society.[168]

A major novelty of the HrvLO, in comparison to the former federal law, is that it no longer requires that a contract have an existing and lawful cause in its objective meaning.[169] However, it retained the rules on the relevance of cause in its subjective meaning (motives), where the wording is the same as in the SrbLO.[170] The only difference is that there is an additional section specifying that the rules on the illegality and immorality of the object of contractual obligations apply appropriately to the motives as well.[171]

The rules of the HrvLO on the basic consequences of the invalidation of contract are verbatim the same as in the SrbLO. These rules pertain to the restitution of benefits conferred, liability for damages caused by invalidation of contract, *ex officio* invalidation, range of persons who may initiate the invalidation of the contract, non-existence of prescription periods for invalidation, and subsequent cessation of the cause of invalidity, partial invalidity, and conversion.[172] The only discrepancy in these rules is related to the notion of null and void contracts, which is in line with the changes of the wording of the rule on the general constraints of the principle of freedom of contract: Besides mandatory rules, the contract is null and void if it is contrary to the Constitution of the Republic of Croatia and the morals of society.[173]

However, there is a novelty in the HrvLO in comparison to the SrbLO. The HrvLO does not enable the court to decline restitution to the party who acted in bad faith or to order to have the benefits of his or her performance handed over to the state or local government. The literature points out that such sanctions are extremely punitive, to the extent of seeming penal, hence they are irreconcilable with the law of obligations, which is not supposed to envisage legal institutions of a penal nature.[174] In this regard, the HrvLO parted with the rule of the former federal law on obligations

166 Slakoper in Gorenc, 2014, p. 8; Slakoper in Slakoper et al., 2022, 592.
167 HrvLO, Article 270 (1).
168 HrvLO, Article 271.
169 For the reasons of abandoning the institution of cause of contract in the Croatian law see Nikšić, 2006, pp. 1836–1844; Klarić and Vedriš, 2014, pp. 148–149; Josipović and Nikšić, 2008, p. 79.
170 HrvLO, Article 273 (1) to (3).
171 HrvLO, Article 273 (4).
172 HrvLO, Articles 322–328.
173 HrvLO, Article 322 (1).
174 Klarić and Vedriš, 2014, p. 152.

providing a possibility of forfeiture of the object of performance of the party who acted in bad faith.

The rules on usurious contracts (*zelenaški ugovor*) in the HrvLO are also the same as the corresponding rules in the SrbLO.[175] However, they have been removed from the part pertaining to special effects of contracts for consideration and moved into the part relating to invalidity of contracts. This approach seems to have greater merit, since usury makes the contract immoral and thus entails the sanction of nullity.[176]

As for the principle of good faith and fair dealing (*načelo savjesnoti i poštenja*) and the prohibition of the abuse of rights (*zabrana zlouporabe prave*), the HrvLO has the very same rules as the SrbLO.[177] However, the HrvLO additionally prescribes the duty of co-operation between the parties in order to achieve full and proper performance of duties and exercise of rights arising from an obligational relationship.[178] There is no such rule in the effective SrbLO. The Federal Law on Obligations from 1978 at the outset contained a sort of a duty of co-operation between the parties, but the literature considered its wording overreaching, imposing duties of cooperation and mutual solidarity, in a sense that is not in line with the logic of a liberal market economy.[179] For this reason it was repealed in the amendments of the Law from 1993. However, a principle of the duty of co-operation in a modern sense, as it is regulated in the HrvLO, strengthens the contractual bond between the parties and directs them toward voluntary performance.

