Inovatívne formy vzdelávania v transformujúcom sa univerzitnom vzdelávaní

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EUROPEAN CONTRACT LAW

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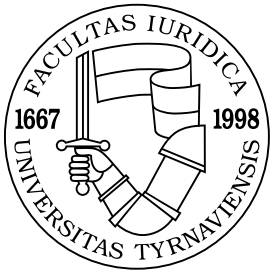

European Contract Law

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Content

Abbreviations

ACQP Acquis Principles
CESL Common European Sales Law
CISG Vienna Convention on the International Sale of Goods.
DCFR Draft Common Frame of Reference
PECL Principles of European Contract Law
SME Small and Medium Enterprise
TFEU Treaty on the Functioning of the European Union

Introduction

European contract law has undergone significant changes in the last decades. In this respect a distinction must be made between binding rules of contract law and non- binding rules (soft law).

Binding rules of contract law are no longer created only on a national level. They may also follow from the international conventions, for instance the UN Vienna Convention on Contracts for the International Sale of Goods of 1980. The central role in the development of binding European law play directives and regulations of EU; these directive are targeted mainly on the area of consumer protection. Most of directives are sector specific, i.e. they are confined to a specific type of contract or a particular issue.

Regarding soft law, it comes from various sources and groups (mainly academics and legal professionals), some of them act independently from European Union, but in the last years, the cooperation between officials of EU and academics has been deepened. The results of this cooperaton are going to be briefly mentioned also in this publication.

1. European contract law

1.1 Binding rules of European contract law

1.1.1 Consumer law

1. The Directive on Consumer Rights[1] will replace, as of 13 June 2014, the current

2. Directive 97/7/EC on the protection of consumers in respect of distance contracts and the current

3. Directive 85/577/EEC to protect consumer in respect of contracts negotiated away from business premises. The provisions of the Directive on Consumer Rights will apply to contracts concluded after 13 June 2014.

Content of the Directive on Consumer Rights: Chapter I contains the common definitions such as "consumer" and "trader" and provides for a common set of rules applicable in all Member States, only allowing them to diverge from these rules in a few specific cases. Chapter II contains core information to be provided by traders prior to the conclusion of all consumer contracts. Member States may add on further national information requirements. Chapter III, which only applies to distance and off-premises contracts, provides for specific information requirements and regulates the right of withdrawal (length of the withdrawal period, procedure and effects of the withdrawal) including a standard withdrawal form (Annex I(B)). Chapter IV provides for rules on delivery and passing of risk applicable to contracts for the sale of goods as well as certain rules applicable to all types of consumer contracts. These include rules on the costs for the use of means of payment (e.g. credit or debit cards), on telephone hotlines operated by traders as well as on additional payments and pre-ticked boxes. Chapter V contains general provisions, e.g. on enforcement and the transposition period for Member States.

The most important changes for consumers in the Directive on Consumer Rights:

a) **The proposal will eliminate hidden charges and costs on the Internet**.

[1] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council

Consumers will be protected against "cost traps" on the Internet. This happens when fraudsters try to trick people into paying for 'free' services, such as horoscopes or recipes. From now on, consumers must explicitly confirm that they understand that they have to pay a price.

b) **Increased price transparency.** Traders have to disclose the total cost of the product or service, as well as any extra fees. Online shoppers will not have to pay charges or other costs if they were not properly informed before they place an order.

c) **Banning pre-ticked boxes on websites.** When shopping online – for instance buying a plane ticket – you may be offered additional options during the purchase process, such as travel insurance or car rental. These additional services may be offered through so-called 'pre-ticked' boxes. Consumers are currently often forced to untick those boxes if they do not want these extra services. With the new Directive, pre-ticked boxes will be banned across the European Union.

d) **14 Days to change your mind on a purchase.** The period under which consumers can withdraw from a distance sales contract is extended to 14 calendar days (compared to the seven days legally prescribed by EU law today). This means that consumers can return the goods for whatever reason if they change their minds.

- Extra protection for lack of information: When a seller hasn't clearly informed the customer about the withdrawal right, the return period will be extended to a year.
- Consumers will also be protected and enjoy a right of withdrawal for solicited visits, such as when a trader called beforehand and pressed the consumer to agree to a visit. In addition, a distinction no longer needs to be made between solicited and unsolicited visits; circumvention of the rules will thus be prevented.
- The right of withdrawal is extended to online auctions, such as eBay – though goods bought in auctions can only be returned when bought from a professional seller.
- The withdrawal period will start from the moment the consumer receives the goods, rather than at the time of conclusion of the contract, which is currently the case. The rules will apply to internet, phone and mail order sales, as well as to sales outside shops, for example on the consumer's doorstep, in the street, at a Tupperware party or during an excursion organised by the trader.

e) **Better refund rights.** Traders must refund consumers for the product within 14 days of the withdrawal. This includes the costs of delivery. In general, the trader will bear the risk for any damage to goods during transportation, until the consumer takes possession of the goods

f) **Introduction of an EU-wide model withdrawal form.** Consumers will be provided with a model withdrawal form which they can (but are not obliged to) use if they change their mind and wish to withdraw from a contract concluded at a distance or at the doorstep. This will make it easier

and faster to withdraw, wherever you have concluded a contract in the EU.

g) **Eliminating surcharges for the use of credit cards and hotlines.** Traders will not be able to charge consumers more for paying by credit card (or other means of payment) than what it actually costs the trader to offer such means of payment. Traders who operate telephone hotlines allowing the consumer to contact them in relation to the contract will not be able charge more than the basic telephone rate for the telephone calls.

h) **Clearer information on who pays for returning goods.** If traders want the consumer to bear the cost of returning goods after they change their mind, they have to clearly inform consumers about that beforehand, otherwise they have to pay for the return themselves. Traders must clearly give at least an estimate of the maximum costs of returning bulky goods bought by internet or mail order, such as a sofa, before the purchase, so consumers can make an informed choice before deciding from whom to buy.

i) **Better consumer protection in relation to digital products.** Information on digital content will also have to be clearer, including about its compatibility with hardware and software and the application of any technical protection measures, for example limiting the right for the consumers to make copies of the content. Consumers will have a right to withdraw from purchases of digital content, such as music or video downloads, but only up until the moment the actual downloading process begins.

j) Common rules for businesses will make it easier for them to trade all over Europe.

These include:

- A single set of core rules for distance contracts (sales by phone, post or internet) and off-premises contracts (sales away from a company's premises, such as in the street or the doorstep) in the European Union, creating a level playing field and reducing transaction costs for cross-border traders, especially for sales by internet.
- Standard forms will make life easier for businesses: a form to comply with the information requirements on the right of withdrawal;
- Specific rules will apply to small businesses and craftsmen, such as a plumber. There will be no right of withdrawal for urgent repairs and maintenance work. Member States may also decide to exempt traders who are requested by consumers to carry out repair and maintenance work in their home of a value below €200 from some of the information requirements.[2]

4. Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts

5. Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising

[2] http://europa.eu/rapid/press-release_MEMO-11-450_en.htm?locale=en

6. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

7. Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers

8. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

9. Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours

10. Unfair Commercial Practices Directive ensures that consumers are not misled or exposed to aggressive marketing and that any claim made by traders in the EU is clear, accurate and substantiated. It seeks to enable consumers to make informed and meaningful choices. The Directive also aims to ensure, promote and protect fair competition in the area of commercial practices.

1.1.2 Late Payment Directive

The Council of the European Union adopted, following agreement with the European Parliament, the new Late Payment Directive (2011/7/EU, 16 February 2011), which will significantly tighten the rules on late payment in commercial transactions. The objective is to further discourage deliberately delayed payment and thereby help small businesses in particular and improve the functioning of the internal market. The new Directive will replace the existing Late Payment Directive (Directive 2000/35/EC).

The scope of the Directive is wide. It is intended to regulate all commercial transactions irrespective of whether they are carried out between private or public undertakings or between undertakings and public authorities. It will apply, for example, to transactions between main contractors and their suppliers and subcontractors. As under the existing law, a business which is due payment for goods delivered or services rendered under the contract has a right to interest on late payments as a matter of law unless the debtor is not responsible for the delay. No notice or reminder is necessary. Under the new Directive payment will be "late" (subject to some refinements for special situations) if it is not made at the time, or by the end of the period, fixed in the contract or, if no such period is fixed, within 30 days after receipt of the invoice.

Sometimes payment is conditional on an acceptance or verification procedure designed to ensure that the goods or services are conform to contract before payment is made. The Directive has provisions designed to prevent abuse of such procedures. The maximum duration of an acceptance or verification procedure should not, as a general rule, exceed 30 calendar days.

The applicable rate of interest will be published by the European Commission on the internet. Basically it will be the reference rate of the relevant Central Bank plus 8 percentual scores. The creditor will also have a statutory right to compen-

sation for the incidental costs of recovering a late payment. The most interesting innovation here is that, when interest for late payment becomes payable, the creditor is entitled to obtain from the debtor, as a minimum, a fixed sum of EUR 40 as compensation for the creditor's own internal recovery costs, such as the time spent by employees in chasing up late payment. This is a response to the fact that proof of such incidental administrative costs can involve difficulty out of all proportion to the amount recoverable. Member States will be allowed to set higher fixed sums for compensation of recovery costs and to change the sum, for example to keep pace with inflation. The creditor will also be entitled to obtain compensation for external expenses incurred because of the late payment, such as the cost of instructing a lawyer or employing a debt collector.

There are also provisions designed to prevent contracts stipulating abnormally long periods of time for payment for goods or services supplied. A norm of 60 days is mentioned but this can be extended by express provision in the contract provided that this is not grossly unfair to the creditor.

An obvious danger is that dominant contractual partners would force small businesses to contract out of the rules on late payment. Article 7 of the Directive obliges Member States to provide that a contractual term or a practice relating to the date or period for payment, the rate of interest for late payment or the compensation for recovery costs is either unenforceable or gives rise to a claim for damages if it is grossly unfair to the creditor. Factors to be taken into account in assessing gross unfairness are set out. An interesting point here is that recital 28 refers to the Draft Common Frame of Reference in support of the test used.

A well-known device for the protection of the unpaid supplier of goods is a retention of title clause. The Directive does not attempt a comprehensive regulation of retention of title on a Europe wide basis – something which would be very useful – but it does make a start in Article 9 by requiring Member States to "provide in conformity with the applicable national provisions designated by private international law that the seller retains title to goods until they are fully paid for if a retention of title clause has been expressly agreed between the buyer and the seller before the delivery of the goods".[3]

1.2 Soft law

With this Action Plan[4] for a coherent contract law from March 2003 the European Commission took over the concept of contract law for Community law. The European Commission regarded the provisions which touch upon contract law, not solely under the point of view of each individual policy area (such as consumer protection, the protection of small and mid-sized businesses etc.). Much

[3] http://www.law.ed.ac.uk/epln/blogentry.aspx?blogentryref=8579

[4] Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan, COM(2003) 68 final (OJ C 63, 15.3.2003, 1-44).

more the European Commission set the objective of achieving a "coherent European contract law" which overarches individual policy areas. The most important means of reaching this goal is according to the Action Plan, the Common Frame of Reference with overarching principles, definitions and rules. From 2005 to 2007 an international network of academics (selected following a call for tenders) has created the draft of the Common Frame of Reference (DCFR). The preparations for this draft were substantially carried out by two international research groups: the "Study Group on a European Civil Code"[5] revised the "Principles of European Contract Law" (PECL)[6] which arose from the work carried out by the "Lando Commission" and developed, on a comparative law basis, principles for further areas of law according to the scheme of these PECL. The "Acquis- Group[7]" prepared those parts of the DCFR which are based upon principles of existing Community law. The European Commission held workshops with experts from interested associations and institutions (so-called "stakeholders") for the discussion of these preparations. The network's "Compilation and Redaction Team" (CRT) took over the compilation of the individual parts and the final edit of the entire draft. At this point in time insurance contract law had not yet been included in this draft; for this area the "Insurance Group" has developed a draft which stands in discussion alongside the DCFR.[8] Accompanying these works on the DCFR the Study Group prepared separate publications in which sets of rules for a variety of areas of law are presented for discussion.[9] The Acquis Group has likewise presented a draft of principles of existing Community law in the field of contract law. With the publication of these "Principles of the Existing EC Contract Law" (Acquis Principles; ACQP) a considerable deficit within earlier research regarding a European contract law was overcome: when the "Lando-Commission" started its work on the "Principles of European Contract Law"in the 1980s it had to solely draw upon a comparison of national laws within Europe in order to draft a European contract law out of the common principles or the "best solutions". Not until the following decade did the European Community's legislation include more and more matters concerned with the law of contract. The ACQP allow from now on an overarching evaluation of Community law within the field of contract law. Furthermore, the ACQP ease the

5 For more information on the "Study Group" see http://www.sgecc.net/;

6 *Ole Lando, Hugh Beale* (eds.), Principles of European Contract Law Parts I and II; prepared by the Commission on European Contract Law, The Hague 1999; *Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann* (eds.), Principles of European Contract Law Part III, The Hague, London and Boston 2003.

7 *European Research Group on Existing EC Private Law*, see http://www.acquisgroup. org/

8 Project Group "Restatement of European Insurance Contract Law", information available online at www.restatement.info.

9 Principles of European Law – Service Contracts, Munich: Sellier, 2006; Principles of European Law – Sales Contracts, Munich: Sellier, 2008;, Principles of European Law – Lease of Goods, Munich: Sellier, 2007; Principles of European Law – Personal Security Munich:Sellier, 2007;, Principles of European Law – Benevolent Intervention in Another's Affairs, Munich:Sellier 2006.

comparison of legal principles and institutions created by Community law to sets of rules based upon national laws (such as the PECL) and to consider consistencies or differences between the *acquis communautaire* and the laws of contract within the Member States. As is clearly given in this preface, the European Commission on the last decades takes academic iniciatives in account and the cooperation between academic and political bodies has intensified.

Academic projects concerning European private law

During the last thirty years, several academic groups have been working with various aspects of European private law. Some of them will be mentioned here:

The *Principles of European Contract Law* were prepared by the *Commission on European Contract Law* ("the Lando Commission). The *Study Group on a European Civil Code* is the successor of the Lando Commission. The Study Group prepared several volumes of *Principles of European Law*. The *Acquis Group* targeted "a systematic arrangement of existing Community law which will help to elucidate the common structures of the emerging Community private law". The *Common Core of European Private Law Project* ("the Trento Common Core Project"), under the leadership of Ugo Mattei and Mauro Bussani, has completed several comparative studies on European private law.[10] The *Academy of European Private Lawyers*, ("Gandolfi Project") based in Pavia, has published a draft *European Contract Code*, inspired by the Italian Civil Code and a draft Contract Code prepared for the Law Commissions of England and Scotland by Harvey McGregor. [11] The *European Group on Tort Law* ("Tilburg Group") has drafted *Principles of European Tort Law*.[12] The *Commission on European Family Law* conducts research concerning the harmonisation of family law in Europe. The *Unidroit Principles of International Commercial Contracts* are not limited to Europe; on the other hand they deal with commercial contracts exclusively.[13]

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[10] See for a comprehensive list of publications, http://www.commoncore. org/index. php?option=com_content&view=article&id=49&Itemid=56.

[11] G. GANDOLFI and L. GATT, eds., *Code européen des contrats: avant-projet*, Milano 2004. Black letter rules of this first Book as well as of the first Title (Sale) of the second Book are available at
http://www.accademiagiusprivatistieuropei.it.

[12] *Principles of European tort law: text and commentary*, Wien 2005. Black letter rules in several languages are available at www.egtl.org.

[13] *Unidroit principles of international commercial contracts 2004*, Rome 2004. More information at www.unidroit.org. See also M. J. BONELL, *An international restatement of contract law: the UNIDROIT*
Principles of International Commercial Contracts, Ardsley, N.Y. 2005; M. J. BONELL, ed., *The Unidroit*
Principles in Practice: Caselaw and Bibliography on the Unidroit Principles of International Commercial
Contracts, Ardsley, N.Y. 2006; S. VOGENAUER and J. KLEINHEISTERKAMP, Commentary on the Unidroit principles of international commercial contracts (PICC), Oxford 2009.

The Draft Common Frame of Reference – overview

The DCFR[14] has the formal outline of a civil code (books, chapters, sections, articles). It consists of black letter rules, comments with illustrations, comparative notes. Structure of DCFR is as follows:

Book I General provisions

Book II Contracts and other juridical acts (pre-contractual duties, formation of contract, representation, invalidity, interpretation, etc.)

Book III Obligations and corresponding rights (performance, remedies for non-performance, transfer of rights and obligations, set-off, prescription)

Book IV Specific contracts and the rights and obligations arising from them (sales, leases, services, mandate, commercial agency, franchise and distributorship, loan contracts, personal security, donation)

Book V Benevolent intervention in another's affairs

Book VI Non-contractual liability arising out of damage caused to another

Book VII Unjustified enrichment

Book VIII Acquisition and loss of ownership in movables

Book IX Proprietary security rights in movable assets

Book X Trusts[15]

The pre-contractual issues stemming from EU law and some general consumer law matters have been placed in Book II, which (besides very few provisions on unilateral juridical acts) mainly contains general contract law. Book II has the following Chapters:

Chapter 1 General Provisions

Chapter 2 Non-discrimination

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14 BAR and CLIVE, eds., *DCFR Full Edition*, 1–23 (Introduction); C. V. BAR, "The Launch of the Draft Common Frame of Reference", *Juridica International*, vol. XIV 2008, 4–9;H. BEALE, "The Nature and
Puposes of the Common Frame of Reference", *Juridica International*, vol. XIV 2008, 10–17; E. CLIVE, "An Introduction to the Academic Draft Common Frame of Reference", *Era Forum*, vol. 9 Supplement 1 2008, 13–31.

15 *Schulze, R. in Schulze, R. (ed) Common Frame of Reference and Existing EC Contract Law, Munich, Sellier, 2008, p 10. :* The Academic Draft of the CFR and the EC Contract Law: *„In another respect there are however significant problems vis a vis this major step achieved by the DCFR as opposed to earlier sets of rules. Above all there are two methodological weaknesses in terms of the overall structure: only particular parts of the DCFR are based upon the link between comparative law and Community law, whilst in the majority of parts the reference to Community law is missing. The structure of the draft (for example the central role of the General Law of Obligations) is largely neither derived from existing Community law nor from a convincing comparative law basis. Both problems stand in conjunction with the wide expansion of the DCFR. In contrast to the PECL, and also to the Acquis Principles, this draft does not focus upon contract law as the main subject matter. Much more it includes various matters which belong within the civil law tradition to the traditional core areas of the law of obligations or which connect the law of obligations to the law of property. Alongside contract law also belong the principles of Benevolent Intervention (Book V DCFR), Tort law (Book VI DCFR) and Unjustified Enrichment (Book VII DCFR), but also within those parts of the DCFR which are scheduled to be published at a later date: Transfer of Movables, Security Rights in Movables and Trusts (Books VIII to X DCFR).*

Chapter 3 Marketing and pre-contractual duties
Chapter 4 Formation
Chapter 5 Right of withdrawal
Chapter 6 Representation
Chapter 7 Grounds of invalidity
Chapter 8 Interpretation
Chapter 9 Contents and effects of contracts

It may be interesting to note that, in particular, Chapters 2 and 3 contain the rules on pre-contractual duties and obligations. These Chapters enclose new material not contained in the PECL, which has been elaborated on the basis of the ACQP. Further new matters, also stemming from the ACQP, are Chapter 5 on Withdrawal and a rather broad section in Chapter 9 on Unfair Terms. Nearly all the other parts of Book II are lifted from the PECL and, if at all, have only been slightly redrafted.

Book III has the title "Obligations and corresponding rights" and contains the following Chapters:

Chapter 1 General
Chapter 2 Performance
Chapter 3 Remedies for non-performance
Chapter 4 Plurality of debtors and creditors
Chapter 5 Transfer of rights and obligations
Chapter 6 Set-off and merger
Chapter 7 Prescription

Character of the DCFR

Purposes: Possible model for a political CFR; legal science, research and education; possible source of inspiration (legislators, courts, parties). As an academic draft the DCFR is therefore of considerable importance for further research and discussion because it clarifies the interrelationship between contract law and non-contractual matters for the future development of EU law and moreover offers a wide spread frame of reference for the exchange of views concerning possible structures, basic concepts and principles of private law in Europe.

Underlying principles: freedom, security, justice and efficiency

Overriding principles: protection of human rights; promotion of solidarity and social responsibility; preservation of cultural and linguistic diversity; protection and promotion of welfare; promotion of the internal market (and again freedom, security, justice and efficiency)

Definitions (suggestions for the development of a uniform European legal terminology)

Model rules (not necessarily "common core" or "restatement"), a "toolbox".

DCFR has become the centre of academic discusssion form very outset, already at the time when its first edition was published in 2008. Hesselink argues that „DCFR is likely to become an authoritative source of law in a substantive

sense. Even if it will not obtain any formal status (e.g. as an optional code) in the near future, it will probably become an important source of inspiration for the Europeanization of private law. This likely course of events is also desirable: a CFR-friendly interpretation of national and EC private law should be a key element of a European legal method for the developing multi-level system of European private law. Furthermore, the academic draft CFR provides a good basis for a final political CFR. In other words, the argument that the DCFR is of insufficient quality is not convincing. Nevertheless, the DCFR can and should certainly be improved, what is urgently needed at this moment is real democratic input, with a focus not only on the scope but also on the content of the CFR. As to its substance, the CFR should be amended along three lines: social justice issues, back to contract, and co-ordination with the proposed EC directive on consumer rights."[16]

1.3 Proposal for a Regulation on a Common European Sales Law

With its Communication of 2001[17], the Commission launched a process of extensive public consultation on the fragmented legal framework in the area of contract law and its hindering effects on cross-border trade. In July 2010, the Commission launched a public consultation by publishing a **'Green Paper on policy options for progress towards a European contract law for consumers and businesses'**[18] (Green Paper), which set out different policy options on how to strengthen the internal market by making progress in the area of European contract law. In response to the Green Paper consultation, the Commission received 320 replies from all categories of stakeholders from across the Union. Many respondents saw value in Option 1 (publication of the results of the Expert Group) and Option 2 (a toolbox for the Union legislator). Option 4 (an optional instrument of European contract law) received support either independently or in combination with a toolbox from several Member States as well as other stakeholders; provided that it fulfilled certain conditions, such as a high level of consumer protection, and clarity and userfriendliness of the provisions.

