CHAPTER 4

Contract Law

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§4.01 GENERAL REMARKS ON CROATIAN CONTRACT LAW

[A] The Sources of Contract Law

[1] Legislation

Croatian law belongs to the legal tradition of continental Europe. A significant feature of that tradition is a written codification of law, and the same is true of Croatian law. However, Croatian civil law is not codified in a single legal source (civil code). The principle source of contract law (ugovorno pravo) is a legislative act that deals with legal relations between creditors and debtors – the Obligations Act/OA (Zakon o obveznim odnosima). Certain contracts are regulated by different regulations (lex specialis), for example, public procurement contracts, concession contract, leasing contract, contracts in the field of copyright law, etc.

The OA regulates law of obligations, and in that way covers institutes of contracts and non-contractual legal relations (liability for damages, unjustified enrichment, negotiorum gestio, and unilateral declarations of will). Although Croatian civil law is not regulated by a single civil code, both jurisprudence and legal practice consider civil law as a more or less coherent branch of law. Civil law was a recognized branch of law even during the time of Socialism, regardless of the fact that there was an ongoing attempt to marginalize it and supplement it with regulations which were more in accordance with socialistic ideology.

The principle source of Croatian contract law, the OA, was adopted in the year 2005 and came into force on 1 January 2006. It is a modified version of the OA which

1. OG 35/05, 41/08, 125/11.
was adopted in the year 1978, in the period when Croatia was part of the former Socialist Federal Republic of Yugoslavia. The initially adopted OA (1978) was federal legislation of former Yugoslavia, but apart from a few provisions, it was not drafted in a typical socialistic manner. Surprisingly, the OA (1978) represented a mixture of foreign legislation from Western Europe, and also took into account the developments in international law. Foreign legislation had often been modified before it was adopted in domestic law. Because of that, the provisions of the OA deviate from its original sources. The fact that a first version of the OA was drafted fairly late, in 1978, a long time after great codifications of civil law came into force in continental Europe, enabled its drafters to use not only foreign legislation texts, but also a vast body of both foreign legal theory and case law as role models. Therefore, the OA contains explicit provisions on issues that cannot be found in foreign legislation texts. A drawback of such an approach is that Croatian contract law (the same was true for the OA 1978) is sometimes over-regulated, and contracting parties in some cases conduct their affairs ignorant of particular provisions of the OA. The complexity of the OA is not caused by its style, since it was drafted in the manner of the Swiss Code of Obligations (Obligationenrecht/OR), which means that every paragraph is formulated as one sentence, and the OA generally tried to avoid a theoretical approach.

Revised version of the OA (enacted in 2005 and came into force on 1 January 2006) retained most of the legal roots of its older version, and obtained some new. The most significant revision in the new OA occurred in the field of liability for damages, not in the field of contract law. The new OA also served for implementation of European Union (EU) law during Croatia’s accession process to the EU. All newly formed independent states formed after the dissolution of Yugoslavia reformed their law of obligations, but kept some version of the amended OA (1978).

The OA’s provisions on contract law are applicable to both civil law contracts and commercial contracts, as a consequence of a so-called monistic theory. Therefore, there is no separate commercial code. However, company law is regulated by separate law. The OA also contains provisions on consumer contracts (e.g., provisions on guarantees for goods sold to the consumers), although majority of consumer law is covered by a separate legislation – Consumer Protection Act.

[2] International Treaties

International treaties (međunarodni ugovori) have the status of legal source in Croatia as well. In respect of contract law, particular place belongs to the United Nations Convention on the International Sale of Goods (1980) – the Vienna Convention. International treaties in force are, according to the Constitution of the Republic of Croatia, directly applicable, and are in hierarchy of legal sources below the Constitution, but take precedence over the Acts of Parliament (legislation) (Article 134 of Constitution). In the past, Croatian courts were reluctant to apply provisions of international treaties. However, in the last decade a new trend started to emerge, and courts began to apply provisions of international treaties. An important step in this respect was the case law of the Supreme Court of the Republic of Croatia, which
quashed the decisions of lower courts on the basis that lower courts did not properly apply substantive law, because they did not apply provisions of the Vienna Convention.

[3] Usages

In certain areas of contract law usages (običaji) are also a relevant legal source. Usages were a particularly important legal source of contract law between the end of the World War II and the enactment of the old OA in 1978. After the end of the World War II Croatia was a federal unit (a republic) of socialist Yugoslavia, which did not enact legislation on contract law until fairly late (1978), and it was necessary to find an alternative legal source. That is why the law of sales was covered by General usages on sale of goods of Chamber of Commerce of former Yugoslavia (1954). Even today, when law of obligations is regulated, usages are important for commercial contracts (usages are applicable unless the contract stipulates otherwise), while in civil contracts usages are the legal source only if law or contract refers to application of usages. When it comes to construction contract Specific usages on construction (1977) were of particular importance, and are still to some extent applicable regardless of the fact that a construction contract is regulated as nominate contract in Croatian law. Practices that contracting parties have developed between themselves are also a legally relevant source of law.

[4] Former Legislation as a Source of Law

Previous absence of legislation in the field of contract law could not always be solved by usages, and therefore, until the OA was enacted, courts applied laws enacted before 6 April 1941 (beginning of the World War II in former Yugoslavia). On the territory of the Republic of Croatia the main legal source of not only contract law, but also private law, was the Austrian Civil Code/ACC, because it was in force in Croatia since 1853, when Croatia was a part of the Habsburg Monarchy. The application of past legislation was explicitly allowed by the law, because the old OA did not regulate donation contract and loan for use contract. After the new OA came into force in 2006, donation contract and loan for use contract were regulated as nominate contract. However, one should not neglect ACC, since it has a long tradition in Croatia. Drafters of new Croatian property law, which was enacted in 1996, and came into force in 1997, have to a large extent relied on ACC as a legislative model.

[5] Case Law and Legal Theory

Case law and legal theory are not legal sources of contract law (or any other branch of law) in a formal way. Croatian legal order belongs to codified legal systems of continental Europe, which means that written law (Acts of Parliament and other public bodies with legislative jurisdiction) is the legal source, and decision of courts do not have the character of legal source for future disputes. Nevertheless, case law is a very
important source for interpretation of legislation, and there are cases when it \textit{via facti} amends written legislation.

[B] The Notion of the Contract

The general notion of contract (ugovor) is not explicitly defined by Croatian legislation. However, from general provisions on formation of contracts and specific provisions on different types of contracts it is clear that contract is an agreement with a purpose to create a legal relation between parties of the contract (e.g., obligation between creditor and debtor), to transfer a right or obligation (e.g., assignment of claim, assumption of debt) or to extinct an already existing obligation (e.g., rescission of a contract on the basis of agreement). The contract is defined as an agreement with certain legal consequences because Croatian law, as a matter of principle, is based upon so-called consensual contracts. Therefore, the essence of a contract is a consensus of the parties. There is an exception in the form of so-called real contracts, which are not concluded in the moment when the parties have reached an agreement (consensus) but in the moment when a thing that is the object of the contract is transferred. However, real contracts are an exception, and the general notion of a contract can be defined as an agreement. Formal contracts could also be considered as an exception to the principle rule, while formal contracts, apart from the consensus, require additional formalities in order to be valid.

The rules that govern contractual relations are also \textit{mutatis mutandis} applicable to other legal transactions (Article 14/3 OA). The main reason for such an approach is that the business community and ordinary people are more familiar with the notion of a contract than the more theoretical notion of legal transaction. The same is true of Croatian law. However, the notion of legal transaction is a well-established term in Croatian legal theory. The notion of legal transaction is broader than a contract, because it covers not only bilateral and multilateral declaration of a will (contracts) but also various unilateral declarations of a will. Therefore, every contract must have at least two parties, while legal transactions can be unilateral in a real sense of the word (e.g., last will, offer, notice to rescind a contract). Unilateral contracts are not unilateral in that sense. Croatian contract law also recognizes unilateral contracts as a legal transaction between two parties, in which one party of a contract undertakes an obligation, and the other party acquires a right (e.g., donation contract).

