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PERFORMANCE OF CONTRACT – QUESTIONS AND DOUBTS AROUND CONTRACTUAL SERVICE AND CONFORMITY

A SZERZŐDÉS TELJESÍTÉSE – KÉRDÉSEK ÉS KÉTELYEK A SZERZŐDÉSES SZOLGÁLTATÁS ÉS A SZERZŐDÉSSZERŰSÉG KÖRÜL

ANDREA MOLNÁR¹

ABSZTRAKT ■ A teljesítésben érdekelték számára a teljesítés meghatározása és véghezvitele lényeges nehézségeket okozhat. A szerződéses szolgáltatást a kötelelem tartalmának megfelelően kell teljesíteni. A tartalom meghatározása, a teljesítés mibenlétének megállapítása az adott eset összes körülményei figyelembevételével történhet, így annak a megítélése is, hogy a teljesítés megtörtént-e, szerződésszerű-e. Ehhez útmutatást a felek szerződése mint belső törvényük ad a szerződésre irányadó jog és az összehasonlító magánjog normáival, valamint a szokásokkal együtt, társadalmi – technológiai környezetben. Mindezeket áthatják a magánjogi alapelvek.

KULCSSZAVAK: teljesítés, szerződésszerűség, nemteljesítés, nem szerződésszerűség, szempontok a teljesítés megítéléséhez

ABSTRACT ■ For those involved in performance, defining and carrying out the performance may present significant challenges. The contractual service must be performed in accordance with the content of the obligation. Determining this content and establishing the nature of the performance must be done by taking all the circumstances of the specific case into account -this also applies to assessing whether the performance has occurred and whether it is in conformity with the contract. Guidance for this can be found in the parties' contract, which serves as their internal law, alongside the applicable law of the contract, the norms of comparative private law, and relevant customs, all within a broader social and technological context. These are all permeated by the fundamental principles of private law.

KEYWORDS: performance of contract, conformity, non-performance, non-conformity, considerations to define performance

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1. UNCERTAINTIES SURROUNDING CONTRACT PERFORMANCE

Is a birthday cake decorated with reversed numbers – celebrating a 17-year-old as if it were their 71st birthday – a proper performance of the contract? Must we accept performance if our debtor delivers more or better than what was agreed? Is there an obligation to provide spare parts for the gearbox of a 10-year-old truck? Has the department store fulfilled its obligation if the hose of a vacuum-cleaner breaks after two years? And how do the disruptions caused by armed conflicts – threatening the safety of even the accessibility of international trade routes cascade into everyday contractual life?

Contracts may take many forms, shaped by the demands of everyday life and the particularities of each situation. What they share in common is that they come to life through performance. By performance, they progress their goal, the expected, expressly and contractually agreed purpose within ever-changing conditions and adapt to them. When it comes to matters of performance, it is the contracting parties who are in the position to decide and act. Legal provisions can offer only limited and general guidance.

This study aims to highlight that the meaning of performance and, in specific cases the method of defining it can give rise to significant uncertainties, the resolution of which lies primarily within the rights and opportunities of the contracting parties themselves. Contractual, commercial and judicial practice can offer valuable guidance in this regard. In the absence of a unified or generally accepted definition, the study examines performance in all its complexity, exploring its significance in the existence of the contract, together with the forces acting upon it and the surrounding elements. It analyses how private law and closely associated branches of law relate to performance, what considerations and criteria they apply and to what extent they support it. This approach allows illuminate the nature of performance, and its most practical and frequently used approaches expressed in legal regulations and practice. In this process, the study also draws on private law or contract law institutions, such as breach of contract, as conceptual counterparts to performance. It incorporates both enacted law and applied law. Given that the general and specific legal norms provide a fragmented picture on the legal environment, it is justified to rely on fundamental principles as well as the law-developing insights of legal scholars. The study primarily considers Hungary as the locus of performance, first as a sovereign state with its own legal system, and second as a Member State of the European Union and a Contracting State to the Vienna Convention (also known by its abbreviation CISG).²

² United Nations Convention on Contracts for International Sale of Goods, adopted in Vienna on April 11, 1980.

2. ABOUT THE PERFORMANCE IN GENERAL

2.1. Complexity of Performance

Act V of 2013 on the Civil Code (HCC), Section 6:34 [The general rule of performance]: *“The service shall be performed in accordance with the content of the obligation.”* This is how the HCC briefly defines it. In everyday life, performance is naturally present in an obvious way, everyone strives to meet their obligations and expects performance due to them. The content of an obligation is not always clear and unambiguous in individual cases.