6.3. Slovenia

The SvnCO provides for the same general constraints of the principle of freedom of contract as the HrvLO: The parties are free to regulate their obligational relationship, but may not act in contravention of the Constitution (*ustave*), mandatory rules (*prisilni predpisi*), or moral principles (*moralna načela*).[180] However, unlike the HrvLO, the SvnCO has not repealed the concept of cause of contract.[181] In terms of the object of contract (*predmet obveznosti*) and cause of contract (*podlaga*), including motives (*nagibi*),[182] as primary legal tools by which the mentioned constraints of the freedom of contract are observed, the regulation fully corresponds to the regulation of the SrbLO, as well as of the former federal law. The only discrepancies may be identified in the different wording of general restrictions of the principle of freedom of contract. The newer literature, however, points out that the applicability of the doctrine of cause in jurisprudence is very limited, since it is quite difficult to differentiate the scope of

175 HrvLO, Article 329.
176 Klarić and Vedriš, 2014, p. 146.
177 HrvLO, Articles 4 and 6.
178 HrvLO, Article 5. For further details see Tomljenović et al. in Baaij, Macgregor and Cabrelli, 2020, pp. 88 et seq.
179 Salma, 2009, p. 160.
180 SvnCO, Article 3.
181 Grilc in Možina, 2019, pp. 107–108.
182 SvnCO, Articles 35, 39, and 40.

application of cause from that of the object of contract. In case law, the doctrine of cause is most often applied in reclaiming performance obligations from gratuitous contracts in prospects of establishing marriage or non-marital partnerships.[183]

Concerning other legal issues in relation to invalidity of contracts, the regulations of the SvnCO,[184] similarly to the HrvLO, are in the most part identical to the rules of the SrbLO, with the necessary terminological alterations mandated by the wording of general constraints of the freedom of contract. In a way similar to the HrvLO, the SvnCO also repealed the rule of former federal law enabling the court to order the handing over of the object of the performance of the party acting in bad faith to a municipality. However, unlike the HrvLO, it retained the rule enabling the court to reject the dishonest party's claim for the restitution of the benefits conferred based on the performance of his or her obligation.[185]

As far as the regulation of usurious contracts (*oderuška pogodba*) is concerned, the SvnCO provides[186] verbatim the same rules as the SrbLO or the former federal law. However, in addition, the SvnCO specifies in the part pertaining to contractual interest that in case the interest agreed by the parties exceeds by more than 50% the prescribed default interest rate, it shall be presumed to be usurious.[187] Such a rule could be considered progressive, since usury regularly occurs in loan contracts with interest; any agreed interest does not make the contract usurious, but only when the interest is manifestly excessive does the rule apply. The question arises as to what is considered an overly excessive interest rate. The new rule of the SvnCO provides a clear guideline in this regard. The SvnCO, however, states that the presumption does not apply to commercial contracts.[188] In addition, the literature points out that the scope of application is further limited, since in the context of consumer law the special rules of the Consumer Protection Act apply.[189]

The SvnCO retained the declaration of principle of good faith and fair dealing (*načelo vestnosti in poštenja*) from the former federal law on obligations in the same wording.[190] It has, however, been supplemented with a rule declaring that the parties must observe good usages of business in their obligational relationship,[191] which has been removed from the context of the rule on the application of good usages of business, where it was regulated in the former federal law. The doctrine points out that beside the Constitution, mandatory rules, and moral principles, the principle of good faith and fair dealing is the other general limitation to the principle of freedom of contract.[192]

183 Možina and Vlahek, 2019, pp. 64–65.
184 SvnCO, Articles 86–93.
185 SvnCO, Article 87 (2).
186 SvnCO, Article 119.
187 SvnCO, Article 377 (1).
188 SvnCO, Article 377 (2).
189 Možina and Vlahek, 2019, p. 82.
190 SvnCO, Article 5 (1).
191 SvnCO, Article 5 (2).
192 Možina and Vlahek, 2019, p. 52.

The prohibition of abuse of rights (*prepoved zlorabe pravic*) has, however, undergone significant modifications and gained more detailed wording. The SvnCO first declares that the rights deriving from obligational relationships shall be limited by the equal rights of others. These rights must be exercised in accordance with the basic principles of the SvnCO and their purpose.[193] The SvnCO further specifies that in exercising their rights, parties in an obligational relationship must refrain from any action by which the performance of the obligations of other participants would be rendered more difficult.[194] Finally, any action by which the beneficiary of a right acts with the sole or clear intention of harming another shall be deemed the bad faith exercise of such a right.[195]

7. Slovakia

7.1. Illegal and immoral contracts

According to § 39 of the SvkCC, '[a] juridical act the content or purpose of which is at variance with a statute [*zákon*], circumvent it, or contradict good morals [*dobré mravy*] shall be invalid.' This strict provision—one of the most discussed in Slovak civil law—regulates the consequences of the conflict of content and cause of the juridical act with law as well as good morals. The consequence is the invalidity of a juridical act, namely nullity, that is, the act being null and void, which can be asserted by anyone, is taken into account by the court *ex officio*, occurs directly *ex lege*, and operates retroactively from the conclusion of any such act (*ex tunc*).