By a Decision of 26 April 2010,14 the Commission set up the Expert Group on European contract law. This Group was tasked with developing a **Feasibility Study** on a possible future European contract law instrument covering the main aspects which arose in practice in crossborder transactions. The Feasibility Study was published on 3 May 2011 and an informal consultation was open until 1 July 2011. On 11 October 2011, on the basis of Feasibility Study, the European Commission published a **Proposal for a "Common European Sales Law**" (or CESL),[19]

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16 Hesselink, M. W. The Common Frame of Reference as a Source of European Private Law. Tulane Law Review, Vol. 83, No. 4, pp. 919-971, 2009

17 COM (2001) 398, 11.7.2001.

18 COM (2010) 348 final, 1.7.2010.

19 European Commission, Proposal for a Regulation on a Common European Sales Law, 11.10.2011, Com (2011) 635 final.

which traders may choose to use to govern their cross-border contracts. It covers the sale of goods, the supply of digital content and some related services.

The Proposal provides for the establishment of a Common European Sales Law. It harmonises the national contract laws of the Member States not by requiring amendments to the preexisting national contract law, but by creating within each Member State's national law a second contract law regime for contracts covered by its scope that is identical throughout the European Union and will exist alongside the pre-existing rules of national contract law. The Common European Sales Law will apply on a voluntary basis, upon an express agreement of the parties, to a cross-border contract. This proposal is based on Article 114 Treaty on the Functioning of the European Union (TFEU).

The policy objectives underpinning the proposed Common European Sales Law contained in Annex I to the document (the CESL) are to: enhance the viability of the EU's internal market through facilitating cross-border trade, both in respect of business to consumer transactions (B2C) and business to business transactions (B2B); secure a high and uniform level of consumer protection across the European Union (EU); maximise the opportunities which can accrue to small and medium enterprises (SME) from an effective internal market; maintain the EU's policy of nondiscrimination against consumers and businesses from third countries; and maintain, except in defined circumstances, freedom of contract.

The proposal consists of three main parts: a Regulation, Annex I to the Regulation containing the contract law rules (the Common European Sales Law) and Annex II containing a Standard Information Notice.

Content of regulation (16 articles) sets out the objective and subject matter of the Regulation., contains a list of definitions for terms used in the Regulation. While some definitions already exist in the relevant acquis, others are concepts defined here for the first time. It explains the optional nature of the contract law rules in cross-border contracts for sale of goods, supply of digital content and provision of related services. Articles 4, 5, 6,7 set out the territorial scope of the Regulation, the material scope of contracts for sale of goods and supply of digital content and related services, such as installation and repair and also the personal scope of application which extends to business-to-consumer and those business-to-business contracts where at least one party is an SME. Article 8 explains that the choice for the Common European Sales Law requires an agreement of the parties to that effect. In contracts between a business and a consumer, the choice of the Common European Sales Law is valid only if the consumer's consent is given by an explicit statement separate from the statement indicating the agreement to conclude a contract. Article 11 explains that as a consequence of the valid choice of the Common European Sales Law this is the only applicable law for the matters addressed in its rules and that consequently other national rules do not apply for matters falling within its scope. The choice of CESL operates retroactively to cover compliance with and remedies for failure to comply with the pre-contractual information duties. Article 13 presents the possibility for Member States to enact legislation which makes CESL available to parties for use in an entirely domestic setting and for contracts between traders, neither of which is an SME. Article 14 requires Mem-

ber States to notify final judgments of their courts which give an interpretation of the provisions of the Common European Sales Law or any other provision of the Regulation. The Commission will set up a database of such judgments.

Annex I contains the text of the Common European Sales Law

Part I 'Introductory provisions' sets out the general principles of contract law which all parties need to observe in their dealings, such as good faith and fair dealing. The principle of freedom of contract also assures parties that, unless rules are explicitly designated as mandatory, for example rules of consumer protection, they can deviate from the rules of the Common European Sales Law.

Part II 'Making a binding contract' contains provisions on the parties' right to receive essential pre-contractual information and rules on how agreements are concluded between two parties. This part also contains specific provisions which give consumers a right to withdraw from distance and off-premises contracts. Finally it includes provisions on avoidance of contracts resulting from mistake, fraud, threat or unfair exploitation.

Part III 'Assessing what is in the contract' makes general provisions for how contract terms need to be interpreted in case of doubt. It also contains rules on the content and effects of contracts as well as which contract terms may be unfair and are therefore invalid.

Part IV 'Obligations and remedies of the parties to a sales contract' looks closely at the rules specific to sales contracts and contracts for the supply of digital content which contain the obligations of the seller and of the buyer. This part also contains rules on the remedies for non-performance of buyers and sellers.

Part V 'Obligations and remedies of the parties to a related services contract' concerns cases where a seller provides, in close connection to a contract of sale of goods or supply of digital content, certain services such as installation, repair or maintenance. This part explains what specific rules apply in such a situation, in particular what the parties' rights and obligations under such contracts are.

Part VI 'Damages and interest' contains supplementary common rules on damages for loss and on interest to be paid for late payment.

Part VII 'Restitution' explains the rules which apply on what must be returned when a contract is avoided or terminated.

Part VIII 'Prescription' regulates the effects of the lapse of time on the exercise of rights under a contract.

Appendix 1 contains the Model instruction on withdrawal that must be provided by the trader to the consumer before a distance or an off-premises contract is concluded, while Appendix 2 provides for a Model withdrawal form.

Primary goal of Proposal for a Regulation on a CESL is to promote cross-border trade. CESL should have a positive impact on the reduction of transaction costs for traders and help to increase the availability of goods and services for consumers..

There is an ongoing a debate on the legal basis of the Regulation, its proposed scope, optional nature as well as the content of CESL itself. The opinion prevails that the maximum extensions of scope of CESL forms a prerequisite to its success, which may hint at the reluctance of Member States. It is very doubtful whether in the field of commercial transactions CESL is able to create a competition in com-

parision to Vienna Convention on the International Sale of Goods. The problem of gaps in CESL inevitably leads to the use of the national law (representation, property acquisition), it could be another concern that prevents its uniform application. Already DCFR overlooked the issue of legal capacity of person, which is not at all reflected in CESL and it has high potential of problems when dealing with digital content, especially in electronic commerce involving underage consumers. Success of instruments based on the principle of opt-in on an international scale is not very high. If the Commission will enforce the adoption of Regulation it has to be expected that its use will have a slow start and will require massive promotion by the authorities of the Union. Some importance will also create a database of judgments from Member States.

As the latest development in the field of academic respnses to the Regulation, we may consider "***Statement on the Proposal for a Regulation on a Common European Sales Law"***which European Law Institute released in September 2012. It consists of three parts : (i) Part A outlines significant practical and conceptual issues which arise from the CESL, and which are elaborated in the proposed revisions in Part C;(ii) Part B sets out practical suggestions to facilitate the CESL's effective implementation; and (iii) Part C sets out proposed revisions to the CESL.

Among the many interesting suggestions made in the paper are the following on the scope and applicability of the CESL.

- The proposed rule that in B2B contracts the CESL will apply only if one of the parties is a small to medium-sized enterprise (an SME) should be abandoned. The ELI says that "the proposed restriction is unprecedented in an instrument of this nature, renders contracting under the CESL too complex, and significantly reduces the CESL's utility".
- The proposed restriction of the CESL to cross-border contracts should be reconsidered and revised. The ELI points out that this restriction will place sellers in a Member State which has not opted to extend the scope of the CESL to domestic contracts at a serious disadvantage in relation to sellers in Member States which have exercised the option and in relation to sellers from outside the EU/EEA.
- The existence of a minor alien element in the contract should not make the CESL unavailable for use. "The parties can never be sure whether a court will later detect such an alien element and refuse to apply the CESL, which makes the CESL unattractive".
- Various proposed exclusions from the substantive scope of the CESL (e.g. contracts providing for deferred payments, or supply of goods not in exchange for a price) should be removed in order to increase its potential usefulness.
- The mechanism for a consumer opt-in to the CESL should be revised and simplified and the proposed Standard Information Notice should be replaced by a reference to a website where all the relevant information can be obtained.
- The applicability of pre-contractual information duties should not be confined to cases where a contract is eventually concluded.

The Institute also makes a number of suggestions for the partial restructuring of the CESL, including a suggestion that, instead of a Regulation and an Annex, there should just be one instrument with consecutive numbering. This could in turn lead to a more user-friendly placing of the definitions rule.[20]

[20] http://www.law.ed.ac.uk/epln/blogentry.aspx?blogentryref=9018

2. Notion of contract and other terms

The term "contract" is commonly used in at least different three senses. The first is the importance of **meeting of wills** of the parties, i.e. agreement. The second meaning refers to the **legal relationship** established by the contract in the agreement sense. With reard to this aspect, it would be no doubt better to use the term "contractual relationship." The term "contract" can also refer to the contract **document**, which contains terms of the agreement. DCFR defines the contract as an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or multilateral juridical act. A juridical act is any statement or agreement, whether express or implied from conduct, which is intended to have legal effect as such. It may be unilateral, bilateral or multilateral.

The **doctrine of a juridical act** as the basis of contract law is a substantial difference between DCFR and PECL. Using the concept of juridical act as the building block of the law of obligations, respectively contract law, may seem obvious for the Slovak jurisprudence, but it should be noted that in the modern jurisprudence and in the modern comparative Union acquis this term hardly works and has been considered too abstract and formalistic by several authors. The term juridical act is not universally used. PECL refer to "the statement and other conduct indicating intention". The reference to "intention" means in the context an intention to create some legal effect.

Regarding the juridical act and its further "use" in the DCFR it should be noted that according some authors the DCFR has been based in comparison with PECL on the complete change of structure,[21] so that the basic standards are primarily guided by juridical act. If we study DCFR more thoroughly, rather the opposite is true, as the first rules in sections are primarily tied to a contract and at the end of the section these rules are complemented by the supplementary articles relating

[21] „The structure of the DCFR fundamentally differs from the PECL and the Acquis Principles by renouncing the concept of contract law in favour of a model of a law of obligations with the General Law of Obligations being at the core. The structure of the draft rather determines the rights and obligations for various areas of law as according to a particular pattern which has developed in some civil law jurisdictions and can be found, for example, in the German Civil Code (*Bürgerliches Gesetzbuch*; BGB). The rules concerning contractual and non-contractual legal relationships are, as far as possible, not specifically provided for each of the individual legal relationships; their formulation is rather somewhat general and abstract so as to be applicable to all different types of legal obligations." Schulze, R. The Academic Draft of the CFR and the EC Contract Law. In Schulze, R. (ed.) Common Frame of Reference and Existing EC Contract Law. München : Sellier, 2008, p. 13

to other juridical acts than contracts. Many times these rules only refer to appropriate or analogous application of the rules on contracts.

PECL do not contain a definition of the contract. Probably, also with regard to the provisions on contracting they consider this notion as obvious. Basic definitional elements of the contract are, however, identical to PECL and the DCFR, as the

A contract is concluded if:
(a) the parties intend to be legally bound, and
(b) they reach a sufficient agreement
without any further requirement. (2:201 PECL)

PECL have been developed to govern contracts, that is to say, agreements intended to create obligations. They also apply to agreements which are intended to alter or to put an end to the obligations. Many of the rules may also apply to declarations of will by one party alone, whether these are promises which are binding without acceptance, or other forms of voluntary declaration or communications which have legal consequences, such as offers or acceptances; appropriation of payments; the various notices which may be given in case of change of circumstances; notices of termination of a contract; renunciations of rights; and so on.

The valid contract is binding. Equally a valid unilateral undertaking is binding on the person giving it if it is intended to be legally binding without acceptance. The binding force of the contract does not prevent modification or termination of the rights and obligations of the parties by agreement of the creditor and the debtor or by law.

Under most law, ***the meeting of wills produces real effects as well as madatory effects.*** *The mandatory effects can be of varying nature. Some of these effects are general in the sense that they can be found in nearly every contract. This category includes behavioral effects (intangibility, fairness, or irrevocability) which translate to the obligations of parties. Other effects are specific to the characteristics of specific contract (implied obligation, obligations intended by the parties.*

As for the real effects, German law proposes particular analysis. In German law real effects of a contract are separate from meeting of wills. This is what Germans refer to under the term ***"Abstraktionprinzip";*** *the contract creates the obligation, whereas the transfer of property occurs through the another act, the two act being independent of one another.*[22]

This axiom of contract law (valid contract is binding) is not explicitly formulated in PECL. The predominant aspect in PECL is the functional one and so some obvious questions are not provided by rules of PECL. The absence of such definition does not loopholes PECL. Rather, the DCFR has a tendency in some parts play not a role of a normative act, but it also invokes the impression of textbook. DCFR contains more definitions, not just in the Annex, but also in the individual articles. Apparently it was also related to the planned use of DCFR as "a toolbox".

[22] *Fauvarque-Cosson, B., Mazeaud, D. (ed.)* European Contract Law. Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules. München : Sellier, 2008. p.5

The **usages and practices** have an important role to determine the extent of parties´ rights and obligations. The parties to a contract are bound by any usage to which they have agreed and by any practice they have established between themselves. The parties are also bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable. DCFR refers to the appropriate use of rules on usages and practices also in the relation to unilateral legal acts.

In the Chapter I Book II DCFR there are more definitions of terms we would like to introduce.

Firstly, the generally applicable rule in the DCFR is an article II. – 1:105 which deals with the **imputed knowledge and imputed intention**. If a person who with a party's assent was involved in making a contract or other juridical act or in exercising a right or performing an obligation under it knew or foresaw a fact, or is treated as having knowledge or foresight of a fact; or acted intentionally or with any other relevant state of mind this knowledge, foresight or state of mind is imputed to the party. Imputed knowledge and intention play an important role if the performance was entrusted to another person, agent or employee.

PECL and DCFR are based on the **informality of contracts and other legal acts.** The contract need not be concluded, made or evidenced in writing nor is it subject to any other requirements relating to the form. The content of contract can be proved by any means, including witnesses. Only exceptionally, certain provisions (or agreement between parties) require written form, verification or official registration. One context in which a formal requirement may be called for is that of certain undertakings to make a donation. Another one is which a formal requirement may sometimes be called for is that of consumer protection. The reason why the formal requirements are rare lies in the experience that they can hinder commerce and can enable parties to escape obligations for no good reason.

Rules that govern **mixed contracts** have relatively complex structure. DCFR distinguishes two groups of these contracts. The first group of mixed contracts is formed by the contracts that include two or more types of specific contracts covered in the DCFR (sale of goods, donation, construction of buildings, lease, donation, etc). The second group consists of those contracts, which partly correspond to the specific contract in the DCFR and partly have other unusual elements, that are not classified under the specific contracts the DCFR. Therefore only general provisions of the law of obligations may be applied, to these elements. If the contract is mixed, appropriate rules of specific contract have to be applied.

This rule, also known in the Slovak legislation, does not apply if its application excludes special provision. According to the article II: - 1:107 DCFR relevant parts of regulation of specific contracts do not apply proportionally if a rule provides that a mixed contract is to be regarded as falling primarily within one category; or one part of a mixed contract is in fact so predominant that it would be unreasonable not to regard the contract as falling primarily within one.

The dominance of preferred or predominant contract means that the provisions governing these elements may not be inconsistent with the rules for preferred contract. Exclusion of application of certain provisions under this article

may not lead to avoidance or elimination of the use of mandatory provisions. PECL do not provide for how to deal with mixed contracts. However, it is logical, since the PECL does not contain specific contracts´ regulation.

PECL employs the concept of the **general terms and conditions**. These are the conditions that have been previously developed for an indefinite number of contracts of a same type which have not been individually negotiated by the parties. According to the commentary on the DCFR previous definition is too strict, and therefore the "indefinite number of contracts" in PECL changed to "several agreements with various parties" in the DCFR. Even terminology has been changed from "general conditions of contract" in PECL to "**standard terms**" in DCFR. Standard terms are closely connected with the definition of the "not individually negotiated terms". This provison is not limited to the terms of the contract. Thus terms in other instruments (e.g. authorisations, i.e.powers of attorney or receipt) are covered as well. The definition is a negative one: a term supplied by one party has not been individually negotiated if the other party " has not been able to influence its content". A party to a contract is able to exercise influence on a term if negotiations take place between the parties which offer a real opportunity to change the term. If it is disputed whether a term supplied by one party as part of standard terms has since been individually negotiated, that party bears the burden of proof that it has been. In a contract between a business and a consumer, the business bears the burden of proof that a term supplied by the business has been individually negotiated. In contracts between a business and a consumer, terms drafted by a third person are considered to have been supplied by the business, unless the consumer introduced them to the contract.

Chapter 1 of Book II of the DCFR contains provisions that are mainly used as definitions in relation to the whole bulk of articles in DCFR and they also play an important role in the interpretation and possible application of this "toolbox". Book I of DCFR contains some of terms defined in Chapter 1 of PECL, such as notice, reasonableness, good faith and fair dealing, computation of time, respectively they were transferred to Annex in DCFR. It may be questionable whether it was necessary and beneficial at all to create Chapter I of Book II DCFR (General provisions), that has been analysed in this section. Although this chapter introduces the terminology common to other books, this aim has also Book I and Annex of DCFR. Terms and concepts introduced in this chapter do not have internal coherence and systematic logic. As an example we may point out at the definition of a contract or of standard terms. We will continue to deal with these terms also in the section of DCFR devoted to the formation of contracts. In our opinion, logical connection of term and substantive rule tied to the term as the legislation technique used in PECL was more user-friendly. Draft of the Common European Sales Law may be the confirmation of this fact, because in this regard the CESL is closer to PECL than to DCFR.

3. Categories of contracts

Within each legal system there are many different types of contracts and many different ways of categorizing contracts and contract law. For example, each system recognizes rules for **specific contracts**, such as sale of goods, contracts for services, contracs for lease, etc. and also the rules that in principle may apply to the contracts of all types unless displaced by a specific rule- what is usually called as **general contract law.**

There are many other ways in which contracts may be categorized. One of the most important and pervasive distinctions in the modern law, both within general contract law and also in the specific contract, is that **between consumer contracts and non- consumer contracts.** Non- consumer contracts are mainly contracts between the businesses, but also the contracts between parties none of them are businesses.

For example, DCFR, like many other systems, applies different rules on unfair terms according to whether the contract is **business – to – business contract (B2B**), a contract between a **business and consumer** (**B2C)** or one between parties neither of whom are making the contract in connection with a business (**C2C);** these alternatively called as person - to – person contract **(P2P).**

3.1 Consumer contracts

The key word in the area of consumer contracts is the definition of consumer. **Directive on consumer rights** defines '**consumer'** as any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession. Similar solution employs the **DCFR**: A **"consumer"** means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession. (I. – 1:106(1)). We may conclude that after some hesitation, the protection that belongs to consumer as the natural person will not be automatically broaden to legal persons not acting in the area of their professional interests. Another problem is connected to the mixed contracts in the sense of contractor- the person acting partly for business and partly for private purposes. Athough each Directive and Regulation has its own definition on consumer, none of them seems to give further guidance on the issue of mixed contract. In this respect, the very indicative may be judgment from 20 January 2005 *Johan Gruber v Bay Way AG, ECJ (Case C-464/01,* ECR 2005 p. I-439), that spelled out, that :

- *a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules of jurisdiction laid down for protection of consumers, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect;*
- *it is for the court seised to decide whether the contract at issue was concluded in order to satisfy, to a non-negligible extent, needs of the business of the person concerned or whether, on the contrary, the trade or professional purpose was negligible;*
- *to that end, that court must take account of all the relevant factual evidence objectively contained in the file. On the other hand, it must not take account of facts or circumstances of which the other party to the contract may have been aware when the contract was concluded, unless the person who claims the capacity of consumer behaved in such a way as to give the other party to the contract the legitimate impression that he was acting for the purposes of his business.*

3.2 Business contracts

If businesses conclude contracts in the course of their professional business activities, the rules for business contracts apply. Slovak legislation treats these contracts separately; the solutions of this problem in the European Union vary. The EU in this area has enacted some directives that are concentraded on these contract, and in the last years the regard has been especially given also to the contracts with SME´s, i.e. small and medium enterprises.[23]

Traditionally, the law on commercial contracts and the law on consumer contracts have been dealt with separately. The recent works on a European law have pretended to aim at a scope of application as wide as possible for the proposed regulations and consequently have lead to attempts to overcome this distinction, much following the footsteps of the Principles of European contract law by the

[23] „SME" stands for small and medium-sized enterprises. The main factors determining whether a company is an SME are:
1. **number of employees** and
2. either **turnover** or **balance sheet total**.

Company category	**Employees**	**Turnover**	or	**Balance sheet total**
Medium-sized	< 250	≤ € 50 m		≤ € 43 m
Small	< 50	≤ € 10 m		≤ € 10 m
Micro	< 10	≤ € 2 m		≤ € 2 m

These ceilings apply to the figures for individual firms only. A firm which is part of larger grouping may need to include employee/turnover/balance sheet data from that grouping too.
See COMMISSION RECOMMENDATION of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (2003/361/EC)

Lando Commission.[24]

3.3. Private contracts

Contracts between two parties neither of whom is acting for business purposes may be subject to different rules from either consumer or B2B contracts. This category is not specially recognized and it is not in the centre of attention in the course of new legislative activities. This fact can be easily explained by the reality that economic importance of these contracts does not influence the market so significantly as the previously mentioned categories of contracts and the changes are not to be expected in the future.

[24] *Moss, G.C. Contracts between Consumer Protection and Trade Usages: Some Observations on the Importance of State Contract Law. In Schulze, R. (ed) Common Frame of Reference and Existing EC Contract Law, Munich, Sellier, 2008, p. 78*

4. Formation of Contract

The formation of contracts is covered by Chapter 4 of Book II of the DCFR. For the interpretation of this chapter we take into account also Chapter 2 (Non-discrimination) and Chapter 3 (Marketing and pre-contractual obligations) of Book II DCFR.

Freedom of contract is the starting point. As a rule, natural and legal persons should be free to decide whether or not to contract and with whom to contract. They should also be free to agree on the terms of their contract. This basic idea is recognised in the DCFR. Parties should be free to agree at any time to modify the terms of their contract or to put an end to their relationship. However, the freedom is subject to any applicable mandatory rules..

Freedom of contract can be justified on the ground of individual autonomy or of public benefit, but whichever basis one prefers, it is certain that contract must have constraints as well; there must be rules, which invalidate certain agreements, or permit their invalidation. These are the cases where the content of contract conflicts with public order, morality or law itself. Contract may be invalid also if there is some flaw in the procedure (contractor may have lacked capacity).

