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Formal Contracts in Central and Eastern European Countries: Agreed Form of Contracts

ABSTRACT: *A requirement to conclude a contract in a certain form may be requested by the legislator (statutory form) or the contracting parties themselves (agreed form). This study examines the agreed form of contracts and the legal consequences arising from non-compliance with that form. First, the study focuses on the form in general, the principle of consensualism as an achievement of modern law, and the types of the form based on various criteria (shape, legal effect, and origin). This is followed by analyses of the agreed form and its functions, variations, advantages, and limitations. The central analyses focus on the approaches of legislators in CEE countries towards the agreed form and legal consequences of non-compliance. Despite the numerous economic, political, and social changes these countries have undergone, the principle of consensualism and the freedom to choose the form of contracts have persisted. Hence, the applicable laws of Poland, the Czech Republic, Slovakia, Hungary, Bulgaria, Romania, Slovenia, Croatia, Serbia, Bosnia and Herzegovina, Montenegro, North Macedonia, and Albania are analysed. The author endeavours to answer what legal effect the agreement has on the form if the contracting parties did not precise whether their form will be the constitutive element of the contract or just the simple proof of its existence. The legal consequences of failing to comply with the agreed form differ across countries: in some, it leads to the nullity of the contract; in others, it makes the contract unenforceable; in certain cases, it*

KEYWORDS: *Form of Contract, Agreed Form, Statutory Form, Ad Solemnitatem Form, Ad Probationem Form, Form as Simple Proof.*

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1.
Introduction

For a contract to be validly formed, certain conditions must be met in the moment of concluding the contract. In the civil law tradition, it is often stated that there are "four plus one" conditions. Therefore, capacity to contract, mutual consent of the expressed wills, the subject matter of the contract (lawful, clearly defined, and possible), and the legal cause (basis) of the contract (lawful, clearly defined, and possible) must always be present. Additionally, the "plus one" or fifth requirement is the form of the contracts, defined as the way in which the intent of the parties is materialised. It is described as a predetermined, external, and visible manner of expressing the content of the parties' intent in legal transactions.[1]

Why is the form considered as a "plus one" requirement? The answer is the principle of consensualism, an expression of the broader concept of freedom of the contract.[2] The principle of consensualism is accepted as an achievement of modern law and as a mark of progress in legal consciousness.[3] In accordance with this principle, a contract is typically formed and becomes legally binding based solely on the mutual consent of the parties – *solo consensu*. Under this principle, the contract is valid and enforceable as soon as the parties reach an agreement. The specific formalities (e.g. written documentation or notarisation) are not needed.[4] Hence, it is also called as the principle of informality. The principle *solus consensus obligat* became an integral part of 19th-century codifications. Moreover, the French legislator did not even formally establish it as a principle in the *Code Civil*, as it was considered self-evident.[5] The principle is not only theoretically justified, but also based on practical reasons: in today's world, the need to expedite legal transactions is essential, whereas strict formalities tend to impede this process.[6] Consensualism is embraced by all Central and Eastern European countries (hereinafter: CEE countries).

1 Karanikić Mirić, 2024, p. 324. http://doi.org/10.62733/2025.2.5-15

2 As the principle of autonomy of will applies to contract law, the freedom of contract is the groundwork of contract law. According to this principle, parties have the autonomy to decide whether to enter into a contract, choose whom they will contract with, determine the content of the agreement, and select the form the contract will take (Perović, 1990, p. 157). This freedom empowers individuals to shape their legal relationships according to their own preferences and needs.

3 Perović, 1990, p. 183.

4 It was a long journey towards the acceptance of the principle of consensualism. In Roman law, great importance was attached to the form. Special rituals had to be observed when concluding contracts, with pre-determined words that had to be spoken, and coughing or mumbling would result in the need for the ritual to be repeated (Zimmermann, 1995, p. 622).

5 Perović, 1990, p. 187.

6 Đurđević, 2014, p. 27.

Nevertheless, for certain contracts, the specific form is mandatory – meaning that the mutual consent of the parties must be expressed in a specified form. First, the legislator may prescribe a specific form for certain contracts. This form is referred to as a statutory (mandated) form. Historically, the principle of consensualism has never been applied absolutely; there have always been certain exceptions.[7] The legislator makes this kind of an exception to the principle of informality when a certain contract is particularly important, complex, or risky.[8] In these exceptional cases, the legal certainty is placed before the freedom of the contract – for example, in a contract for the sale of real estate.[9] The number of contracts whose valid conclusion requires compliance with statutory formalities has increased significantly; however, this development does not undermine the principle of consensualism, since such requirements represent narrowly defined exceptions rather than a departure from the general rule.[10] In such cases, the contract will be void if the required form was not fulfilled. Nullity as a sanction for non-compliance with the statutory form is prescribed by the laws of all CEE countries. Second, the contracting parties themselves may agree on a specific form. This type of form is referred to as an agreed form. Concluding a contract in a specific form can help the parties clarify their intentions, carefully consider the conclusion of the contract, and significantly simplify the process of proving the existence and content of the contract later on. In accordance with the principle of freedom of the contract, the contracting parties are also free to determine the legal effect of the form themselves. They may agree on whether the contract will be valid without that form or not. However, if the parties do not specify the consequences of deviating from the agreed form, the legal consequences may not always be clear. By contrast, when a statutory form is required, the legal consequences of non-compliance are defined by law. Furthermore, as I demonstrate in this paper, the legal consequences of not fulfilling the agreed form vary across CEE countries.