Performance is the phase of the contract that follows its conclusion and lasts until its termination, in case of proper fulfilment. In the absence of proper performance, this phase may end with breach of contract. A contract which came to existence effective, valid and enforceable comes to life in the phase of performance: this is when it begins to adapt to its environment, if necessary, adjust to circumstances that have changed in relation to the originally agreed content. Actual execution is also entrusted to the parties; it is largely their responsibility to define and carry out performance. Based on the ideas of BÉNI GROSSCHMID, LÁSZLÓ LESZKOVEN considers performance as the actual realization and completion of the contract. During the performance phase, the contract often undergoes modifications that were in fact impliedly part of the original agreement and which emerge through contractual terms, legal provisions, or evolving circumstances. He aligns with LÁSZLÓ KELEMEN'S view, that the parties' conduct within the obligation is the most essential element of its content.³ Many types of contracts exhibit a wide variety of the meaning of performance, which can be further complicated by questions of interpretation. A uniform regulation for this diversity is impossible. The law provides a guiding definition that a created contract must be fulfilled according to its content. This is further elaborated by detailed regulations that offer recommendations for the most general questions. The final element in the regulatory logic is the dependence on the “all circumstances of the case”, which offers instructions for case-specific determinations. It is worth unpacking both the concise definition and the meaning of “all the circumstances of the case” as if looking into a magician's hat.

³ LÁSZLÓ LESZKOVEN: *Szerződésesség a polgári jogban*. Budapest, Wolters-Kluwer, 2018, 20, 34.

2.2. The Significance of Contract Performance

The significance of performance lies in the fact that realization of the contractual purpose depends on it. Performance determines the further fate of the contract, as it brings the contract to an end. Through performance, the parties either achieve the goal they expected at the time of conclusion or that goal is only partially or not at all fulfilled. This, of course, applies only to proper performance. Performance also plays an important role in legal relationships which relate to unfulfilled contracts and aim at settlement, as it provides criteria for defining the parties' obligations. Its significance and effectiveness are influenced by many factors, including the obligor's situation – for instance, in enforcement or bankruptcy proceedings against them, where multiple creditors may be waiting in line.

2.3. Performance in the Life of a Contract. Performance and its Context

The life of a contract can be divided into theoretical phases. The first is the pre-contractual phase, followed by the conclusion of the contract. The phase between the conclusion and either the termination by achieving the contractual purpose or the breach of contract is the performance phase. This process flow assumes the validity, effectiveness and enforceability of the contract before a court.

Performance must be defined within the contract itself. The parties are to disclose their expectations to each other and agree on them prior to or at the time of conclusion. The manner of performance is entrusted to the parties themselves, based on the principles of contractual freedom, mutuality, good faith, reciprocity and mutual dependence. Questions, doubts and disagreements regarding performance may arise between the contracting parties. These may stem from the parties themselves or their relationship, or they may be triggered by external circumstances. Fulfilment and qualifying the contract as either completed or breached reflect actual interdependencies. The obligor's awareness is naturally influenced by the fear of the consequences of non-performance, while non-performance or non-conformity determines the nature and direction of the consequences.

No contract exists in isolation, nor do the parties participate as solitary rights-holders or obligors. Even their internal relationship is shaped by the cyclical process that begins by the moment of conclusion, where each contracting party is simultaneously a creditor and a debtor, their roles shift accordingly. Furthermore, in contractual relationships, the parties must act with their own interests in mind while also considering the other party. The contracting parties are surrounded

by an external environment, into which the contractual purpose – and the need the contract is intended to satisfy – must fit. Therefore, in defining performance, the parties must take these external circumstances and during performance, the involvement of third parties into account. These internal and external factors influence performance. In legal practice, this is summarized under the expression “all the circumstances of the case”.

2.4. The Legal Environment of Contract Performance

Codified law and legal literature devote considerable attention to the concept, institution, validity and effectiveness of contracts. Similarly, breach of contract is examined as one of the most notable sources of legal disputes. Various perspectives have been applied to examining breaches, their causes, definitions, consequences, and liability for damages. Civil codes dedicate only a few considerations to the phase between contract formation and breach. Beyond the general guiding rule of performance, they provide minimum requirements regarding the place, time and quality of performance. Additional implied rules can be identified among the provisions on contract formation and breach, and the specific rules given for the types of contracts, as well as in the general principles of civil law. However, the construction of the legal environment must begin with the parties themselves. This is dictated by the freedom of contract and the autonomy of the parties.

Primarily, performance must be determined by the agreement of the parties, which serves as their internal law.⁴ In terms of form, the agreement may be written – and in certain cases, writing is mandatory. However, it may also be explicitly oral or tacit, between the frames and limits provided by the applicable legal system.⁵

Codified law supports parties in their contractual relationships generally with dispositive provisions and minimum standards. Hungarian law has chosen a multi-level abstraction, where the rules on performance appear at different level of generality. Thus, in the Book Six, the Law of Obligations, within the part on contracts, one finds not only the rules concerning the definition, general principles, formation, validity and confirmation of contracts, but also the general rules on performance and certain specific cases of performance. The HCC

⁴ HCC section 6:58 and section 6:63, par (2).

