The Aggrieved Party of a Contractual Breach: Its Position, Rights and Duties, Limits of Sacrifices Under Hungarian and Comparative Law Instruments

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ABSTRACT *A diligent and vigorous obligee may prepare for the performance or for the breach of a contract by its co-contractant, by applying measures appropriate to the circumstances, beginning from the precontractual phase, through complete or partial performance, or an accidental breach, right until the dissolution of the contractual relationship. The objectives of the entitled party are to foster performance or to find the less harmful outcome if a breach occurs. These objectives are promoted by the general principles of proportionality, the equilibrium and safety of obligations, and good faith. The aggrieved party has rights but obligations as well, not only to provide services but also to respect and protect the infringing party's interests. With allowances and sacrifices, if necessary. What are the rights and obligations of an aggrieved party, what kind of conduct to carry out, and what assistance is provided by Hungarian and comparative legal instruments such as the Civil Code, the CISG and the UPICC? These questions are subjected to examination in the paper.*

KEYWORDS *obligations, contractual equilibrium, breach of contract, system of remedies, limits of sacrifices by an aggrieved party, Civil Code, CISG*

1. What can an aggrieved party do?

The paper desires to provide a survey on the cases of breach of contract, with the examination of the entitled party's position, through the dispositions of three legal instruments. The mainstream of legal thinking focuses on the obligor, approaching it from the aspect of the interests of the obligee. This paper chooses the opposite direction, wishing to give incentives for more conscious contractual conduct. It places and assesses the instruments and possibilities available for the aggrieved party in their legal environment.
Questions of conclusion of a contract, topics which had gained independence as a separate branch of law, like the protection of consumers, public procurement, data protection as well as contracts of the digital world remain outside the scope of this paper.

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2. Obligations, contracts, interests

The situation of the aggrieved party in a contractual breach can be better understood by positioning it within the context of the obligations, the contract and the interests.

Obligations provide a broad framework for the ensemble of contractual rights and duties, as laid down in Section 6:1 of the Hungarian Civil Code. Their significant characteristics are the enforceability and satisfaction of interests, destination and purpose, and the equilibrium of interests.[1] The limits of the obligations are general social values and prohibitions, self-limitation for the purpose of belonging to a community, and the maintenance of equilibrium.

The notion of contract differs from country to country but, everywhere, it expresses an act arising from consensus which creates obligations. The contract belongs to the parties' private autonomy. Business will and consensus is needed for its establishment and formation. It is characterized by mutuality, the equality of the parties, the purpose, which is the satisfaction of interests. Parties must seek performance, in accordance with the principle of *pacta sunt servanda*. In this regard, the parties are standing on the same side. A decisive element in performance is the conduct of the contracting parties, to be interpreted in the light of all the circumstances. The contractual relationships of the digital world turn away from the traditional schemes and rules of contract law, establishing a grave asymmetry to the detriment of private interests through unidentified contractors who are hidden from the local public authorities. Neither a regulated type of contract nor the clients are identifiable, therefore, it is better to mention data manager and concerned person instead of parties, while mutuality has been replaced by one-sided subordination and defencelessness. The law finds its first reactions to this situation in the general principles of law and flexibility.[2]

Interests provide the driving force for the obligations, for the contracts, and for the law, as well. Interests exist and are interpreted in the context of social coexistence, in perpetual change, in the triangle of private person – society – public power, seeking equilibrium. The purpose-dependent research and assessment of interests may promote this aim.

3. The role of law concerning contracts. The norms taken as a basis for the examination

The role of the law is to explore the interests, to elaborate the aspects for their assessment and ranking, to shape the regulatory environment of the contract and, even broader, of the social frameworks of obligations. It offers solutions or renders such solutions imperative. The purpose of the law is to give inspiration and incentives for accomplishing the contracts and, also, to protect injured

[1] László Kelemen, *A szerződésen alapuló kötelem* (M. Kir. Ferenc József-Tudományegy. barátainak Egyesülete, 1941), 4–6.

[2] Attila Menyhárd, "A technológiai fejlődés hatása az alapjogok érvényesülésére," *Közjegyzők Közlönye* 26, no. 3 (2022): 10.

interests, based on elaborated methods, international tendencies and developments in comparative private law. Nevertheless, it cannot discharge the parties from seeking equilibrium and proportionality, from being sensitive to the others' interests, from continuously assessing and balancing their interests.