4.1 Non-discrimination

PECL, do not mention, let alone provide rules on the topic "protection against discrimination through private law". Leible argues that the PECL are nothing more than a reflection of European private law as it stood at the era of their making, i.e. in the eighties and nineties of the 20th Century. At this time, the issue of discrimination was discussed against the background of human rights, but not against that of private law. There were hardly any private law rules which dealt with the topic. In extreme cases, one would refer to general clauses such as good faith. Towards the end of the last millennium, things started to change. The European Community entered the scene. In the Treaty of Amsterdam, its powers were extended. For the first time, the Community could now "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" (Art. 13 EC Treaty). It did not take long until the EC used this power to adopt no less than four directives against discrimination. Since then, the protection against discriminatory behavior has become a basic tenet in European private law. It is therefore clear that the Common Frame of Reference

must also draw upon this subject. [25]

Non-discrimination is the subject of Chapter 2 of Book II of the DCFR. The right to non-discrimination is according to DCFR in connection to the contracts and other legal acts by which people gain access to publicly available goods and services. If a person is discriminated in conflict with Article II.- 2:101 DCFR, in addition to the possible availability of non-contractual damages compensation, he or she has right to claim damages under Book III, Chapter 3, that provides remedies for non- performance. "Loss" includes economic and non-economic loss, the claim for non – economic loss is in these cases more frequent. The right to terminate the contract or the right to claim the formation of contract are not excluded however.

M. Hesselink considered the inclusion of chapters on non-discrimination in contractual relations as a substantial progress of DCFR in comparison with national codes and also compared with PECL. Nevertheless, this author critically considers limitation of the prohibition of discrimination in the DCFR only for reasons that are related to gender, nationality and race. Hesselink refers to the Charter of Fundamental Rights, which in Article 21 ecomprises the incomparably greater number of possible grounds of discrimination. Mathiass Storme expressed the opposite view with respect to non-discrimination in contract law long ago. In his opinion, the non -discrimination in contract law brings about a restriction of freedom of will, that should be admissible only in respect of the monopoly and public law. S. Leibl evaluates the regulation of non-discrimination in the DCFR as a coherent and convincing set of rules, but he expresses some doubts concerning the regulation of burden of proof in DCFR. The basic principle, which is generally used in anti-discrimination legislation (plaintiff presents only facts that establish a presumption of discrimination, the defendant must prove differently), remains untouched in DCFR.[26]

The provisions of Chapter 2 of Book II of the DCFR, that enshrine the right to non-discrimination, apply not only to contracts but also to performance of obligations in contracts, which provide goods and services to public; to the right to specific performance and to remedies; including the right to terminate the contractual relationship. This means that the rules of this chapter shall apply mutatis mutandis to the rights and obligations provided in this book and other books of DCFR.

4.2 Pre- contractual Stage

Book II Chapter 3 DCFR provides rules on marketing and pre-contractual duties, which can be divided into:

a) information duties;

[25] Leible, S. Non-Discrimination. In *Schulze, R. (ed) Common Frame of Reference and Existing EC Contract Law, Munich, Sellier, 2008, p. 127*

[26] Ibid p.156

b) duty to prevent input errors and acknowledge receipt in case of distance contracts concluded by electronic means;
c) negotiation and confidentiality duties;
d) regulate the delivery of unsolicited goods and services.

Breach of marketing and pre-contractual duties entitles to compensation. Where any rule in this Chapter makes a person liable for loss caused to another person by a breach of a duty, the other person has a right to damages for that loss. The content of information duties imposed to parties before the contract has been concluded may be classified mainly by the parties (consumer to business) or type of the contract formation (distance contract, a contract concluded by electronic means). A business is liable to the consumer for any loss caused by a breach of information duties. Remedies for the breach can not be excluded or modified to the detriment of the consumer or exclude. If a business has failed to comply with the information duty and a contract has been concluded in the circumstances stated in this Chapter (distance contract, etc.) the other party has a right to withdraw from the contract by giving notice to the business within regulated period. Information duties provided for in DCFR have their origin in the EU consumer law. At the same time, however, they reach beyond the usual protection given in the directives system, because rules of DCFR provide the remedies for breach of information duties. Directives, on the other hand are in this respect usually insufficient. PECL for obvious reasons do not have comparable regulation, as it has no common core with consumer protection. However, we have to keep in mind that the information duties in the DCFR are not linked only to consumer contracts (B2C), but general information duties to the extent that diverting from the usual business practice also apply to relations between businesses (B2B).

PECL as DCFR regulate consequences of **negotiations contrary to good faith and fair dealing.** A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing. This duty may not be excluded or limited by contract. The parties are free to negotiate about the conclusion of the contract and they are not responsible if an agreement has been reached. It is contrary to good faith and fair dealing, in particular, for a person to enter into or continue negotiations with no real intention of reaching an agreement with the other party

Parties negotiating the contract do not have the general obligation to treat the **information obtained in the course of negotiations as confidential**. In the course of negoitation party may disclose the information to others and they can use it for their own needs. However, a party may have an interest in confidentiality. Party can explicitly specify that the information should remain confidential and it should not be used by the other party. Moreover, if such indication was made, the receiving party has an implied obligation to treat certain information as confidential. This implied obligation may result from the specific nature of the information and professional status of the parties. The other party knows or should know that the information is confidential. It would be contrary to the principles of good faith and fair dealing to divulge this information or use it for their own needs in the case if the contract has not been concluded. If the party in the negotiations provide

confidential information, the other party shall not disclose it to third parties or use for their needs, regardless of whether they subsequently made a contract or not. A party who is in breach of the duty is liable for any loss caused to the other party by the breach and may be ordered to pay over to the other party any benefit obtained by the breach. DCFR took the PECL rule over. DCFR has its own definition of "confidential information"- it means information which, either from its nature or the circumstances in which it was obtained, the party receiving the information knows or could reasonably be expected to know is confidential to the other party.

An important rule in the precontractual stage covers situation where a business delivers **unsolicited goods to, or performs unsolicited services for consumer.** In such a case no obligation arise from consumer´s failure to respond. In particular it means that no contract arises from the consumer's failure to respond or from any other action or inaction by the consumer in relation to the goods and services; and no non-contractual obligation arises from the consumer's acquisition, retention, rejection or use of the goods or receipt of benefit from the services. In particular, the action *rei vindicatio* for business is excluded.

4.3 Terms of contract

According to the PECL a contract is concluded if the parties intend to be legally bound, and they reach a sufficient agreement without any further requirements. DCFR follows identical definition of contract (intention to be legally bound, sufficient agreement) and conclusion of contract is linked to the parties' intention to enter into a legally binding contract or cause other effects. Other legal effects must be understood as an agreement on the amendment or termination of rights and obligations, assignment or release. Whether or not agreement is needed there are no further requirements. No form is required. Nor is it necessary that a promisee undertakes to furnish or furnishes something of value in exchange for the promise (consideration). Even an undertaking to lend money and a promise to receive a deposit are effective before they have been performed. A contract is not invalid because at the time of its conclusion it was impossible to perform the obligation assumed.

Intention of party to be bound is determined by its statements or conduct, as reasonably understood by this expression of the other party. Agreement is sufficient if the terms of the contract the parties were adequately defined, so that the contract was enforceable, and the rights and obligations may be otherwise adequately addressed. However, if one of the parties refuses to conclude a contract unless the parties agree on an issue, the contract does not arise unless a consensus is reached on this issue.

In the developing the European model principles, it was necessary to clarify what the legal consequences are attached to the parties intention to be bound by the contract. Binding force of the contract and its consequences differ significantly in civil law and common law. What it means to be bound by the contract? In our system of civil law an obvious consequence of contract is the obligation to fulfill

contractual obligations and the ability to enforce them. On the contrary, in the system of common law, the right to demand performance of a contractual obligation (specific performance) is considered rather extraordinary remedy and the creditorl is usually only entitled to claim damages and in the case of a serious breach of the contract he is entitled to terminate the contractual relationship.

If a contract document contains an individually negotiated term stating that the document embodies all the terms of the contract **(a merger clause),** any prior statements, undertakings or agreements which are not embodied in the document do not form part of the contract. If the merger clause is not individually negotiated it establishes only a presumption that the parties intended that their prior statements, undertakings or agreements were not to form part of the contract. This rule is mandatory. The parties' prior statements play also an important role in the interpretation of contract. A party may by statements or conduct be precluded from asserting a merger clause to the extent that the other party has reasonably relied on such statements or conduct.

4.4 Offer and acceptance

A proposal amounts to an offer if:

a) it is intended to result in a contract if the other party accepts it; and
b) it contains sufficiently definite terms to form a contract.

An offer may be made to one or more specific persons or to the public. A proposal to supply goods from stock, or a service, at a stated price made by a business in a public advertisement or a catalogue, or by a display of goods, is treated, unless the circumstances indicate otherwise, as an offer to supply at that price until the stock of goods, or the business's capacity to supply the service, is exhausted.

An offer may be revoked by the offeror or on the other hand it may be rejected by the offeree.

An offer may be revoked if the revocation reaches the offeree before the offeree has dispatched an acceptance or, in cases of acceptance by conduct, before the contract has been concluded. An offer made to the public can be revoked by the same means as were used to make the offer.

However, a revocation of an offer is ineffective if:

a) the offer indicates that it is irrevocable;
b) the offer states a fixed time for its acceptance; or
c) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

If the offeror would have a right to withdraw from a contract resulting from its acceptance, revocation of the offer is effective also in the cases where it would be otherwise excluded. The purpose of this provision is to prevent problems that could arise if a consumer who has the right to withdraw, withdraw the offer without realizing that the revocation is ineffective, and without knowing that he he does not want to be bound by the contract, it is essential that he actually must

withdraw from the contract. Since the right of withdrawal is mandatory provisions, the rule on effectiveness of revocation in thse case has same nature, and parties may not, to the detriment of the offeror, exclude the application of this rule or derogate from or vary its effects..

When a **rejection** of an offer reaches the offeror, the offer lapses. The rejection need not be express but may be implied by the offeree's conduct, for instance if the offeree makes a counter-offer or states that it would consider a lower bid or a smaller consignment than the one offered.

. PECL or DCFR provides for the legal consequences to the death of the plaintiff.????.

Any form of statement or conduct by the offeree is an **acceptance** if it indicates assent to the offer. Silence or inactivity does not in itself amount to acceptance. The acceptance must be unconditional. It may not be made subject to final approval by the offeree, or its board of directors, or by a third party, unless the offeror knew or ought to know that the approval of a third party (e.g. government authorities) was required. Neverhtless, the rules on modified acceptance apply in appropriate cases.

Time of conclusion of the contract (II. – 4:205) has a great significancem as from this moment each party is bound to the other and cannot revoke or withdraw its consent. If an acceptance has been dispatched by the offeree the contract is concluded when the acceptance reaches the offeror. In the case of acceptance by conduct, the contract is concluded when notice of the conduct reaches the offeror. If by virtue of the offer, of practices which the parties have established between themselves, or of a usage, the offeree may accept the offer by doing an act without notice to the offeror, the contract is concluded when the offeree begins to do the act. In these cases the start of production or other preparations makes the acceptance effective even though the offeror does not get notice of these acts.

An acceptance of an offer is effective only if it reaches the offeror within the time fixed by the offeror. If no time has been fixed by the offeror the acceptance is effective only if it reaches the offeror within a reasonable time. If the time for performance has not been fixed by the offeror the offeree's acceptance must reach it within a reasonable time. Due account has to be taken of the circumstances of the transaction. One factor is the rapidity of the means of communication used by the offeror. Another factor is the type of the contract. Offers relating to the trade of commodities or other items sold in a fluctuating market will have to be accepted within a short time. Offers relating to the construction of a building may need longer time for reflection.

Where an offer may be accepted by performing an act without notice to the offeror, the acceptance is effective only if the act is performed within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time.

A late acceptance is nonetheless effective as an acceptance if without undue delay the offeror informs the offeree that it is treated as an effective acceptance. If a letter or other communication containing a late acceptance shows that it

has been dispatched in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that the offer is considered to have lapsed.

DCFR and as well as PECL have rules on **modified acceptance**, the rule that lack significantly in Slovak contract law (II. – 4:208). A reply by the offeree which states or implies additional or different terms which materially alter the terms of the offer is a rejection and a new offer. But a reply which gives a definite assent to an offer operates as an acceptance even if it states or implies additional or different terms, provided these do not materially alter the terms of the offer. The additional or different terms then become part of the contract. According this regulation one have to differ and determine whether a term materially alters terms of contract. When a term is material? According comments to PECL, a term is material if the offeree knew or as a reasonable person in the same position as the offeree should have known that the offeror would be influenced in its decision as to whether to contract or as to the terms on which to contract,

However, modified reply is always treated as a rejection of the offer provided that: the offer expressly limits acceptance to the terms of the offer or the offeror objects to the additional or different terms without undue delay. Same effecr has situation where the offeree makes the acceptance conditional upon the offeror's assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time.

To-day's standardized production of goods and services has been accompanied by the standardized conclusion of contracts through the use of pre-printed supply- and purchase orders. The form has blank spaces meant for the description of the performance, the quantity, price and time of delivery. All other terms are printed in advance. Each party tends to use conditions which are favourable to it. Those prepared by the supplier, or by a trade organization representing suppliers, may, for example, contain limitations of liability in case of difficulties in production and supply or of defective performance, and provide that customers must give notice of any claim within short time limits. The forms prepared by the customer or its trade association, in contrast, hold the supplier liable for these contingencies, and give the customer ample time for complaints. A special rule for this battle of forms is called for because it often happens that the parties purport to conclude the contract each using its own form although the two forms contain conflicting provisions. There is an element of inconsistency in the parties' behaviour. By referring to their own general conditions, neither wishes to accept the general conditions of the other party, yet both wish to have a contract. A party will only be tempted to deny the existence of the contract if the contract later proves to be disadvantageous for that party .The purpose of the rule is to uphold the contract and to provide an appropriate solution to the battle of forms**. Article II. – 4:209:** Conflicting standard terms states: *If the parties reach agreement, the contract shall be deemed to have been concluded, regardless of the offer and acceptance refer to conflicting standard terms. The standard terms form part of the contract to the extent that they are common in substance.*

The contract is not formed if one of the parties expressly, and not by the standard conditions previously showed an intention not to be bound by a contract, or shall promptly notify the other party that does not wish to be bound by this contract.

If businesses have concluded a contract but have not embodied it in a final document, and one without undue delay sends the other a notice in textual form on a durable medium which purports to be a confirmation of the contract but which contains additional or different terms, such terms become part of the contract unless:

a) the terms materially alter the terms of the contract; or
b) the addressee objects to them without undue delay.

Formation of contract can not always be technically divided to the offer and acceptance. Parties may begin by the statement of intention or contract proposal presented by one of the parties or by a third party. Following negotiations take place, either in the presence of both parties, or through an exchange of letters. Parties may also begin joint negotiations, and sometimes have only vague ideas about how the negotiation ends. Therefore, it is not easy to say when specifically in that process the parties reach an agreement that will result in a binding contract. PECL and DCFR provisions on contracting therefore apply with appropriate adaptations even though the process of conclusion of a contract cannot be analysed into offer and acceptance.

It may happen that an offeree accepts an offer knowing that it is incompatible with another contract which the offeror has made. A collector accepts the offer of an art dealer to sell a picture knowing that the dealer has already sold the same picture to another collector. A theatre manager accepts the offer of an actor to perform at her theatre for a period during which the actor has engaged himself to perform at another theatre. Knowing that both contracts cannot be performed the offeree may still accept the offer: the contract is not invalid. However, PECL nor DCFR deal with the question which of the collectors or which of the theatres may claim performance. Nor do they deal with the question whether the offeree may incur liability towards the first buyer or towards the owner of the other theatre.

4.5 Other juridical acts

Mirror image of the provisions on the formation of contracts is Section 3 of Chapter 4 of Book II of the DCFR, which lays down rules for the persons to be bound by the unilateral legal act.

The requirements for a unilateral juridical act are:

a) that the party doing the act intends to be legally bound or to achieve the relevant legal effect;
b) that the act is sufficiently certain; and
c) that notice of the act reaches the person to whom it is addressed or, if the act is addressed to the public, the act is made public by advertisement,

public notice or otherwise. The intention of a party to be legally bound or to achieve the relevant legal effect is to be determined from the party's statements or conduct as they were reasonably understood by the person to whom the act is addressed. Where a unilateral juridical act confers a right or benefit on the person to whom it is addressed, that person may reject it by notice to the maker of the act, provided that is done without undue delay and before the right or benefit has been expressly or impliedly accepted. On such rejection, the right or benefit is treated as never having accrued.

4.6 The right of withdrawal

(Book II, Chapter 5 DCFR)

Rights of withdrawal and the associated cooling-off periods are fairly new concepts in private law. Although traces of a right of withdrawal may already be found in a proposal for a statutory *Reurecht* for buyers in hire-purchase Rights of Withdrawal schemes in 1891, it was not until the late 1960s and the early 1970s before a right of withdrawal was first laid down in legislation. The right of withdrawal is usually meant to protect a consumer from making rash decisions: during a relatively short cooling off-period, the consumer may go back on his decision to conclude a contract, sometimes even if that contract has already been performed by the parties. The counterpart to the contract, typically a trader (i.e. a professional seller or service provider), is not given such possibility. When the consumer does exercise his right of withdrawal, all contractual obligations are extinguished.

At European level, the right of withdrawal was introduced by the Doorstep Selling Directive. Since then it has been included in Directives on Life Assurance, Timeshare, Distance Selling, Distance Marketing of Financial Services,and, recently, Consumer Credit. It should be noted, however, that the directives use different terms to indicate the right of withdrawal. Member States sometimes have additional cooling off-periods in areas that are not or not yet (fully) harmonised. Moreover, occasionally extra-legal (contractual) rights of withdrawal have developed in contractual practice. A common example is the commercial practice in retail shops that a goods may be returned in exchange for the contract price or a credit note if it does not satisfy the buyer's needs. The right of withdrawal gives the consumer the right to unilaterally go back on his decision to conclude a contract. As such, it is a far-reaching instrument, protecting one party from another party by restricting the binding nature of the contract. It is, therefore, at odds with the principle of *pacta sunt servanda*, which is commonly regarded as one of the pillars of contract law. That principle maintains that when parties have concluded a contract, they are bound to uphold their word and are required to perform their part of contract. The right of withdrawal appears to affect the binding force of a contract in

its core. It should be noted, however, that the principle of *pacta sunt servanda* is not without its limitations. For centuries, exceptions have been made to it, in particular when one of the parties was not able to freely determine whether it wishes to be bound by that contract. In the view of Canaris, the right of withdrawal may be seen as just another example of the fact that the formal and material notions of freedom of contract need not always coincide, as already follows from more familiar instruments as fundamental mistake, deceit and fraud. In this view, the right of withdrawal is not really at odds with the principle of *pacta sunt servanda*, as the 'pactum', on which the binding nature of the contract is based, is not really founded on freely determined consent by the consumer. Nevertheless, given its far-reaching nature, the use of such an instrument needs justification. Obviously, whether a right of withdrawal is justified is a matter of legal politics and ethics: justification for such an instrument is normally reflected in the function that the legislator wishes it to fulfil. The function it is to fulfil, however, does of course influence the answers to the questions of how long the cooling-off period should last and how the consumer is to effect his withdrawal in case he decides to make use of his right, as these affect the effectiveness of the right of withdrawal and, therefore, contribute to the answer to whether the use of the instrument of a right of withdrawal as such is actually justified.[27]

Right of withdrawal (right of withdrawal) compared to PECL DCFR new institute, which responds primarily to the needs of consumer law. Chapter 5 Book II of the DCFR is divided into two sections. In Section 1 (Performance and effects), the right to withdraw constructed as an institution of general contract law, the provisions of this section shall apply to all cases where the book II, III and IV DCFR zakladajú the right to withdraw from the contract during a certain period. Borne by the party can not modify or exclude the application of these provisions.

The provisions on right of withdrawal in DCFR have mandatory nature. A right to withdraw is exercised by notice to the other party. No reasons need to be given. Returning the subject matter of the contract is considered a notice ofwithdrawal unless the circumstances indicate otherwise.

A right to withdraw may be exercised at any time after the conclusion of the contract and before the end of the withdrawal period. Right resign is applicable only for a certain time (the cooling-off period). The withdrawal period ends fourteen days after the latest of the following times;

a) the time of conclusion of the contract;
b) the time when the entitled party receives from the other party adequate information on the right to withdraw; or
c) if the subject matter of the contract is the delivery of goods, the time when the goods are received.

The withdrawal period ends no later than one year after the time of conclusion of the contract. A notice of withdrawal is timely if dispatched before the end of the withdrawal period.

A right to withdraw means right to terminate the relationship under the con-

[27] Rights of Withdrawal **Marco Loos**

tract (or other legal action) without special reason, and without liability for breach of the obligations arising from this contract or any other legal action..

It is clear that compared with other means of termination of the contractual relationship, such as asserting invalidity or termination for non-performance, the right of withdrawal is not subject to special conditions. If an authorized person has the opportunity to exercise the right to cancel the contract and would be also entitled to invoke invalidity or terminate the contract for failure to comply, it is in the sole discretion of this person which choice applies.

Recital 40 of Consumer Rights Directive, which unifies the withdrawal period for 14 days states that; "at present, there are differences in the lengths of the withdrawal between Member States and between contracts concluded at a distance and off-premises contracts, causing legal uncertainty and costs to comply with the rules."

The effect of withdrawal is termination of the contractual relationship and the extinction of obligations of both parties under the contract. The restitutionary effects of such termination are governed by the rules in Book III, Chapter 3, Section 5, Sub-section 4 (Restitution) as modified by specific provisions on withrawal, unless the contract provides otherwise in favour of the withdrawing party.

Where the withdrawing party has made a payment under the contract, the business has an obligation to return the payment without undue delay, and in any case not later than thirty days after the withdrawal becomes effective. The withdrawing party is not liable to pay:

a) for any diminution in the value of anything received under thecontract caused by inspection and testing;
b) for any destruction or loss of, or damage to, anything received under the contract, provided the withdrawing party used reasonable care to prevent such destruction, loss or damage.

Nevertheless, the withdrawing party is liable for any diminution in value caused by normal use, unless that party had not received adequate notice of the right of withdrawal. If a consumer exercises a right to withdraw from a contract after a business has made use of a contractual right to supply something of equivalent quality and price in case what was ordered is unavailable, the business must bear the cost of returning what the consumer has received under the contract..

If a consumer exercises a right of withdrawal from a contract for the supply of goods, other assets or services by a business, the effects of withdrawal extend to any linked contract.

The second section of this chapter governs the conditions of withdrawal in specific cases (Particular rights of withdrawal), which relate to contracts negotiated away from business premises and timesharing.

H. Eidenmüller believes that the right of withdrawal, which is a clear deviation from the principle of pacta sunt servanda, is reasonable to apply only to consumer contracts. He states that notwithstanding the historically proven importance of *pacta sunt servanda*, the principle has slowly been eroded in Europe over the last decades due to the proliferation of withdrawalrights. Such rights are an important

element of the European consumer law acquis and its further development, but Eidenmüller argues that a withdrawal right should only be granted if, in a particular case setting, its benefits clearly outweigh its costs. Firstly, he considers such a ground the existence of infomation asymmetry. In the distance selling context, information asymmetries with respect to product use and utility can lead to market failure. Granting consumers a withdrawal right can be a device to counteract these asymmetries and the resulting potential market failure. This author prefers solution where, consumers should be given an option to choose between a contract with and a contract without a withdrawal right.