Whether the form is statutory or agreed, it becomes the fifth requirement for the contract to be validly concluded. Be that as it may, even if the legislator, and not the contracting parties themselves, mandates a certain form, the intent must be expressed in some way – whether orally, in written form, in electronic form, or perhaps in the notary form. Some means of expressing the intent must be present for the contract to come into existence.[11] Hence, some kind of form always exists;[12]

7 Perović and Stojanović, 1980, pp. 273–274.
8 Đurđević, 2014, p. 28.
9 Therefore, it is emphasised that old formalism (as in Roman law) is the formalism of religion and underdeveloped socio-economic relations, while modern formalism is the formalism of legal certainty (Perović and Stojanović, 1980, p. 274).
10 Dudás *et al.*, 2022, p. 254.
11 See Karanikić Mirić, 2015, p. 1297.
12 Karanikić Mirić, 2015, p. 1297.

thus, it is debatable whether the form should be considered a requirement only when demanded by the legislator or the parties. The principle of informality of the contract shall not be understood in a way that the contract in general does not need a form, but rather that contracting parties are free to decide the form in which they will conclude their contract, unless otherwise required by law.

This study examines the agreed form of contracts and the legal consequences arising from non-compliance with that form. The comparative law method is used, since the solutions adopted in Central and Eastern European (CEE) countries with regard to the agreed form of contracts and the legal consequences of non-compliance with such form are analysed. The author was motivated to address this topic because, while failure to comply with a statutory form requirement invariably results in the nullity of the contract, the legal consequences of disregarding an agreed form vary significantly across legal systems. Against this background, the paper examines and compares the approaches of Poland, the Czech Republic, Slovakia, Hungary, Bulgaria, Romania, Slovenia, Croatia, Serbia, Bosnia and Herzegovina, Montenegro, North Macedonia, and Albania, highlighting both common trends and notable divergences in their treatment of agreed contractual form and its effects.

2.
Types of Form

At the outset, it is essential to begin with the different types of contractual form and to outline them briefly, as this provides the necessary framework for analysing the agreed form in light of the remaining relevant criteria. The form can be categorized based on various criteria, but three classifications of form are legally relevant. Those are the categorisations based on the appearance of the form, its legal significance and its origin.

First, if we take the appearance of the form as the criterion, there are oral, real, written, and electronic forms. The oral form may be defined as the expression of legally relevant intent through spoken words.[13] The real form (*contractus re*) requires the delivery of the object; mutual consent is not enough. It was widely accepted in Roman law,[14] but it is almost extinct in modern law.[15] The written form refers to a

13 However, the terms oral and informal are not synonyms, and oral contracts may not always be informal; for example, *stipulatio*, *dotis dicto*, *iusiurandum liberti* and *praediatura* in Roman law were oral, but strictly formal legal transactions (Karanikić Mirić, 2015, p. 1298).

14 *utuum*, *commodatum*, *depositum* and *pignus* were concluded in real form in Roman law (see Zimmermann, 1995, pp. 153–229).

15 In Serbian law, deposit is an only example of the real contract form in the Law of obligations (art. 79).

signed document. It can take the form of either a simple or qualified written form. A simple written form is a document prepared by the contracting parties themselves, with their signatures under the text being sufficient. Meanwhile, a qualified written form requires signatures under the text as well, but implies some additional requirements – for example, the involvement of a public authority, such as a notary.[16] The electronic form of a contract refers to the expression of the parties' intent through an electronic document.

Second, based on the legal significance, the form can be constitutive (*ad solemnitetem* or *ad validatem*), for evidence purposes (*ad probationem*), or for simple proof. The form is constitutive if the contract is rendered null and void when the required form is not met. In the case of the *ad probationem* form, the contract remains valid even without it. However, having the written form of contract is the only permissible evidence in case of disputes or legal proceedings. Without fulfilling this form, it becomes impossible to prove the existence and content of the contract in court. This type is considered to be contrary to the principle of free evaluation of evidence in some CEE countries, for example, former Yugoslav countries.[17] In line with the principle of free evaluation of evidence, the judge is free to rely on any evidence presented and base their decision on it. Restricting the judge from considering other facts presented, aside from the written form of the contract, goes against this principle. This form represents an expression of distrust towards other means of evidence, especially towards witnesses.[18] Thus, it is said that form *ad probationem* can only be prescribed, not stipulated.[19] If the form is agreed to be a simple proof, the contract will remain valid even if the form is not met, and the existence and content of the contract may be proved otherwise – for example, by hearing the contracting parties

16 See Karanikić Mirić, 2024, pp. 333–334.

17 However, that was not always the case. Before World War II, the Serbian Civil Code stipulated that a claim arising from a contract could not be proven in court if its value was less than 200 dinars. Additionally, after the war, according to the Regulation on the Conclusion of Contracts for the Sale and Purchase of Goods from 23 January 1947, which was repealed in 1953, all contracts involving goods valued at more than 5,000 dinars had to be concluded in written form. Therefore, these provisions significantly weakened the principle of consensualism (Perović 1990, pp. 360–361, fn. 805).

18 Karanikić Mirić, 2024, p. 351.

19 See Karanikić Mirić, 2024, p. 351. Although form *ad probationem* is not prescribed by the Serbian legislator, according to the jurisprudence, examples of this form do exist – for instance, agreement on territorial jurisdiction (prorogation agreement) and arbitration agreement (see Karanikić Mirić. 2015, p. 1303). If a contracting party enters into a dispute before a court or arbitration that, by law, lacks territorial jurisdiction without raising an objection, these kinds of agreements are considered to have been tacitly concluded. Meanwhile, if a contracting party claims that a certain court or arbitration lacks jurisdiction because there is a prorogation or jurisdictional agreement establishing such jurisdiction, they will not be able to prove it without a written form of the agreement.

and witnesses. Simply put, the contract is concluded, and the parties wish to create a document that will serve as proof of their agreement.