The paper invokes three legal norms, embedding them in their historical and legal context. These are the Hungarian Civil Code, the CISG and the UPICC, which three instruments present the first inconvenience for the aggrieved party: differences in terminology.

The Hungarian Civil Code is Act V of 2013 on the Civil Code (hereinafter: CC), having been in force since the 15th of March 2014, its Hungarian abbreviation is Ptk. During the codification, it could build on the systematization and contractual dispositions of the previous code of 1959, but also on the brave results of the codification of private law and commercial law before World War II, and comparative private law comprising the norms of the European Union.[3]

The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG), with its date of adoption of 11th of April 1980 and entry into force of 1st of January 1988, - prepared with significant Hungarian legal contribution – is a unified private law instrument with its own rough terminology, a model for national and international private law codifications. It offers a coherent system, without lacunae, to manage the difficulties of performance of a contract, comprising foreseeability, a system of assessments, subsystems of consequences and remedies. The Convention bears a clear message inviting for performance and for a holistic mindset. The provision on fundamental breach – although it is to be evaded – takes its position in article 25, as a point of reference, right before the rules of basic duties and conformity, encompassing the whole norm. The CISG does not cover every contractual situation, leaving room for national legislations, and for other instruments of comparative private law. The CISG is flexibly binding, meaning regulated possibilities of excluding its application, in the Participating States or Contracting States, like Hungary, and between contracting parties.

The UNIDROIT Principles of International Commercial Contracts, abbreviated to: UPICC, are international restatements of the general principles of contract law,[4] which supplement the CISG. They provide detailed rules, with the objective of worldwide application. Following the first edition in 1994, the "Principles" were revised, the latest version was published in 2016.

[3] Ministerial interpretation of the CC, Miniszteri indoklás a polgári törvénykönyv tervezetéhez, Általános rész, III. fejezet, Hagyomány és újítás. Külföldi példák. 4.

[4] UNIDROIT International Institute for the Unification of Private Law, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016, Published by the International Institute for the Unification of Private Law (UNIDROIT), Rome, xxviii, https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf. The legal instruments used in this paper are not independent from each other and from other norms of comparative private law.

4. The injured party

The protagonist of this paper is a party to a contract who has suffered or may potentially suffer a contractual breach. In a synallagmatic legal relationship, within the framework of the ensemble of rights and duties, the party, who is entitled to a service, is bound to provide consideration at the same time. Its position is in continuous change between the obligee and obligor, depending on the circumstances. He must insist on the accomplishment of the obligations. His position is shaped and restricted parallelly with the whole obligation, by the circumstances.
Depending on the situation, its name by terminology is entitled, creditor, obligee, complaining party, aggrieved or injured party etc, compared to its co-contractor termed as the obligor, debtor, party in breach, infringing party, etc. Accomplishment is in the interest of the aggrieved party.
The breaching party is not 'patted on the shoulder', expressly *not* promoted by the civil law, however, its interests are not disregarded, the creditor is not allowed to ignore them.[5]
The entitled party's objectives are to foster performance in the first place and, in the second place, to find the less harmful outcome of an accidental breach. To achieve this, continuous monitoring and alignment with the changed situation is expected on its side, and a perpetual foresight of the unforeseeable.

5. A general overview of the aggrieved party's position

The party affected by a breach might trust in the obedience of all those concerned, in a conscious compliance for the sake of the accomplishment.[6] Its interests are qualified and ranked by the law, in adjustment to the already known or third parties, or those who might become third parties, like creditors of a debtor in bankruptcy.
The injured party's way of thinking is holistic, covering the type of contractual service, the sphere of concerned persons, the actual possibilities and dangers of performance, the allocated risks, accidental hardship and changes in circumstances. The injured party takes care of the equilibrium of colliding interests, keeps its own expectations reasonable, with a loyal regard to the co-contractant's interests.[7]
Among its express or implied duties, the entitled party is charged with some special obligations, namely, to vigorously facilitate performance, to prevent obstacles, to promote its co-contractant. Such obligations are the duty of giving notice and the mitigation of losses.