Secondly he points out to the exogenous factors. Consumers' contract decisions can be distorted by various external influences. Surprise, time pressure, psychological entrapment, the inability to easily terminate contract negotiations, and other manipulative tactics might all contribute to a particular contract decision being based on the distorted preferences of a consumer. As a consequence, the contract decision of the consumer itself might be inefficient: the consumer purchases goods or orders services for which he or she has no use or for which the use-related value is at least lower than the price which, in a competitive market, reflects the costs of the seller. If the distortion of the consumer's preferences normally corrects itself in a cooling-off period, granting a withdrawal right can be a sensible policy choice. This is the case of door-step –selling, but this author assumes that there are no persuasive arguments to stipulate such a withdrawal right for all contracts concluded off-premises. It is not reasonable to assume that the great majority of contracts concluded off-premises are inefficient and hence justify the stipulation of a (mandatory) withdrawal right..

Thirdly, endogenously distorted preferences support granting a mandatory withdrawal right with respect to timesharing agreements and credit contracts. In sum, the complexity of the agreements in question, their long-term effects and in particular the very often grave financial consequences for the consumers, and the simultaneous presence of exogenous preference distortions justify the proposed regime.[28]

[28] **Why Withdrawal Rights?** HORST EIDENMÜLLER

5. Representation

(Chapter 6 Book II)

The purpose of the rules on representation is to regulate the external effects of representation, i.e. effects of representative´s acts in relation to a third party. Provisions in the DCFR regulate also the situation where a person purports to be a representative without actually being the representative. DCFR respects the separation of internal and external effects of representation as it has been developed in the jurisprudence during the 19th century, therefore the provisions of DCFR in this chapter do not regulate the internal relationship between agent (representative) and principal. Rules on the authority of representatives are not intended to be used in relation to (1) the representatives appointed by the public or judiciary representatives to perform public law functions; (2) those, such as parents, guardians or tutors, acting as the legal representatives of children and of adults deprived.

Recitals in this Chapter include definitions of basic terms. **Agent (representative**) is a person who has authority to affect directly the legal position of another person, the principal, in relation to a third party by acting on behalf of the principal. The **"authority"** of a representative is the power to affect the principal's legal position. The "**authorisation"** of the representative is the granting or maintaining of the authority. **"Acting without authority"** includes acting beyond the scope of the authority granted. A **"third party",** in this Chapter, includes the representative who, when acting for the principal, also acts in a personal capacity as the other party to the transaction. Some terminological changes were realized in the DCFR´s provisions on representation compared to PECL. Firstly, the term "agent" has been replaced with the term "representative" in order to focus more sharply on the situation where one person represents the other in legal transaction or doing of juridical acts. Secondly, another important change is the preference for the definition of representative including words "affect directly the legal position of of the principal" rather than "authority to bind the principal," used in PECL. The word "bind" may be thought to refer only to the process of creating an obligation for the principal. The representative´s act may, however, acquire a right for principal terminate a liability, to accept a performance, etc. Thirdly, the inclusion of the term "directly" in the definition of representative leads to the exclusion of indirect representation of the scope of this chapter. So, e.g. commission agents employed to conclude a contract in their own name but with the expectation that the principal

will take them over are excluded from this Chapter. Such agents have no authority to bind the principal directly but may in certain circumstances affect the principal´s legal position indirectly.

The article II. – 6:103 **Authorisation** sets out the ways in which the representative may obtain authority. The authority of a representative may be granted by the principal or by the law. The principal's authorisation may be express or implied. Implicit creation of authority is derived from the "circumstances". As an example, the trader employing the salesman impliedly authorizes him to enter into contracts of sale on his behalf. Interpretation of the implicit power of representation has to respect usages and established practices. The representative may also derive its authority from a rule of law which combines certain positions or situations (especially in company law) with the right to represent. Like PECL, the DCFR is working with **apparent authority**, which arises from a targeted action or statement represented. The purpose of apparent authority is to protect third parties. If a person brings to a third party reasonable belief that someone gave authorization to represent, and a third party in good faith looks at the person as a representative, that person will be considered as the apparent agent. In German law this concept is known as so called *"Anscheinsvollmacht"*. Slightly different position has concept of "*Duldungsvollmacht",* where authority of purported representatives derives from .

The scope of the representative's authority is determined by the grant. If it does not conflict with an authorization granted or other circumstances, the representative has authority to perform all incidental acts necessary to achieve the purposes for which the authority was granted. A representative has authority to delegate authority to another person (the delegate) to do acts on behalf of the principal which it is not reasonable to expect the representative to do personally. The rules on representation apply to acts done by the delegate. Delegation is permissible, provided that it would not be reasonable to expect the agent to carry out the necessary acts personally. A representative can not delegate to the delegate more authority than he has himself, as the delegate´s authority is directly related to the extent of representative´s authority.

Article II. - 6:105 DCFR provides conditions that must be met in order to affect principal's legal position by representative's acts. The representative must act in name of the principal, or otherwise make it clear to third parties that it is intended to affect the legal status of the principal and his acts must be carried out within the scope of his authority to represent. If these conditions are met, the conduct of the representative has the same legal consequences as if the principal acted personally. If the first condition is not satisfied, that is, if the representative is acting on its own behalf or his intention to affect the legal status of the principal is not clear to a third party, representative remains responsible for the legal consequences of his acts.

When the representative, despite having authority, does an act in his or her own name or otherwise in such a way as not to indicate to the third party an intention to affect the legal position of a principal, the act affects the legal position of the representative in relation to the third party as if done by the representative in a personal capacity. It does not as such affect the legal position of the principal in

relation to the third party unless this is specifically provided for by any rule of law.

Acts of the person who pretends to be a representative, but in fact is not authorized to represent, does not affect the legal status of a person who has been referred to as the purported principal. Purported principal has the option of an additional approval. Failing ratification by the purported principal, the person is liable to pay the third party such damages as will place the third party in the same position as if the person had acted with authority. If the third party knew or could reasonably be expected to have known of the lack of authority, there is no right to damages.

Where a person purports to act as a representative but acts without authority, the purported principal may ratify the act. Ratification by the principal has ex tunc effects, so that the acts of purported representative are treated as if the representatives has had authority to represent from the beginning, i.e. upon ratification, the act is considered as having been done with authority, without prejudice to the rights of other persons.

The third party who knows that an act was done without authority may by notice to the purported principal specify a reasonable period of time for ratification. If the act is not ratified within that period ratification is no longer possible. The purpose of this rule, taken from UPICC, is to prevent the principal from being able to keep the third party in a state of legal uncertainty for an indefinite time.

DCFR allows the representative acting in the name of the principal not to reveal principal´s identity to the third parties at the outset of negotiations. If a representative fails to reveal that identity within a reasonable time after a request by the third party, the representative is treated as having acted in a personal capacity. This rule is justified because the representative assumed the risk by refusing to reveal the principal´s identity. Binding the representative to the third prty is also justified by the fact that the representative usually will be able to transfer to principal any assets received form the third party and conversely, the principal will be able to reimburse the representative for the charges incurred vis a vis the third party.

DCFR devotes considerable attention to the regulation of conflict of interest. A **conflict of interest** occurs when a representative is involved in multiple interests, one of which could *possibly* corrupt the motivation for an act in the other. While being obliged to promote and preserve principal´s interests, the representative may be approached by the third party who is seeking to pursue other interests. In addition, he or she may be tempted to pursue representative´s own interests at the expense of principal. If an act done by a representative involves the representative in a conflict of interest, the principal may avoid the act according to the provisions of II. – 7:209 (Notice of avoidance) to II. – 7:213 (Partial avoidance).

The protection of the third party is guaranteed as the right to avoid for principal arises only if the third party knew or should have known about this conflict. The burden of proof is transferred to the representative and there is presumed to be a conflict of interest where:

a) the representative also acted as representative for the third party; or
b) the transaction was with the representative in a personal capacity.

However, avoidance is excluded in four instances:

- if the representative acted with the principal's prior consent;
- or if the representative had disclosed the conflict of interest to the principal and the principal did not object within a reasonable time;
- or if the principal otherwise knew, or could reasonably be expected to have known, of the representative's involvement in the conflict of interest and did not object within a reasonable time; or
- if, for any other reason, the representative was entitled as against the principal to do the act by virtue of IV. D. – 5:101 (Self-contracting) or IV. D. – 5:102 (Double mandate).

Similarly, the principal may not avoid the act, if he has confirmed the act impliedly or explicitly after learning of the ground of avoidance. This follows from the general rules on avoidance of contracts and other juridical acts.

DCFR very strictly regulates termination or restriction of authority. It does not matter how representative ceases to be authorised for the purposes of this regulation. The authority of a representative continues in relation to a third party who knew of the authority notwithstanding the ending or restriction of the representative's authorisation until the third party knows or can reasonably be expected to know of the ending or restriction. Where the principal is under an obligation to the third party not to end or restrict the representative's authorisation, the authority of a representative continues notwithstanding an ending or restriction of the authorisation even if the third party knows of the ending or restriction. The third party can reasonably be expected to know of the ending or restriction if, in particular, it has been communicated or publicised in the same way as the granting of the authority was originally communicated or publicised.

Notwithstanding the ending of authorisation, the representative continues to have authority for a reasonable time to perform those acts which are necessary to protect the interests of the principal or the principal's successors. This authorization is in substance limited to the acts necessary for the preservation of the principal´s interests. Similar rule applies also in Slovakia (§ 33b (6) CC)

The authors of the DCFR have decided to perfectly differentiate the internal and external relations and by the rules of Chapter 6 of Book II they emphasized fact that it actually governs the effects of external representation, in relation to a third party. Therefore, authority to represent is primarily tied to knowledge of a third party about termination of authority and in the meantime it continues on the basis of the apparent authority.. The grounds for ending the authorisation stem from the internal relationship, but with regard to the effects vis a vis third parties ending is irrelevant until the rightful notification or "constructive" knowledge of third party arises.

5.1 Indirect representation in the PECL and the DCFR

PECL in Chapter 3 (Authority of agents) as opposed to DCFR differentiate two categories of representation - direct and indirect. Direct representation means a

situation where an agent acts in the name of a principal. It is irrelevant whether the principal's identity is revealed at the time the agent acts or is to be revealed later. However, where an intermediary acts on instructions and on behalf of, but not in the name of, a principal, or where the third party neither knows nor has reason to know that the intermediary acts as an agent, the rules on indirect representation apply. The most typical commercial example is a so-called commission agent in the Continental countries. There is indirect representation also if the intermediary acts in his own name and does not even disclose that he acts on behalf of a principal. This description covers the undisclosed agency of the English common law and the so-called strawman (*prête-nom*) in the Continental countries. Subject to exceptions, and in contrast to direct representation, no direct relationship between the principal and the third person comes into being. Rather, two separate relationships exist side by side: one between the principal and the intermediary and another between the intermediary and the third party. It is left to the internal relationship between the intermediary and his principal as to how the intermediary transfers the benefits which he was instructed to obtain to the principal, or how he is to be relieved from the obligations which he has incurred vis-à-vis the third party.

In exceptional circumstances, an indirect representation of the PECL can induce specific effects of direct representation and establish direct rights between the principal and the third party. This situation arises if the intermediary becomes insolvent, or if it commits a fundamental non-performance towards the principal, or if prior to the time for performance it is clear that there will be a fundamental non-performance. Similarly, this link will be created also in the situation where intermediary´s insolvency or fundamental non-performance towards the third party occurs. An anticipated future fundamental non-performance is to be treated in the same way. The intermediary's fundamental non-performance suffices; the intermediary's contracting party (be it his principal or the third party) need not take court action against the intermediary or even attempt enforcement of a judicial decision against him.

To protect interests of principal and the third parrty PECL provide for two measures. First, the intermediary must disclose to his principal or to the third party, respectively the name and address of the third party or of the principal, respectively, unless the name and address of the "economic opposite" is already known. Since the intermediary cannot and need not know whether this name and address is already known to the principal or the third party, respectively, the latter must make a request for disclosure.

Second, the principal or the third party may exercise against the respective "economic opposite" the rights which the intermediary has acquired against that "opposite". Of course, the exercise of these rights is subject to any defences which the "opposite" may have against the intermediary,

The DCFR has undergone - and not only from a systematic point of view - a significant changes in the regulation of indirect representation. Effects of indirect representation in relation to third parties are in representation chapter of DCFR defined only negatively, specifically in Article II. - 6:106, which emphasizes that

representative has to act in principal´s name or otherwise has to indicate to the third party an intention to affect the legal position of a principal.

The relevant provisions dealing with exceptional circumstances in indirect representation and the need for protection of principal´s interests are now included in Section 4 of Chapter 5 of Book III of the DCFR (Transfer of rights and obligations on agent's insolvency). These rules apply where an agent has concluded a contract with a third party on the instructions of and on behalf of a principal but has done so in such a way that the agent, and not the principal, is a party to the contract. If the agent becomes insolvent the principal may by notice to the third party and to the agent take over the rights of the agent under the contract in relation to the third party. The third party may invoke against the principal any defence which the third party could have invoked against the agent and has all the other protections which would be available if the rights had been voluntarily assigned by the agent to the principal.Compared with PECL third party can not initiate a change of party. These rights belong only to principal. Third party has only right for defence. The imbalance of protection principal and the third party in the event of insolvency is justified by the different starting positions of these subjects. If a third party from the beginning was satisfied with the agreement concluded with an indirect agent, there is no reason to provide the this party protection, if things went wrong the wrong direction." If the principal did not know the name of the third party he has the right to request for the name and address of the third party, if at the time of his insolvency. Specific questions related to indirect representation are covered in Book VIII of the DCFR (Acquisition and loss of ownership of the goods), which provided direct acquisition of ownership subject to the special conditions. Where an agent acting under a mandate for indirect representation acquires goods from a third party on behalf of the principal, the principal directly acquires the ownership of the goods (representation for acquisition). Where an agent acting under a mandate for indirect representation transfers goods on behalf of the principal to a third party, the third party directly acquires the ownership of the goods (representation for alienation).

6. Invalidity and Nullity of Contract

Chapter 4 of PECL (Validity) deals with the topics often considered under the notion of vices of consent.

A contract is not invalid merely because at the time it was concluded performance of the obligation assumed was impossible, or because a party was not entitled to dispose of the assets to which the contract relates. [29]

Other defects dealt with in this chapter are fundamental mistake as to facts or law, [30]fraud[31], threat, excessive benefit or unfair advantage. Remedies for parties are: right to avoid contract, adaptation of contract and damages.

Chapter 15 (Illegality) of PECL deals with the effects of the illegality of contracts or contractual provisions. A contract is of no effect to the extent that it is contrary to principles recognised as fundamental in the laws of the Member States of the European Union.[32] The formulation of Article 15:101 is intended to avoid the varying national concepts of immorality, illegality at common law, public policy, *ordre public* and *bonos mores*, by invoking a necessarily broad idea of fundamental principles of law found across the European Union. The Principles here avoid the national concepts of nullity (absolute or relative), voidness, voidability and unenforceability, and use instead a concept of "ineffectiveness". Ineffectiveness extends to non-enforcement of the contract where enforcement (as distinct from the contract itself) would be contrary to principles regarded as fundamental in the laws of the Member States of the European Union. The parties' freedom of contract is curtailed by the so-called mandatory rules. A rule is mandatory when the parties cannot deviate from it when they make their contract. It is non-mandatory when they may deviate from it. The distinction between mandatory and non-mandatory rules, from which the parties may deviate when they make their contract, is well known in the civil law. Where a contract infringes a mandatory rule of law applicable under Article 1:103 of PECL, the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule. Where the mandatory rule does not expressly prescribe the effects of an infringement upon a contract, the contract may be declared to have full effect, to have some effect, to have no effect, or to be subject to modification.

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[29] 4:102 PECL

[30] 4:103 PECL, 4:104 PECL (*An inaccuracy in the expression or transmission of a statement is to be treated as a mistake of the person which made or sent the statement)*

[31] 4:107 PECL

[32] 15:101 PECL

Lack of capacity is not treated both in PECL and DCFR because it is more a matter of the law of persons than of contract law.

DCFR incorporates in Chapter 7 of Book II the effects of:

a) mistake, fraud, threats, or unfair exploitation; and
b) infringement of fundamental principles or mandatory rules.

This chapter applies in relation to contracts and, with any necessary adaptations, other juridical acts. A contract is not invalid, in whole or in part, merely because at the time it is concluded performance of any obligation assumed is impossible, or because a party has no right or authority to dispose of any assets to which the contract relates. Similarly as PECL, DCFR assumes no rule of an invalidity of contract because of initial impossibility of performance, which is applied in some national legal systems.

A party may avoid a contract for mistake of fact or law.[33] This right belongs to a party also in the situation when the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose[34]. Right to avoid contract is granted provided that coercion or threats in process of formation of contract significantly influenced the conclusion of contract and if in the circumstances the threatened party had no reasonable alternative.[35] Last ground for avoidance is unfair exploitation, i.e. if, at the time of the conclusion of the contract: (a) the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill; and (b) the other party knew or could reasonably be expected to have known this and, given the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or grossly unfair advantage.[36]

A contract which may be avoided on the ground of vitiated consent or intention is valid until avoided but, once avoided, is retrospectively invalid from the beginning. The question whether either party has a right to the return of whatever has been transferred or supplied under a contract which has been avoided , or a monetary equivalent, is regulated by the rules on unjustified enrichment. The effect of avoidance on the ownership of property which has been transferred under the avoided contract is governed by the rules on the transfer of property.

DCFR follows some national laws in giving the court certain powers of **adaptation of contract**:

a) for mistake, where either the non- mistaken party is willing to accept the contract on mistaken party´s terms, or where there was a common mistake and the court may bring the contract into accordance with what, but for

[33] II. – 7:201 DCFR

[34] II. – 7:205 DCFR

[35] II. – 7:206 DCFR

[36] II. – 7:207 DCFR

the mistake, might reasonably have been agreed; and

b) for unfair exploitation where the court in certain circumstances may bring the contract into accordance dealing with what might have been agreed had the requierements of good faith and fair dealing been observed. This is the effect of power to moderate terms of contract based on a broad role seen in DCFR for the operation of the principle of objective good faith and fair dealing, but it also demonstrates, as Cartwright states, a view of strong role of courts in providing solutions to problems resulting from the negotiating phase of contract.[37]

If a party who is entitled to avoid a contract confirms it, expressly or impliedly, after the period of time for giving notice of avoidance has begun to run, **avoidance is excluded**. A party who has the right to avoid a contract (or who had such a right before it was lost by the effect of time limits or confirmation) is entitled, whether or not the contract is avoided, to damages from the other party for any loss suffered as a result of the mistake, fraud, coercion, threats or unfair exploitation, provided that the other party knew or could reasonably be expected to have known of the ground for avoidance. The damages recoverable are such as to place the aggrieved party as nearly as possible in the position in which that party would have been if the contract had not been concluded, with the further limitation that, if the party does not avoid the contract, the damages are not to exceed the loss caused by defect in consent or intention.

Remedies for fraud, coercion, threats and unfair exploitation cannot be excluded or restricted. Remedies for mistake may be excluded or restricted unless the exclusion or restriction is contrary to good faith and fair dealing

M. Hesselink compared Article 4:109 of PECL, whose wording has not been significantly changed in the DCFR with Article 3.10 UPICC (Gross disparity). He states that: *in art. 4:109 (Excessive Benefit or Unfair Advantage) the PECL have adopted a double requirement of (1) some sort of weakness and (2) excessive advantage. In other words, under this rule a combination (or rather: accumulation) of procedural and substantive unfairness is required. Neither of them suffices in isolation. This seems a rather harsh rule. The UNIDROIT Principles of International Commercial Contracts are more generous in this respect. Article 3.10 (Gross disparity) says: 'A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract term unjustifiably gave the other party an excessive advantage', without any further requirement. UPICC unlike PECL and DCFR filed in comparable conditions, the law permits the invalidity (voided) contract, if the prerequisites undue advantage one party, without necessarily called for the second assumption of weakness and dependence on the other side. However, since the UPICC this factor into account, it does not seem obvious difference in assumptions. Yet the fact remains that the weakness is by UPICC prerequisite.*[38]

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[37] Cartwright, J. Defects of Consent in Contract Law

[38] Hesselink, Martijn W., Capacity and Capability in European Contract Law. European Review of Private Law, Vol. 13, No. 4, pp. 491-507, 2005; Amsterdam Center for Law & Economics Working Paper No. 2005-09. Available at SSRN: http://ssrn.com/abstract=869246

DCFR compared with PECL explicitly added as a reason for avoidance a failure of pre-contractual information duties or failure to prevent input errors. However a party may not avoid the contract for mistake if:

a) the mistake was inexcusable in the circumstances; or
b) the risk of the mistake was assumed, or in the circumstances should be borne, by that party.[39]

The originally final chapter 15 PECL is shifted to in Section 3 of Chapter 7, which deals with the violation of the fundamental principles or mandatory rules. As in PECL, violation of fundamental principles is strictly sanctioned. In DCFR; a contract is void to the extent that it infringes a principle recognised as fundamental in the laws of the Member States of the European Union; and nullity is required to give effect to that principle.[40] What can be considered the basic principles can be derived mainly from some EU documents such as the Charter of fundamental rights of the European Union (Privacy), the Convention for the Protection of Human Rights and Fundamental Freedoms (e.g. prohibition of slavery and forced labor) or the Treaty on the Functioning of the EU (e.g. free movement of goods and services). Where a contract is not void but infringes a mandatory rule of law, the effects of that infringement on the validity of the contract are the effects, if any, expressly prescribed by that mandatory rule. Where the mandatory rule does not expressly prescribe the effects of an infringement on the validity of a contract, a court may:

a) declare the contract to be valid;
b) avoid the contract, with retrospective effect, in whole or in part; or
c) modify the contract or its effects.[41]

Decision of court should be an appropriate and proportional response to the infringement, having regard to all relevant circumstances, including:

a) the purpose of the rule which has been infringed;
b) the category of persons for whose protection the rule exists;
c) any sanction that may be imposed under the rule infringed;
d) the seriousness of the infringement;
e) whether the infringement was intentional; and
f) the closeness of the relationship between the infringement and the contract.[42]

In contrast to PECL, DCRR does not deal explicitly with the notion of illegality, as the contract may be immoral, although it does not violate the legal standards directly.

39 II. – 7:201 DCFR

40 II. – 7:301 DCFR

41 II. – 7:302 DCFR

42 Article II. – 7:302 (3) DCFR

7. Interpretation, content and effects

7.1 Interpretation

The purpose of contract interpretation is to determine the content of the rights and obligations of the parties to contract. The importance of the formulation of rules for interpretation arises if the contract contains ambiguous or vague terms.