The said provision covers three factual situations, which are present if the content or purpose of the juridical act is at variance (*odporuje*) with the law (*negotium contra legem*), circumvents (*obchádza*) the law (*negotium in fraudem legis*), or contradicts (*prieči sa*) good morals (*negotium vers bonos mores*). The content of a juridical act means the determination of the rights and obligations of the parties to the juridical act. The cause (the motive, or subjective *causa*) in turn means the subjective goal pursued by the juridical act.[196] Accordingly, the illegal cause of an obligation (*kauza záväzku*) renders the contract illegal as well.[197]

The variance of a juridical act with the law is understood quite widely in case law. These include not only cases where a juridical act contradicts a legal prohibition or public order, but also cases where the juridical act is the result of a—widely interpreted—illegal activity, or cases where the juridical act does not meet statutory requirements, often regardless of whether invalidity in such cases constitutes an adequate sanction. This takes place even though the Constitutional Court has repeatedly taken the view that

193 SvnCO, Article 7 (1).
194 SvnCO, Article 7 (2).
195 SvnCO, Article 7 (3).
196 Gyárfáš, 2019.
197 Knapp, 1957, p. 52.

> 'the basic principle of interpretation of contracts is the priority of an interpretation that does not invalidate a contract over such an interpretation that establishes invalidity of a contract if both interpretations are possible. The principle of autonomy of the contracting parties, the nature of private law and the associated social and economic function of the contract are thus expressed and supported. The invalidity of the contract should therefore be the exception and not the rule. Therefore, the practice, according to which the general courts prefer a completely opposite view, favoring the interpretation leading to the invalidity of the contract over the interpretation not establishing the invalidity of the contract is not constitutionally compliant and is in conflict with the principles of the rule of law arising from Article 1 of the Constitution.'[198] Legal literature therefore takes the view that the variance of a juridical act with the law must be of a qualified nature.[199]

Circumvention of the law is a situation where 'a juridical act is directed at consequences that are not expressly prohibited, but their inadmissibility can be inferred from the meaning and purpose of the law.'[200] By performing such a juridical act, the ultimate aim of the person acting is 'that the law not be complied with.'[201]

As for the contradiction between the juridical act and good morals, or the circumvention of good morals, good morals are considered open concept. The Supreme Court sees them as usual, honest, and fair behavior that corresponds to the basic moral principles prevailing in society.[202]

When resolving the question of whether a juridical act is invalid pursuant to § 39 of the SvkCC, it is always necessary to take into account whether the law provides a special sanction for a given situation. For example, if the conclusion of the contract was induced by fraud, the rules on deceit causing only voidability (in Slovak legal doctrine traditionally called 'relative invalidity') shall apply. Similarly, if a debtor transfers his or her property to a friend in order to frustrate the satisfaction of creditors' claims, it will not be an invalid juridical act but an act that may be avoided.

It is also necessary to examine whether all or only a part of the juridical act is invalid. According to § 41 of SvkCC '[i]f the ground for invalidity relates only to a part of a juridical act, only that part is invalid unless it follows from the nature of the juridical act or its content or from the circumstances under which it occurred that this part cannot be separated from the rest of the content.' Therefore, if it is a separable part, then the rest of the juridical act shall stay valid. Whether or not a certain part of a juridical act is separable depends not only on the content of the juridical act, but also on its nature or on the circumstances in which it occurred.

198 Case No. I. ÚS 242/07.
199 Knapp, 1957, p. 52.
200 Fekete, 2018.
201 Fekete, 2018.
202 R 5/2009.

Likewise, in the event of the invalidity of a juridical act, it is necessary to examine whether this invalid act does not meet the requirements of another juridical act that is valid. If it does, according to § 41a (1) of SvkCC it may be convalidated if it is clear from the circumstances that it expresses the will of the persons acting. In this case, the so-called conversion of a juridical act (*konverzia, premena*) occurs.