[5] László Leszkoven, *Szerződésszegés a polgári jogban* (Wolters Kluver Hungary Kft, 2018), 112.
[6] Salamon Beck, *Kötelemvalósulás* (Pesti Lloyd-Társulat Nyomdája, 1927), 10.
[7] Béni Grosschmid, *Fejezetek kötelmi jogunk köréből (1933) - [2_2. kötet]* (Grill Károly Könyvkiadó Vállalata, 1933), 865.

As the circumstances surrounding the contract are under continuous formation, the contracting party is under the permanent obligation to evaluate the situation and to adjust to the newcoming events. Even though remedies against non-performance are the most general tools of promoting accomplishment of obligations, these do not tend to be the exclusive resort. The entitled party may have recourse to rights expressed in norms and may get inspired by the laws regulating some neighbouring institutions, like anticipatory breach and mitigation of losses and, if necessary, it may use, by analogy, arguments in alien cases fitting the specific case.

6. Circumstances to be regarded and assessed

The circumstances of the conclusion and completion of a contract are to be collected and evaluated in the view of contractual complexity, for the purpose of finding the best answer to a breach.

6. 1 The characteristics of the obligation and the service

The main characteristics of the obligation and the service take the first place in the analysis. Here belong the specificity and conformity of the service, the participants with collaborators and identified or still unknown third parties and any unbalances between them, their individual interests and aptitude for performance, as well as the duration of the contract.

6. 2 The concept of breach

The breach changes the contract, it changes the operation of the agreed obligations and their intensity. It is the concept of the breach of contract which comes into play and follows a logical chain. It is to be decided if there is a breach or not. If yes, is it fundamental or not? If yes, can the contract be saved or not? The related analysis takes the breach into consideration together with all its essential circumstances, focusing on the aspects of contractual equilibrium and the principle of *favor contractus*. For establishing the consequences, it builds on the pillars of the detriment caused by the breach and of the exemption from liability. Thus, the concept of breach is a coherent system.
Any of the contractual duties may be breached, even the lack of documentation, ancillary obligations, third party's rights and intellectual property rights. And the breach of any duties may rise to the level of fundamental breach.[8]

6. 3 The system of remedies

A cornerstone in case of breach is that both the infringing party and the injured party are to seek the outcome of the less harmful consequences and to adjust

[8] Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2015), 829.

their expectations to the changed circumstances. The system of remedies offers assistance in that, its elements apply depending on the features of the breach and all the circumstances. With further subsystems, such as damages, or exemptions, it consists of objective sanctions for any kind of contractual breach. Using a modern approach, the point of departure is the breach and the equal treatment of breaches, influenced by the cause-oriented approach,[9] such as specific performance, price reduction or the 'Nachtfrist' principle in Article 48 of the CISG.

In the operation of the system, the principal direction is saving the contract. When the service does not reach the level of conformity, but the shortages and defaults causing the difference can be fixed and rectified, should the injured party be charged with the obligation to provide the obligor a further chance and accept the late or defective performance? Without disproportionate difficulty arising on its side, the aggrieved party shall not resort to avoidance but may seek a price reduction, repair, substitution, whichever is appropriate. Supplemented by damages, if no exemption applies in the given case. The functioning of the system is supported by general principles, like good faith and proportionality, and also requires case-by-case assessment and flexibility. The system of remedies must encourage performance. A negative example for that would be easily available damages.

As for the use of the remedies, certain elements of the system of sanctions may be used alone and at any time, others only when their application is not banned by another chosen or obligatory element. Logically, the demand for repair excludes avoidance, while price reduction permits only partial and proportional avoidance or demand to repair or substitution. Indeed, special issues need elaboration based on a case-by-case approach, such as delay in performing a payment obligation. Interest is an objective sanction with the presumption of the fact and measure of the harm caused by the delay. The debtor is rarely exempted from paying it. But details like duration, currency, rate, excessive damages are also important details, worth agreeing on.

6. 4 The validity and interpretation of the contract

Besides the questions of representation and the sphere of validity, a keyword is interpretation. It relates to the consensual expectation of both parties to the extent that the other party had been made aware of it. Principles and aspects worked out by comparative law navigate the parties to understand each other's words given in the past and to be heard in the future, as laid down in Articles 7 and 8 of the CISG.