Third, according to its origin, the form may be statutory and agreed. The statutory form is required by law for a specific contract, while the agreed form is the shape of the contract the contracting parties have mutually determined for their agreement. In the following discussion, the author focuses on the agreed form, though all these distinctions are equally important, as the agreed form can take different shapes and carry different legal significance.

3.
Agreed Form: Tightening of Statutory Rules

Legal subjects are generally free to conclude a contract in the form that suits them best. The contracting parties determine the form of the contract bearing in mind their interests in each case. This approach acknowledges that every contractual relationship is unique and the parties themselves are the ones best positioned to determine the form that ensures that their objectives, expectations, and risks are appropriately addressed. The strictness of the regulation shall vary according to the specific situation envisioned.[20] Hence, the contracting parties may agree that their contract will be concluded through a certain form, whether the contract is informal or formal according to the applicable law.

While negotiating about the content of the contract, the negotiators may also discuss the form of the contract. When they reach an agreement about the form, such agreement is called an agreement on form. The parties may choose any form from the catalogue of forms already recognised by the legislator, or they can opt for a non-institutional form requirement – for example, linking the conclusion of the contract to a practice that typically does not carry such weight in legal transactions.[21] However, the contracting parties are not allowed to use the agreed form in a way that violates public order; otherwise, the contract would be void. The agreement on form itself is an informal contract that conditions the conclusion of another contract by expressing consent regarding its content in a precisely defined form.[22] Such an agreement is inherently informal, and it can be the subject of a separate agreement or a single clause within the contract.[23] It creates an obligation for the contracting parties to conclude the contract in a certain form.

20 Suzuki-Klasen, 2022, p. 155.
21 Karanikić Mirić, 2024, p. 347.
22 Orlić, 1993, p. 275.
23 Orlić, 1993, pp. 277–278.

Typically, the contracting parties will agree on a specific form for concluding a contract when the law does not prescribe one. In these cases, the form is agreed upon to ensure clarity and protect private interests. If there had been a public interest in prescribing a form, it is assumed that the legislator would have done so.[24] The form acts as a safeguard, confirming that the parties have agreed to the terms in the agreed manner. A contract concluded in written form offers stronger and more reliable evidence of the parties' rights and obligations than a contract concluded orally.[25] Parties may opt to use the form for various reasons to gain certain advantages that a chosen form provides, such as increased evidentiary weight, minimising disputes.[26] They are bound by a contract at the time and in the manner they intend and anticipate.[27]

If the legislator already prescribes a certain form for a specific contract, the contracting parties may agree to conclude the contract in a different form. However, the agreed form must be stricter than the prescribed one.[28] Otherwise, agreeing on a less demanding form than the prescribed one would be contrary to mandatory regulations, and such a contract will be nullified. These are usually cases where the form is prescribed not only in private but also in public interest; thus, the legislator must ensure compliance with the prescribed form. Naturally, if they want to, they may make it more formal with additional requirements.

In both cases, the contracting parties may determine the legal significance of the agreed form. In other words, they may or may condition the validity of the contract on the fulfilment of a form. Hence, the agreed form may be constitutive or merely to ensure proof of the conclusion and content of the contract. In the first case, the contract will be considered concluded when the agreed form is met, and in the second case, the contract will be considered concluded as soon as the agreement is reached. Therefore, failing to observe the agreed form does not automatically render a juridical act invalid. Rather, its meaning and purpose must be assessed.[29]

4.
Contract Law in CEE Countries

Historically, the CEE countries have undergone major social, political, and economic transformation over the centuries. The collapse of communism unravelled

24 Karanikić Mirić, 2024, p. 347.
25 Dudás *et al.*, 2022, p. 254.
26 Suzuki-Klasen, 2022, p. 155.
27 Suzuki-Klasen, 2022, p. 156.
28 A stricter form means that it absorbs the form prescribed by law and is also more demanding (e.g. notarial form is stricter than written form), Karanikić Mirić, 2024, p. 347.
29 Dudás *et al.*, 2022, p. 253.

the connections that had bound nations together, leading to the disintegration of the Soviet Union and Yugoslavia. This process continued with the peaceful "Velvet Divorce" in 1993, which saw the amicable separation of the Czech and Slovak republics.[30] The most significant development has been the region's reintegration with Western Europe.[31] During the 1990s, partnerships with the European Union (EU) grew stronger, eventually leading to the accession of eight former socialist states in 2004, followed by Bulgaria and Romania in 2007, and Croatia in 2013. The remaining countries have either achieved EU candidate status or are considered potential candidates.

These profound social, political, and economic transformations also spurred substantial legislative reforms. The domestic legal systems underwent a process of liberation from socialist influences. The same process unfolded in the law of obligations, leading to amendments to the applicable law, corresponding changes in judicial practice, and updates in the academic treatment of the institutions of obligations law.[32] When it comes to the form of contracts, the long-standing adoption of the principle of consensualism ended in the 16th and 17th centuries, long before the rise of socialism. It became part of the European civil law tradition and the continuation of the legacy of Roman law. Legislators in CEE countries looked upon to the first European codifications and incorporated the principle into national legislations. The principle has withstood all social, political, and economic changes.