[C] Classification of Contracts


Consensual contracts are the main type of contracts in Croatian contract law. Conclusion of consensual contract does not require any particular formalities or symbolic acts and is a separate act in the respect of the performance of a contract. A typical example would be the sale contract. After its conclusion, a contractual obligation is created between contracting parties, by which the seller is obliged to deliver an object of sale
and transfer ownership to the buyer and the buyer is obliged to pay a price. Exceptionally, some types of contracts require an act of performance of a contract as a constitutive element for the conclusion of contract (real contracts). An example of that is the loan for use, by which one party hands over a thing for gratuitous use to the other party, which undertakes to return it after a certain period of time or after it was used for a certain purpose (Article 509 OA). If the object of a loan for use was not handed over to the other party, a contract is not concluded. Some contracts according to Croatian law can be either consensual or real contracts. For instance, donation contract is a real contract if it is concluded and performed at the same time. Consensual donation, which is a promise to donate accepted by a recipient of donation, requires a form of public notary act.

[2] Nominate Contracts Regulated by the OA

The provisions of the OA are divided into three parts. The first part consists of provisions on the general part of law of obligations. The second part is dedicated to provisions on contract law and provisions that regulate non-contractual legal relations. The third part consists of the final provisions of the OA. The second part of the OA regulates over forty different nominate contracts.

One has to bear in mind that some contracts are also regulated in the first part of the OA (general part of law of obligations): assignment of claim, assignment of contract, assumption of debt, suretyship contract, novation, and settlement. The principle of autonomy of the will, expressed in the Article 2 OA, enables conclusion of valid contracts regardless of the fact that they are not on the list of nominate contracts stipulated by the OA or any other law. Innominate contracts are also regulated by the OA, but only by the general part of the OA and the general part of contract law.


Since 1 January 2010 when the new administrative law came into force, Croatian law also regulates administrative contracts (upravni ugovori). However, because of the fact that contract law belongs to private law, and General Administrative Procedure Act is one of the cornerstones of public law, administrative contracts do not fit into usual categories of contract law. Administrative contracts are a novelty in Croatian contract law and at this point it is difficult to predict various consequences of the new regulation. The new regulation of the administrative contracts provides the conditions for a conclusion of administrative contracts, and establishes jurisdiction of administrative bodies and administrative courts to settle disputes that will arise between the contracting parties of administrative contracts. It is interesting to note that even during the Socialist period contracts between public law subjects and private individuals were considered as civil law contracts, and administrative courts repeatedly denied dealing with disputes between contracting parties. Such cases were referred to ordinary civil law courts. Currently there is a debate in legal theory (and in a much lesser degree in legal practice) about which contracts exactly fall into the category of administrative
contracts. In this respect the most difficult example is the public procurement contract. According to some opinions, based mainly on French law, public procurement contracts are a typical example of administrative contracts. However, there is an opinion according to which public procurement contracts in Croatian law are not administrative contracts. Second opinion is based on the fact that the relation between contracting parties of a public procurement contract is not subordinated as it should be according to the current regulation on administrative contracts. It should also be noted that the subject matter of public procurement contract is not different in its substance to civil law contracts or commercial contracts (e.g., sale of goods, construction contract).

However, concession contracts fit into the category of administrative contracts, but are on the basis of specific regulation in some details closer to the category of commercial contracts. For instance, commercial courts have jurisdiction for disputes that arise out of the concession contract. Parties of concession contract can even agree to submit their dispute to arbitration. Because of the fact that concession legislation is in respect to the general administrative law so-called *lex specialis*, it excludes the application of the general provisions on jurisdiction of administrative bodies and administrative courts in the matters of concession contracts.

§4.02 FORMATION OF CONTRACTS

[A] Principle of Autonomy of the Will and Consensus of Contracting Parties

Civil law and commercial law as branches of private law are generally based on the principle of autonomy of the will, which in the field of contract law means freedom of contract. Each contracting party freely decides to enter into contractual obligation, to determine its content, to choose with whom they will conclude the contract, and so forth. By virtue of expressing consent, every person is exercising the freedom to contract. Consent to a contract can be declared by words, accepted signs or conduct, which enables that existence and content of consent, but also the identity of a person, can be established with certainty (Article 249/1 OA). Consent to a contract must be free and serious (Article 249/3 OA).

According to the Article 247 of the OA a contract is concluded when parties reach an agreement on the essential terms of contract. The OA regulates the conclusion of contracts on the basis of very well-known mechanism of accepting an offer which contains essential terms of a contract and intention to be bound by the contract.

Essential elements of a contract are the minimal content of a contract. If the contracting party did not reach an agreement on essential elements, a contract is not concluded. Typical examples of essential elements of sale contracts are the object of the sale and the price. Contracting parties do not have to arrange every detail of their transaction, because the OA provides rules on different aspects of contract (e.g., rights and obligations that arise from the contract, rules on time and place of performance,
rules that deal with defective performance or non-performance of contractual obligations). These elements are referred to as natural elements of contract. For instance, natural element of non-gratuitous (onerous) contracts is the liability for defects of object of contract. Because it is a natural element of a contract, the liability for defects does not have to be explicitly mentioned in the text of a contract. On the contrary, if contracting parties do not want to be held liable for defects, they must explicitly exclude liability as a natural element of a contract. Exclusion of the liability for defects in certain situations may be invalid (e.g., if a seller knew that a defect existed and concealed it to a buyer).

Apart from essential elements and elements implied by a law, a contract can contain so-called non-essential elements. Non-essential elements must be explicitly included in a contract in order for them to take effect between contracting parties.

The OA also regulates pre-contractual stage of negotiations. According to the Article 251/1 of the OA each party of negotiations is free to withdraw from negotiations. Naturally, negotiations do not have to finish successfully in the sense that a contract is concluded. The importance of the provision that regulates negotiations is that it introduces pre-contractual liability (predugovorna odgovornost) in Croatian contract law. Therefore, a party who is negotiating contrary to the principle of the good faith or has withdrawn from negotiating contrary to the same principle is liable for damages to the other party (Article 251/2 OA). Pre-contractual liability also extends to unauthorized use of confidential information obtained during negotiations, regardless of the fact whether a contract was concluded or not (Article 251/4 OA). Provisions of the OA are applicable in pre-contractual stage based on the principles of the law of obligations, most notably the principle of the good faith. Parties are obliged to conduct their affairs in accordance with the principle of the good faith not only after the conclusion of a contract, but also during the formation of a contract (Article 4 OA).

### [B] Obligatory Conclusion of Contracts

Croatian contract law recognizes a possibility that a contract is concluded without the consent of one party. According to the Article 248/1, if somebody is bound by the law to conclude a contract, the other party of a future contract is entitled to claim the conclusion of a contract without any further delay. Croatian contract law also recognizes situations when law supplements consent by providing for a content of contract (Article 248/2 OA). Obligatory conclusion of contract and obligatory content of contract diminish the importance of the principle of autonomy of the will as one of the cornerstones of contract law. Examples of obligatory conclusion of contract can be found in the field of public services, which are provided within a realm of private law (public transport, health care, water-supply, supply of electricity and gas, etc.) and insurance law. In some of these cases obligation to conclude a contract on a side of service providers can be justified because of the fact that service providers are free to choose whether they are going to pursue a certain economic activity. Consequently, even if they are not free to decide whether they are going to conclude a particular
contract or not, they are free to choose whether they are going to work in the area that limits the freedom of contract.