⁵ HCC does not consider silence or abstention from a certain conduct to constitute a juridical act, unless expressly provided by the parties (Section 6:4). Regarding the application of the CISG, Hungary – until its withdrawal made on 6 July 2015 – declared inapplicable the rule allowing a contractual declaration to be made in a form other than writing.

designates the contract as the most important source of obligations. Thus, the general rules of obligations, especially the definition and main characteristics of an obligation, the interpretation of legal declarations, and the rules on multi-party obligations are also applicable to contracts. More detailed rules can be found in the part on specific types of contracts.

The Vienna Sales Convention, as well as the context of its formation and application also belongs to the legal environment of contract performance.⁶ The achievements of international comparative private law over the past one and a half centuries vividly illustrate the potential for development, offering solutions to failures and unresolved issues.

Customs and the instruments – primarily from international comparative law⁷ – that summarize them form the next group within the legal environment. This includes model contracts, as well.⁸ Let us now move from the international stage back to the immediate relationship between the party and the local customs that the parties' contract may refer to. Such references can be made explicitly or tacitly. In fact, if the parties do not wish certain customs to apply, they must expressly exclude them.⁹

The principles and general clauses that permeate legislation and legal practice come to the forefront when neither the contract nor statutory provisions resolve the uncertainty. In reality, they play a continuous guiding role in the proper exercise of rights and in faithful performance of contractual obligations.

It is also necessary to address the role of branches of law closely related to private law. On issues regarded as most important, especially where specific interests are protected, detailed sectoral regulations may be found. Such examples include consumer protection and the performance-related obligations of employers under labour law.

⁶ The list of States Parties to the CISG are published by United Nations Commission on International Trade Law (UNCITRAL): https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status. The scope of the Convention - including its broad territorial scope - is governed by Article 1. One of the collections of its case law is abbreviated as CLOUT (Case Law on UNCITRAL Texts). It refers to a collection of court decisions and arbitral awards relating to legal texts prepared by the UNCITRAL.

⁷ UNIDROIT Principles of International Commercial Contracts - 2016 (UPICC), Draft Common Frame of Reference (DCFR) – Principles, Definitions, and Model Rules of European Private Law.

⁸ Model contracts issued by The Grain and Feed Trade Association (GAFTA) or INCOTERMS® issued by the International Chamber of Commerce (ICC).

⁹ Opinion 1/2012. (VI.21.) PK, issued by the Civil Division of the Hungary's Supreme Court – Kúria – on Certain Legal Application Issues Related to Defective Performance: 1/2012. (VI. 21.) PK vélemény a hibás teljesítéssel kapcsolatos egyes jogalkalmazási kérdésekről, see the commentary to the point 1 of the Opinion.

3. ON THE NATURE OF PERFORMANCE

What qualifies as performance in a specific case? What does it mean to perform in accordance with the content of the contract?¹⁰ Let us begin to explore these questions with the help of legal commentary and scholarly literature. The commentary of HCC defines performance in the narrow sense as an act or behaviour, with conformity to the contract as a key concept. For interpretation, it refers to aspects found in earlier laws, such as suitability and fair performance.¹¹ It states that performance means suitability to meet the need described in the contract. The Opinion of the Hungarian Supreme Court, 1/2012. (VI.21.) PK Vélemény, in point 1, contains a similar provision. In addition to the regulatory minimum requirements of performance, it also demands compliance with specific quality standards and further includes ancillary obligations.¹²

Let us recall the legal development ideas of three Hungarian scholars from the period preceding the Second World War. László Kelemen defines performance through the combined application of multiple elements, approaching it from the perspective of the outcome. Proper performance is expected to result in the honest and genuine balancing of interests — that is, in accordance with the parties' intentions and their mutual expectations. He suggests that the determination of the other party's obligation should be adjusted not only based on the party's declaration or on "*what the party thought at the time of making the declaration, but also, afterwards, on what the party—through honest conduct—should have reasonably considered under the given circumstances*". ISTVÁN SZÁSZY highlights the intentional conduct as a defining feature, distinguishing performance from accidental realization which happens due to external factors. GYULA DEZSŐ views performance as a simple real act which, if it meets the requirements of the legal transaction, results in final and irrevocable competition – bringing about the termination

¹⁰ Similarly, the CISG gives a simple definition for the meaning of performance, when in Article 30 providing the main obligations of the seller, it prescribes performance as required by the contract and the Convention.

¹¹ Section 277 of the Act IV of 1959 on the Civil Code of Hungary (Former Hungarian Civil Code), Section 277, Section 1084 of the Draft of Civil Code of 1928 (Draft of Private Law of 1928). Commentary: GYÖRGY WELLMANN (ed.): *Polgári Jog I–IV. – új Ptk. – Kommentár a gyakorlat számára*. 6th ed. Budapest, ORAC Kiadó, 2024, commentary of the section 6:34 of HCC.