Therefore, the applicable law in every CEE country allows the contracting parties to: 1) agree about a particular form for their contract, as long as it is not contrary to the public order, mandatory provisions, and good morals; 2) choose the form freely from the catalogue of forms prescribed by the legislator or agree that a certain practice among them be considered a required form; 3) determine the legal consequences of not following the agreed form, that is, condition the validity of the contract on fulfilling such a form. However, what happens if the parties themselves have not specified the legal significance of the form they have agreed upon – will the contract be valid or not? The answers vary across the CEE countries, depending on the applicable law. The author will analyse the legislature in CEE countries, focusing on the agreed form and the legal consequences of its non-compliance.

30 International Monetary Fund, 2014, p. 2.
31 International Monetary Fund, 2014, p. 2.
32 Cvetković and Arsenijević, 2024, p. 1048.

5.
CEE – Comparative View

5.1. Poland

Contract law is not treated as a separate category in Polish legislation because the Polish Civil Code (*Kodeks cywilny,* hereinafter: KC) is built around the concept of a legal transaction. The Polish legislator was influenced by the 19th-century German idea of legal transactions, with contracts being considered a specific type of legal transaction within this framework.[33] KC underwent significant amendments in 2016 aimed at its modernisation and compliance with European private law. One of the important changes regarding contract form was the reduction of the *ad probationem* form. Such change was believed to lead to a reduction in formalities in legal transactions, with an additional argument for removing this form from the Civil Code being the fact that it is not used in most legal systems.[34] However, the *ad probationem* form still exists in Polish law.

In Poland, the principle of freedom of contract implies that a contract does not need to be in writing or meet any specific formal requirements for its validity.[35] The legislator states that the parties' intent may be expressed through any form or behaviour.[36] Reaching consensus among them is considered to be enough for the valid contract but parties may agree on a certain form as well.[37] When it comes to the agreed form, the Polish legislator prescribes a unique solution. In accordance with the freedom of the form principle, contracting parties may stipulate the form and legal effects if such a form is not fulfilled.[38] Nevertheless, if legal consequences are not explicitly determined, they depend on the shape of the form. Hence, if the parties

33 Romanowski, 2013, p. 67. This is the reason why the legislator uses the term legal act rather than contract itself. Despite the legislator's reasoning and to be more precise, the author uses the term contract in this paper.
34 Kaczorowska, 2009, p. 25.
35 See, for example, the Supreme Court's decision of 28 April 1995, III CZP 166/94; Von Bar et al., 2009, p. 195.
36 Subject to statutory exceptions, the intent of a person performing a legal act may be expressed through any behaviour by that person that sufficiently reveals their intent, including expressing that intent in electronic form (declaration of intent).
37 Kryla-Cudna, 2016, p. 139.
38 See art. 76 KC.

agreed to perform the act in written, documentary,[39] or electronic form without specifying the consequences of failing to observe this form, it is assumed, in case of doubt, that the form was required solely for evidentiary purposes (*ad probationem*).[40] If the written, documentary, or electronic form is agreed upon without specifying the consequences for non-compliance, in litigation, witness testimony or statements from the parties regarding the act's performance are inadmissible as evidence.[41] The contract will be binding for them, but the contracting party who initiates legal proceedings will not be able to prove the existence of the contract nor its content. In the reform in 2016, the documentary and electronic form are prescribed as equivalent to the written form.

There are many exceptions[42] from the *ad probationem* form: a) if the requirement of a written, documentary, or electronic form is specified solely to produce certain legal effects of the act;[43] b) witness evidence or evidence in the form of declarations of the parties is admissible if both parties consent thereto;[44] c) if requested by a consumer in a dispute with an entrepreneur;[45] d) if the fact of the legal act is made probable by means of a document;[46] e) if a written, documentary, or electronic form is required for a declaration by one of the parties, in the event of non-compliance, witness testimony, or statements from the parties on the fact of the transaction's completion are also admissible upon the request of the other party;[47] f) legal transactions in relations between entrepreneurs.[48]

5.2. The Czech Republic

In the Czech Republic, the applicable law on this matter is the Czech Civil Code (*Občanský zákoník*, hereinafter: COZ). It is modelled after German law as well, so the

39 The documentary form, inspired by German law, serves as a flexible option between written and oral forms. It accommodates situations where a full written signature is unnecessary, and a simple "written trace" is sufficient to identify the party's intent. Unlike the textual form, which only applies to text-based declarations, the documentary form also includes audio and audiovisual statements, making it well-suited for modern communication methods such as email and SMS (Kaczorowska, 2009, p. 25).
40 Art. 76 KC. The same holds for the stipulated form, see art. 73 and 74 KC.
41 Art. 74 para 1 KC.
42 These exceptions are prescribed for the statutory *ad probationem* form but may be applied to the agreed form as well.
43 Art. 74 para. 1 KC.
44 Art. 74 para. 2 KC.
45 Art. 74 para. 2 KC.
46 Art. 74 para. 2 KC.
47 Art. 74 para. 3 KC.
48 Art. 74 para. 4 KC.

same applies here regarding terminology and systematisation of legal acts. Thus, although the Czech legislator uses the term juridical act, the author will refer to it as a contract.