[C] Conclusion of Contracts

[1] Offer

A contract is concluded if and when contracting parties reach an agreement on essential elements of a contract. An agreement can be reached in different ways, but one of the methods is typically recognized by contract law. Instead of a more general formulation, according to which a contract is concluded when parties reach an agreement, one could state that contract is concluded at the moment when an offer was accepted. Croatian contract law also relies on offer and acceptance as instruments for conclusion of a contract.

An offer (ponuda) is an act which serves as an initiative to conclude a contract. An offer is binding from the moment when it was received by the party to which it was directed. Because of the fact that contract is concluded at the moment of acceptance of an offer and that no further actions are necessary, the offer must contain all relevant elements of a future contract, or at least the essential elements of a future contract.

From the moment when an offer was received by the person to whom it was addressed, the offer cannot be unilaterally withdrawn by the offeror. The offeror can withdraw the offer only if the declaration of revocation reaches the offeree before or at least at the same time when the offeree has received the offer (Article 257/2 OA). This means that the offeror who wants to withdraw an offer must use faster mean of communication for the declaration of revocation (e.g., if the offer was sent to the offeree by the post, revocation can be done by the express courier service), which is in some situations impossible (e.g., if the offer was sent via e-mail). Offeror is bound by an offer for a certain period of time. How long that period lasts depends on the content of an offer and on whether parties negotiate conclusion of a contract directly or indirectly. The content of an offer is relevant for this issue because the offeror is entitled to determine the period of time in which the offer shall be binding. If the offer itself does not contain the provision on its time limit and parties negotiate conclusion of contract directly, the offer is binding only for the short period of time. If such offer is not accepted immediately, it expires (Article 263/1 OA). To conduct negotiations directly means that parties are in the position to answer to any statement of the other party without any delay. Legal theory and legislation use a term ‘the conclusion of contract among the present parties’. In this sense parties do not have to be present at the same geographical location. Therefore, the conclusion of a contract among the present parties also takes place if the parties negotiate during a telephone conversation, but also if they negotiate with the help of their representatives. An offer to an absent person (offer by correspondence) lasts longer. It shall be binding for the offeror for the time the offer takes to reach the offeree, to be considered and for the time the reply takes to reach the offeror (Article 258/4 OA). In case law it was established that this meant a period of eight days. However, this period can vary because it depends, among other
factors, on means of communication used by the offeror and the offeree. If they use modern technology to communicate, that period can be reduced drastically. After elapse of the time during which the offeror is bound by an offer, the offer expires.

Offer will not expire as a consequence of the death of the offeror or if the offeror lost capacity to act (e.g., because of mental illness), unless intent of the parties, usages or a nature of contract suggest otherwise (Article 267 OA).

Offer does not need to be directed to any specific person. An offer directed to an undetermined number of persons (general offer) is in this respect valid. The OA considers the display of goods with the statement of price (e.g., in shop windows) as an offer (Article 255 OA). However, advertisement is not an offer but an invitation to treat (Article 256/1 OA).

A provision of the offer stipulating that silence shall amount to acceptance is invalid, unless the parties have already established business relations regarding the sale of certain goods or in a case when a person in the course of his or her business handles affairs of clients, such as attorneys-at-law or forwarding agents (Article 265/2-4 OA).

[2] Acceptance

The acceptance (prihvat) of an offer is a declaration of the offeree that he or she accepts the offer. The acceptance of an offer can be explicit or implicit. Implicit acceptance of an offer takes place if, for example, the offeree pays the price stated in the offer. The acceptance of an offer can amount to a counter-offer, which means that the offer was declined and a new offer was made by the offeree, who from that moment overtakes the position of offeror, and the offeror then becomes offeree (Article 264 OA). The offer can be declined regardless of the fact that the wording of acceptance may suggest otherwise. It is also important to note that, if the offeree replies to the offeror that he or she is accepting the offer as such, but at the same time proposes, for example, a different price, the offer is declined and the acceptance amounts to a new offer (counter-offer).

An offer can be accepted only before it expires. If it was accepted after it had expired, the acceptance amounts to a new offer, and the offeree becomes the offeror (Article 266/1 OA). However, a late acceptance can still lead to the conclusion of a contract, but only if it was dispatched before the offer expired and if the offeror knew or ought to have known that it was dispatched on time (e.g., on the basis of date on the stamp if it was sent by the post) (Article 266/2 OA). Even then the offeror can prevent the conclusion of a contract, if the offeror the very next day after receiving of late acceptance, notifies the offeree that he or she does not consider to be bound by the offer any more (Article 266/3 OA).

By accepting an offer, the contract is concluded (Article 252/1 OA). For various reasons the place where a contract is concluded can be important. A contract is deemed to be concluded in the place of the offeror’s principal habitual residence or place of business (Article 252/2 OA).
The OA explicitly regulates the conclusion of contracts among absent parties (offer and acceptance by correspondence). The provision of the Article 262/1 of the OA provides that an offer is accepted at the moment when the offeror receives the acceptance from the offeree. In this respect the OA is clearly based on the so-called receipt theory. The acceptance of an offer, as a matter of principle, cannot be withdrawn, unless a notification of withdrawal was received by the offeror at least at the same moment as the acceptance (Article 262/3 OA).

The OA also contains provisions that explicitly qualify certain technical methods of conducting negotiations as conclusion of contracts between absent parties. For instance, according to the Article 263/3 OA conclusion of contract via fax machine is conclusion of contract between absent parties. However, the Article 263/2 OA provides that conclusion of contract during telephone conversation or by radio contact falls outside the scope of application of rules on conclusion of contract among absent persons. Conclusion of contract by electronic means (e-mail, web shops, etc.) cannot be uniformly qualified as either conclusion of contracts between present parties or conclusion of contracts among absent parties. If the particular way of electronic communication enables contracting parties to conduct negotiations directly, which means that each party can immediately respond to the proposal of the other party, rules on conclusion of contracts between present parties will be applicable (Article 293/2 OA). Conclusion of contracts by using e-mail falls into the category of conclusion of contracts between absent parties, even though there is a possibility to immediately reply to a received e-mail. However, e-mails are still not used as an instant messaging system. Whether this categorization will change due to the fact that modern mobile phones are capable of sending and receiving e-mails is yet to be seen.

§4.03 VALIDITY OF CONTRACTS

[A] General Remarks

Not every acceptance of an offer will result in valid contract and its consequences. In order to be valid, certain conditions must be fulfilled. Croatian contract law sets forth following conditions of validity of contracts: (1) capacity of the parties, (2) absence of defects of consent, (3) object of contract must be possible and determined, and it must not be illicit, (4) motive of contracting parties must not be illicit and, exceptionally, (5) the contract must be concluded in a certain form.

[B] Capacity of Contracting Parties

Croatian law and legal theory recognize two different aspects of capacity of contracting parties: legal capacity and capacity to act. Legal capacity (pravna sposobnost) is a capacity to bear rights and obligations. Every natural and legal person has legal capacity. Without legal capacity there can be no legal subject (person). Person acquires a legal capacity at the same moment when it comes into existence – natural person at the moment of birth, and legal person at the moment when it was established. A
natural person loses legal capacity at the moment of death. In a case of missing person court can declare a missing person as deceased, if conditions prescribed by the law are met. Legal person loses legal capacity at the moment when it ceases to exist. Legal capacity is not transferable to other persons.

Capacity to act is a capacity of a person to acquire rights and obligations by his or her own acts. Like a legal capacity, capacity to act is not transferable from one person to another. Capacity to act of natural persons serves as a means to protect his or her interests. A natural person acquires the capacity to act at a certain age. In Croatia, a natural person acquires the capacity to act at the age of 18, or earlier if he or she gets married with the approval of the court (court can approve the marriage if the spouses are of the age of 16) or if he or she becomes a parent and is, at the same time, of the age of 16. A person at the age of 15 can conclude the labour contract with parental approval, and a minor who concluded the labour contract has the capacity to act in relation to that contract and also regarding the income acquired during the employment. Croatian law does not recognize different degrees of the capacity to act, and therefore natural persons younger than 18 do not have the capacity to act at all, unless they get married or become parents. Persons younger than 18 are considered to be children, incapable of conducting their affairs. However, in everyday reality children of a certain age start to conclude contracts, which are effectively null and void. However, in Croatian legal practice this problem did not appear.