7.2. Usury

Usury is regulated in Slovak law in § 39a of the SvkCC, according to which '[a] juridical act performed by a natural person—[a] non-entrepreneur—in which someone abuses his or her distress, inexperience, intellectual immaturity, agitation, trustworthiness, recklessness, financial dependence or inability to fulfill his or her obligation and has his or her promise […] a performance, the value of which is grossly disproportionate to the counter-performance.'

It follows from this provision that usury causes the nullity of a juridical act only if the abused person is a natural person, a non-entrepreneur. The legal regulation of usury is therefore not applicable to entrepreneurs.

The subjective aspect of usury is that the aggrieved party must be in a certain unfavorable situation enumerated in § 39a of SvkCC, such as distress or inexperience affecting his or her consent to a juridical act. The objective side, in turn, is that there is a gross disparity between the mutual performances to the detriment of the abused person. The condition is that there is a causal link between the abuse of the unfavorable situation and the juridical act. It is not necessary that it be the other party to the contract who commits the abuse; it may also be committed by a third party.[203] That said, the other party to the contract does not necessarily have to be of bad faith.

The consequence of usury is—as mentioned earlier—the nullity of a juridical act. The Slovak legal system does not give the aggrieved party the possibility to maintain the juridical act in force, e.g., by eliminating the gross disparity between the mutual performances.

7.3. Legal consequences of invalidity of juridical acts

A juridical act that is rendered invalid due to a conflict with the law or good morals does not have the intended legal consequences. According to § 457 of SvkCC, '[i]f the contract is invalid or has been terminated, each of the participants is obliged to return to the other everything he has received.' The law does not distinguish whether the party acted in good or bad faith. On the other hand, this obligation, or respectively the right that corresponds to it, like any other right or obligation, should be exercised in accordance with good morals.[204] However, no case law invoking the rule of *nemo auditur* in such situations is known in Slovakia.

203 Fekete, 2018; Mitterpachová, 2019.
204 According to Gyárfáš, 2019. See also SvkCC, § 3 (1).

Moreover, as stated in the previous chapter, the person who caused the invalidity shall be liable for the damage suffered as a result of the invalidity.[205]

It should be added that according to § 41 of the SvkCC, '[i]f the reason for invalidity applies only to a part of a juridical act, only that part is invalid, unless the nature of the juridical act or its content or the circumstances in which it occurred lead to the conclusion that this part cannot be separated from other content.'

7.4. Good faith in contract law

Slovak law does not have an explicit special regulation for the area of non-commercial relations that would relate to good faith in contractual relations. Undoubtedly, however, the principle of the protection of good faith can be deduced from certain provisions that concern either specifically contractual relations or general legal relations as such.

Such a provision is primarily § 3 (1) of the SvkCC, according to which '[t]he exercise of rights and obligations arising from civil law relations may not, without legal reason, interfere with the rights and legitimate interests of others and must not be contrary to good morals.' Another important provision is § 43 of the SvkCC, according to which, 'When regulating their mutual contractual relationships, the participants must see to it that everything that could result in the arising of disputes is removed.'

It follows from these two provisions that, even at the pre-contractual stage, it is necessary to proceed fairly to avoid conflicts between the parties. This means, among other things, that the parties must formulate the content of the contract in such a way as not to unnecessarily raise doubts. After the conclusion of the contract, the exercise of any rights or the performance of any obligations must be in accordance with good morals. In this respect, in particular, the parties may not, through their actions, even if permitted, aim to cause damage to the other party. The consequence of the exercise of rights and performance of duties contrary to good morals is that such exercise and performance does not enjoy legal protection.

In commercial relations, the Commercial Code contains an explicit provision according to which 'the exercise of a right that is contrary to the principles of fair trade does not enjoy legal protection.'[206]

8. Concluding remarks

In determining the general confines of freedom of contract, Czech law states that a contract must not infringe good morals and statutory norms. If it does, the contract is invalid when required by the meaning and the purpose of a statute. In addition, the CzeCC specifies that a contract is null and void if it manifestly disrupts public order or good morals.