¹² Point 1 of 1/2012. (VI. 21.) PK vélemény – see footnote 9: *„The obligor performs defectively if the service does not meet the requirements set out in Section 277(1) of the Civil Code. Performance is also considered defective if the service fails to satisfy the specific quality standards applicable to it or if the obligor does not fulfil the so-called ancillary obligations related to the service.”*

of the obligation. Performance, therefore, is not merely an act but also requires a result, through which the full content of the contract is realized.¹³

Let us continue with the thoughts of contemporary legal scholars. The HCC defines performance as the fulfilment of a service. LAJOS VÉKÁS cites GYULA EÖRSI, stating: “we interpret the service – in its most general sense – the conduct defined in the contract, which the obligor has undertaken to perform, and which the obligee may demand from the obligor.” According to the structured reasoning of GYÖRGY BÍRÓ, the subject of the contract is the service aimed at satisfying interests which the obligee may claim from the obligor. In Hungarian private law, performance refers to real performance. If this performance conforms to the contract, its legal effects include the due date of the counter-performance, the transfer of the risk of damage, and, primarily, the termination of the obligation.¹⁴

László Leszkoven revisits a frequently cited formulation of Béni Grosschmid and proposes a natural, though at first glance seemingly inverted perspective. Within the meaning of performance, the cornerstones are, the fulfilment of service, and the satisfaction of contractual interests as legal effects. These together realize the contractual objective. In addition to the aspects that define performance, he also draws the attention to tolerance thresholds in cases where uncertainty or consequences of borderline breaches of contract could be resolved through acceptance or minor sacrifices. He let us see the performance of contract together with the content of service and, also from the perspective of breach of contract. He analyses performance as a process. Leszkoven proposes using the breach of contract as a reflection of the content of the contractual obligation, to define performance. “Here it becomes clear what is really contained within the obligation and how it is contained. ... Only a substantive examination – understanding “substance” both as the actual content and through an interest-driven approach – can reveal whether a breach of contract has occurred. The negative – the failure of the result to occur – thus transforms the positives. ... When we say the debtor is liable for the service, this also implies liability for its non-performance.”¹⁵

In the commentary of the Vienna Sales Convention, TAMÁS SÁNDOR and Lajos Vékás apply breach of contract as the same aspect, just as the structure of the convention itself suggests.¹⁶ The part of the convention that outlines the rights and

¹³ LÁSZLÓ KELEMEN: *Jóhiszeműség és tisztesség a magánjogban*. Szeged, 1937, 163–164; ISTVÁN SZÁSZY: *A kötelmi jog általános tanai*. Budapest, Grill Károly Könyvkiadóvállalata, 1943, 273; GYULA DEZSŐ: *A teljesítés módja, helye és ideje*. Budapest, 1940, 5–6.

¹⁴ LAJOS VÉKÁS: *Szerződési jog, általános rész*. Budapest, Orac Kiadó, 2024, 69. GYÖRGY BÍRÓ: *A kötelmi jog és a szerződés tan közös szabályai*. Miskolc, Novotni Kiadó, 2000, 219, 403–407.

¹⁵ LESZKOVEN 2018, 65.

¹⁶ TAMÁS SÁNDOR – LAJOS VÉKÁS: *Nemzetközi adásvétel*. Budapest, HVG-ORAC, 2005, 202.

obligations of the parties under the concluded contract is introduced by Article 25, with the definition of breach of contract, thereby allowing performance to be assessed by working backward from the breach definition. Thus, questions to be taken into consideration are the breach of contract, and the detriment that substantially deprives the other party of what they were entitled to expect, the issue of foreseeability. Since the CISG itself distinguishes between non-performance and non-conformity, this distinction must also be observed when it is necessary to define the consequences.¹⁷ This approach, naturally, can only serve to refine the overall picture, as it plays role determining the consequences of an already occurred deviation. A fundamental breach, which opens the door to the most radical consequences, such as contract termination, must be assessed strictly.

Let us take Leszkoven's suggestion and, in defining the content of the contractual service and performance. Let us, alongside the chapters of the CC in the content and performance of the contract, also include the title on breach of contract, furthermore, let us compile a collection of the relevant principles and general clauses. The study below examines the aspects of performance explicitly named in legislation, along with other influencing factors, thereby moving closer to understanding the meaning of the expression "all circumstances of the case".

4. CONSIDERATIONS FOR ASSESSING PROPER PERFORMANCE OF A CONTRACT

4.1. General Remarks on the Considerations

The list bellow is illustrative. The most common considerations relate to quantity, quality, manner, place, time, and the questions of "by whom" and "to whom" performance is rendered. Within or alongside these, there are further details developed through practice or derived from specific rules created to protect particularly sensitive interests.