The interpretation rules are in Chapter 8 of Book II of the DCFR (Interpretation). Also in the legal literature there is frequently discussed the importance of completive interpretation *(ergänzende Auslegung*), whose purpose is to fill gaps in the express or implied contract terms. Additional rules are provided for in Chapter 9 of Book II of the DCFR (Contents and effects of contracts). PECL governs the interpretation in Chapter 5. This chapter is one of those passages of PECL, which has been especially positively evaluated by judges' practice, as well as by legislators and academics and the extracts of these rules often occur in the reasoning of the court decisions, particularly in the decisions of courts of last instance and constitutional courts.

The interpretation of contracts must comply with their functions which is primarily to allow parties to settle their legal relations as their discretion. Nowadays, the principle of freedom of contract applies as a general rule in all European legal systems. This is aptly expressed in Article II.-1:102 DCFR: *"Parties are free to enter into a contract and to determine its contents, subject to any mandatory rules."*

A theory of interpretation which is based in the actual intention of the parties is often called "*subjective"* whereas a theory which emphasises the external signs of communicative act, such as literal meaning of declaration in particular, is characterized as "*objective*". Historically, the objective approach with its focus on the literal meaning of the words has been the starting point. This is related to the fact that in the legal systems whose development has not yet reached an advanced level there is obviously a strong leaning to formalism and therefore an over-emphasis of the role of the literal meaning of contract terms. In the course of legal and judicial development, however the modes of interpretation have become more refined and more flexible. Correspondingly, the idea of freedom of contract- which is underlying principle of subjective interpretation- had to gain acceptance step by step against the original notion that only certain types of contracts are admissible.

Also DCFR primarily applies two general rules based on subjective interpreta-

tion. A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words. If one party intended the contract, or a term or expression used in it, to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could reasonably be expected to have been aware, of the first party's intention, the contract is to be interpreted in the way intended by the first party.

The objective interpretation rule should be applied in two situation. Firstly, if an intention cannot be established under preceeding rules. Secondly, if the question arises with a person, not being a party to the contract or a person who by law has no better rights than such a party, who has reasonably and in good faith relied on the contract's apparent meaning. In these cases, the contract is to be interpreted according to the meaning which a reasonable person would give to it.

PECL and DCFR as well provide a judge (or other person who interprets the contract) the exhaustive list of criteria that may be relevant in determining the common intention of the parties or the proper meaning of the contract. These include the circumstances in which it was concluded, including the preliminary negotiations; the conduct of the parties, even subsequent to the conclusion of the contract; the interpretation which has already been given by the parties to terms or expressions which are the same as, or similar to, those used in the contract and the practices they have established between; the meaning commonly given to such terms or expressions in the branch of activity concerned and the interpretation such terms or expressions may already have received; the nature and purpose of the contract; usages; and good faith and fair dealing.

DCFR employs also the well known *contra proferentem* rule, frequently used in many national legal systems and in the directives on consumer protection. Where there is doubt about the meaning of a term not individually negotiated, an interpretation of the term against the party who supplied it is to be preferred. Where there is doubt about the meaning of any other term, and that term has been established under the dominant influence of one party, an interpretation of the term against that party is to be preferred.

PECL and DCFR further enshrine these interpretive rules: Terms which have been individually negotiated take preference over those which have not. Terms and expressions are to be interpreted in the light of the whole contract in which they appear. An interpretation which renders the terms of the contract lawful, or effective, is to be preferred to one which would not (*negotii favor, potius Vale actus quam pen).* Where a contract document is in two or more language versions none of which is stated to be authoritative, there is, in case of discrepancy between the versions, a preference for the interpretation according to the version in which the contract was originally drawn up.

It is clear that the rules on interpretation of contracts can not be directly applied to **unilateral juridical acts**, as already the default rule on the common intention of the parties is not applicable for these acts. Therefore DCFR contains the rules for the interpretation of other juridical acts. The starting point is to protect the reasonable interpretation of a reasonable recipient of the act (reliance interest). A unilateral juridical act is to be interpreted in the way in which it could rea-

sonably be expected to be understood by the person to whom it is addressed. Exceptionally, if the person making the juridical act intended the act, or a term or expression used in it, to have a particular meaning, and at the time of the act the person to whom it was addressed was aware, or could reasonably be expected to have been aware, of the first person's intention, the act is to be interpreted in the way intended by the first person. If the question arises with a person, not being the addressee or a person who by law has no better rights than the addressee, who has reasonably and in good faith relied on the act's apparent meaning, an objective interpretation apply; i.e. juridical act to be interpreted according to the meaning which a reasonable person would give to it. Other provisions on interpretation of contracts, apply with appropriate adaptations to the interpretation of a juridical act other than a contract.

7.2 Content and effects

Chapter 9 of Book II DCFR (Contents and effects of contracts) is internally divided into four sections: Section 1 (Contents), Section 2 (Simulation), Section 3 (Effect of stipulation in favour of a third party), Section 4 (Unfair terms). DCFR compared to PECL has undergone significant changes in the content of provisions and also in the systematics of regulation. Systematically, we may observe two major changes:

a) inclusion of provisions on not individually negotiated terms, that were in PECL included in Chapter on formation**,**
b) new Section 4 of mandatory nature, which deals with unfair terms, and its roots are in European consumer law. Nevertheless, the essence of regulation still remains the same as it was in Chapter 6 of PECL.

Terms of a contract (the contents of the contract) do not contain only express agreement of the parties. To determine the terms of contract one should take into account also the terms that have not been expressly agreed, but are considered to be obvious (tacit agreement), the conditions under law or those established on custom and usages. Where it is necessary to provide for a matter which the parties have not foreseen or provided for; the gap may be supplemented by the court, taking into account several factors; among them

a) the nature and purpose of the contract;
b) the circumstances in which the contract was concluded; and
c) the requirements of good faith and fair dealing.

Any term implied by court should, where possible, be such as to give effect to what the parties, had they provided for the matter, would probably have agreed. If the parties have deliberately left a mater unprovided for, accepting the consequences of so doing, provision on gap filling by court does not apply.

Implied terms supplemented by judicial interpretation (also known as *constructive interpretation*) are not the same as terms derived from tacit agreement of parties. The difference lies in the fact that a tacit agreement is aimed at wholly normal and obvious terms of contract that are usually obvious to everyone in cir-

cumstances. Implied terms conversely require some consideration and taking into account the above said factors. Most legal systems will consider this self-evident, but some do not.

Like PECL, the DCFR considers pre-contractual statements of parties as part of contract terms. A statement made by one party before a contract is concluded is regarded as a term of the contract if the other party reasonably understood it as being made on the basis that it would form part of the contract terms if a contract were concluded. In assessing whether the other party was reasonable in understanding the statement in that way account may be taken of the apparent importance of the statement to the other party; whether the party was making the statement in the course of business; and the relative expertise of the parties.

In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of provisions on binding nature of statements made by business in the course of his or her business activities or derogate from or vary its effects. If one of the parties to a contract is a business and before the contract is concluded makes a statement, either to the other party or publicly, about the specific characteristics of what is to be supplied by that business under the contract, the statement is regarded as a term of the contract. This does not apply if the other party knew or should have known that the statement was incorrect or did not affect its decision to conclude the contract. Entrepreneur is bound not only by his public statements, but also by the statements made by persons acting on behalf of entrepreneurs in marketing or advertising, if the other party is a consumer.

Article 2:104 PECL stipulated ***Contract terms which have not been individually negotiated*** *may be invoked against a party which did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded. Terms are not brought appropriately to a party's attention by a mere reference to them in a contract document, even if that party signs the document.* DCFR takes over this provision with slight stylistical changes (II. – 9:103).

DCFR also contains a definition of "**not individually negotiated terms**" already in the general provisions of Book II, with emphasis on the various options, how these terms are presented to the other party (II. – 1:110: Terms "not individually negotiated") We must realize that we are working with multiple interdependent definitions. Firstly, the concept of **standard terms and conditions** - they are based on three assumptions: they were prepared in advance, they are useful for a number of contracts and they have not been individually negotiated. Article II. – 1:109 of DCFR defines a "standard term" as a term which has been formulated in advance for several transactions involving different parties and which has not been individually negotiated by the parties. Definition of the term "not individually negotiated" will always apply to **standard contract terms.** The terms that have not been individually negotiated, can not be equated with the concept of standard terms and conditions of contract, and because of that 'not individually negotiated "may be subject not only to the terms of a contract, but also may be subject to other legal action (e.g. authorization). Another definition is one on

unfair terms. The concept of unfair terms in the DCFR is always bound to not individually negotiated terms. Some tentative step forward was the provision of Article 81 in a Study on the Feasibility of a European contract law, which extended the control of unfair terms in consumer contracts also on the terms that have been individually negotiated. Proposal for a Regulation on a Common European Sales Law (CESL) prepared on the basis of this study, however, goes back to reducing the unfair terms to those that have not been individually negotiated. Consumer Rights Directive obliges Member States to notify the Commission if they extended unfairness trial to individually negotiated terms.

DCFR specifically states that if a contract is to be concluded by electronic means, the party supplying any terms which have not been individually negotiated may invoke them against the other party only if they are made available to the other party in textual form.

The rules regarding contents of the contract consist also the provisions on the determination of price, the unilateral determination by a party, determination by a third person, reference to non-existent factor and the quality of performance.

PECL in Chapter 6 contains significant rule on **Change of circumstances** (Article 6:111). The majority of countries in the European Community have introduced into their law some mechanism intended to correct any injustice which results from an imbalance in the contract caused by supervening events which the parties could not reasonably have foreseen when they made the contract. In practice contracting parties adopt the same idea, supplementing the general rules of law with a variety of clauses, such as "hardship" clauses.

The Principles adopt such a mechanism, taking a broad and flexible approach, as befits the pursuit of contractual justice which runs through them: they prevent the cost caused by some unforeseen event from falling wholly on one of the parties. The same idea may be expressed in different terms: the risk of a change of circumstances which was unforeseen may not have been allocated by the original contract and the parties or, if they cannot agree, the court must now decide how the cost should be borne. The mechanism reflects the modern trend towards giving the court some power to moderate the rigours of freedom and sanctity of contract.

This rule has been moved to Book III of DCFR (Article III. – 1:110: Variation or termination by court on a change of circumstances). The provision is based on the assumption that an obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished. If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may:

a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or
b) terminate the obligation at a date and on terms to be determined by the

court.

c) Court discretion applies only if:
d) the change of circumstances occurred after the time when the obligation was incurred;
e) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances;
f) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and
g) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.

7.3 Simulation

Simulation is the situation in which the parties, with the aim of concealing their real intentions, have made two agreements: an overt one (the sham transaction) and another which is intended to remain secret. This covert agreement is sometimes described as a counter-letter (*contre-lettre*). It is thus different to the case where there is a single agreement which is merely ambiguous or vague. The simulation may have the aim of making it appear that there is an agreement which in fact the parties have no intention of entering: for example if a debtor who is threatened with distraint of his goods by creditors enters a fictitious sale of his goods, or an entrepreneur creates a fictitious company to limit his liability. It may also relate to the nature of the transaction (thus a fictitious sale with a secret agreement that the price shall not be paid is a disguised gift) or to the content of the agreement (e.g. the price). Finally, the simulation may relate to the true beneficiary of the contract: a sale is concluded with one person for whom another will really be substituted, the true buyer. In this case the secret agreement is one of agency, which reveals that the person who has ostensibly made the agreement is in reality an agent and, at the demand of the seller, may be treated as such (*prête-nom*, or man of straw).

According to the PECL (Article 6:103): "*When the parties have concluded an apparent contract which was not intended to reflect their true agreement, as between the parties the true agreement prevails.*" PECL do not provide simulation effects in relation to third parties. DCFR takes over PECL rule, but also establishes a rule that protects the good faith of others in an apparent contract. See Article II. – 9:201 (2) DCFR: *„However, the apparent effect prevails in relation to a person, not being a party to the contract or apparent contract or a person who by law has no better rights than such a party, who has reasonably and in good faith relied on the apparent effect.*"

7.4 Effect of stipulation in favour of a third party

PECL contain a rule on stipulation in favour of a third party based on Article 6:110, under which a third party may require performance of a contractual obligation when its right to do so has been expressly agreed upon between the promisor and the promisee, or when such agreement is to be inferred from the purpose of the contract or the circumstances of the case. The third party need not be identified at the time the agreement is concluded. If the third party renounces the right to performance the right is treated as never having accrued to it. The promisee may by notice to the promisor deprive the third party of the right to performance unless:

a) the third party has received notice from the promisee that the right has been made irrevocable, or
b) the promisor or the promisee has *received notice from the third party that the latter accepts the right.*

According to the authors of the DCFR this rule is outdated, and with respect to the newer version of UPICC or the new rules in English law, DCFR states that the parties to a contract may, by the contract, confer a right or other benefit on a third party. Like in PECL a third party may not be identified when the contract is concluded. Moreover, where one of the contracting parties is bound to render a performance to the third party under the contract, then, in the absence of provision to the contrary in the contract:

a) the third party has the same rights to performance and remedies for non-performance as if the contracting party was bound to render the performance under a binding unilateral undertaking in favour of the third party; and
b) the contracting party may assert against the third party all defences which the contracting party could assert against the other party to the contract. In article II. – 9:303 DCFR thoroughly regulates also the way of rejection or revocation of benefit and its legal consequences.

7.5 Unfair terms

A term which is unfair is not binding on the party who did not supply it. If the contract can reasonably be maintained without the unfair term, the other terms remain binding on the parties. Provisions of DCFR on unfair terms are mandatory.

The predecessor provisions on unfair terms in DCFR is article Article 4:110 of PECL on unfair terms not individually negotiated:

"A party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract

was concluded.

(2) This Article does not apply to:

a) *a term which defines the main subject matter of the contract, provided the term is in plain and intelligible language; or to*
b) *the adequacy in value of one party's obligations compared to the value of the obligations of the other party"*

This provision extends the scope of application of the general clause of the EC Council Directive 93/13 on Unfair Terms in Consumer Contracts (1993) to contracts between private persons and to commercial contracts.

D. Mazeud (although in relation to the feasibility study) indicates that this clear, understandable rule of PECL has lost nothing of its qualities, and critical points to efforts in DCFR to distinguish unfairness in relation to nature of the parties (B2B, B2C, P2P)[43]. The inclusion of Section 4 of Chapter 9 in Book II of the DCFR is heavily influenced by the directive 93/13/EEC.

DCFR stressed the importance of transparency in terms not individually negotiated. A person who supplies terms which have not been individually negotiated has a duty to ensure that they are drafted and communicated in plain, intelligible language. In a contract between a business and a consumer a term which has been supplied by the business in breach of the duty of transparency may on that ground alone be considered regardless of its content.

DCFR separately defaines what shoul be considered as unfair in relation between businnesses, between consumer and business and between non- business parties.[44] Some authors critically evaluate the implementation of the different levels of evaluation of unfair terms depending on the nature of entities parties.

Contract terms are not subjected to an unfairness test if they are based on:

a) provisions of the applicable law;
b) international conventions to which the Member States are parties, or to which the European Union is a party; or
c) rules of DCFR.

For contract terms which are drafted in plain and intelligible language, the unfairness test extends neither to the definition of the main subject matter of the

[43] *Mazeaud, D.* Unfairness and Non- negotiated Terms. In *Schulze R., Stuyck, J.* (ed.) Towards a European Contract Law, cit. supra, s. 123 a nasl

[44] II. – 9:403: Meaning of "unfair" in contracts between a business and a consumer In a contract between a business and a consumer, a term [which has not been individually negotiated] is unfair for the purposes of this Section if it is supplied by the business and if it significantly disadvantages the consumer, contrary to good faith and fair dealing.
II. – 9:404: Meaning of "unfair" in contracts between non-business parties
In a contract between parties neither of whom is a business, a term is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and significantly disadvantages the other party, contrary to good faith and fair dealing.
II. – 9:405: Meaning of "unfair" in contracts between businesses
A term in a contract between businesses is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.

contract, nor to the adequacy of the price to be paid.

In article II. – 9:407 DCFR states factors to be taken into account in assessing unfairness.

Under the influence of the Court's judgment Océano Grupo Editorial and Salvat Editores enshrines unfairness in consumer contracts clause conferring exclusive jurisdiction establishing exclusive jurisdiction by the local office of the entrepreneur. A term in a contract between a business and a consumer is unfair if it is supplied by the business and if it confers exclusive jurisdiction for all disputes arising under the contract on the court for the place where the business is domiciled.

DCFR almost completely taken over the contents of the Annex to the Directive on unfair terms in consumer contracts and a list of terms which are in consumer contracts deemed to be unfair.. However, the DCFR does not take over the technique of that Directive, which supplements only indicative and non-exhaustive list of terms which may be regarded as unfair (unfair). Unlike the Directive; DCFR establishes a rebuttable presumption of unfairness(grey list). In the black list in the DCFR there is only one terms - the clause conferring exclusive jurisdiction under domicile of business.

8. Performance

DCFR covers all substantial issue for the regulation of perfomace: place of performance (III. – 2:101); time of performance (III. – 2:102); early performance (III. – 2:103); order of performance (III. – 2:104); alternative obligations or methods of performance (III. – 2:105); performance entrusted to another or by a third person III. – 2:106- 107); method and currency of payment III. – 2:108- 109) imputation of performance (III. – 2:110); property and money not accepted (III. – 2:111 -112).

9. Remedies for- non performance

As the system of remedies for non –perfomance in DCFR comes from PECL, we are going to explain this issue on the basis of PECL. Moreover we would like to point out also to CISG, that has been inspiration not only for PECL but for UPICC as well. The unitary concept of legal consequences of non- performance we regard as a substantial issue also for the Slovak re- recodification, so we dealt with this issue more thoroughly. "Non-performance" is the term used in the UPICC and the PECL, analogous to "breach of contract" used in the CISG. A brief survey reveals that *breach of contract* as a unitary institution of contract law is not familiar to all legal systems. The concept as such is derived from Anglo-American law. But a unitary approach is also adopted in the Romanic legal systems; there it is called *non-performance*. The CISG uses the basic and unitary concept of "breach of contract", which may now be regarded as widely, although not yet generally accepted. Under the CISG the notion "breach of contract" covers all failures of a party to perform any of his obligations. There is no distinction between main obligations and auxiliary obligations. And it does not matter whether the obligation had its origin in the contract, in a usage or in the CISG itself. Under certain conditions a breach of contract is considered to be fundamental (Art. 25). A *breach of contract* is always given when the objective facts of a breach have occurred, hence irrespective of whether there are grounds for exemption or not. It follows from that the term *failure to perform* as contained in Arts. 79, 80 (*Exemption*) refers to *any breach of contract*, which is "to be conceived here in the broadest sense of the word. Apart from late performance and non-performance it includes, in particular, non-conform[ing] performance and relates to the obligations of both the seller and the buyer". On the other hand, both the UNIDROIT Principles and the PECL, where "breach" is called non-performance, set up a substantially identical definition to the CISG. In the UNIDROIT Principles, it is expressly set out in Art. 7.1.1 that: "*Non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance.*" This article defines "non-performance" for the purpose of the Principles. Particular attention should be drawn to two features of the definition. The first is that "non-performance" is defined so as to include all forms of defective performance as well as complete failure to perform. So it is non-performance for a builder to erect a building which is partly in accordance with the contract and partly defective or to complete the building late. The second feature is that for the purposes of the Principles the concept of "non-performance" includes both non-excused and excused non-performance. The PECL has set up a similar structure and terms. "Breach" is called non-performance, and occurs whenever a party

fails to perform any of its obligations under the contract. As the Official Comment to the PECL makes it clear: "Under the system adopted by the Principles there is non-performance whenever a party does not perform any obligation under the contract. The non-performance may consist in a defective performance or in a failure to perform at the time performance is due, be it a performance which is effected too early, too late or never. It includes a violation of an accessory duty such as the duty of a party not to disclose the other party's trade secrets. Where a party has a duty to receive or accept the other party's performance a failure to do so will also constitute a non-performance."

Clearly, the difference between these two basic concepts, i.e. "breach of contract" as used in the CISG and "non-performance" in the UNIDROIT Principles or in the PECL, is not of essence. Indeed, the process of legal harmonization in global economic markets has made a further step forward when non-performance is defined in terms under it that include all failures and defects in performance, including those that are excused, and avoids terminology emphasizing breach or fault. A commentator's statement on the CISG confirms this: "Exemptions, as can be seen particularly well from the context of impediments, only lead to the removal of certain legal consequences of the breach of contract, while others continue to exist. The reason for it is a breach of contract [...] cannot be eliminated as such by way of exemptions. From this it follows that the term 'breach of contract' does not necessarily include an accusation." For instance, German law and some legal systems inspired by it (such as Austrian, Swiss and Slovak law) do not use a unitary approach. Instead they distinguish between the various causes of breach, especially between impossibility of performance, delay, and all other instances of breach; in addition, following Roman traditions, defects of individual goods are dealt with on a special basis. This system of splitting up breach of contract into several more or less separate institutions has proved to be quite inadequate in many respects because it gives rise to difficult problems of delimitation. However, under the impact of comparative law and the unification of sales law there is now a strong tendency in German academic writings to adopt the unitary approach. [45]

The CISG grants reciprocal remedies within three basic categories to the buyer and seller and clearly establishes that the primary remedy available to an injured party is specific relief, i.e. specific performance. Secondly, the CISG establishes that an injured party shall have a right to a substitutionary relief, which requires the party in breach to pay some amount of money to compensate the loss suffered by the other party. Finally, an aggrieved party shall have a right to avoid (terminate) the contract and thus put an end to the contractual relationship. As such, the remedial provisions of the CISG generally correspond with all major legal systems. The CISG also follows the above mentioned three-category system and thus provides three basic remedies, namely specific performance, damages and avoidance of the contract.