[9] Ingeborg Schwenzer and Edgardo Muñoz, *Global Sales and Contract Law* (Oxford University Press, 2022), 583–585.

6. 5 The performance

The wronged party should look on the facts of performance, including malperformance and non-conformity as well, objectively, with a judge's eye, but not ignoring the subjective elements. The colliding interests of the parties are to be examined in their complexity and with due regard to the purpose of the contract, as a point of reference.
In Hungarian legal academic literature, Eörsi Gyula classified the most general types of breach, such as the obligor's delay, the obligee's delay, non-conformity or defective performance, impossibility and repudiation, which arise in most cases from a breach of the duty to cooperate.[10] It is worth having a look at delay, non-conformity and the conduct of the parties influencing default.
As regards delay, it is temporary non-performance or temporary impossibility. A frequent natural consequence is a change in the injured party's interests. Moreover, the party deprived of its contractual expectations, may refer to the lapse of its interests, effectively or based on a presumption, as provided in Section 6:154 of the CC. Pursuant to the Hungarian code, the obligee can also fall into delay, under the rules of intermediate breach. As provided in Section 6:150 of the CC, the duties of the obliged party become deferred, its responsibility is retained only for intent and gross negligence. There are situations without delay, e.g. damages which become due by the time of occurrence. Briefly mentioning the question of time, it arises not only when performing in conformity with the contract but also when saving the contract, or influencing the outcomes, as well.
When assessing conformity and non-conformity, one must start from the contractual stipulations, or, in the lack of those, from the legal regulations related to obligations.
The conduct of one party builds up confidence and trustworthiness in the co-contractant. The parties' conduct is a main influencer of the result, it may produce conformity or provoke default.[11] Even the tolerance of a non-conform state may qualify as a breach. The possible ways of conduct are partially foreseeable. Mistaken business decisions figure on the list of ordinary risks, but each party must bear the consequences of their unintentionally encouraging and provoking behaviour.[12] This is provided for in Section 6:587 of the CC. The intervention and contribution of the aggrieved party, be it an act or omission, is critical regarding the consequences of a breach. The entitled party frequently errs regarding its general obligations, like the duty to cooperate, commits an intermediate breach, it is in delay in takeover, fails to prevent or mitigate damages, etc. Regarding the infringement, it is better to make a distinction

[10] Gyula Eörsi, *Kötelmi jog Általános rész* (Tankönyvkiadó, 1983), 151.
[11] A judgment on the practical application of cooperation and the duty to inform: Győri Ítélőtábla Pf.20.483/2008/4.
[12] László Fürst, *Utaló magatartások* (Dunántúl Egyetem Nyomdája, 1929), 94, 104. Sándor Kornél Túry, *Szilárd jogú nyilatkozatok a kereskedelmi jogban* (Grill Károly Könyvkiadó Vállalata, 1938), 31.

between conduct before and after the occurrence of a breach. The infringing party faces higher standards of care, while the injured party causing unintentionally accidental damages by saving the contract, may count on a fair and reasonable assessment.
Third parties and further concerned persons might influence the contractual relationship in a direct and express form, but also indirectly, coming from the logic of living in society. In a multi-personal situation, the merchant of a seasonal product having a poor stock in comparison with the number of buyers, shares the accessible products between them to assure even a small part for everyone, even those who arrive later. The buyers are to respect this behaviour.[13]
Changes in circumstances are to be regarded strictly, apart from ignorance or default. Changes might provoke different solutions, within narrow limits. The influences of the changes on the performance show similarities to the breach. Minor changes are to be adjusted to by the party whose side these changes have arisen on. Should the changes affect the economic foundation of the obligation to such a depth that performance becomes essentially disproportionate and hard, the injured party cannot obviously expect performance. Instead, it may follow the mechanism the parties established for such hardships at the time of conclusion of the contract. Concerning the question of changes impeding performance or rendering it impossible, liability and potential exemptions need clarification. If the injuring party falls within the narrow limits and becomes exempted from liability, by virtue of Article 79 of the CISG, this fact will largely restrict the possible remedies available to the injured party.