205 SvkCC § 43.
206 SvkCC § 265.

In Hungarian law contracts that infringe or circumvent the law or violate good morals are considered null and void. That legislation recognizes a great range of different contractual relationships that are considered null and void due to the violation of good morals. Hungarian law also takes into account whether the parties acted in good faith in concluding an invalid contract. The court may reject the claim for restitution submitted by the party who caused invalidity but may no longer order forfeiture of the object of performance to the benefit of the state.

The PolCC regulates the invalidity of juridical acts and contracts separately. In its General Part it specifies that a juridical act is invalid if it contravenes or circumvents the law, or if it is contrary to the principles of social coexistence. In relation to contracts, it specifies that parties are free to devise their contractual relationships as they see fit, but they may not infringe the law or the principles of social coexistence.

The RouCC specifies that contracts infringing mandatory norms or public order are considered illegal. It does not prescribe any limitation to claims for restitution by the parties based on the *nemo auditor* principle, nor does it provide for the forfeiture of the object of performance of the party who acted in bad faith in favor of the state.

In Serbian law the general confines of freedom of contract are mandatory rules, public order, and good morals. The HrvLO and SvnCO have departed to some extent from the former federal law on obligations. They both prescribe that a contract must not be contrary to the Constitution, mandatory rules, or moral norms. The SrbLO still has the rule, inherited from the former Yugoslav Law on Obligations, according to which the court may order the forfeiture of the object of performance of the party who acted in bad faith if the contract grossly violates good morals. Both the HrvLO and the SvnCO have parted with this legal institution.

The SvkCC specifies that a juridical act is considered invalid if, by its content or purpose, it infringes on a statute, circumvents it, or contradicts good morals. In terms of the consequences of the declaration of nullity, the institution of forfeiture of the object of performance of the party acting in bad faith has long been relegated in Slovakian law.

The CzeCC does not explicitly require that a contract have a valid and lawful cause. However, the case law considers contracts concluded to achieve illicit aims as being null and void. The HunCC also traditionally belongs to the group of legal orders in which a valid and lawful cause is not a precondition of the validity of a contract. However, contracts concluded with the aim of achieving illicit or immoral purposes are considered null and void, based on the general rules of invalidity of contracts. The RouCC also belongs to the group of legal orders in which a valid cause is a necessary precondition of the formation of a valid contract. Interestingly, the RouCC does not have explicit rules on usury. However, usurious contracts are considered null and void due to their unlawful motive (cause). Both the SrbLO and the SvnCO retained the institution of cause of contract from the former Yugoslav Law on Obligations. The HrvLO, however, relegated the institution of cause in its objective meaning yet retained the rules on cause in its subjective meaning (motive). The SvkCC also requires that a contract have a valid and lawful cause.

The CzeCC envisages the conversion or reclassification of an invalid contract into a valid one. There are, however, no general rules on convalidation of invalid contracts by performance. It also recognizes partial invalidity by which an invalid contract may be saved if the part of the contract carrying the ground of invalidity is separable. The PolCC explicitly regulates partial invalidity of juridical acts: The invalidity affects only the part carrying the reason of invalidity. However, if the act is meaningless without these clauses, the whole juridical act shall be declared null and void. The RouCC enables a conversion or reclassification of an invalid contract if it fulfils the conditions of another valid contract, if that is not contrary to the parties' presumed contractual intent, without requiring that the obligations of any parties be previously performed. It also envisages the possibility of saving the contract from the effects of complete invalidation if partial invalidity is applicable. The SrbLO prescribes a range of legal institutions, the aim of which is to save a contract from invalidation: partial invalidity, conversion or reclassification of a contract, and performance of the parties' obligations if the prohibition of smaller importance ceased to exist in the meantime. In this regard, the HrvLO and the SvnCO have the same rules. The SvkCC also envisages partial invalidity as a means by which an invalid contract, without the part carrying the reason of invalidity, may be salvaged. In addition, it also knows of the conversion or reclassification of an invalid contract into a valid one.

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