[45] Liu Chengwei ,Remedies for Non-performance - Perspectives from CISG, UNIDROIT Principles and PECL, http://www.jus.uio.no/sisu/remedies_for_non_performance_perspectives_from_cisg_upicc_and_pecl.chengwei_liu/2.2.html (3.9.2012)

Under the CISG, the remedies available for both the buyer and the seller, each dealt with under a section in Part III, are described in a unified scheme that is clear and easy to follow. In this respect, the remedies available for a breach of contract are summarized in Arts. 45 and 61, which set forth reciprocal remedies for the buyer and seller, respectively. Art. 45(1) gives an overview of the remedies available to the buyer in the event of breach of the seller, namely specific performance, avoidance, compensatory damages, and reduction in price. The seller's remedies are enumerated at Art. 61(1). They differ from the remedies available to the buyer for obvious reasons in two respects. First, the remedy of claiming a reduction in price is not available to the seller. Second, there is no need for substitutional performance or the requirement that the buyer cure a defect in his performance. **Generally, the CISG represents a compromise between the civil law and common law systems, sometimes reflecting concepts that are unique to one system and not the other**. Especially, the availability of specific performance as a primary remedy for a breach of contract under the CISG, corresponds with the civil law countries, contrary to the common law countries which regard damages as the primary remedy for a breach of contract. The CISG makes specific performance available to both the seller (Art. 46) and the buyer (Art. 62). Before the parties have fulfilled their obligations, at least in terms of its placement in the CISG's overall scheme, specific performance is the primary remedy although damages are equally available. Under Art. 46, specific performance of the breaching seller may arise in the form of the seller's right to delivery, substitute delivery and repair. While under Art. 62, the seller may require the breaching buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement. Besides specific performance, the right to obtain damages for a breach of contract plays an important role within the CISG. Damages (or monetary compensation) may be the only available remedy for an aggrieved party if, e.g. the requirements for granting specific performance or the right to avoid the contract are not met. It can, therefore, also be argued that damages are the primary remedy pursuant to the CISG. Moreover, the aggrieved party's right to obtain monetary compensation supplements substantionally the rights to require specific performance and avoidance in that he always has the right obtain damages. For the sake of putting the aggrieved party into as good a position as he would have been had the contract been performed as agreed, the aggrieved party has, therefore, always a right to claim for damages in addition to a claim for specific performance or avoidance. Damages include not only compensation for the expenses incurred by a party, but also the loss of profit. The amount of damages is limited by two conditions: foreseeability and mitigation. Foreseeability means that damages may not exceed the loss that the party in breach foresaw or should have foreseen (Art. 74). The mitigation rule imposes on the innocent party the duty to mitigate the loss (Art. 77). The right to receive interest is also available in addition to the right to damages (Art. 78).

Arts. 49 and 64 of the CISG provide an aggrieved the right to declare the contract avoided. Avoidance of contract under the CISG puts an end to the performance obligations of both parties. It is, however, required that the breach is a fun-

damental breach. The idea behind this is said that the CISG was designed to take into account the special characteristics of the international sale of goods, such as long distances involved, costs of transportation and the length of the term of the contracts. Due to this design, the CISG emphasises remedies that seek to preserve the contract notwithstanding a breach. This deliberation is further supported when the CISG provides a tool in Art. 47/63, familiar to the German legal system and known as the Nachfrist principle, where the aggrieved has the option of fixing an additional period of time for the breaching party to perform his obligations, and during that period he may not resort to any other remedy for the breach, unless he receives notice that the other party will not perform.

Moreover, the CISG contains additional remedies besides the above mentioned. Firstly, as for the anticipatory breach, besides the right to avoid the contract as contained in Art. 49/64 when an anticipatory fundamental breach exists (Art. 72), the CISG provides a possibility to suspend performance in certain situations as provided for in Art. 71. Under this Article a party may suspend the performance of his obligations if, after conclusion of the contract, it becomes apparent that the other party will not perform a substantional part of his obligations. Secondly, the CISG evidences a solicitude for the interests of the seller in "curing" defective performance of the contract. Where a breach has occurred, the CISG encourages *the Seller* to keep his contractual promises by offering him the express right to cure his own mistakes (Art. 48). Thirdly, *the Buyer* has, according to Art. 50, the right to a reduction of price in the case of non-conformity of goods. The right to a reduction in price serves as an alternative to damages being a kind of restitutionary measure of monetary relief, available even where the buyer is not entitled to avoidance. Fourthly, if under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, *the Seller* may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him (Art. 65).

Under the PECL two chapters establish the remedial scheme: Chapter 8 deals with Non-performance and Remedies in General. Art. 8:101 of PECL states the remedies available as: "*(1) Whenever a party does not perform an obligation under the contract and the non-performance is not excused under Article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9. (2) Where a party's non-performance is excused under Article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9 except claiming performance and damages. (3) A party may not resort to any of the remedies set out in Chapter 9 to the extent that its own act caused the other party's non-performance.*" In the DCFR non performance and its remedies are dealt in the Chapter 3 of Book III.

Thus, the remedies available for non-performance depend upon whether the non-performance is not excused, is excused due to an impediment under Art. 8:108 or results from behaviour of the other party. A non-performance which is not excused may give the aggrieved party the right to claim performance - recovery of money due (Art. 9:101) or specific performance (Art. 9:102) - to claim damages and

interests (Arts. 9:501 through 9:510), to withhold its own performance (Art. 9:201), to terminate the contract (Arts. 9:301 through 9:309) and to reduce its own performance (Art. 9:401). If a party violates a duty to receive or accept performance the other party may also make use of the remedies just mentioned. A non-performance which is excused due to an impediment does not give the aggrieved party the right to claim specific performance or to claim damages (Article 8:108). However, the other remedies set out in Chapter 9 may be available to the aggrieved party. The fact that the non-performance is caused by the creditor's act - or omission has an effect on the remedies open to the obligee. It would be contrary to good faith and fairness for the creditor to have a remedy when it is responsible for the non-performance. This effect may be total, that is to say that the creditor cannot exercise any remedy, or partial. The exact consequence of the creditor's behaviour will be examined with each remedy. It is to be noted that the PECL similarly provides the additional remedies as contained in the CISG or in the UPICC such as cure by non-performing party (Art. 8:104), assurance of performance in case of anticipatory non-performance (Art. 8:105) and notice fixing additional period for non-performance (Art. 8:106). However, it is should also be mentioned here that the party's right to withhold its own performance as contained in PECL Art. 9:201 (as well as in UPICC Art. 7.1.3, CISG Art. 58) until the other party performs its obligation will not be given detailed discussion. This right is not regarded as a remedy for breach of contract.

10. Change of parties

An "assignment" of a right is the transfer of the right from one person (the "assignor") to another person (the "assignee"). An "act of assignment" is a contract or other juridical act which is intended to effect a transfer of the right.

The requirements for an assignment of a right to performance are that:

a) **the right exists**;
b) **the right is assignable;** All rights to performance are assignable except where otherwise provided by law. A right to performance which is by law accessory to another right is not assignable separately from that right. A future right to performance may be the subject of an act of assignment but the transfer of the right depends on its coming into existence and being identifiable as the right to which the act of assignment relates. A right to performance of a monetary obligation may be assigned in part. Where the right is to a performance of a non – monetary obligation it woudl be often unfair to the debtor to require a division of the performance. Therefore a right to performance of a non-monetary obligation may be assigned in part only if the debtor consents to the assignment; or the right is divisible and the assignment does not render the obligation significantly more burdensome. Where a right is assigned in part the assignor is liable to the debtor for any increased costs which the debtor thereby incurs. A contractual prohibition of, or restriction on, the assignment of a right does not affect the assignability of the right.Further requirements , however are given in Article III.- 5:108 DCFR. A right is not assignable if it is a right to a performance which the debtor, by reason of the nature of the performance or the relationship between the debtor and the creditor, could not reasonably be required to be rendered to anyone else than creditor.
c) **the person purporting to assign the right has the right or authority to transfer it;**
d) **the assignee is entitled as against the assignor to the transfer by virtue of a contract or other juridical act, a court order or a rule of law; and**
e) **there is a valid act of assignment of the right.**

As soon as the assignment takes place the assignor ceases to be the creditor and the assignee becomes the creditor in relation to the right assigned. The debtor is discharged by performing to the assignor so long as the debtor has not received a notice of assignment from either the assignor or the assignee and does not know that the assignor is no longer entitled to receive performance.

The change of the debtor realizes by the subsitution and / or addition of the debtor. The rules on the substitution or addition of debtorare designed to enable parties to achieve results while maintaining a legal relationship in existence, which they could also achieve by bringing it to an ned and starting afresh.

11. Specific Contracts

11. 1 Sale contract

Part A of Book IV DCFR applies to contracts for the sale of goods and associated consumer guarantees. A contract under which one party undertakes, for a price, to manufacture or produce goods for the other party and to transfer their ownership to the other party is to be considered as primarily a contract for the sale of the goods. A contract for the "sale" of goods is a contract under which one party, the seller, undertakes to another party, the buyer, to transfer the ownership of the goods to the buyer, or to a third person, either immediately on conclusion of the contract or at some future time, and the buyer undertakes to pay the price.

The seller must:

a) transfer the ownership of the goods;
b) deliver the goods;
c) transfer such documents representing or relating to the goods as may be required by the contract; and
d) ensure that the goods conform to the contract.

Main obligations of the buyer are:

a) to pay the price;
b) to take delivery of the goods; and
c) to take over documents representing or relating to the goods as may be required by the contract.

In a consumer contract for sale, any contractual term or agreement concluded with the seller before a lack of conformity is brought to the seller's attention which directly or indirectly waives or restricts the remedies of the buyer provided by DCFR in respect of the lack of conformity is not binding on the consumer.

Loss of, or damage to, the goods after the risk has passed to the buyer does not discharge the buyer from the obligation to pay the price, unless the loss or damage is due to an act or omission of the seller. In a consumer contract for sale, the risk does not pass until the buyer takes over the goods.

Consumer goods guarantee means any undertaking given to a consumer in connection with a consumer contract for the sale of goods:

(a) by a producer or a person in later links of the business chain; or (b) by the seller in addition to the seller's obligations as seller of the goods. A consumer

goods guarantee, whether contractual or in the form of a unilateral undertaking, is binding in favour of the first buyer, and in the case of a unilateral undertaking is so binding without acceptance notwithstanding any provision to the contrary in the guarantee document or the associated advertising. Similarly Article 6(1) of Consumer Sales Directive indisputably establishes the binding force of the guarantee. It declares: "A guarantee will be legally binding on the offerer on the conditions laid down in the guarantee statement and the associated advertising." The Directive opts for a voluntary instrument, which means that no party is obliged to provide a guarantee. This is a confirmation of the modern trend of regulation in Europe, as in the vast majority of Member States the guarantee also exists on a voluntary basis. This point should be very well stressed in comparision to Slovak legislature, which enacts legal obligation to provide 24 month guarantee in consumer contracts!

11.2 Donation

Donation is regulated in the Part H of Book IV DCFR (hereinafter "Donation Principles").

Donation Principles have been prepared by Working Group for Gratuitous Contracts led M. Schmidt-Kessel. The Working Group began work at a time when works on DCFR had already been well advanced. Donation Principles are based on the contract law of DCFR. This has influenced the work on Donation Principles as a predisposition, as some principles of European law do not deal with modifications to the contract type, while others deal with them with regard to the possibility of contract´s gratuitousness. Principles of European Law on Services Contracts) take regard to free of charge services: Article 1:101 paragraph 6 states that "these principles shall be applied to contracts where the service provider undertakes to provide a service to the client or as a reward." Modifications to the use of these principles are reflected particularly in assessing the level of care in the provision of services. European law Principles of commercial agency, franchise and distribution, pursuant to Article 1:101 are appropriately used to provide this service free of charge. Similarly under Article IV. D. - 1:101 paragraph 3 DCFR in relation to the scope of regulation of Part D Book III ((mandate contracts), it applies where the agent is to be paid a price and, with appropriate adaptations, where the agent is not to be paid a price. Donation Principles must also take into account the provisions of DCFR on acquisition and loss of ownership of the goods.

A contract for the donation of goods is a contract under which one party, the donor, gratuitously undertakes to transfer the ownership of goods to another party, the donee, and does so with an intention to benefit the donee. A contract under which one party undertakes gratuitously, and with an intention to benefit the other party, to manufacture or produce goods for the other party and to transfer their ownership to the other party is to be regarded as primarily a contract for the donation of the goods. Notwithstanding the fact, that goods at the time of the conclusion of the contract do not yet exist or are to be acquired by the donor,

contract may be valid.

The definition of donation includes a subjective element (the donor's intention to give the benefit for donee) and the objective element of donation (gratuitousness). A donor may be regarded as intending to benefit the donee notwithstanding that the donor:

a) is under a moral obligation to transfer; or
b) has a promotional purpose.

An undertaking to transfer is gratuitous if it is done without reward. If the donation was conditional, it must be individually determined whether the condition is contrary to the gratuitoisness of the gift. If a donor gives something free of charge through the sole reason to get rid of these goods, it does not constitute a donation.

The primary obligation of the donor is to deliver goods which conform with the contract. Transfer of ownership is a key element, since "serves as a dividing line to distinguish donation from other juridical acts done without reward. Gratuitous service or mandate are not considered as donation.

The starting point for drafting of Donation Principles were DCFR rules for contract of sale. It means that their authors have adopted the concept of civil law, which considers donation as a contract. The definition of donation as the contract implies the application of the general provisions of contract law. In DCFR a valid unilateral undertaking is binding on the person giving it if it is intended to be legally binding without acceptance. Appropriate adaptations in application of these principles are required also in situation where the donor gratuitously immediately transfers the ownership of goods to the donee. This leaves open the question of whether an immediate donation can be considered a contract. Immediate donations in French law known as "Don Manuel" are in some legal systems not regarded as a contract, but only as a way of transfer of the ownership.

Donation Principles do not apply where:

a) performance of the obligation to transfer is due only on the donor's death;
b) the transfer or obligation to transfer is subject to the suspensive condition of the donor's death; or
c) the transfer or obligation to transfer is made subject to the resolutive condition of the donee predeceasing the donor.

This provision does not exclude donations if the donor renders performance or waives the condition before the donor's death. Donatio mortis causa is in national laws often diametrically different interpretated and regulated. In addition, there is a close connection with the law of succession, which is excluded from the scope of the DCFR. These facts led to the exclusion of the application of the Donation Principles to various modalities of donation upon death.

If the party undertaking to transfer receives or is entitled to some reward and the transaction is thereby not entirely gratuitous the contract is regarded primarily as a contract for the donation of goods if:

a) this party undertakes to transfer with an intention inter alia to benefit the other party; and

b) the values to be conferred by the performances are regarded by both parties as not substantially equivalent. This special rule for transactions that are not entirely free of charge is intended to take into account situations that could lead to circumvention of the donation. If the donee will provide some (albeit trivial) consideration; several mixed contracts may be taken into account. This "mix" will often consist of a combination of gift and purchase, but it may also be created by service element.

'Intention to benefit" is not identical to that of "*animus donandi* ", as known in most legal systems. Intention to benefit is a narrower concept. This limitation of the scope of Donation Principles excludes donations that are motivated by purely selfish interests, or even suggest the possibility of a hidden intention to hurt the donee, whose well-known example is the Trojan horse.

The second chapter of Donation Principles contains specific provisions on the formation of a contract. A contract for the donation of goods is not valid unless the undertaking of the donor is in textual form on a durable medium signed by the donor. „Undertaking of the donor" is not identical to "offer of the donor", but it may form only part of it.

Formal requirements follow the national traditions providing protection to donor against ill-considered promises.

DCFR provides these exceptions to the form requirements:

a) in the case of an immediate delivery of the goods to the donee or an equivalent to such delivery, regardless of whether ownership is transferred;
b) if the donation is made by a business;
c) if the undertaking of the donor is declared in a public statement broadcast in the radio or television or published in print and is not excessive in the circumstances.

In article IV. H. – 2:103: Mistake; the right to avoid contract for donor´s mistake is provided also in situation if other party (donee) has not caused or shared a mistake. Special rule on the unfair exploitation (IV. H. – 2:104: Unfair exploitation) is based on the shift of the burden of proof in comparision with the general rule. A donor, who was dependent on, or was the more vulnerable party in a relationship of trust with, the donee, may avoid contract unless the donee proves that the donee did not exploit the donor's situation by taking an excessive benefit or grossly unfair advantage. In some legal systems there are special provisions prohibiting donation in relation to persons as medical facilities, doctors, lawyers and other persons who provide some form of care for donor. Donation Principles prefer general control mechanism.

Obligation and remedies for non- performance are generally regulated in Book III of DCFR. General rules apply also to donation contract unless they are excluded or modified by Donation Principles. The starting point for regulation of parties´ obligations was sale contract in DCFR.

The donor must:

a) deliver goods which conform with the contract; and
b) transfer the ownership in the goods as required by the contract.

The donee must take delivery and accept the transfer of ownership. The donee performs the obligation to take delivery and accept transfer by carrying out all the acts which could reasonably be expected of the donee in order to enable the donor to perform the obligations to deliver and transfer.

Revocation by the donor in DCFR is based on a comparison of this institute under the laws of continental Europe. The essential features of the regulation are:

a) the parties are bound by donation contract,
b) the freedom of the parties to negotiate the terms of revocation;
c) the protection of reasonable reliance of donee by the defence of disenrichment,
d) general clause of revocation;
e) special cases of revocation.

General rule states that contracts for the donation of goods are revocable only if a right to revoke is conferred by the terms of the contract or provided for under the rules on donation in DCFR.

The donor's right to revoke is to be exercised by giving notice to the donee. A declaration of partial revocation is to be understood as a revocation of the whole contract for the donation of goods, if, giving due consideration to all the circumstances of the case, it is unreasonable to uphold the remaining parts. On revocation the outstanding obligations of the parties under the contract come to an end. In the case of a partial revocation, the relevant part of the outstanding obligations comes to an end. The donee is obliged to return the goods. Rules on unjustified enrichment apply with appropriate adaptations.

The right to revoke expires if notice of revocation is not given within a reasonable time, with due regard to the circumstances, after the donor knew or could reasonably be expected to have known of the relevant facts.

Rights of the donor to revoke are specially provided for in the situation where ingratitude of the donee arises or in the case of donor´s impoverishment.

A contract for the donation of goods may be revoked if the donee is guilty of gross ingratitude by intentionally committing a serious wrong against the donor. Revocation is excluded if the donor knowing the relevant facts forgives the donee.

A contract for the donation of goods may be revoked if the donor is not in a position to maintain himself or herself out of his or her own patrimony or income.

The donor is not in a position to maintain himself or herself if:

a) he or she would be entitled to maintenance from another if that other were in a position to provide the maintenance; or
b) he or she is entitled to social assistance.

The right to revoke is suspended if the donee maintains the donor to the extent that the latter is or would be entitled to under rules on social assistance.

A donor who is not in a position to maintain himself or herself or who will imminently be in that situation may withhold performance of any obligations under the contract which have not yet been performed.

Right to revoke on the ground of impoverishment arises also in the situation when the donor's ability to meet maintenance obligations established by rule of

law or by court order, or the existence of those obligations, is dependent on effective revocation of a donation.

The right to revoke on the grounds of impoverishment is mandatory.

Donation Principles rules also introduce the so-called residual right to revoke the donation as a response of the Working Group to other possibilities of revocation known in national laws.

Some legal orders specifically regulate revocation on the grounds of dissolution of marriage or even justified by unexpected birth of donor´s child.

Such a right for revocation shall be sufficiently narrowly defined and provided for. Otherwise it would be manifestly unjust in relation to reasonable reliance of donee. Therefore a contract for the donation of goods may also be revoked to the extent that other essential circumstances upon which it was based have materially changed after the conclusion of the contract, provided that as a result of that change:

a) the benefit to the donee is manifestly inappropriate or excessive; or
b) it is manifestly unjust to hold the donor to the donation.

This is applicable only if the change of circumstances was not so foreseeable at the time of the conclusion of the contract that the donor could reasonably have been expected to provide for it; and the risk of that change of circumstances was not assumed by the donor.

Donations in Europe are in many aspects an example of divergent ideas and reflect special national traditions. Therefore DCFR rules on donations are especially useful discussion platform and a set of terminological harmonization proposals. The ambition of the Working Group for Gratuitous Contracts was not only to prepare the draft of Donation Principles, but also to prepare general rules for gratuitous contracts and specific rules for gratuitois use. Only time constraints in the frame of work on DCFR restrained them to be incorporated into the DCFR, but these principles are published on the website of the Working Group on Gratuitous Contracts.[46]

11.3 Services

Services are regulated in Section C of Book IV DCFR (hereinafter referred to as "Service Principles"); in eight chapters. The first two chapters contain general provisions and other chapters regulate specific kinds of services: construction; processing; storage; design; information and advice; treatment.

The economic importance of the services is currently growing. The reflection of these developments in Europe is European Parliament and Council Directive 2006/123/EC of 12 December 2006 on services in the internal market. Service Principles in the DCFR follow the earlier publication (**Principles of European Law on Service Contracts)** of the Working Team on Sales, Services and Long-term Contracts within the Study Group on European Civil Code (SGECC), which contains the

[46] www.schenkung-uos.de

basic principles and rules for these relatively new types of contracts. Services have since long been the underdeveloped area of law. At a time of major codifications in 19th century there was no reason to address specific contracts relating to the provision of certain services, but the 20th century saw the rise of their frequency and number and also the change in the nature of these previously random and short-term contract arrangements to long-term relations of great significance and economic importance. In the preliminary research, the members of this working group stabilized and defined certain types of services which create the basis of the new model rules, among them information, representation, design, mandate, storage, transportation and treatment. The long-term contracts as commercial agency, franchise and distribution contracts have similarly character of services.

Drafting model rules for contractual relationships between service provider and his client (service relationship) may be regarded as a pioneering work, as at the national level in any of the Member States, there is no comparable coherent body of law to govern these relationships. Familiar looking notions at the national level such as Dutch *opdracht,* the German *Auftrag* and the French *mandat* in fact represented different and incoherent set of legal rules, which did not particularly lend themselves for generalization, even because so their scope differed considerably and contracts that are included in one set of legal rules were governed by another set of rules in the next country. One may conclude that the regulations on service contracts generally are a patchwork of rules that were developed by legislators or courts on an ad hoc basis without taking into account similar or opposite rules developed for other services. It is therefore clear, that national sets of rules developed for services contracts were simply too different, too incoherent and too little developed to form a solid basis for European model rules on services.

Neither the Directive on services in the internal market does complete the substantive rules on European level, because it consists only of fragments of desired regulation that is primarily bound only to the pre-contractual stage (information obligations - Article 22 of the Directive).

The step forward under EU law may be the draft of Regulation on a Common European Sales Law, that in recital 19 provides that *"with a view to maximising the added value of the Common European Sales Law its material scope should also include certain services provided by the seller that are directly and closely related to specific goods or digital content supplied on the basis of the Common European Sales Law, and in practice often combined in the same or a linked contract at the same time, most notably repair, maintenance or installation of the goods or the digital*." It should be however noted, that this proposal does not attempt to be a coherent set of rules for services, but is very strictly limited to certain aspects of the sale contract.

Chapter I (General Provisions) of Service Principles defines the scope of regulation ant its relation to regulation of mandate contracts (Section D of Book IV DCFR) and to that one of the commercial agency, franchise and distribution (Section IV E books DCFR). In the case of any conflict the rules on mandate and rules on commercial agency, franchise and distributorship prevail over the rules on Services. The same principle applies if there is a conflict between a general rules on services in the first two chapters of relevant Book of DCFR and a special rules in Chapters

3 to 8 of Service Principles. Service Principles do not apply to contracts in so far as they are for transport, insurance, the provision of a security or the supply of a financial product or a financial service. On the contrary, the general provisions on services should be applied to package travel contract as DCFR contains no special regulation thereof.

Under definition in the DCFR**; service contract** is the one under which one party, the service provider, undertakes to supply a service to the other party, the client, in exchange for a price. Service Principles will apply if was agreed to provide services free of charge.