Contractual parties can conclude contracts in whatever form they choose, explicitly (e.g. in oral or written form) or in another way that clearly conveys what the party intended, unless specific formalities are required by law or have been mutually agreed upon by the parties.[49] If a contract is not made in the form agreed by the parties or provided by a statute, it is considered void.[50] Nevertheless, lack of the form prescribed by the legislator results in voidness, while non-compliance of the agreed formalities leads to voidability (relative nullity).[51] The courts interpret the written form requirement quite strictly – the complete intent of the parties must be clearly discernible from the written document; it is not enough that the contract's content is only understood by the parties themselves.[52]

There are three mitigations for these sanctions. First, the law allows for the correction of form defects in contracts if addressed by the parties.[53] The parties may correct the defect after the conclusion of the contract, by complying with the required form afterwards (supplementation of form).[54] Second, if any part of the contract lacks the required form, it does not automatically invalidate the entire agreement – only the part in question may be invalidated.[55] Thus, if the contract includes several acts – for example, multiple clauses – the lack of form for one part does not necessarily invalidate the whole contract. Only the part that fails to meet the formal requirements may be affected. Third, if a required form is missing, the contract may be invalid only if performance has not yet started.[56] This rule applies to the cases where a specific form is required under Book Four of the Civil Code as well, which regulates inheritance law and related matters.[57]

49 The written form in Czech law may be the simple form and by official record, while the oral form is not explicitly prescribed. The requirements for the written form are fulfilled if a legal act is completed electronically in a way that allows the act to be recorded and identifies the person executing it (Fiala and Hurdík, 2020, pp. 36, 46). See art. 559 OZ.
50 Fiala and Hurdík, 2020, p. 36.
51 Fiala and Hurdík, 2020, p. 46.
52 See Supreme Court 3 Cdo 227/96 (Von Bar et al., 2009, p. 196).
53 Art. 582 para. 1 COZ.
54 Dudás *et al.*, 2022, p. 259.
55 Art. 582 para. 1 COZ.
56 Art. 582 para. 2 COZ.
57 Art. 582 para. 2 COZ.

5.3. Slovakia

In Slovakia, the applicable law on the matter of the contract is the Slovak Civil Code (*Občiansky zákonník*, hereinafter SOZ). The same approach applies here to the terminology and classification of legal acts, following the model of German law.

According to SOZ, a declaration of intent may be made by action or omission, explicit or expressed in another way that leaves no doubt as to what the party intended to convey.[58] Moreover, the Slovak legislator prescribed that a legal act is invalid if it is not made in the form required by law or agreed upon by the parties.[59] Failure to comply with the statutory form requirement, regardless of its source, results in the invalidity of the contract.[60] However, if the form is agreed upon by the parties, the sanction will not result in voidness, but voidability (relative nullity).[61] Thus, the contract is considered valid unless the person affected by such an act claims its invalidity, but the one who caused the invalidity cannot claim it.[62] This provision prevents a person from challenging the validity if they are the one who caused the defect, for example, by failing to follow the form.

5.4. Hungary

Hungarian Civil Code (*Polgári Törvénykönyv*, hereinafter: Ptk) recognizes the principle of autonomy of the will in Section 6:58, which states that parties are free to establish the content of their contract, subject to the limitations imposed by law. Regarding the form, the principle is further clarified in the latter provisions of the Code.[63] Hungarian law gives the flexibility to the parties in a way how they form legal relationships, ensuring that formalities do not prevent valid agreements from arising when intent is clear. A legal declaration can be made orally, in writing, or through implied conduct.[64] The recognition of implied conduct as a valid form of expressing intent on the one hand allows the legal system to consider real world scenarios where

58 Art. 35 para. 1 SOZ.
59 Art. 40 SOZ. See Fiala and Hudrig, 2017, p. 38.
60 However, if it is a commercial contract and the requirement of a written form is established only for the protection of a certain party, then the contract is voidable, even if this requirement of the form follows from the law, unless it is a contract in areas of corporate law (see Dudás et al., 2022, p. 284).
61 Art. 40a SOZ. See Fiala and Hudrig, 2017, p. 38.
62 Art. 40a SOZ.
63 Unike Polish, Slovak and Czech legislator, Hungarian legislator has consistently avoided adopting the high level of abstraction found in the BGB (Vékas, 2010, p. 95).
64 See art. 6:4 para. 2 Ptk. Nevertheless, it does not prevent legal provisions or parties from requiring a written form for a contract to be valid (Kriston and Sápi, 2019, p. 74).

written or oral declarations are impractical and, on the other hand, restricts the legal recognition of silence or abstention to situations where the parties expressly agree. Hence, the section avoids potential misunderstandings or abuses where one party might wrongly assume consent through silence.[65]

When it comes to the agreed form, the outdated version of Ptk (1959) prescribed that a form specified by the parties' agreement would only be a condition for the validity of the contract if it was expressly agreed upon.[66] However, the legislator let the contracting parties to remedy their contract.[67] Namely, in those cases, the contract became valid if it was performed or at least partially performed ("upon acceptance of the performance or part thereof").[68]

The applicable Ptk states that if the law stipulates certain form or it is agreed upon between the parties, the contract is only valid if it complies with that form.[69] *A contrario*, not following both stipulated or agreed form leads to the invalid contract.[70] The second paragraph of article 6:6 prescribes the principle of parallelism of forms – any amendment, modification, or termination of a contract or legal act must follow the same form as that which was used for the original act. Hence, Hungarian legislator treats the stipulated form and the statutory form in a similar manner in terms of legal consequences. Whether the form is mandated by law or agreed upon, the contract will only be valid if the required form is followed.[71] However, there is an exception for written form. Terms that are not qualified as substantial may form part of the contract even if they are not set out in writing, and the same approach applies to amendments of existing contracts.[72]

Nevertheless, the performance has remained the remedy. In certain cases, fulfilling obligations can remedy formal defects in contracts, especially in long-term business agreements where formal errors shouldn't invalidate a contract that has already served its purpose.[73] According to the article 6:94 Ptk, the acceptance of performance remedies the formal defects. It is not necessary for both parties