These considerations are interrelated and often overlap, they must be applied as a whole when assessing performance, thereby providing a reliable standard. Where necessary and to the extent required, non-performance must be distinguished from non-conformity. The criteria for assessing may be drawn from the characteristics of the parties, applicable norms, intended purpose, customs and practices, the parties' knowledge and conduct, their declaration and many other factors. What

¹⁷ Section 6:157. of CC and Art 35 CISG provide the negative determination of conformity.

follows includes not only considerations, but also comparative case examples and questions based on common sense, demonstrating that performance may, at times, require significant effort and cooperation from the parties involved.

4.2. Quality, Performance, Quantity, and Fitness for Purpose

Discrepancies in quantity, quality, or fitness for purpose may cause uncertainty for the obligees. Here are a few practical examples.

At first glance, the general rule would appear to be that only perfect contractual performance constitutes proper performance. However, any deviation from the agreed terms must reach a certain level of seriousness or gravity, for rendering the performance unacceptable. Judicial practice discourages parties from demanding perfection in an exaggerated manner.¹⁸ This is echoed in the warranty rules, where the right of rescission is limited in cases of insignificant defects, as provided in Section 6:159 (3) of HCC.

But what level of deviation is acceptable? Examples include: a burgundy carpet intended for a castle that deviates by 5 units on a 0-100 colour scale; a long-term-use machine that breaks down after three years due to a replacement part; wine with added sugar (chaptalized), or with 9 % added water; planting soil with a clay content different from what was agreed; meat with a fat content higher than specified.¹⁹ These were all matters that courts assessed by invoking additional, case-specific factors.

According to a part of legal practice and scholarship, aliud performance (i.e. delivery different from the subject of the contract) qualifies as defective performance. Its assessment depends on the value and usability of the delivered performance compared to the contractual specification.²⁰

Partial performance, excessive performance, premature performance raises a different kind of difficulties, that requires the application of reasonable proportionality, as supported by legal literature, and expects the obligee to accept a shortfall or surplus – provided it does not cause them undue hardship. This leads us to the question of whether the obligee is expected to make sacrifices.

¹⁸ CLOUT Case 252.

¹⁹ A decision of the Hungarian Supreme Court (Kúria) decision number: Kúria Pfv.21145/2018/9. szám, CLOUT case 237, CLOUT case 150, CLOUT case 170, CLOUT case 941, CLOUT case 248.

²⁰ SÁNDOR – VÉKÁS 2005, 202. Leszkoven adopts a more nuanced approach, suggesting that the issue should be decided based on the specific facts of the case; thus, in the event of a substantial deviation, non-performance may also be established, in which case the consequences of delay may likewise be applicable. LESZKOVEN 2018, 252.

Can a surplus in quality be rejected? There is no clear-cut answer. In some cases, the specific circumstances may lead, for example, a shopkeeper to reject higher quality goods at the same price, fearing that it may disrupt the expectations of regular customers accustomed to lower quality and price. In everyday life, we all encounter surplus in quality – for instance, when technology providers introduce service improvements and innovations during the term of an already concluded contract, resulting in better performance for the same price, which we accept. A significant and sudden increase in the procurement price may make performance substantially more difficult for the obligor, but not impossible. How should the obligee respond to such a situation?²¹

Has the buyer's payment obligation been fulfilled if the purchase price is paid through a commission agent if the amount is threatened by the agent's creditors? Is the seller's obligation to transfer possession fulfilled if the goods are delivered to the commission agent for transfer to the buyer, but the agent's creditors may seize them? What if the losing party in litigations pays the prevailing party's legal fees, but the latter's creditors seek to satisfy their claims from that amount? What is the purpose of property damage insurance in the case of mortgaged real estate?²²

The requirements set forth by quality regulations applicable at the place of use or of performance may pose challenges for unprepared parties. As a general rule, it is logically the recipient of the service who is closer to the issuer of local norms and therefore expected to be familiar with them and to secure the necessary local permits.²³

4.3. The Significance of the Time Factor. The Place of Performance. The Manner of Performance

In practice, the questions of time, place and manner are closely interrelated. Performance obliges the receiving party in terms of taking delivery and preparing for receipt. More precisely, *“the seller (defendant) must perform at the designated place*

²¹ A decision of the Capital Court of Appeal of Hungary (Fővárosi Ítéltábla), decision number: Fővárosi Ítéltábla Pf.20847/2022/4. szám.

²² These original examples are of SALAMON BECK. SALAMON BECK: *A rendeltetéses javak*. Budapest, Franklin Társulat, 1917. The modernized version of the examples are in SZILVIA DARÁKNÉ NAGY – TERÉZIA VILÁGHYRNÉ BÖCSKEI: *Polgári jog II. – Kötelmi jog. A PTK-ban foglalt egyes szerződések*. Budapest, Novissima Kiadó, 2023, 382, in the Law LIII of 1994 on the judicial execution, Section 110, in the law XLIX of 1991 on the liquidation procedure, Section 48. § (1), and in the widely used stipulation “security clause in favor of the secured creditor” („zálogjogosultat megillető hitelbiztosítéki záradék”) in the insurance contracts.