As a comment on criticism that the **definition of the service contract** is too vague and does not define a service essentially; Marco Loos writes that "*this seems almost as inevitable as a notion of service does not have a well defined meaning in any legal system and is rather seen as a residual category;, if the obligation undertaken by the party other than one who pays the price cannot be classified as the falling primarily under a sale contract, a lease contract or a aebour contract, it is either defined as a service contract or considered to be an obligation sui generis In this respect, the notion of service is already much more specific than the one contained in the proposal for Consumer Rights Directive, where it is defined as "any contract other than a sale contract whereby a service is provided by the trader to consumer", implying that the notion of services covers at least also lease contracts and package travel contract*".[47]

Chapter 2 contains the rules that generally apply to all contracts for services. Regulation is based on the assumption that if the service provider is a business, a price is payable unless the circumstances indicate otherwise. Article III.- 2:102 (1) DCFR provides taht where parties have not agreed otherwise, payment of price is due within a reasonable time after it arises. Where the price is to be calculated on an hourly basis or on the basis of a contingency fee, this will be the moment the billable hour has elapsed, or the moment when the envisaged result has been achieved. The provision of Article III.- 2:102 (1) is much more problematic when the parties have agreed to a fixed price , which is particularly common in the case of physical services (e.g. construction) In such cases, one can argue taht the reasonable time for payment is to be calculated from the moment when the contract is concluded. Since in such contracts the service provides often needs a long period for completing its obligation, this would effectively mean that the client would be requiered to pay for the service long before it is completed, thus eliminating the client´s possibility to withhold performance performance if the service rendered turned out to have been defective. For that reason, fro construction, processing and storage contracts the price becomes due when the goods that were produced, processed or stored are handed over or returned to the client.

Pre-contractual duties; that are enshrined in the general provisions are complemented by the specific regulation in Service Principles**. Pre-contractual duties to warn consist of obligation of service provider** to warn the client if the service provider becomes aware of a risk that the service requested:

a) may not achieve the result stated or envisaged by the client;

[47] Loos services towards a european civil code

b) may damage other interests of the client; or
c) may become more expensive or take more time than reasonably expected by the client. This duty does not arise if the client already knows of the risks or could reasonably be expected to know of them. If a risk materialises and the service provider was in breach of the duty to warn of it, a subsequent change of the service by the service provider which is based on the materialisation of the risk is of no effect unless the service provider proves that the client, if duly warned, would have entered into a contract anyway. This is without prejudice to any other remedies, including remedies for mistake, which the client may have.

The client is under a pre-contractual duty to warn the service provider if the client becomes aware of unusual facts which are likely to cause the service to become more expensive or time-consuming than expected by the service provider or to cause any danger to the service provider or others when performing the service. If these facts occur and the service provider was not duly warned, the service provider is entitled todamages for the loss the service provider sustained as a consequence of the failure to warn; and an adjustment of the time allowed for performance of the service. The service provider is presumed to be aware of the risks mentioned if they should be obvious from all the facts and circumstances known to the service provider, considering the information which the service provider must collect about the result stated or envisaged by the client and the circumstances in which the service is to be carried out. The client cannot reasonably be expected to know of a risk merely because the client was competent, or was advised by others who were competent, in the relevant field, unless such other person acted as the agent of the client, in which case the rule on imputed knowlege applies.

The obligation of co-operation requires in particular:

a) the client to answer reasonable requests by the service provider for information in so far as this may reasonably be considered necessary to enable the service provider to perform the obligations under the contract;
b) the client to give directions regarding the performance of the service in so far as this may reasonably be considered necessary to enable the service provider to perform the obligations under the contract;

The service provider may subcontract the performance of the service in whole or in part without the client's consent, unless personal performance is required by the contract. Any subcontractor so engaged by the service provider must be of adequate competence.

The service provider must ensure that any tools and materials used for the performance of the service are in conformity with the contract and the applicable statutory rules, and fit to achieve the particular purpose for which they are to be used.

Obligation of skill and care and its level have the highest importance in determination whether the perfomance has been conform. The service provider must perform the service with the care and skill which a reasonable service pro-

vider would exercise under the circumstances; and in conformity with any statutory or other binding legal rules which are applicable to the service. If the service provider professes a higher standard of care and skill the provider must exercise that care and skill. If the service provider is, or purports to be, a member of a group of professional service providers for which standards have been set by a relevant authority or by that group itself, the service provider must exercise the care and skill expressed in those standards.

The obligations of skill and care require in particular the service provider to take reasonable precautions in order to prevent the occurrence of damage as a consequence of the performance of the service.

Generally applies that determining the exact meaning of the service contract may be necessary before it can be determined whether the contract is valid or whether there has been a non-performance. For example, it may be necessary to decide whether the debtor's obligation was one to produce a particular result (*obligation de résultat*) or only one to use reasonable care and skill (*obligation de moyens*). The fundamental problem of regulation of service provision is whether the service provider is required to achieve the expected result of the client. Generally, this problem has two solutions. The first approach is based on an assessment of whether the service provider fulfills its commitment to due skill and care. The second approach is based on the provider´s liability for failure – no- performance if the result was not achieved. Service Principles provide a flexible solution that takes into account the likelihood of achieving the expected results to clients. The supplier of a service must achieve the specific result stated or envisaged by the client at the time of the conclusion of the contract, provided that in the case of a result envisaged but not stated:

a) the result envisaged was one which the client could reasonably be expected to have envisaged; and
b) the client had no reason to believe that there was a substantial risk that the result would not be achieved by the service.

The service provider must follow all timely **directions of the client** regarding the performance of the service, provided that the directionsare part of the contract itself or are specified in any document to which the contract refers; or are result from the realisation of choices left to the client by the contract or from the realisation of choices initially left open by the parties.

The service provider must warn the client if the service provider becomes aware of a risk that the service requested may not achieve the result stated or envisaged by the client at the time of conclusion of the contract, may damage other interests of the client; or may become more expensive or take more time than agreed on in the contract either as a result of following information or directions given by the client or collected in preparation for performance, or as a result of the occurrence of any other risk. The service provider must take reasonable measures to ensure that the client understands the content of the warning.

Without prejudice to the client's right to terminate, either party may, by notice to the other party, **change the service to be provided**, if such a change is reason-

able taking into account:

a) the result to be achieved;
b) the interests of the client;
c) the interests of the service provider; and
d) the circumstances at the time of the change.

A change of the service may lead to an adjustment of the time of performance proportionate to the extra work required in relation to the work originally required for the performance of the service and the time span determined for performance of the service.

The client must notify the service provider if the client becomes aware during the period for performance of the service that the service provider will fail to perform the obligation to achieve result.

The client may terminate the contractual relationship at any time by giving notice to the service provider. When the client was justified in terminating the relationship no damages are payable for so doing. When the client was not justified in terminating the relationship, the termination is nevertheless effective but, the service provider has a right to damages in accordance with the rules in Book III.

. M. Loos points out that the power to unilaterally change the contract takes into account the nature of the legal relationship of service provision, which may be long-term, or at least has the appearance of a continuous process, in both cases there is a high probability of changing circumstances. The specific nature of the services is the reason for the admissibility of the modification of binding contract by unilateral notice, if required conditions are met. Simlarly, client is entitled to terminate the contract without any reason by the unilateral notice. This right belongs to client in the comparable specific contracts in most legal systems.

11.3.1 Construction

Chapter 3 (construction) regulates construction contract under which one party, the constructor, undertakes to construct a building or other immovable structure, or to materially alter an existing building or other immovable structure, following a design provided by the client. Similarly, this chapter may be applied to the contract, whre the constructor undertakes to construct a movable or incorporeal thing, following a design provided by the client; or to construct a building or other immovable structure, to materially alter an existing building or other immovable structure, or to construct a movable or incorporeal thing, following a design provided by the constructor.

The provisions of this Chapter also apply in the situation where the object to produce is not an immovable good, but a movable good (e.g. a piece of furniture) or an incorporeal structure (e.g. software). However, where a movable good is produced and ownerhips thereof is to be transfered to the client, the Article IV.A-1:102 DCFR equally applies; which- following the example od the consumer Sales directice – indicates that "the contract is to be considered as primarily a contract form the sale of goods." According the Article II.- 1:108 pargraph (3) DCFR, this im-

plies that to such a contract is exclusively governed by the rules on sales contract. This is useful to the extent that the constructor is a professional party and the client is a consumer, as Book IV.A DCFR contains mandatory provisions protecting the consumer in a consumer sales contract. However, excluding the applicability of the sevice provisions altogether, as the effect of aticles IV.A.- 1:102 and II.- 1:108 paragraph (3) DCFR, igmnoers the fact that in such contract, the rules governing the execution of the service provide useful clarifications as to what may be expected of the service provider during the production of these goods.

The obligation of co-operation requires in particular the client to provide access to the site where the construction has to take place in so far as this may reasonably be considered necessary to enable the constructor to perform the obligations under the contract; and to provide the components, materials and tools, in so far as they must be provided by the client, at such time as may reasonably be considered necessary to enable the constructor to perform the obligations under the contract.

The constructor must take reasonable precautions in order to prevent any damage to the structure.

The constructor must ensure that the structure is of the quality and description required by the contract. Where more than one structure is to be made, the quantity also must be in conformity with the contract.

The client may inspect or supervise the tools and materials used in the construction process, the process of construction and the resulting structure in a reasonable manner and at any reasonable time, but is not bound to do so.

If the parties agree that the constructor has to present certain elements of the tools and materials used, the process or the resulting structure to the client for acceptance, the constructor may not proceed with the construction before having been allowed by the client to do so.

If the constructor regards the structure, or any part of it which is fit for independent use, as sufficiently completed and wishes to transfer control over it to the client, the client must accept such control within a reasonable time after being notified. The client may refuse to accept the control when the structure, or the relevant part of it, does not conform to the contract and such non-conformity makes it unfit for use.

Acceptance by the client of the control over the structure does not relieve the constructor wholly or partially from liability. This rule also applies when the client is under a contractual obligation to inspect, supervise or accept the structure or the construction of it.

The price or a proportionate part of it is payable when the constructor transfers the control of the structure or a part of it to the client. However, where work remains to be done under the contract on the structure or relevant part of it after such transfer the client may withhold such part of the price as is reasonable until the work is completed.

If the structure is destroyed or damaged due to an event which the constructor could not have avoided or overcome and the constructor cannot be held accountable for the destruction or damage.

11.3.2 Processing

The core distinction between a construction contract and a processing contract is that in the case of construction, a new good is produced, whereas in the case of processing, a service is provided on an existing good.

Processing contract is a contract under which one party, the processor, undertakes to perform a service on an existing movable or incorporeal thing or to an immovable structure for another party, the client. It does not, however, apply to construction work on an existing building or other immovable structure.

Chapter 4 (processing) of Service Principle applies in particular to contracts under which the procesor undertakes to repair, maintain or clean an existing movable or incorporeal thing or immovable structure. The processor must take reasonable precautions in order to prevent any damage to the thing being processed.

If the service is to be performed at a site provided by the client, the client may inspect or supervise the tools and material used, the performance of the service and the thing on which the service is performed in a reasonable manner and at any reasonable time, but is not bound to do so.

If the processor regards the service as sufficiently completed and wishes to return the thing or the control of it to the client, the client must accept such return or control within a reasonable time after being notified. The client may refuse to accept the return or control when the thing is not fit for use in accordance with the particular purpose for which the client had the service performed, provided that such purpose was made known to the processor or that the processor otherwise has reason to know of it. The processor must return the thing or the control of it within a reasonable time after being so requested by the client. Acceptance by the client of the return of the thing or the control of it does not relieve the processor wholly or partially from liability for nonperformance. If, by virtue of the rules on the acquisition of property, the procesor has become the owner of the thing, or a share in it, as a consequence of the performance of the obligations under the contract, the procesor must transfer ownership of the thing or share when the thing is returned.

The price is payable when the processor transfers the thing or the control of it to the client or the client, without being entitled to do so, refuses to accept the return of the thing. However, where work remains to be done under the contract on the thing after such transfer or refusal the client may withhold such part of the price as is reasonable until the work is completed. If, under the contract, the thing or the control of it is not to be transferred to the client, the price is payable when the work has been completed and the processor has so informed the client.

In a contract between two businesses, a term restricting the processor's liability for non-performance to the value of the thing, had the service been performed correctly, is presumed to be fair for the purposes of II. – 9:405 (Meaning of "unfair" in contracts between businesses) except to the extent that it restricts liability for damage caused intentionally or by way of grossly negligent behaviour on the part of the processor or any person for whose actions the processor is responsible.

11.3. 3 Storage

Sorage contract is a contract under which one party, the storer, undertakes to store a movable or incorporeal thing for another party, the client. Chapter 5 of Service principles does not apply to the storage of:

a) immovable structures;
b) movable or incorporeal things during transportation; and
c) money or securities (except in the circumstances mentioned in paragraph (7) of IV. C. – 5:110 (Liability of the hotel-keeper)) or rights.

Differently from Roman tradition, where storage had been known as a real contract, the DCFR concept of storage is based on a consensual agreement. Exclusion of storage during transportation is justified by the existence of special rules at the level of international treaties. The same reason led to the exclusion of money and securities. Addressing the question of whether these rules apply to vehicles in the parking lot would depend on whether it is a car park. If so, this regulation will be applied. Storage of incorporeal things includes storing computer files. Placing things in the safety deposit box is not storage, as the service provider does not know the nature of the things given to the deposit safe box and therefore he can not take over the liavlity for these objects.

The storer, in so far as the storer provides the storage place, must provide a place fit for storing the thing in such a manner that the thing can be returned in the condition the client may expect. The storer may not subcontract the performance of the service without the client's consent.

The storer must take reasonable precautions in order to prevent unnecessary deterioration, decay or depreciation of the thing stored. The storer may use the thing handed over for storage only if the client has agreed to such use.

Without prejudice to any other obligation to return the thing, the storer must return the thing at the agreed time or, where the contractual relationship is terminated before the agreed time, within a reasonable time after being so requested by the client. The client must accept the return of the thing when the storage obligation comes to an end and when acceptance of return is properly requested by the storer.

If, during storage, the thing bears fruit, the storer must hand this fruit over when the thing is returned to the client.

The storage of the thing does not conform with the contract unless the thing is returned in the same condition as it was in when handed over to the storer. If, given the nature of the thing or the contract, it cannot reasonably be expected that the thing is returned in the same condition, the storage of the thing does not conform with the contract if the thing is not returned in such condition as the client could reasonably expect. If, given the nature of the thing or the contract, it cannot reasonably be expected that the same thing is returned, the storage of the thing does not conform with the contract if the thing which is returned is not in the same condition as the thing which was handed over for storage, or if it is not of the same kind, quality and quantity, or if ownership of the thing is not transferred.

The price for storage is payable at the time when the thing is returned to the client The storer may withhold the thing until the client pays the price.

After the ending of the storage, the storer must inform the client of any damage which has occurred to the thing during storage; and the necessary precautions which the client must take before using or transporting the thing, unless the client could reasonably be expected to be aware of the need for such precautions.

A hotel-keeper is liable as a storer for any damage to, or destruction or loss of, a thing brought to the hotel by any guest who stays at the hotel and has sleeping accommodation there. A thing is regarded as brought to the hotel:

a) if it is at the hotel during the time when the guest has the use of sleeping accommodation there;
b) if the hotel-keeper or a person for whose actions the hotel-keeper is responsible takes charge of it outside the hotel during the period for which the guest has the use of the sleeping accommodation at the hotel; or
c) if the hotel-keeper or a person for whose actions the hotel-keeper is responsible takes charge of it whether at the hotel or outside it during a reasonable period preceding or following the time when the guest has the use of sleeping accommodation at the hotel.

The hotel-keeper is not liable in so far as the damage, destruction or loss is caused by:

a) a guest or any person accompanying, employed by or visiting the guest;
b) an impediment beyond the hotel-keeper's control; or
c) the nature of the thing.

A term excluding or limiting the liability of the hotel-keeper is unfair if it excludes or limits liability in a case where the hotel-keeper, or a person for whose actions the hotel-keeper is responsible, causes the damage, destruction or loss intentionally or by way of grossly negligent conduct. Except where the damage, destruction or loss is caused intentionally or by way of grossly negligent conduct of the hotel-keeper or a person for whose actions the hotel-keeper is responsible, the guest is required to inform the hotel-keeper of the damage, destruction or loss without undue delay. If the guest fails to inform the hotel-keeper without undue delay, the hotel-keeper is not liable. The hotel-keeper has the right to withhold any thing brought to the hotel by client until the guest has satisfied any right the hotel-keeper has against the guest with respect to accommodation, food, drink and solicited services performed for the guest in the hotel-keeper's Professional capacity. This regulation does not apply if and to the extent that a separate storage contract is concluded between the hotel-keeper and any guest for any thing brought to the hotel. A separate storage contract is concluded if a thing is handed over for storage to, and accepted for storage by, the hotel-keeper.

In 1962, under the auspices of the Council of Europe was adopted Convention on the Liability of Hotel-keepers Concerning the Property of Their Guests. The Convention has been ratified by 17 states, however, the Slovak Republic does not belong to them.

11.3.4 Design

Contract for design is a contract, under which one party, the designer, undertakes to design for another party, the client:

a) an immovable structure which is to be constructed by or on behalf of the client; or
b) a movable or incorporeal thing or service which is to be constructed or performed by or on behalf of the client.

A contract under which one party undertakes to design and to supply a service which consists of carrying out the design is to be considered as primarily a contract for the supply of the subsequent service (e.g. contract for construction).

The designer's pre-contractual duty to warn requires in particular the designer to warn the client in so far as the designer lacks special expertise in specific problems which require the involvement of specialists.

The designer's obligation of skill and care requires in particular the designer to attune the design work to the work of other designers who contracted with the client, to enable there to be an efficient performance of all services involved; to integrate the work of other designers which is necessary to ensure that the design will conform to the contract; to include any information for the interpretation of the design which is necessary for a user of the design of average competence (or a specific user made known to the designer at the conclusion of the contract) to give effect to the design; to enable the user of the design to give effect to the design without violation of public law rules or interference based on justified third-party rights of which the designer knows or could reasonably be expected to know; and to provide a design which allows economic and technically efficient realisation.

In so far as the designer regards the design, or a part of it which is fit for carrying out independently from the completion of the rest of the design, as sufficiently completed and wishes to transfer the design to the client, the client must accept it within a reasonable time after being notified. The client may refuse to accept the design when it, or the relevant part of it, does not conform to the contract and such non-conformity amounts to a fundamental non-performance. After performance of both parties' other contractual obligations, the designer must, on request by the client, hand over all relevant documents or copies of them. The designer must store, for a reasonable time, relevant documents which are not handed over. Before destroying the documents, the designer must offer them again to the client.

11. 3. 5 Information and advice

Chapter 7 of Service Principles applies to contracts under which one party, the provider, undertakes to provide information or advice to another party, the client. Chapter 8 (Treatment) contains more specific rules on the obligation to inform.

In the rules of Service Principles is used the legislative abbreviation "information", including also the advice. There is a need to distinguish three types of

information, **factual information**, that are limited to a description of the actual situation, **the assessment information** including the subjective evaluation of the facts by the service provider, and information including the **recommendations or advice** on how to proceed and what decisions to take in a given situation.

The provider must, in so far as this may reasonably be considered necessary for the performance of the service, collect data about the particular purpose for which the client requires the information; the client's preferences and priorities in relation to the information; the decision the client can be expected to make on the basis of the information; and the personal situation of the client. In case the information is intended to be passed on to a group of persons, the data to be collected must relate to the purposes, preferences, priorities and personal situations that can reasonably be expected from individuals within such a group.

In so far as the provider must obtain data from the client, the provider must explain what the client is required to supply.

The provider must acquire and use the expert knowledge to which the provider has or should have access as a professional information provider or adviser, in so far as this may reasonably be considered necessary for the performance of the service.

In any case where the client is expected to make a decision on the basis of the information, the provider must inform the client of the risks involved, in so far as such risks could reasonably be expected to influence the client's decision.

When the provider expressly or impliedly undertakes to provide the client with a **recommendation** to enable the client to make a subsequent decision, the provider must:

a) base the recommendation on a skilful analysis of the expert knowledge to be collected in relation to the purposes, priorities, preferences and personal situation of the client;
b) inform the client of alternatives the provider can personally provide relating to the subsequent decision and of their advantages and risks, as compared with those of the recommended decision; and
c) inform the client of other alternatives the provider cannot personally provide, unless the provider expressly informs the client that only a limited range of alternatives is offered or this is apparent from the situation.

The provider must provide information which is of the quantity, quality and description required by the contract. **The factual information** provided by the information provider to the client must be a correct description of the actual situation described.

In so far as this may reasonably be considered necessary, having regard to the interest of the client, the provider must keep records regarding the information and make such records or excerpts from them available to the client on reasonable request.

When the provider expressly or impliedly undertakes to provide the client with a recommendation to enable the client to make a subsequent decision, the provider must disclose any possible conflict of interest which might influence the

performance of the provider's obligations. So long as the contractual obligations have not been completely performed, the provider may not enter into a relationship with another party which may give rise to a possible conflict with the interests of the client, without full disclosure to the client and the client's explici or implicit consent.

The rules take regards also on the influence of ability of the client, nevertheless the involvement in the supply of the service of other persons on the client's behalf or the mere competence of the client does not relieve the provider of any obligation.. The provider is relieved of those obligations only if the client already has knowledge of the information or if the client has reason to know of the information.

If the provider knows or could reasonably be expected to know that a subsequent decision will be based on the information to be provided, and if the client makes such a decision and suffers loss as a result, any non-performance of an obligation under the contract by the provider is presumed to have caused the loss if the client proves that, if the provider had provided all information required, it would have been reasonable for the client to have seriously considered making an alternative decision.

11. 3. 6 Treatment

Chapter 7 of Service Principles applies to contracts under which one party, the treatment provider, undertakes to provide medical treatment for another party, the patient. It applies with appropriate adaptations to contracts under which the treatment provider undertakes to provide any other service in order to change the physical or mental condition of a person. Where the patient is not the contracting party, the patient is regarded as a third party on whom the contract confers rights corresponding to the obligations of the treatment provider imposed by this Chapter.

The treatment provider must, in so far as this may reasonably be considered necessary for the performance of the service: interview the patient about the patient's health condition, symptoms, previous illnesses, allergies, previous or other current treatment and the patient's preferences and priorities in relation to the treatment; carry out the examinations necessary to diagnose the health condition of the patient; and consult with any other treatment providers involved in the treatment of the patient. This preliminary assement of patient health condition may be regarded as the compulsory first step and the first obligation of the treatment provides. Neglecting this obligation may create basis for invoking the remedies for non- perfomance.