Because of various reasons, natural persons of the age of 18 or older sometime cannot attend their affairs (e.g., persons with mental disorders). If this is the case, court can limit or even completely remove the capacity to act from a person. Court shall limit a person’s capacity to act in a sense that the person cannot conclude certain contracts without the approval of a legal representative. If the person whose capacity to act is limited concludes the contract, such contract without the approval of a legal representative will be avoidable (Article 276 OA). In the case of complete removal of the capacity to act, a contract will be null and void. Subject-matter of removal and limitation of capacity to act is regulated by the family law.

The requirements regarding legal capacity and the capacity to act also apply on legal persons. The difference in comparison to the capacity to act of a natural person is a consequence of the fact that natural persons are human beings, and cannot act on their own best interests before a certain age. Legal persons acquire legal capacity and the capacity to act at the same time because they do not have to wait until adulthood to obtain the capacity to act like natural persons. However, the legal capacity of a legal person is more limited because legal persons are established to fulfil a certain purpose and therefore have to act within the field of its activity. Natural persons have broader field in which they can act. However, contracts concluded by a legal person outside of the scope of the legal person’s field of activity are legally valid (Article 274/2 OA), which is a clear proof that Croatian law does not support the ultra vires doctrine. Unlike natural persons, legal persons always have the complete capacity to act.
[C] Defects of Consent

Consent of contracting parties to a contract will be valid if the will of the parties corresponds to what was declared by them. If declaration of will of a person does not correspond to the actual will, consent is defective. The same can occur in the situation when declaration corresponds to the will but the will itself suffers from certain defects. Absence of defects of consent is one of the conditions of validity of a contract.

[1] Duress

There can be no consent if one party has extorted the consent of the other party. If the consent of one party is a result of physical force a contract is null and void (Article 279/3 OA). In this respect one has to make a distinction between physical force (fizička sila), and threat (prijetnja). An example of physical force is a case when one party holds a hand of the other party and forces him or her to sign a contract. Only physical force results in nullity of a contract.


Contract concluded as the consequence of a threat (prijetnja) is avoidable (Article 279/1 OA). In this respect it is irrelevant whether a threat originated from the contracting party or a third person. A threat has to be serious, which means that it must be directed towards life, body or other important good of the contracting party or a third person (Article 279/2 OA). A threat also has to be illicit (e.g., a threat of a lawsuit is not illicit and consequently will not affect the validity of a contract). Provisions on threat as a reason of invalidity of contract are also applied in other areas of private law (e.g., property law).

[3] Error

The error (zabluda) invalidates consent and causes avoidance of a contract, but only in a case of fundamental error. The new OA abandoned the absence of fault, and therefore the contract can be avoided even if error was a consequence of the fault of a party. At the first glance this could lead to legal insecurity, while a contracting party who erroneously consented to a contract could avoid the contract regardless of a fault. However, if the contract is avoided, the erroneous party will be held liable for damages to the other party, which will without any doubt discourage the erroneous party from seeking the avoidance of the contract (Article 280/3 OA). Even if the party who seeks the avoidance of the contract acted without any fault, he or she will be held liable for damages to the other contracting party, because the liability in this case is based on the system of strict liability.

The OA provides five cases when error is fundamental: error regarding the object of a contract, error regarding the significant quality of an object, error regarding the identity of a contracting party, error in motive (but only regarding gratuitous contract),
and finally, error concerning the fundamental according to the usages or according to the intention of parties (Article 280/1 OA). All of these cases are in legal theory qualified as error regarding the facts. This qualification is important because the error regarding the law (e.g., if contracting party ignorant of the legal consequences of a particular type of contract, consents to it) falls outside of the scope of error regarding the facts. Error regarding the law does not invalidate consent, and consequently a contract will be valid. Error regarding the value of the object of the contract is not dealt within the provisions that regulate error, but is, because of reasons of the legal tradition, regulated separately as laesio enormis.

Legal theory defines error as a misconception on a certain fact. The OA does not explicitly deal with the case when one contracting party completely lacks any knowledge about a certain fact (ignorance). However, legal theory equals the cases of error and ignorance, and consequently the rules on error are applicable on both error, in more narrow meaning, and ignorance.

In order to avoid the contract because of the error, a party that has erroneously concluded the contract has to initiate the avoidance of the contract within the prescribed period of time (one year from the day when contracting party discovered an error, but not later than three years from the conclusion of contract). However, even if the avoidance of the contract was initiated, the right to avoid a contract can be extinguished by the action of the other contracting party. If the other party is prepared to fulfill a contract in a way as the erroneous party has understood it, the contract cannot be avoided (Article 280/4 OA).

[4] Dissensus

The dissensus (nesporazum) is a defect of the consent regulated by the OA separately from the error. Opinions of legal theory related to dissensus and error are divided. According to some legal writers, dissensus exists if by objective criterion it can be determined that contracting parties did not reach consent on essential elements of a contract or on a legal nature of contract, regardless of the fact that they think they did (Article 282 OA). In this way, the dissensus is distinguished from the error. Error exists if one party concluded a contract because of misconception regarding a certain fact. However, dissensus could be considered as a specific type of error. Regardless of the fact which opinion shall prevail, it is important to point out that a contract in case of dissensus is null and void. As stated earlier, error will cause avoidance of the contract. Up to this moment, Croatian case law did not tackle this issue, and it is yet to be seen whether any practical problem will arise out of the unclear distinction between dissensus and error.

[5] Fraud

The fraud (prijevara) in the sense of the OA is closely connected to the error. The fraud is defined as a situation when one party causes the error on the side of the other party or keeps the other party in such state with the aim of concluding a contract (Article 284/1
If one party acted fraudulently, the contract will be voidable (Article 284/1 OA). Fraud can be committed not only by action, but also by omission (Article 345/1 OA) if one party notices the error of the other party and intentionally omits to warn the other party.

The fraud can also be committed by a third person. The validity of a contract, if fraud was committed by a third person, depends on the position of the other contracting party. If the contracting party, at the moment of the conclusion of contract, knew or ought to have known that his partner was fraudulently brought into a contract, a contract will be avoidable (Article 284/3 OA). In a case of gratuitous contract, a contract will be avoidable regardless of the position of the other contracting party (Article 284/4 OA). This is yet another example where gratuitous contracts become invalid easier than non-gratuitous contracts. The logic is always the same. Non-gratuitous (onerous) contracts are more significant for legal order because they are the backbone of business, and thus must be protected in the way that they do not easily become invalid. Gratuitous contracts, however, regardless of their significance for particular contracting parties, are on a more general level not so important, and therefore legal order can impose additional conditions of their validity, or, to put it in other words, they can be invalid more often than non-gratuitous contracts.

Because of the fact that in the basis of fraud there is an error, a fraud is sometimes referred to as a qualified error. However, there is an important difference between error and fraud. If fraud was committed, error does not need to be fundamental (Article 284/1 OA). The fact that error has to be fundamental protects the contract from invalidity. Such protection is not necessary if an error was induced by the other contracting party, or by a third person, but with the knowledge of the contracting party.