²³ See point 4.5 below.

and time in a manner that satisfies the contractual requirements regarding quality, quantity, documentation, and related information".²⁴ In addition, conditions not directly tied to the transactions, such as interest clauses affecting one party, tax obligations, procedural matters, or licensing jurisdiction, may also be influenced by these factors. If the parties have not provided clear instructions on these matters in their contract, or if such provisions exist but are disregarded by the obligor, an incorrectly chosen method of performance may constitute defective performance – whether it concerns primary or ancillary obligations. However, justified insistence on specific terms by the recipient must not amount to unreasonable obstruction. If the modified performance imposes no undue hardship, the recipient is expected to accept it.

Time influences performance in countless situations. It plays a role both in the knowledge and regulations existing at the time the contract is concluded, and separately, in those applicable at the time of performance. For instance, if the obligee fails to notify the obligor of a change in their registered address, they must accept performance at the address provided at the time of contracting or bear the additional costs caused by the change of address. The use of deadlines and due dates in cross-border transactions is complemented by considerations such as time zones, and more locally, by working hours, operating times, or even the exact second when a submitted document is officially received.²⁵

Where the parties' agreement is absent or insufficiently precise, the general rule is that performance must occur as soon as possible, adapted to the intended purpose of the service and allowing for the time necessary to prepare for it.²⁶ The obligation to examine the delivered service does not necessarily imply immediacy. The HCC requires inspection without delay, while the CISG refers to the shortest period possible under the circumstances. However, if the buyer or the nature of the service requires special preparation, expectations must be aligned with those circumstances. If the debtor has a defined timeframe for performance, they may, in principle, performance may take place at the last possible moment. Still, they may be expected to avoid unnecessary delay, provided that doing so does not harm their own interests and serves the interests of the creditor.

²⁴ A decision of Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, case number MKIK VB/2017.061.

²⁵ As regards deadlines, see the Law CXXX of 2016 on the Hungarian Civil Procedure, Section 146 par (6), or the Implementing governmental decree 179/2023. (V.15.) Kormányrendelet of the law C of 2021 on the Hungarian Land Registry, Section 132 par. (2).

²⁶ See HCC Section 6:35, par. (2) – (3), Decision of the Capital Court of Appeal (Fővárosi Ítéltábla), decision number Fővárosi Ítéltábla Pf.20146/2024/5. sz.

Simultaneous performance is not always feasible; in such cases, one party effectively extends credit to the other, which raises the issue of requiring security. In the context of simultaneity, a key consideration is the seriousness of the offer to perform: the correct interpretation favours “appears ready to perform” over merely “declares readiness”.²⁷

In cases of uncertain, disputed, or incomplete contractual wording, the primary consideration in determining the time and place of performance is the realization of the contractual purpose. Thus, if multiple locations are possible, performance must take place at the location most closely connected to the contract.

The manner of performance is an umbrella term – as earlier legal scholarship notes – it encompasses all the circumstances of performance.²⁸ Model contracts may assist the parties in agreeing on the manner of performance, covering specific steps of performance as well as matters such as cost-bearing and obtaining necessary permits.

4.4. Supplementary or Ancillary Obligations

The manner of performance includes certain acts that are supplementary in nature, yet indispensable. Their omission may amount to a fundamental breach of contract and give rise to the most serious legal consequences. Such obligations include timely declarations, necessary preparations for performance and for receiving the service, the duty to notify obstacles, and the duty to cooperate and duty to inform, which are codified as the Hungarian contract law principles.

Some of these obligations may be fulfilled at the party’s discretion, while others require explicit agreement or adherence to external regulations. In more complex cases, monitoring and verification require prior documentation of the process; otherwise, judicial resolution of disputes may result in findings of mutual breach or mutual omission.²⁹ Packaging, labelling, and storage are often regulated by governmental decrees for safety or consumer protection purposes and must be observed by the parties. Interoperability and compatibility with other service

²⁷ GYULA DEZSŐ: Szolgáltatás és ellenszolgáltatás a kötelmi jog körében. In: *Emlékkönyv a Kecskeméti működő Egyetemes Református Jogakadémia fennállásának 100. évfordulójára. 1831–1931*. Egyetemes Ref. Jogakadémia Tanári Kara, 1932, 321. DARÁKNÉ NAGY – VILÁGHYNNÉ BÖCSKEI 2023, 174.

²⁸ GYULA DEZSŐ – ARTÚR MESZLÉNY – BÉLA FRIGYES: *Glossza Grosschmid Béni Fejezetek kötelmi jogunk köréből című művéhez*. Vol. 1. Budapest, Grill Károly Könyvkiadóvállalata, 1932, 356. See also the Chapter title before Section 1084 of Mtj. and VÉKÁS 2024, 198.