The mandatory nature has rule that the treatment provider must use instruments, medicines, materials, installations and premises which are of at least the quality demanded by accepted and sound professional practice, which conform to applicable statutory rules, and which are fit to achieve the particular purpose for which they are to be used. The treatment provider's obligation of skill and care

requires in particular the treatment provider to provide the patient with the care and skill which a reasonable treatment provider exercising and professing care and skill would demonstrate under the given circumstances. If the treatment provider lacks the experience or skill to treat the patient with the required degree of skill and care, he is obliged to refer the patient to a treatment provider who can.

As in the previous rule, to the detriment of the patient, parties are not allowed to exclude the application of this rule or derogate from or vary its effects.

The treatment provider must, in order to give the patient a free choice regarding treatment, inform the patient about, in particular:

a) the patient's existing state of health;
b) the nature of the proposed treatment;
c) the advantages of the proposed treatment;
d) the risks of the proposed treatment;
e) the alternatives to the proposed treatment, and their advantages and risks as compared to those of the proposed treatment; and
f) the consequences of not having treatment.

The treatment provider must, in any case, inform the patient about any risk or alternative which might reasonably influence the patient's decision on whether to give consent to the proposed treatment or not. It is presumed that a risk might reasonably influence that decision if its materialisation would lead to serious detriment to the patient. The information must be provided in a way understandable to the patient.

If the treatment is not necessary for the preservation or improvement of the patient's health, the treatment provider must disclose all known risks.

If the treatment is experimental, the treatment provider must disclose all information regarding the objectives of the experiment, the nature of the treatment, its advantages and risks and the alternatives, even if only potential.

There are special grounds for exceptions to the obligation to inform. Broadly conceived information obligation has two major exceptions. First, it can also be described as therapeutic, so the information which would normally have to be provided by virtue of the obligation to inform may be withheld from the patient if there are objective reasons to believe that it would seriously and negatively influence the patient's health or life. The second exception relates to the patient's right to refuse information (right not to know). This exception can be respected only if the non-disclosure of the information does not endanger the health or safety of third parties.

The obligation to inform need not be performed also in the situation where treatment must be provided in an emergency (e.g. urgent surgery). In such a case the treatment provider must, so far as possible, provide the information later.

The treatment provider must not carry out treatment unless the patient has given prior informed consent to it. The patient may revoke consent at any time.

In so far as the patient is incapable of giving consent, the treatment provider must not carry out treatment unless:

a) informed consent has been obtained from a person or institution legally entitled to take decisions regarding the treatment on behalf of the patient; or
b) any rules or procedures enabling treatment to be lawfully given without such consent have been complied with; or
c) the treatment must be provided in an emergency.

In this situation, the treatment provider must not carry out treatment without considering, so far as possible, the opinion of the incapable patient with regard to the treatment and any such opinion expressed by the patient before becoming incapable. Such treatment may be carried out only to improve the health condition of the patient.

The treatment provider must create adequate records of the treatment. Such records must include, in particular, information collected in any preliminary interviews, examinations or consultations, information regarding the consent of the patient and information regarding the treatment performed.

The treatment provider must, on reasonable request, give the patient, or if the patient is incapable of giving consent, the person or institution legally entitled to take decisions on behalf of the patient, access to the records; and answer, in so far as reasonable, questions regarding the interpretation of the records.

If the patient has suffered injury and claims that it is a result of nonperformance by the treatment provider of the obligation of skill and care and the treatment provider fails to fulfill the obligation to give records and to answer the questions, non-performance of the obligation of skill and care and a causal link between such non-performance and the injury are presumed.

Duty to keep the records, and give information about their interpretation, lasts during a reasonable time of at least 10 years after the treatment has ended.

The treatment provider may not disclose information about the patient or other persons involved in the patient's treatment to third parties unless disclosure is necessary in order to protect third parties or the public interest. The treatment provider may use the records in an anonymous way for statistical, educational or scientific purposes.

With regard to any non-performance of an obligation under a contract for treatment, Book III, Chapter 3 (Remedies for Non-performance) and apply with the following adaptations:

a) the treatment provider may not withhold performance or terminate the contractual relationship if this would seriously endanger the health of the patient; and
b) in so far as the treatment provider has the right to withhold performance or to terminate the contractual relationship and is planning to exercise that right, the treatment provider must refer the patient to another treatment provider.

11.4 Mandate

Mandate contracts in DCFR (the "Mandate Principles) are systematically structured in six chapters: Chapter 1: General Provisions, Chapter 2: Main obligations of principal, Chapter 3: Performance by the agent, Chapter 4: Directions and changes, Chapter 5: Conflicts of Interest, Chapter 6: Termination by notice other than for non-performance, Chapter 7: Other grounds for termination.

Working Group of Marco Loos at the University of Amsterdam has placed emphasis on logical division of rules to chapters in such way, that they reflect different stages of mandate relationship. Book IV of Part D DCFR is based on strict and precise definition of the scope and terms; with which these rules work, so that explicitly answer the questions about the internal and external relationship and they link together the regulation of direct and indirect representation in mandate contracts. They make clear the relation of Mandate Principles to other specific contracts in Part C of the book IV (Services). This purpose fulfills in particular, the Chapter 1, which contains general provisions and its rules define scope of the Mandate Principles and basic terminology.

Mandate Principles are used only for the internal relationship between the principal and the agent. Relationship of principal and a third party or a third party and the agent is governed mainly by the provisions on representation in the DCFR.

Definitions in Mandate Principles are bound to Chapter 6 Book II DCFR, where explanations of terms "authority" and "representative" are given.

Mandate contract is a contract under which the agent is authorized and instructed (mandated) to act in the interest of the principal.

His task may be:

a) to conclude a contract between the principal and a third party or otherwise directly affect the legal position of the principal in relation to a third party (**mandate for direct representation**);
b) to conclude a contract with a third party, or do another juridical act in relation to a third party, on behalf of the principal but in such a way that the agent and not the principal is a party to the contract or other juridical act **(the mandate for indirect representation)** ; or
c) to take steps which are meant to lead to, or facilitate, the conclusion of a contract between the principal and a third party or the doing of another juridical act which would affect the legal position of the principal in relation to a third party. This is an activity that traditionally corresponds to intermediation.

Mandate Principles apply only to the internal relationship between the principal and the agent (the mandate relationship). They do not apply to the relationship between the principal and the third party or the relationship (if any) between the agent and the third party.

The **'prospective contract'** is the contract the agent is authorised and instructed to conclude, negotiate or facilitate, and any reference to the prospective contract includes a reference to any other juridical act which the agent is author-

ised and instructed to do, negotiate or facilitate. „**Direction"** is a decision by the principal pertaining to the performance of the obligations under the mandate contract or to the contents of the prospective contract that is given at the time the mandate contract is concluded or, in accordance with the mandate, at a later moment;

The mandate may include the steps taken by the principal in the execution of another legal act in the interest of the principal, such as a contract, which will affect the legal position of principal in respect of a third party (such as the right to compensation for damage).

Mandate Principles are be applied when the principal is bound to act in the interest of principal and according to his instructions (that assumes contractual obligation). Accordingly, the principles apply with appropriate adaptations, where the agent is merely authorised but does not undertake to act, but nevertheless does act.

Generally these principles shall be applied where the agent is to be paid a price but, with appropriate adaptations, where the agent is not to be paid a price. If the parties conclude a mixed agreement, which includes elements that are within the scope of Mandate Principles, as well as it contains elements that are within the scope of the book C IV DCFR (Services), provisions of Mandate Principles prevail.

It is obvious that the mandate contracts belong to the group of contracts generally known as services. Authors of DCFR therefore discussed the systematic inclusion of Mandate Principles in the Part on Sevices. Due to the specific relation of mandate contracts to representation and their other specific elements in comparison with other types of services set out in Part C of Book IV (Services), it was decided to allocate regulation of mandate contract independently. So Mandate Principles create an independent part of Book IV DCFR and not just a chapter in the Part Service.

Mandate contract may be concluded:

a) for an indefinite period,
b) for a fixed period, or
c) a particular task.

The contract for a fixed period, and the contract formationed to fulfill a specific task contracts are both in their nature contracts for a definite period. The difference lies in the fact that in case of the contract formationed to meet a particular task, it is uncertain whether and when the task will be done. Parties can thus be de facto bound indefinitely.

The contract, which is for a predetermined period of time, is subject to regulation by tacit renewal. If certain conditions are met, a contract for a specified period of time becomes a contract for an indefinite period.

In principle, the mandate of the agent can be revoked by the principal at any time by giving notice to the agent. The termination of the mandate relationship has the effect of a revocation of the mandate of the agent. This provision has mandatory nature and the parties may not, to the detriment of the principal, exclude its application. Only exceptionally, Mandate Principles allow the mandate to be

irrevocable. In order to safeguard a legitimate interest of the agent other than the interest in the payment of the price; or the common interest of the parties to another legal relationship, the mandate of the agent cannot be revoked by the principal and the revocation of principle is of no effect. With this regulation, the authors of Mandate Principles aimed at some national legal orders that allow for irrevocability of mandate under certain circumstances. The effort to find an equitable solution in this case led to a significantly complicated regulation, that sometimes seems unclear.

An important aspect of the right to revoke mandate by the principal at any time means that this revocation does not constitute a breach of contract. But, as the consequence of revocation is the termination of mandate relationship, if the conditions for termination are not met, this revocation can base liability of principal for damage caused to agent by the early termination of the contract.

The main obligations of the principal; the obligation to cooperate with the agent to enable him to perform contract. Generally formulated obligation to cooperate given in the DCFR, for the purposes of mandate contracts requires the principal in particular to:

a) answer requests by the agent for information in so far as such information is needed to allow the agent to perform the obligations under the mandate contract; and
b) give a direction regarding the performance of the obligations under the mandate contract in so far as this is required under the mandate contract or follows from a request for a direction.

In principle, the principal is required to provide payment if the principal perfoms the obligations of mandate contracts in the course of business. Payment is due, when the mandated task has been completed and the agent has given account of that to the principal. If the parties had agreed on payment of a price for services rendered, the mandate relationship has terminated and the mandated task hasnot been completed, the price is payable as of the moment the agent has given account of the performance of the obligations under the mandate contract.

The Mandate Principles also provide a rule for cases where the prospective contract has not been concluded in duration of mandate relationship. Nevertheless, the contribution of the agent should be rewarded. Establishment of rules for these situations significantly contributes to the protection of the parties and prevents disputes where the parties deal with the situation previously not anticipated in the contractual agreement When the mandate is for the conclusion of a prospective contract and the principal has concluded the prospective contract directly or another person appointed by the principal has concluded the prospective contract on the principal's behalf, the agent is entitled to the price or a proportionate part of it if the conclusion of the prospective contract can be attributed in full or in part to the agent's performance of the obligations under the mandate contract. When the mandate is for the conclusion of a prospective contract and the prospective contract is concluded after the mandate relationship has terminated, the principal must pay the price if payment of a price based solely on the conclusion of the

prospective contract was agreed and the conclusion of the prospective contract is mainly the result of the agent's efforts provided that the prospective contract is concluded within a reasonable period after the mandate relationship has terminated.

The basic agent´s obligations requires that at all stages of the mandate relationship the agent must act in accordance with the mandate. The agent must act in accordance with the interests of the principal, in so far as these have been communicated to the agent or the agent could reasonably be expected to be aware of them. Where the agent is not sufficiently aware of the principal's interests to enable the agent to properly perform the obligations under the mandate contract, the agent must request information from the principal. The agent has an obligation to perform the obligations under the mandate contract with the care and skill that the principal is entitled to expect under the circumstances. If the agent is, or purports to be, a member of a group of Professional agents for which standards exist that have been set by a relevant authority or by that group itself, the agent must exercise the care and skill expressed in these standards.

In determining the care and skills, which the principal is entitled to expect, it is necessary to take into account the nature, severity, frequency, and predictability of the risks associated with the implementation of the directions, the fact that the obligations are fulfilled by non-professionals free of charge, the amount of remuneration for the performance of their obligations and the time reasonably required to fulfill the obligations.

Section 2 of Chapter 3 regulates the consequences of acting beyond mandate. The agent may act in a way not covered by the mandate if the agent has reasonable ground for so acting on behalf of the principal; the agent does not have a reasonable opportunity to discover the principal's wishes in the particular circumstances; and the agent does not know and could not reasonably be expected to know that the act in the particular circumstances is against the principal's wishes. If these conditions are met, act of the agent beyond mandate has the same consequences as between the agent and the principal as an act covered by the mandate. Where, in circumstances that these reasonable conditions have not been fullfiled and nevertheless, an agent has acted beyond the mandate in concluding a contract on behalf of the principal, ratification of that contract by the principal absolves the agent from liability to the principal, unless the principal without undue delay after ratification notifies the agent that the principal reserves remedies for the non-performance by the agent. The reason for such apparently contradictory acting of principal may be casued by situation in which, although externally the principal ratifies the prospective target (e.g. he does not want to lose the contractor or the reputation of the trade relations), in fact the agent did not act in accordance with principal´s and interests and in the internal relationship therefore principal reserves the application of remedies for breach.

Mandate is normally not exclusive, it means that the principal is free to conclude, negotiate or facilitate the prospective contract directly or to appoint another agent to do so. The agent may subcontract the performance of the obligations under the mandate contract in whole or in part without the principal's consent,

unless personal performance is required by the contract. Any subcontractor so engaged by the agent must be of adequate competence. In accordance with Article III. – 2:106 (Performance entrusted to another) the agent remains responsible for performance.

During the performance of the obligations under the mandate contract the agent must in so far as is reasonable under the circumstances inform the principal of the existence of, and the progress in, the negotiations or other steps leading to the possible conclusion or facilitation of the prospective contract. The agent must without undue delay inform the principal of the completion of the mandated task.

The agent must give an account to the principal of the manner in which the obligations under the mandate contract have been performed; and of money spent or received or expenses incurred by the agent in performing those obligations. Giving account of fullfilment of his aobligations creates also prerequisite for renumeration of agent.

An agent who concludes the prospective contract with a third party must communicate the name and address of the third party to the principal on the principal's demand. In the case of a mandate for indirect representation this obligation arises only if the agent has become insolvent.

Chapter 4 of Mandate Principles regulates the principal's directionsand change mandate contracts. The principal is authorized to give directions and the agent is obliged to follow the instructions of the principal. These rules are an expression of the principle that the principal is a "master contract".

However, the agent is required to notify and warn the principal when directions

a) cause the fulfillment of the obligations of mandate contracts significantly more costly and would require much more time, as agreed in the mandate contracts, or
b) are inconsistent with the purpose of mandate contracts or may otherwise be detrimental to the interests of the principal.

Unless the principal revokes the direction without undue delay after having been so warned by the agent, the direction is to be regarded as a change of the mandate contract. In certain situations, the agent is obliged to require instruction of the principal. The agent must ask for a direction on obtaining information which requires the principal to make a decision pertaining to the performance of the obligations under the mandate contract or the content of the prospective contract. The agent must also ask for a direction if the mandated task is the conclusion of a prospective contract and the mandate contract does not determine whether the mandate is for direct representation or indirect representation.

Article IV. D. - 4:201 DCFR provides for conditions and consequences of changing mandate contracts. This rule reflects various factors: duration of mandate relationship, changes of situation during this relation, reasonable expectations of both parties, already mentioned fact that the principal is master of the contract but also the basic principle *pacta sunt servanda.* In the case of a change of the mandate contract under this article, the agent may also terminate the mandate re-

lationship by giving notice of termination for an extraordinary and serious unless the change is minor or is to the agent's advantage.

Chapter 5 contains a very detailed regulation of conflicts of interest that may occur either in the form self - contracting, or as a dual mandate. In principle, the the agent may not become the principal's counterparty to the prospective contract or act as the agent of both the principal and the principal's counterparty to the prospective contract. The principles, however, provide exemptions from the ban of self- contracting and double mandate. If the agent is becoming the counterparty, the agent is not entitled to payment for services rendered. Conversely, if the double is allowed, the agent is entitled to the reward.

The basic idea of termination mandate relation by notice is that either party may terminate the mandate relationship at any time by giving notice to the other. A revocation of the mandate of the agent is treated as termination. Notice is always effective except if the mandate of the agent is irrevocable under IV. D. – 1:105. When the party giving the notice was justified in terminating the relationship no damages are payable for so doing. When the party giving the notice was not justified in terminating the relationship, the termination is nevertheless effective but the other party is entitled to damages in accordance with the rules in Book III.. The reason of such regulation lies in the specific nature of mandate contracts, that is and should be based on the basis of mutual trust. It would not be reasonable to insist on continuing the relationship, if one party is willing to end it. Chapter 6 is organized logically so, that after the general arrangements for the termination by notice follow articles, that in addition to differentiation based on whether the termination was initiated by the principal or the agent, also distinguishes between:

a) whether it is to end the relationship for an indefinite period, on a particular task or gratuitous relationship,
b) if the reason for termination of extraordinary and serious.

Following these criteria is important as they create the basis to determine whether the termination by notice was or not. Wrongful termination of the relationship by notice entitles to damages.

Other methods of termination of the mandate relationship governs the final chapter of the Mandate Principles.

If the mandate contract was concluded solely for the conclusion of a specific prospective contract the mandate relationship terminates when the principal or another agent appointed by the principal has concluded the prospective contract. The death of the principal does not end the mandate relationship, but both the agent and the successors of the principal may terminate the mandate relationship by giving notice of termination for extraordinary and serious reason. On the other hand, the death of the agent ends the mandate relationship.

11.5 Commercial agency

Commercial agency along with the franchise and distribution are regulated in Part E of Book IV DCFR, as these contract types have a common economic func-

tion, which consists of the establishment and regulation of market relations. The common denominator of these contracts is the existence of mostly long-term relationship in which one independent trader places the products of another trader in the market. If another contractual relationship corresponds to the classification and would not be named subsuming it under contract types listed in this section, it is necessary to apply the provisions of this section adequately, especially those that are mandatory. Using different nomination of contract by parties should not lead to avoidance of these mandatory provisions.

Commercial agency is governed by the national laws of the Member States, but this legislation has been heavily influenced by the transposition of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of Member States relating to self-employed commercial agents.

Common elements of a commercial agency, franchise and distribution are dealt with in Chapter 2 of Book IV Part E DCFR. Regulation is focused on refinement of pre-contractual information duties, taking into account the long-term nature of these relations in comparison with the general regulation.

The parties to a contract must collaborate actively and loyally and co-ordinate their respective efforts in order to achieve the objectives of the contract. During the period of the contractual relationship each party must provide the other in due time with all the information which the first party has and the second party needs in order to achieve the objectives of the contract. A party who receives confidential information from the other must keep such information confidential and must not disclose the information to third parties either during or after the period of the contractual relationship.

If contract is for a definite period, a party is free not to renew a contract for a definite period. If a party has given notice in due time that it wishes to renew the contract, the contract will be renewed for an indefinite period unless the other party gives that party notice, that it is not to be renewed. Either party to a contract for an indefinite period may terminate the contractual relationship by giving notice to the other. Given the long- term nature of these sontract, the notice has no be of a reasonable lenghts. Whether a period of notice is of reasonable length depends, among other factors, on the time the contractual relationship has lasted; reasonable investments made; the time it will take to find a reasonable alternative; and usages. A period of notice of one month for each year during which the contractual relationship has lasted, with a maximum of 36 months, is presumed to be reasonable. Where a party terminates a contractual relationship but does not give a reasonable period of notice the other party is entitled to damages.

When the contractual relationship comes to an end for any reason (including termination by either party for fundamental non-performance), a party is entitled to an indemnity from the other party for goodwill if and to the extent that the first party has significantly increased the other party's volume of business and the other party continues to derive substantial benefits from that business; and the payment of the indemnity is reasonable. If the contract is avoided, or the contractual relationship terminated, by either party, the party whose products are being brought on to the market must repurchase the other party's remaining stock,

spare parts and materials at a reasonable price, unless the other party can reasonably resell

Commercial agency is a contract under which one party, the commercial agent, agrees to act on a continuing basis as a self-employed intermediary to negotiate or to conclude contracts on behalf of another party, the principal, and the principal agrees to remunerate the agent for those activities. The commercial agent must make reasonable efforts to negotiate contracts on behalf of the principal and to conclude the contracts which the agent was instructed to conclude.

The regulation in DCFR is based on the Directive on the coordination of the laws of Member States relating to self-employed commercial agents. In terms of activity of the agent, as opposed to the Directive, which provides only for authorized agents to negotiate the sale of goods, activity of commercial agent in DCFR has a wider scope in relation to the provision of services, not only sale of goods.

Section 2 of this chapter governs obligations of the agent, Section 3 principal´s obligations.

Commercial agent is required to develop reasonable efforts to negotiate business in the interest of the principal, to contract according to the instructions of the principal, to follow the reasonable instructions of the principal, unless significantly interfere with the independence of the agents, to inform the principal of negotiated agreements or contracts, market conditions, characteristics of the client, keep proper accounts relating to contractual arrangements or closed for the principal.

Principal is obliged to provide payment - commission - if the conditions are met for the payment or after the termination of their contract (mandatory provision) provide the commission within the time allowed (mandatory provision), to inform the agent about the nature of goods and services and the prices and other conditions of purchase or sale; to inform the agent about the expected decline in business since the future development may significantly affect the commission of agent (mandatory provision)

As the commission is usually linked to the performance of contracts concludes by the agent, the principal must supply the commercial agent in reasonable time with a statement of the commission to which the commercial agent is entitled. This statement must set out how the amount of the commission has been calculated. For the purpose of calculating commission, the principal must provide the commercial agent upon request with an extract from the principal's books. Also, in order to fulfill this obligation, the principal shall keep proper accounts.

The commercial agent is entitled to an indemnity for goodwill on the amounting to:

a) the average commission on contracts with new clients and on the increased volume of business with existing clients calculated for the last 12 months, multiplied by:
b) the number of years the principal is likely to continue to derive benefits from these contracts in the future.

In any case, the indemnity must not exceed one year's remuneration, calculated from the commercial agent's average annual remuneration over the preceding

five years or, if the contractual relationship has been in existence for less than five years, from the average during the period to substitute for obtaining good reputation and customers (indemnity for goodwill), which sets out the conditions of the law, and limits the amount of compensation (mandatory provision).[48]

Del credere clause can only be validly agreed in writing with respect to certain contracts or specific clients, and only in a manner that reasonably reflects the interests of the parties. The commercial agent is entitled to be paid a commission of a reasonable amount on contracts to which the del credere guarantee applies (del credere commission). Del credere regulation reflects traditional national regulation, not those in Directive. This is probably the reason for non- mandatory regulation of dele credere commission in the DCFR.

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[48] Interpretation of indemnity by the Court of Justice in relation to the abovementioned Directive 86/653/EEC was given in Case of 23 March 2006 Honyvem, C-465/04, ECR. s. I-2879, and 26 March 2009, Turgay Semen, C-348/07, ECR. s. I-2341st.

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