65 See art. 6:4 para. 4 Ptk.
66 See Art. 217 para. 2 Ptk (1959), Available at: https://njt.hu/jogszabaly/1959-4-00-00 (Accessed: 17 December 2025).
67 Szitás, Dudás, 2023, p. 187.
68 Art. 217 para. 2 Ptk (1959), Available at: https://njt.hu/jogszabaly/1959-4-00-00 (Accesed: 17 December 2025). See more Von Bar et al., 2009, p. 197.
69 Art. 6:6 para. 1 Ptk.
70 Szitás, Dudás, 2023, p. 188.
71 In the old version of the Hungarian Civil Code (Act IV of 1959), art. 217 para 2 stated that if a contract specified that amendments must be made in a particular form (e.g., in writing), then any modifications not meeting this formality would generally be invalid. This requirement was designed to give legal certainty to the original contract terms and ensure that any changes would only be recognized if they followed the agreed-upon formalities.
72 Dudás *et al.*, 2022, p. 263.
73 Kriston and Sápi, 2019, p. 17.

to fulfil their obligations – it is sufficient for one party to accept the performance, which creates an obligation for the other party.[74] However, a contract lacking formal requirements becomes valid only to the extent it has been performed.[75] There is no possibility to demand the fulfilment of the remaining obligations based on partial performance. As a rule, convalidation of a contract by the will of the parties produces *ex tunc* effects, although the law also permits the parties to agree that the ground of invalidity be eliminated only with *ex nunc* effect.[76] Additionally, it is important to note that performance can only remedy the lack of a simple written form. On the other hand, if the law requires that it be recorded in a public deed or in a private deed with full probative force, or if the contract is aimed at the transfer of ownership of real property, performance does not remedy the nullity resulting from the failure to observe the mandatory formality.[77]

5.5. Romania

The Romanian Civil Code (*Codul Civil,* hereinafter: RCC) came into force in 2011, when it replaced the previous 1864 Civil Code, marking a significant modernisation of Romanian private law by incorporating principles from both civil law traditions and EU law. Romanian law recognises informal, formal, and real (in rem) contracts (presupposing the delivery of the goods, otherwise the contract is not concluded).[78] Article 1169 establishes the principle of contractual freedom, stating that parties are free to conclude any contract and determine its content, within the limits imposed by law, public order, and good morals. Additionally, RCC states that the contract is concluded by the simple agreement of the parties' wills, unless the law requires a specific formality for its valid conclusion.[79]

When it comes to the agreed form, the RCC prescribes that when, during negotiations, one party insists on reaching an agreement on the form, the contract is not concluded until an agreement is reached.[80] This means that the contracting parties cannot conclude the contract until they reach a consensus on the form, even if only one of them insists on a certain form. However, if the parties have agreed that a contract should be concluded in a certain form, which the law does not require,

74 Kriston and Sápi, 2019, p. 17.
75 Kriston and Sápi, 2019, p. 17.
76 Szitás, Dudás, 2023, p. 188.
77 Art. 6:94, para. 1 Ptk.
78 Dudás et al., 2022, pp. 269–270.
79 Art. 1178 RCC.
80 Art. 1185 RCC.

the contract is considered valid even if the form was not respected.[81] On the other hand, if the form is required by law and form is not fulfilled, the contract is subject to absolute nullity and cannot be remedied by performance.[82]

Thus, the Romanian legislator clearly distinguishes between the statuary and stipulated form. The idea is to avoid unnecessary invalidation of contracts over formalistic issues where public interest is not intrigued, as long as the parties' intent is clear and mutual consent is evident. This solution indeed promotes contract validity by ensuring that the absence of an agreed but non-mandatory form does not nullify an agreement, so long as the other required elements of the contract are in the place.

5.6. Bulgaria

The Bulgarian Obligations and Contracts Act (*Закон за задълженията и договорите,* hereinafter: BOCA), dating back to the mid-20th century, regulates the requirements for concluding the contract. BOCA reflects the principle of consensualism in Bulgarian law, where the mere expression of mutual intent is sufficient to form a contract, without a specific form being required unless mandated by law.[83] The legislator lists several grounds for nullity of contracts, emphasising the importance of legal compliance and moral considerations in contract formation. If a contract lacks essential elements, such as consent, subject matter, or the legally prescribed form – it is void.[84]

Although not stated explicitly, in accordance with the principle of consensualism, parties are free to stipulate the form of the informal contracts.[85] However, what happens if such a form is not fulfilled, since the law does not provide the answer? The Bulgarian legal theory is divided on this question. According to one opinion, parties may condition the validity of the contract on the adherence to a form not prescribed by law, just as they can condition the legal effect on, for example, the agreement of a term or condition.[86] According to another view, the fact that the parties have agreed on a form as a condition for validity does not make the contract formal, as the signing by the parties does not carry ceremonial significance but merely represents

81 Art. 1241 para. 2.

82 Art. 1241 para. 1. Not even the voidability is the sanction for non-compliance with the agreed form, see Căzănel, 2021, pp. 50–51. About the impossibility to remedy the nullity through the performance see Szitás, Dudás, 2023, pp. 192–194.

83 The exception is prescribed by art. 18 BOCA, stating that contracts for the transfer of ownership or the establishment of other real rights on immovable property must be concluded by a notarial deed.

84 Art. 26 para. 2 BOCA.

85 The Bulgarian law also recognises *ad probationem* form if content of a transaction values over BGN 5,000. See art. 164 of the Bulgarian Civil Procedure Code (Von Bar et al., 2009, p. 196).