Fictitious (Simulated) Contract

Contracting parties may, for various reasons, only pretend that they are concluding a contract. If this is the case, they do not actually want the effects of the contract. For instance, they can act in this way to circumvent mandatory provisions of law that prohibit conclusion of a certain contract (e.g., if the conclusion of contract of sale for a particular item is forbidden, they may pretend that they want to conclude a long term lease without actual intention to return the thing that is the object of a contract, after lease expiry), to pay lower taxes (e.g., if the tax rate on donation contract is lower than the tax rate on contract of sale), to fraud creditors (e.g., by fictitious increase of the value of patrimony of one contracting party), etc. Because of the fact that in case of fictitious contract (simulirani ugovor) parties do not want to conclude a contract, the contract will be null and void (Article 285/1 OA). However, if fictitious contract was concluded in order to conceal other contract, fictitious contract will be null and void, while contract that was concealed may be valid depending whether it fulfils the conditions for validity of a contract (Article 285/2 OA).

Position of third persons regarding fictitious contract is protected if the third persons did not know that a contract is fictitious. In such case, nullity of the contract does not affect their rights and interests (Article 285/3 OA).
Reservatio Mentalis

Legal theory and textbooks on contract law mention reservatio mentalis, as the only example of defect of consent that does not invalidate the contract. This is the case despite the fact that the OA is silent on this type of defect of consent. If one party made an offer without the real intention to conclude the contract, and if the other party is ignorant of that, valid contract will be concluded regardless of the fact that defect of consent is present. The reason for that is obvious. One cannot intentionally declare false consent and later invoke defect of the consent. Therefore, reservatio mentalis serves to protect legal security.

Object of the Contract

The object of the contract is a performance (činidba) of contractual obligation, which means performance that consists of either giving (davanje), activity (činjenje), omission (propuštanje) or sufferance (trpljenje) (Article 269/1 OA). The object of the contract is performance that the debtor owes to the creditor. Legal theory emphasizes that the obligation to pay a certain amount of money is a separate type of obligation – so-called monetary obligation (novčana obveza), even though in the past the same was considered to be the obligation to give. An argument in favour of such approach is that, in the case of late payment, a debtor is obliged not only to pay the due amount but also to pay legal interest. This is specific only for monetary obligations, and all other obligations to give (dare) are in this respect different than the monetary obligations. In order to conclude a valid contract the object of the contractual obligation must be possible, allowed and determined (Article 269/2 OA). If any of these requirements of a contractual obligation are not fulfilled, the contract is null and void (Article 270/1 OA).

Initial Impossibility of Performance

If performance of the contractual obligation is impossible a contract is null and void. However, not every type of impossibility of contractual obligation will cause nullity of a contract. Law and legal theory differentiate between initial impossibility (impossibility that existed in the moment of the conclusion of a contract) and impossibility that occurred after the conclusion of a contract. Only initial impossibility caused invalidity of the contract. Impossibility that occurs after the contract has been concluded can terminate a contract, but it cannot make it invalid. In this respect one also has to distinguish between a subjective impossibility and an objective impossibility. The subjective impossibility of performance means that the contracting party who is obliged to perform contractual obligation (debtor) is not able to perform it. Subjective impossibility does not lead to invalidity of a contract. Only if nobody can perform contractual obligation a contract will be null and void because of the objective
impossibility. Thus, impossibility of performance will cause a contract to be null and void only if it is at the same time initial and objective.

[3] Illicit Content of a Contract

Provision of the Article 2 of the OA sets limits to principle of freedom of contract, because contracting parties can freely arrange their contractual relations, but at the same time they must respect the principles of the Constitution of the Republic of Croatia, mandatory provisions and public morality. Same criteria are used for determining validity of a contract. Provision of the Article 271 of the OA provides that the object of contract is illicit if it is contrary to the Constitution, mandatory provision of law or if it is immoral. If the object of a contract is illicit, the contract is null and void. In most cases of nullity of contract because of the illicit content, a contract is null and void because it is contrary to mandatory provisions. Croatian contract law also regulates nullity of a standard form contract. If the terms of a standard form contract, contrary to principle of the good faith, cause obvious inequality in the respect of rights and obligations of the contracting parties to the detriment of the contracting party of the drafter of standard form contract or if such terms compromise the fulfilment of the purpose of the contract, they will be null and void (Article 296/1 OA). These rules apply to contractual terms that have been pre-formulated for a larger number of contracts that one party (drafter) proposes to the other contracting party, no matter whether they are included in a form contract or referred to in the contract (Article 295/1 OA).

Immorality of the object of contract is a more flexible category that serves to nullify the contracts that are contrary to public morality, regardless of the fact that no explicit legal provision was violated. An example for a contract contrary to public morality is a contract of loan for the purpose of illegal gambling.

[4] Undetermined Object of Contractual Obligation

The object of contractual obligation must be determined by a contract. It can be determined directly, but also indirectly if the contract contains a relevant date in order to determine the object of contractual obligation, or if the parties have referred the determination of the object of contractual obligation to a third person (Article 272/1 OA). If the third person does not determine the object of the contractual obligation, the contract will be null and void (Article 272/2 OA).

[5] Disproportional Values of Performance and Counter-Performance

In the case of non-gratuitous (onerous) contracts, contracting parties can freely determine whether the values of performance and counter-performance will match each other in respect of value. Only if the disproportion regarding the values of performance and counter-performance exceeds a certain degree, the contract is invalid. The OA regulates in this respect laesio enormis (prekomjerno oštećenje). Laesio enormis
was an invention of the Roman law and has been kept in many legal systems to this day but at least in some jurisdictions it went through significant reforms. In Croatian law it applies to all non-gratuitous contracts (and all objects – movable and immovable objects or rights) if there is obvious disproportion between values of performance and counter-performance, and if the party who suffered laesio enormis did not know or ought to have known the real value of the object of contract (Article 375/1 OA). The lack of knowledge on the side of one party represents significant alteration in comparison to the regime of Roman law, and brings laesio enormis to the area of error. This is a consequence of the fact that the contracting party who has suffered harm because of the laesio enormis in order to seek remedy must be ignorant on the real value of the object of a contract. As it was mentioned earlier, ignorance of the significant element of the contract is in the same regime as an error on the same matter. Therefore, ignorance of the real value of the object of a contract is in its essence the same as an error. However, deeply rooted legal tradition has prevailed. Provisions on laesio enormis in the OA are regulated separately from provisions on error and other defects of consent. Both legal theory and case law follow that pattern and consider it to be separate issues in respect of error.

In the case of laesio enormis, a contract is avoidable. A party who has suffered harm is entitled to seek avoidance of a contract within one year from a moment of the conclusion of contract (Article 375/2 OA). After one year the right to avoid a contract ceases to exist. A contract will not be avoided if the other party exercises his or her right to rectify the contract by paying the real value (Article 375/4 OA).

Aleatory contracts cannot be avoided because of laesio enormis, and the same applies to commercial contracts, public sale and cases when a higher price has been paid because a buyer had a particular intention to obtain the object of a sale (Article 375/5 OA).

The OA recognizes one more case of invalidity of contract that is connected to disproportion of value of performance and counter-performance, and, at the same time, represents an example of a contract contrary to the mandatory provisions of law and public morality. If there is an obvious disproportion between values of performance and counter-performance, which is the result of one contracting party taking advantage over the other party’s state of emergency, economic difficulties, lack of experience or improvidence, a contract is null and void (Article 329/1 OA). A party that suffered harm is entitled to claim diminishing of obligation to an equitable level (Article 329/3 OA). This claim has to be submitted to the court within five years from the moment of conclusion of a contract (Article 329/4). If the court approves the claim, the contract will become valid.

**[E] Motive of Contracting Parties**

According to the Article 273/1 of the OA, motives generally do not influence the validity of contracts. However, if a motive (pobuda) of one party was at the same time illicit and decisive reason to undertake the contractual obligation, and the other party knew or ought to know it, the contract will be null and void (Article 273/2 OA).
contract in question was gratuitous, the contract will be null and void in the case of illicit motive, regardless of the position of the other party. This is yet another example how legal order provides less protection to gratuitous contracts.