²⁹ Arbitral Award No. 97/2002 of International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, 06.06.2003, <https://www.unilex.info/cisg/case/1043>.

providers or contracts, despite its surrounding doctrinal complexities, has evolved into a core contractual obligation. For example, phone manufacturers have no direct relation to internet or cloud service providers, yet when ordering a device online, one typically expects more than just a bare handset.

4.5. The Parties' Knowledge, Understanding, Conduct, and All the Circumstances of the Case

Examining all the circumstances of a case is an appealing challenge for any legal professional — many rabbits may be hidden in the hat. What a party knows and understands, what they believe the other party knows and understands, and how they relate to all of this influences the validity, content, and performance of the contract. It encompasses all the circumstances of the case, which in turn reacts to what is known and understood. The obligee's awareness of an inherently defective performance, and whether that awareness was influenced by the obligor, has long been a subject of legal scholarship. The issue is closely tied to the interpretation of contractual intent and meaning.

Differences in interpretation may arise, for example due to textual discrepancies or differences in logical or grammatical reasoning, which can seriously disrupt the relationship between the parties. Section 6:8 of the HCC provides a formula to address this, prioritizing the understanding of the addressee, depending also on the presumed intent of the declarant and other circumstances.³⁰ Interpretive difficulties must be addressed through a broad range of sources, including ethical and economic standards. Interpretation may apply not only to written texts or spoken words, but also to silence or certain behaviours. An example of this is defective performance that becomes accepted due to the waiver of an interest; returning to the original contract terms from such a situation is only possible with due consideration for the obligor's interests.³¹

It is not a requirement for the CISG to serve as a direct and frequently applied source of law in national legal systems. However, in relation to performance, we can find a richly illustrated description of the parties' knowledge and understanding in Opinion No. 19 of the CISG Advisory Council, which is also worth considering even in contracts between private parties. The recommendations contained in the

³⁰ Article 8 of the CISG initiates the assessment from the perspective of the declaring party, using a detailed and regulated mechanism.

³¹ BÉNI GROSSCHMID: *Fejezetek kötetmi jogunk köréből*. Vol. 2. Budapest, Grill Károly Könyvkiadó Vállalata, 1933, 865; LÁSZLÓ LESZKOVEN: Érdekleengedés vagy lemondás? Elbirtokolható-e az előzőekenység? *Gazdaság és Jog*, 2024 (1–2), 17–21.

opinion draw attention to the influence of the relationship and power dynamics between the parties, through the local usages and regulations they refer to. Let us look at a few examples from the recommendations. The standards applicable to performance – whether legal regulations, professional standards, or internal norms of conduct – concern usability and fitness for purpose and must be those the contracting parties could have known at the time of concluding the contract. The rules governing performance are expressly or implicitly acknowledged by the parties as applicable to their contract, unless they are explicitly excluded. In assessing conformity, all statements and conduct of the parties, both before and after the conclusion of the contract, may be relevant. A party that is aware of an essential requirement may be expected to draw the other party's attention to it. The involvement of the obligee or creditor in preparation, such as in planning or choosing materials, limits the obligor's discretion in how to perform, but may also excuse the obligor in the event of non-conforming performance. The party's expertise in relation to the other party, its environment, including business context or other contract-related aspects, its position, and its specific characteristics must be examined with particular care in relation to the other party. The relationship between the parties prior to the conclusion of the contract may serve to build mutual trust, which can cause a reduction in the level of scrutiny. The expert party must assess whether the obligations undertaken by the non-expert (lay) party are feasible, and the expert must provide the lay contracting party with adequate information about its own undertakings. A party who has access to standards, regulations, or other essential information affecting performance is obliged to inform the other party to the extent that can reasonably be expected of a fair and responsible party. Failure to access, inquire about, or use such information cannot be turned to the advantage of the party who failed to do so. The clarity of the applicable regulations may also be in doubt if there are competing standards or if substantive changes create uncertainty about which rules apply. Circumstances relevant to the assessment of performance – such as the purchase price in comparison to the market price – can, even based on common sense, carry a clear message regarding the expectations for proper performance.

This enumeration is well illustrated by the case of the cadmium-contaminated mussels. The mussels delivered by the Swiss seller were unsuitable for the German buyer, as their cadmium content exceeded the limits set by German food safety regulations. The mussels were, nevertheless, consumed. In this case, the court developed criteria for when the obligor's lack of knowledge may serve as an excuse for defective performance. As a general rule, the obligor is not expected to be familiar with regulations in foreign jurisdictions, whereas the obligee is expected to acquire such knowledge. However, if the obligor's prior commercial

relationships – especially those tied to the obligee – indicate that the regulation should not have been unknown to them, then they cannot be excused from liability for defective performance.³²

5. PRINCIPLES, GENERAL CLAUSES, LEGAL SCHOLARSHIP, AND ARGUMENTS SUPPORTING EVALUATION

Before the following thoughts, let us recall the principle that in the cyclical flow of obligations initiated by the conclusion of a contract, the parties continuously alternate between debtor and creditor positions until the contract is terminated by performance.