86 Коев [Koev], 2014, p. 111.

the final consent of the party who signed it.[87] Arguments from Bulgarian law – that is, art. 26 para. 2 of the BOCA – state that the reason for nullity can only be the absence of a form prescribed by law, thus only a statutory norm, not a norm stipulated by private individuals.[88] However, both viewpoints agree that if the agreed form is not adhered to, the contract does not produce legal effects. According to the first viewpoint, this is explained by the fact that the parties conditioned the legal effect on the agreed form. Per the second viewpoint, the failure to comply with the agreed form results in the legal act not producing legal consequences, but not because the form was not fulfilled, but because a previously assumed obligation was not fulfilled.[89] Hence, if the parties have explicitly agreed that their contract must be concluded in a specific form, then that form becomes a binding condition for the validity of the contract.

5.7. Serbia, Slovenia, Croatia, Bosnia and Herzegovina, Montenegro, and North Macedonia

The countries mentioned in the title are grouped together because they share their law of obligations. The Socialist Federal Republic of Yugoslavia (SFRY), a one-party communist state formed after World War II, existed from 1963 to 1992. This federation included what are now the countries of Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro, and North Macedonia. The obligations law in this state was predominantly regulated by a federal *Law on Obligations* (*Zakon o obligacionim odnosima*, hereinafter: ZOO[90]) that came into force in 1978. After a decade of preparation, ZOO was remarkably forward-thinking for its era, notable for three main reasons: its central role within the Yugoslav legal framework, its innovative provisions, and its limited reliance on the socialist legal tradition.[91] The draft for ZOO (*Skica za Zakonik o obligacijama i ugovorima*) was written by Mihailo Konstantinović, a professor at the University of Belgrade. Although the legislator adopted most of the text, certain provisions were modified, removed, or added. With the collapse of socialism, the Law on Obligations underwent changes only in terms of its fundamental principles and concepts. The Federal Law on Obligations continued to function as a republican law in all the former republics of the SFRY, and its relevance has not been questioned.[92]

87 Ibid., p. 111.
88 Ibid., 2014, p. 112.
89 Ibid., 2014, pp. 122–113.
90 It is called *Zakon o obligacionim odnosima* in Serbia, Bosnia and Herzegovina, and Montenegro. In Slovenia, the official name is *Obligacijski zakonik*, while the law is named *Zakon o obveznim odnosima* in Croatia and *Zakon za obligacionite odnosi* in North Macedonia.
91 See Tot, 2024.
92 Cvetković and Arsenijević, 2024, pp. 1049–1050.

The legislator prescribes the possibility for the parties to stipulate the contract form.[93] There are two options for them: to agree that such a form will be the condition for the validity of the contract or to stipulate such a form only as a simple proof of the concluded contract. In the first case, the contract will be void, but in the second case, the contract will be valid, and the contract parties will have the contractual obligation to fulfil the stipulated form. The *ad probationem* form cannot be stipulated, since it is not recognised by the applicable law.[94] ZOO prescribes that a contract not concluded in the agreed form has no legal effect if the parties have conditioned the validity of the contract on a special form.[95]

What is the case when parties do not precise the reasoning and the purpose behind the agreed form? According to the majority of jurisprudence,[96] in case of doubt, it is assumed that the agreed form is constitutive, under the threat of absolute nullity. This position is in line with art. 70 para. 2 of the ZOO. Since the contracting parties are renouncing the principle of informality, it should be assumed that they have a deeper reason for wanting to conclude their contract in a specific form, rather than merely ensuring proof – this assumption is more plausible and better reflects the actual intentions of the parties.[97] However, there are different opinions as well. The reasoning behind this approach by a minority of jurisprudence lies in logical deduction based on the relationship between the rule and exception. Specifically, the informality of contracts is a general principle, while *forma ad solemnitatem* is an exception that should be interpreted narrowly. Since this deviates from the principle of informality, the exception should be accepted only when the contracting parties have unequivocally expressed their mutual intent.[98] Serbian courts adhere to the first standpoint, favouring the presumption of the *ad solemnitatem* form.[99]

However, nullity cannot be invoked if the contracting parties have fulfilled their obligations, either in full or in substantial part.[100] Since the agreed form is always established in private interest, the legislator provides for the possibility of validation through performance.

93 See art. 69 in the Serbian and Bosnian ZOO, art. 54 in Slovenian ZOO, art. 289 in Croatian ZOO, art. 63 in Montenegrin ZOO, and art. 61 in Macedonian ZOO.

94 See Karanikić Mirić, 2015, p. 1303.

95 Art. 70 para 2 in the Serbian and Bosnian ZOO, art. 55 para 2 in Slovenian ZOO, art. 290 para 2 in Croatian ZOO, art. 64 para 2 in Montenegrin ZOO, and art. 62 para 2 in Macedonian ZOO.

96 Karanikić Mirić, 2024, p. 349; Orlić 1993, p. 284–286; Perović, 1990, p. 364.

97 See Orlić, 1993, p. 285, fn. 598.

98 See Orlić, 1993, p. 285, fn. 597.

99 The decision of the Supreme Court of Serbia, Gž. 3413/56, dated 1 January 1957 (Orlić, 1993, p. 285). See also Decision of the District Court in Valjevo, Gž. No. 1421/05 of 21 October 2005 [Online]. Available at: https://pn2.propisi.net/?di=sp16983&dt=sp&dl=16983 (Accessed: 13 December 2025).