**[F] Formal Requirements**

Having the autonomy of the will or the freedom of contract, among other aspects, means that the contracting parties are free to choose a form in which they are going to conclude a contract (Article 286/1 OA). A contract must be concluded in a particular form only if law prescribes so or if contracting parties themselves agreed that a form is a condition of validity of a contract (Articles 286/1 and 289/1 OA). If the form of a contract is prescribed by law all subsequent alterations or annexes of contract must be in a prescribed form (Article 286/2 OA), while if it is agreed, alterations or annexes of a contract can be made informally (Article 289/2 OA). If a contract is formal, only supplementary points of the contract can be made verbally, and the same is true of contract clauses that are aimed to mitigate the obligations of one party if the form of a contract has been prescribed in an interest of contracting parties (Article 286/3-4 OA).

When it comes to rescission of a formal contract the agreement to rescind a contract (again a contract by its legal nature) can be informal, at least if the formality of a contract has arisen out of the agreement of contracting parties (Article 289/2 OA). If a contract is formal on the basis of law, rescission can be done informally, unless the law itself explicitly or implicitly suggests otherwise (Article 288 OA).

Croatian law prescribes a form of the contract (oblik ugovora) as a condition of its validity in numerous cases. The written form is the most frequent type of formal contract (suretyship, sale of immovable property, instalment sales contract, donation of immovable property, lease of immovable property, construction contract, license contract, commercial agency contract, allotment contract, bank account contract, and credit contract). The requirement of a written form is fulfilled when the contracting parties sign a contract (Article 292/1 OA). Written contract does not have to be in a single document, while the requirement of a written form is satisfied if each party signs a copy intended for the other party (Article 292/3 OA). The requirement of a written form is also satisfied if the contracting parties exchange written form and written acceptance. Some contracts have to be concluded in a so-called qualified written form, which means forms of judicial record and/or public notary act (e.g., lifelong support contract, contract of support until death, consensual donation contract). The involvement of a court or a public notary ensures the protection of interests of the contracting party because the judge and the public notary are obliged to explain legal consequences of a contract to the contracting parties and have duty to refuse the conclusion of contract if they establish that a contracting party lacks the capacity to conclude a contract.

The OA is not the only law that prescribes the form of a contract as a condition of the contract’s validity. As a matter a fact, there are numerous examples of different laws that prescribe the form of a contract:
- Act on Ownership and Other Property Rights (Zakon o vlasništvu i drugim stvarnim pravima). In a field of property law the written form is prescribed for contracts and other legal transactions related to rights in rem on immovable property. Land Registration Act (Zakon o zemljišnim knjigama) prescribes additional formalities, while it requires the certification of signature for unconditional establishing, transfer or extinction of rights on immovable property.

- Succession Act (Zakon o nasljedivanju). Contracts that are regulated by Inheritance Act must be concluded in the qualified written form: a form of judicial record or a public notary act.

- Act on Flat Rental (Zakon o najmu stanova) and Act on Lease and Sale of Business Premises (Zakon o zakupu i prodaji poslovnog prostora). Act on flat rental prescribes the written form for contracts on flat rental (Article 4/2 Act on Flat Rental), while Act on Lease and Sale of Business Premises prescribes the written form for the lease of business premises, and the qualified written form (form of public notary act) if the owner of business premises is the Republic of Croatia, or local and regional municipality (Article 4/3 Act on Lease and Sale of Business Premises).

- Public Procurement Act (Zakon o javnoj nabavi). The written form is prescribed for public procurement contracts (Article 2/26 Public Procurement Act).

- Concession Act (Zakon o koncesijama). The written form is prescribed for concession contracts (Article 30/5 Concessions Act).

- Act on Real Property Agency (Zakon o posredovanju u prometu nekretnina). Contracts on real property agency must be in writing (Article 15/2 Act on Real Property Agency).

Civil procedural law, as a matter of principle, does not require written evidences of concluded contracts. However, this is true only regarding civil litigation. In civil procedure of enforcement only written evidences are admissible, and the same is true, with some minor exceptions, of proceedings conducted by a land records division of the court.

[G] Types of Invalidity of Contracts

[1] Nullity of Contracts

The nullity of a contract (ništetnost ugovora) is a more severe type of invalidity of a contract. The contracts that are null and void do not produce legal effects of a valid contract. To state this in a different manner, a contract that is null and void is like a contract that has never been concluded. The nullity of a contract takes effect without any action of the contracting party from the moment of the conclusion of contract. If a contract is null and void, each contracting party is entitled to refuse to perform the contractual obligation and is entitled to claim the return of what was given. Each contracting party, a third person or a public attorney can initiate court proceedings to seek the declaration of nullity.

A contract is null and void if the contracting party lacks legal capacity or capacity to act. A contract is null and void in some cases of defects of consent (duress, dissensus, fictitious contract), and also if the object of a contract is impossible, illicit or not determined enough. Nullity of a contract occurs if the motive of the contracting party is illicit, and finally in the case of a formal contract if it was concluded informally.

Nullity of a contract serves to protect the public interest, and therefore, among other authorized persons, the public attorney is entitled to initiate the proceedings to declare the nullity of a contract. Otherwise, any person with interest could request that the court declares the nullity of a contract. Declaration of nullity is not limited by elapse of time.

[2] Voidable Contracts

Voidable contracts (pobojni ugovori) have legal effects of valid contracts. Unlike contracts that are null and void, voidable contracts lose effects of valid contracts only if the contracting party invalidates it. In continental Europe there are two main approaches to voidable contracts. In certain legal orders unilateral declaration of will, sometimes referred to as a notice, is sufficient, while in the other judicial proceedings have to be initiated. The prevailing opinion in Croatian case law and theory is that voidable contract has to be annulled by the judgment of a court. Therefore, if the contracting party wants to avoid a contract litigation must be initiated. It is interesting to note that the OA does not explicitly require the involvement of a court.

Unlike nullity of contract, a claim concerning avoidable contracts is limited in several different aspects. First, avoidance of a contract can be claimed only by the contracting party on whose side is a cause of avoidance. Second, after the lapse of time prescribed by the law, avoidance is precluded, and a voidable contract becomes valid. Unless otherwise provided by a law, time limit is one year from the moment when the party learned about the reason of avoidance of a contract, but not later than three years from the day when the contract was concluded (Article 335 OA). If a contract is avoided by a court there are no significant differences in comparison to contracts that are null and void. After a contract has been avoided, the ownership of the property is
automatically returned to the original owner. This is the consequence of the fact that avoidance of a contract takes effect retroactively.

Reasons for avoidance of a contract are: threat, error, fraud, limited capacity to act, and laesio enormis. Though similar in its title, the avoidance of contracts and other legal acts because of harming creditor’s interests (actio Paulina), in common law jurisdictions known as fraudulent conveyance, does not fall into the category of avoidable contracts. Avoidance of contracts and other legal acts because of the harming creditor’s interests is action directed against valid contracts, if debtor cannot fulfill his or her obligation, and at the same time debtor’s assets are not valuable enough to allow the creditor to collect the debt in a course of enforcement proceedings (Article 66 OA).

§4.04 THE EFFECTS OF CONTRACT

If a contract is valid, the effects of the contract (učinci ugovora) depend on its content. Nominate contracts have typical content provided by law, while innominate contracts draw their effects from the will of the parties. The principle rule is that a contract creates rights and obligations between the contracting parties (Article 336/1 OA). However, a contract can also serve as a means to transfer an existing right or obligation. The effects of a contract extend to the universal successors of the contracting parties, unless it is otherwise agreed by the parties or it is a consequence of the nature of a contract (Article 336/2 OA). A contract can also be a legal basis for the right of a third party (Article 336/3 OA). The contracts in favour of a third party do not form a separate type of contract, but are simply contracts with the contract clause for the benefit of a third person.