Section 1084 of the Draft of the Hungarian Private Law Act of 1928 (Mtj.) stated: *“The debtor must fulfil their obligation in the manner that fairness requires, taking into account the circumstances of the case and prevailing social values.”* Gyula Dezső provided commentary on this provision in 1934. In cases involving contracts with uncertain content or ambiguous interpretation, the applicable standards may include not only general societal values, but also commercial customs, honesty, reasonable fairness, the pursuit of balance, the duty to make sacrifices, and the ideal of social responsibility over individual selfishness. This equity, which binds both parties mutually, should not be confused with mere generosity. The legal order is not sustained by the rigid enforcement of law alone, but by flexible application shaped by social development. Like his contemporaries, Dezső emphasizes the communal character of contracts and performance within them. He highlights mutual dependence as well as human greed, which is restrained by legal regulations.³³

László Kelemen’s thoughts about the limits of obligations are also applicable in the context of performance. These general value judgments serve to restrict individual arbitrariness. The notion that the goal aimed to be achieved by performance must also be acceptable to the community ensures the balance of obligations. In his formulation, protective duties appear as active obligations of care in supporting performance, even if this requires sacrificing legally recognized own interests. However, such sacrifice can only extend to the extent of reasonableness and fairness. With these duties of care, the entitled party is obliged to monitor *“the movements of interests within the legal relationship and thus influence it so that the performance is not merely apparent, but provides real, obligation-conforming*

³² CLOUT case 123 (VIII ZR 159/94).

³³ DEZSŐ – MESZLÉNY – FRIGYES 1932, 321.

value and truly fulfils the interest for which the creditor entered into the legal relationship".³⁴ In his idea of community, the duty of care is extended also to those who do not have a legal relationship with the entitled party, based on good faith and fairness in commerce, humanity, and honesty. Such an obligation requires each party to actively prevent harm and injuries that would obstruct performance. Some of these obligations are already reflected in positive law, such as the duties of information and damage prevention.

If it is known that the obligor has multiple creditors, enforcement against them must take into account the interests of the other creditors as well. This conclusion was drawn by Salamon Beck from the consideration that bilateral obligations can expand into multilateral ones. This does not mean that the debtor's performance must be shared among the other creditors, but rather that, instead of future-jeopardizing selfishness, the possibilities of the other creditors should be supported or at least not obstructed.³⁵

Both in carrying out performance and in receiving it, the parties must act in accordance with the principles of good faith and fair dealing, guided by their mutual contractual intent and exercising their rights economically. This approach brings us closer to resolving difficult cases. According to forecasts, further doctrinal uncertainties are expected to emerge alongside technological advancement, especially when the end result delivered to the user is the combined output of multiple manufacturers and service providers, and the user may even further develop it. The identity and number of obligors are not necessarily known, nor are those of the entitled parties, and the content of their legal relationships is not always clear. The current concepts of contract law, which have evolved organically, cannot be applied or interpreted in relation to contracts emerging and evolving with technological progress; however, classical principles are capable of maintaining fundamental security and order.

6. SUMMARY

Fulfilling a contract often requires considerable effort from the parties and may even present an insurmountable challenge for the participants. The service must be performed according to the content of the contractual obligation, but the contractual content itself frequently requires interpretation between the parties.

³⁴ LÁSZLÓ KELEMEN: *A szerződésen alapuló kötelem*. Szeged, M. Kir. Ferenc József-Tudománygy. barátainak Egyesülete, 1941, 70.

³⁵ SALAMON BECK: *A többszemélyes magánjogi helyzet*. Szeged, Szeged Városi Nyomda és Könyvkiadó Rt., 1935.

If their internal law, the contract itself does not provide guidance, the solution must be sought within the private law environment. This includes specific contractual and obligation law norms, customs, collections of customs, and comparative private law tools. The performance and its context can be aided by the surrounding contractual environment. The parties, who are simultaneously both entitled and obliged, continuously shift these positions throughout the life of the contract and are obligated to do everything necessary to fulfil the contract, according to their own interests but also taking the interests of the other party and their broader environment into account. Doubts can ultimately be resolved by supporting principles and general clauses, guided by sound considerations of proper legal practice. This is how trust in the contract and its performance can and must be maintained and strengthened.

The nature of the service itself can reveal the importance of exact performance – for example, in the case of a birthday greeting, defective performance need not be accepted. It is considered appropriate for the obligee to accept over-performance, whether in quality or quantity, provided it does not place a significant additional burden on them. Accessories are to be expected from merchants and manufacturers according to the rules of warranty for defective performance, although many other factors – technological and social – also come into play. The unavoidable effects of international conflicts are shared between the parties and, on a broader scale, with the members of the affected social communities.

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