100 Art. 73 in Serbian and Bosnian ZOO, art. 58 in Slovenian ZOO, art. 294 in Croatian ZOO, art. 68 in Montenegrin ZOO, and art. 65 in Macedonian ZOO.

5.8. Albania

The Civil Code of the Republic of Albania (*Kodi Civil i Republikës së Shqipërisë*, hereinafter: CCA) prescribes the freedom of the form, stating that the legal transaction may be made by any undoubtful expression of will.[101]

Nonetheless, different legal effects for non-compliance with the statutory and the agreed forms are provided. CCA states that the contract not concluded in the form expressly required by the law is void, while in other cases, the legal transaction is valid, but cannot be proved by witnesses.[102] Accordingly, the legislator restricts the contracting parties in terms of proving the existence and content of the contract. Therefore, the agreed form is the *ad probationem* form in Albanian law, while the legislator distinguishes between non-compliance with a form prescribed by law and a form agreed upon by the parties.

6.
Concluding Remarks

The form of a contract is defined as the external shape of the contract – the materialisation of the parties' intent. Since their will must be expressed, every contract must have a certain form. Therefore, it is incorrect to say that the form is an element of the contract only when required by law or explicitly agreed upon by the parties. The form can be classified based on several criteria. According to the criterion of how it is expressed, the form can be oral, real, written, or electronic. The Polish legislator also includes the documentary form in this category. Based on its legal effect, the form can be *ad solemnitatem*, *ad probationem*, or a simple proof form. Finally, based on its origin, we distinguish between statutory and agreed forms.

CEE countries have experienced profound social, political, and economic changes, particularly after the fall of communism. These transformations prompted significant legislative reforms, including in contract law, where the enduring principle of consensualism was preserved despite the shifts in societal structures. Today, legal systems in CEE countries permit contracting parties to agree on specific forms for their contracts, with certain exceptions where public interest is intrigued. Despite the principle of informality, the legislators allow contracting parties to conclude a contract in a certain form – the agreed form. Parties may opt for the form for various reasons pertaining to their private interest, but primarily to facilitate proving the existence and content of their contract in the event of a dispute. Thus, parties may

101 Art. 80 CCA.
102 Art. 83 para. 2 CCA.

conclude a contract in a specific form if the legislator does not mandate a particular form for their contract or impose a stricter form than that mandated by law. However, it is important to emphasise that they cannot agree on a less stringent form than that required by the legislator. Since the provisions on legal form are mandatory, a contract that loosens the required form would be void. Contracting parties may decide on the consequences of non-compliance, except for legal systems that do not recognise the *ad probationem* form. Furthermore, parties may even integrate established practices as contractual requirements, with the legal implications of such agreements varying across jurisdictions.

Regarding the non-compliance with the form parties themselves have agreed to, CEE countries can be divided into four categories. The first group of countries treats non-compliance with the agreed form the same as non-compliance with the statutory form, prescribing nullity as the sanction for both. In this category, the author includes Hungary, Serbia, Slovenia, Croatia, Bosnia and Herzegovina, Montenegro, North Macedonia, and Bulgaria. Nevertheless, the legislator in the mentioned countries tended to mitigate such strict sanction, ensuring the possibility of validation of contract through its performance. The second group encompasses countries where not fulfilling the agreed form results in voidability (relative nullity), while not meeting the statutory form requirements leads to voidness (absolute nullity) of the contract. The Czech Republic and the Slovak Republic are representatives of this group. The Czech and Slovak legislators believe that non-compliance with the agreed form does not justify the same treatment as non-compliance with the statutory form, prescribing a stricter sanction for the latter. CEE countries in the third group recognise the *ad probationem* form and link this form to the consequences of not fulfilling the agreed form. Poland and Albania belong to this group. Finally, the only representant of the fourth group is Romania, where a contract cannot be concluded unless parties agree on the form they (or one of them) want to impose, but the contract is considered valid even if the agreed form is not fulfilled.

While it is understandable and indeed justified that modern legislatures seek to mitigate the legal consequences of non-compliance with agreed form in comparison to the much stricter consequences attached to the breach of a statutory form requirement, such mitigation should not amount to a complete disregard of the parties' agreement on form. In contrast to Romania, other legal systems adopt a more nuanced and balanced approach by preserving the binding force of the agreed form while softening its effects through mechanisms such as convalidation, the qualification of invalidity as relative rather than absolute, or by limiting the role of form to evidentiary purposes. These solutions better reflect the principle of party autonomy and the contractual significance of an agreed form, without equating it to the mandatory form prescribed by law. Although at first glance, these solutions appear divergent, they ultimately pursue the same underlying objective: to uphold the

contract and give effect to the parties' true intent, while still distinguishing between statutory form, which protects public interests and legal certainty, and agreed form, which primarily reflects party autonomy.

Jurisprudence is divided on the legal effect of a contract when its form is agreed upon by the parties, but the legal consequences of that form are not explicitly defined. This question arises in the first group of countries, where the sanction for not meeting the requirements is voidness. Can it be assumed that the contracting parties intended to condition the validity of the contract on a specific form, or did they merely wish to ensure evidence of the contract's existence to prove its existence and content in a simple way? The legislators do not answer this question, entrusting it to legal theory. Only Hungarian law before the reform explicitly expressed an opinion on the matter. There are two perspectives on this issue. Most of the jurisprudence assumes that the agreed form is constitutive and subject to absolute nullity in case of non-compliance, reflecting a deeper intent beyond mere proof. By contrast, the minority view argues that the *ad solemnitatem* form should be narrowly interpreted as an exception to the general principle of informality, applicable only when the parties have clearly expressed such an intent.

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