Unlike French law, in Croatian contract law the contract itself does not produce direct legal consequences in the field of property law. If, for example, a contract of sale is concluded, the buyer acquires the right to claim the performance of contract, not the ownership itself. Ownership will be acquired when the seller performs the contract (delivery of movable, entry in the land register if object of sale is immovable) (Articles 116/1 and 119/1 Act on Ownership and other Property Rights). Therefore, a contract that serves as the legal basis for transfer of ownership and transfer itself are two separate acts.

However, if the content of contractual obligation is the activity of a debtor, the OA follows the pattern established in French law. In order to determine what is being owed, one must establish whether the debtor’s duty is to achieve a specific result (obligations de résultat) or to perform a certain action without the guarantee that the result will be achieved (obligations de moyens).

§4.05 PERFORMANCE OF CONTRACTUAL OBLIGATIONS

Croatian contract law regulates many different aspects of the performance of contractual obligations, within general rules on performance of civil law obligations. In this respect it is irrelevant whether the debt originates from a contract or another source of
obligation. Contractual obligations are different only because of the fact that the contracting parties are in the position to arrange various aspects of performance by the virtue of contract. Statutory rules on performance are of dispositive nature and will be applicable only if contracting parties did not agree otherwise.

If contracting parties did not agree otherwise, the law provides specific rules on issues such as who is authorized to claim and accept the performance on one hand, and who is obliged to perform the contractual obligation on the other (Articles 161, 162 and 164 OA). Besides other issues relevant for performance of contractual obligation, the OA also regulates details regarding the object of performance (Articles 166-170 OA), time (Articles 173-177 OA) and place (Articles 178-179 OA) of performance, and discharge of the debtor in the case when the creditor refuses to accept the performance without just cause (Articles 184-194 OA).

§4.06 NON-PERFORMANCE, DEFECTIVE PERFORMANCE AND LATE PERFORMANCE

[A] General Remarks

Non-performance of a contract is regulated by three different sets of rules of the OA. The first set of rules sanctions non-performance regardless of the fact whether obligation arises from the contract or another source of obligation (Article 9 OA). For instance, provisions on interest for late payment are applied to both contractual and non-contractual obligations. The second set of rules is provided for non-performance of contractual obligations (Articles 342-347 OA). They apply on non-performance of different types of contracts, though certain classes of contracts are in the foreground. In this respect synallagmatic and non-gratuitous contracts are in many respects more important than the other types of contracts. The third set of rules are rules on non-performance that are specific for each and every type of nominate contracts regulated by the OA (e.g., sale, loan, construction contract).

When it comes to non-performance one should differentiate cases of non-performance and cases of defective performance or late performance. Non-performance in a more narrow sense means that a debtor did not perform the obligation at all. The defect exists if the object of a contract is not in conformity with the contract, but also in the case when the debtor did not transfer the right to the creditor in accordance with the contract (e.g., because a seller was not the owner of an object) or the right was transferred but at the same time there was a burden upon the object which buyer did not agree to acquire with the transfer of ownership (e.g., real burden on immovable). The late performance means that contractual obligation was not performed in due time.
The Remedies

Specific Performance

The principle remedy for non-performance of contractual obligations is specific performance. A creditor is entitled to obtain the performance of a contract through judicial assistance if necessary. Creditor’s claim is limited to a certain period of time, and the general period of prescription is five years (Article 225 OA), unless law provides otherwise (e.g., prescription regarding commercial contracts is three years – Article 288/1 OA). This is a natural consequence of pacta sunt servanda principle explicitly mentioned in Article 9 the OA. In some cases, specific performance is excluded. For instance, if the object of a contract is destroyed and the object was an individual item (species) which cannot be replaced (e.g., a work of art), the contract itself will cease to exist. If the object was of generic nature, the fact that the object which was supposed to be delivered is destroyed will not lead to extinction of obligation, and the seller will be obliged to obtain a new object and deliver it to the buyer.

The contracting party also cannot claim specific performance if the contract contains a clause with the fixed term in which the performance was due. In such case, the contract will automatically expire (Article 361/1 OA), and the contracting party will be entitled only to claim damages. However, even in this situation a contract can be upheld by a declaration of the contracting party that he or she insists on the performance of the contract (Article 361/1 OA).

The contracting party is entitled to claim a specific performance, but is not obliged to do so. Instead of that, the creditor is entitled to rescind the contract. However, the contracting party is not entitled to rescind a contract immediately. Prior to rescission of contract, the creditor must set an appropriate term for the debtor to fulfill the contractual obligation. If the debtor fails to fulfill the obligation in additional time, the contract is rescinded ex lege (Article 362/2-3 OA). The creditor does not have to set an additional term if it is obvious that the debtor will not fulfill the obligation (Article 363 OA).

Liability for Damages

The OA contains specific provisions on liability for damages in the case of the breach of a contract. In this respect the OA recognizes the standard dichotomy between contractual liability (ugovorna odgovornost za štetu) and non-contractual liability (izvanugovorna odgovornost za štetu). Provisions of non-contractual liability are of general nature, and contractual liability is a special legal regime.

Within the contractual liability, the contracting parties are entitled to regulate the issue of liability for damages that may arise between them. However, by doing so, they must not exceed certain limits, and if they do, their arrangement will be null and void. Croatian law prohibits the exclusion of liability for damage caused by intent or gross negligence (Article 345/1 OA). The clause of exclusion of a liability for ordinary
negligence is valid, but the court can invalidate such clause if it was a result of monopolistic position of one of the contracting parties or unequal position of the parties (Article 345/2 OA). The clause that limits liability is valid, unless the amount of damages is in an obvious disproportion with the limit set by a contract (Article 345/3 OA). The clause that limits the liability will not have effect if a damage was caused by intent or gross negligence (Article 345/4 OA).

In the absence of contractual clause, the amount of damages is limited if the contracting party who breached the contract acted only with the ordinary negligence. If this is the case, the criterion of foreseeability is applied (Article 346/1 OA). If the contracting party acted with intent, gross negligence or fraudulently, he or she is obliged to full compensation. In either case, the debtor is liable for both pecuniary and non-pecuniary damage.

[3] Penalty Clause, Earnest and Forfeit Money

The contracting parties may include a penalty clause (ugovorna kazna) in the contract. A penalty clause is an amount of money or other economic benefit that a debtor owes to a creditor if he or she does not perform his or her obligation, or if the performance was defective, but also in the case of late performance (Article 350/1 OA). The difference between a penalty clause for non-performance on one hand, and a penalty clause for late performance or defective performance on the other, is that in the first case a creditor is entitled either to claim the performance or to claim the amount due on the basis of the penalty clause, while in the second case a creditor is entitled to both the performance and the amount due on the basis of penalty clause (Articles 353/1 and 353/4 OA).

The contracting parties are free to determine the amount of money to be paid on the basis of a penalty clause (Article 351/1 OA). However, a court can diminish the amount owed on the basis of a penalty clause if it is disproportionally high in comparison to a value and significance of the object of a contract (Article 354 OA). Penalty clause is not valid in the case of monetary obligations, because the law provides a creditor with the right to claim interest on late payment.

Penalty clause is related to liability for damages, but one must bear in mind that penalty clause and liability for damages are two separate institutions. A creditor is entitled to claim the amount agreed as penalty clause even if he or she did not suffer any damage as a consequence of non-performance, late performance or defective performance. The only thing that matters is that there was a valid penalty clause. If a creditor suffered damage that exceeds the amount due on the basis of a penalty clause, he or she is entitled to claim full compensation (Article 355/2 OA). However, for the amount that exceeds a penalty clause a creditor must be able to prove conditions of liability for damages.

One contracting party may also pay the other party earnest money (kapara) as a sign that a contract has been concluded. In the case of non-performance, a party that has paid earnest is entitled to claim double amount of earnest money if the other party is responsible for non-performance (Article 304/2 OA). On the other hand, if the party
that has paid earnest money is responsible for non-performance, the other party is entitled to retain the paid amount (Article 304/1 OA). The fact that earnest money has been paid does not entitle a debtor to refuse the performance. Only if earnest money was at the same time as a forfeit money (odustatnina), a debtor can withdraw from the contract by relinquishing paid amount or paying the double amount (Article 307 OA). Forfeit money can also be paid independently from earnest money (Article 306 OA).

[4] **Interest on Late Payment**

If one contracting party fails to fulfil contractual obligation, which consists of paying a certain amount of money, he or she is obliged, apart from fulfilling the principle obligation, to pay interest (zatezna kamata) on late payment as well. The consequences of late payment are regulated not only by provisions of the OA, but also in special legislation on financial transactions.

[5] **Liability for Defects**

Apart from liability for damages, the OA regulates separately liability for a defective performance (odgovornost za neuredno ispunjenje). The performance can be defective in two different ways. The defect can concern the object of a contract (e.g., if there are defects concerning the goods that are the object of a contract). Performance will also be defective if a debtor has not transferred the right on a creditor, which he or she was supposed to do. The latter case is referred to as legal defect. Both of these cases of defects can have same consequences as the non-performance of a contract.

Defects of the object of a contract are regulated within rules on sale contract (Articles 400-422). These rules are applicable to defective performance of all non-gratuitous contracts, unless the law provides otherwise for a specific contract. Provisions of the OA that deal with defective performance were drafted in accordance with the Directive 99/44/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.

Liability for defects of the object of a contract is applicable to all non-gratuitous contracts without the necessity to expressly stipulate it in the contract. If defect of the object exists, a buyer has the right to claim the repair or the replacement, or the reduction of the price and in the end, if issue of defect was not solved, the rescission of contract (Article 410/1 OA). One should differentiate between liability for the defects of the object and guarantee of a seller and/or a producer that exists only if the guarantee statement was issued by either a seller or a producer.

Legal defects can cause the reduction of the price or the rescission of the contract (Article 432/1 OA).

[6] **Right to Withhold Performance**

Right to withhold performance is applied in the case of synallagmatic contracts. Each party is entitled to refuse performance of his or her obligation until other party has
performed his or her obligation, unless otherwise is provided by a law or by a contract (Article 358/1 OA).


[a] Rescission in a Case of Non-performance

If one party does not perform the obligation that arises out of synallagmatic contract, the other party is entitled to claim the performance of contractual obligation or to rescind a contract (raskid ugovora). A contract can be rescinded by unilateral declaration of intent or it can be rescinded ex lege.

A contract will be rescinded ex lege if it stipulates that the performance of contractual obligation in due time is an essential element of the contract (Article 361/1 OA). If a contract contains a stipulation that can lead to ex lege rescission of the contract and if the creditor declares after the expiry of the stipulated time that he or she claims the performance of the contract, a contract will not be rescinded (Article 361/2 OA). The same rule applies if the performance in time as an essential element of the contract is not explicitly stipulated by a contract, but it is a consequence of the nature of the contract (Article 361/4 OA).

If the performance of contractual obligation is not an essential element of a contract, a creditor cannot rescind a contract without giving a debtor additional appropriate time to fulfil the obligation. After the additional time has expired, a contract is rescinded ex lege (Article 362 OA). A creditor can rescind a contract without leaving additional appropriate time if a debtor’s conduct demonstrates that he or she will not perform the obligation in the additional period of time (Article 363 OA). In this case a contract is rescinded by unilateral declaration of intent.

 Croatian law also recognizes rescission of a contract in the case of anticipatory breach. According to Article 364 of the OA, if it is obvious that one party shall not perform the contractual obligation before the time when the obligation is due expires, the other party is entitled to rescind the contract and claim the damages. Rescission of a contract is also possible if the contract has to be performed in instalments and it is obvious that future obligations will not be fulfilled. Rescission of instalments contract has effects only for future obligations as a matter of principle.

However, past performances have no meaning without future performances. A contract can be rescinded in respect of both past and future instalments (Article 365 OA).

In any case, when a creditor wants to rescind a contract, he or she must communicate it to a debtor without delay (Article 366 OA). Contracts cannot be rescinded if only the negligible part of a contract is not performed.

If a contract is rescinded, the contracting parties are released of their obligations, except of the obligation to pay the damages (Article 368/1 OA). If a part of the obligation or the complete obligation of one party was performed before the contract was rescinded, the party who performed it is entitled to claim it back (Article 368/2
OA). Each party owes a compensation for the use of the thing that was returned and interest for money that was paid back (Article 368/4-5 OA).

[b] Rescission in a Case of Changed Circumstances

Croatian law acknowledges the rescission of a contract in the case of changed circumstances (raskid ugovora zbog promijenjenih okolnosti). According to Article 369/1 OA, if the circumstances have changed after the conclusion of a contract in a way that performance of obligation becomes excessively onerous or would inflict excessive loss to one party, and if this change of circumstances was extraordinary and could not be foreseen in the moment when the contract was concluded, a party can claim alteration or rescission of a contract. A contract will not be rescinded even if the conditions are met when the other party offers or consents to equitable alteration of contractual clauses (Article 412/2 OA). In the case of the rescission of a contract on the basis of changed circumstances, the involvement of a court is necessary because of the fact that the contract is rescinded by the judgment of a court.

[c] Rescission in a Case of Defective Performance

A contract can also be rescinded in the case of defective performance. As it has been previously mentioned, defects can reflect on the object of a contract, or can exist in the respect of a right that was supposed to be transferred from one contracting party to the other. In the case of defects on the object of a contract, the rescission of a contract will not follow immediately, but after the expiration of additional appropriate time, during which a defect can be repaired (Article 412/1 OA). If the additional appropriate time has expired and defect was not repaired, a contract will be rescinded ex lege (Article 413/1 OA). A contracting party does not need to leave additional appropriate time if the other party declares that he or she will not perform an obligation or if it is obvious that he or she is not capable of doing so, and also in the case when the purpose of a contract cannot be achieved (Article 412/2 OA). If defective performance took place in the respect of a contract with a clause that stipulates performance in due time as an essential element of the contract, the rescission of the contract will occur ex lege (Article 412/2 OA).

The rescission of a contract because of legal defects will take place in the case of the so-called complete eviction, which means that a buyer lost the possession of an object of sale because the real owner took it. In this situation a contract will be rescinded ex lege. If there was a legal defect, but the object of sale was not taken from the buyer, he or she is entitled either to rescind the contract or to claim the reduction of price (Article 432/1 OA). A seller can avoid the rescission of a contract by removing the claim of a third party (e.g., by paying a third person a sum of money), or delivering another object without legal defects (Article 432/2 OA).
[8] Impossibility of Performance

Croatian contract regulates impossibility of performance (nemogućnost ispunjenja) of the synallagmatic contracts. These rules are applicable only if the impossibility occurred after the conclusion of a contract. In the case of initial impossibility, the contract shall be null and void. If the impossibility of the performance of obligation of one contractual party is a consequence of force majeure that occurred after the conclusion of a contract and before the date when the obligation is due, the obligation of other party ceases to exist (Article 373/1 OA). This is a case when none of the parties is responsible for the impossibility of the performance of contractual obligation. If only one part of the contractual obligation of one party cannot be performed, and neither party is responsible for the impossibility, the other party can rescind a contract if partial performance does not satisfy the needs of a creditor (Article 373/2 OA). If a contract is not rescinded, the other party is entitled to proportional diminishing of his or her obligation.

If one contracting party is responsible for impossibility of performance of the other party’s obligation, the obligation of the responsible party remains, and the obligation of the other party ceases to exist (Article 374/1 OA). However, the obligation that remains is diminished by the benefit that the party whose obligation ceased to exist might have on the basis of that.

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