6. 6 Assurances

The most secure fact is performance, moreover, the one promoted by inspirative assurances. The same is true for a lack of assurance in a negative sense. Assurances cannot cover each case and cannot protect every interest of each participant. Moreover, the injured party might find itself factually unassured in multi-sided obligations. Like the interests of a tenant against the buyer of the estate, the consigner's claim for the purchase price against the consignee's creditors, the owner's claim for compensation for fire loss against the pledgee, the claim of a buyer of a flat in a condominium pledged for the purpose of construction, against the bank providing a loan to the builder. These are the situations to be overcome in good faith and with self-restraint.

[13] Salamon Beck, *A többszemélyes magánjogi helyzet* (Szeged Városi Nyomda és Könyvkiadó Rt, 1935), 3–4.

6. 7 Enforcement of claims

The context of presumptions, the reasons leading to impossibility and resistibility[14] need conscious and deep consideration, while uncertainty regarding several questions raises the importance of rationality. Just like loopholes in the legal regulations, the impediments to enforcement, also regarding the limitation period and foreseen investments, the claim-killer burden of proof and the inconsistency of judicial practice, the fact that frictions generate yet further frictions.

7. The rights and duties of the aggrieved party

When a contract is breached, the aggrieved party *'cannot simply do nothing.*'[15] Its rights and duties are built on moral and ethical foundations which can be expressed in legal terms or in generally applicable requirements. Within this ensemble, each element has a counterpart on the opposite side: every right has a pair among the obligations and vice versa. The obligations charging the aggrieved party encompass its rights. This explains why they are examined together. The main aspects of the examination are dependence on purpose and proportionality. In daily life, breaches that the aggrieved party should adapt to vary on a very large scale. The possibilities can be classified along the life cycle of the contract and in addition, in the category of extraordinary situations. Besides the most well-known answers, a wronged party must not be short of creativeness, as practice raises questions. The collection below focuses on the less-known situations and aspects.

7. 1 Rights and duties over the phases of the contract

There are rights and duties which are continuously present in the toolkit, others exist before concluding the contract, or between conclusion and breach, or after the breach or around the breach.

7. 1. 1 Rights and duties accompanying the whole life of the contract

These possibilities appear rather as generally applicable requirements and regulatory frameworks, pervading the rights and duties and providing them a measure and a method of application.

[14] A non-exhaustive list is given in rule 7 of CISG-AC Opinion No. 20, Hardship under the CISG, Rapporteur: Prof. Dr. Edgardo Muñoz, Universidad Panamericana, Guadalajara, Mexico. Adopted by the CISG Advisory Council following its 27th meeting, in Puerto Vallarta, Mexico on 2 – 5 February 2020.

[15] Bruno Zeller, *Damages under the Convention on Contracts for International Sale of Goods* (Oxford, 2018), 327.

Good faith and fair dealing. This is both a right and a duty at the same time, framing the legal relationship and providing prompt aid or last resort.[16] Rationality and proportionality, as well as the demand for equilibrium of obligations, are attached to this right.
Confidence, reliability, predictability as regards performance. An expectation towards the entitled party is to form a definite will on the adequate circumstances of performance (place, time, quality, quantity, contributors, etc) and notify the obligor of them, as well as confidentiality. '*Each party undertakes its obligation in the expectation that its co-contractant will likewise perform*.'[17]
An intent to perform, a definite will to accomplish. During the whole relationship, careful, diligent and loyal-to-obligation conduct: as required by the situation. E.g. notifying, mitigating, or maintaining or saving assurances. The intention to perform generally goes hand in hand with sacrifices, even though not without limits.
Restraint from jeopardizing and from causing exaggerated harm, as it is prescribed for the pending situations in Section 6:117 of the CC. 'Exaggerated' means an otherwise not illegal step which is qualified so by the situation.
An obligation to keep away from each party all the harms and damages, which may arise in an unjustified manner, compared to the normal content of the contract. To use by reciprocal analogy a duty imposed on the debtor, the creditor is charged with a protective obligation, which is to consider the developments of interests within the legal relationship with a working diligence and to exert such influence that the interests are really accomplished in such a manner that serves the purpose the legal relationship was created for by the debtor. It is also stated in Art. 43 of the Slovak Civil Code on the notion of contract: '*The participants are obliged to pay attention that by the time of settling the contractual relationship, anything is to be eliminated, which might lead to the arising of conflicts.*'
The obligation to cooperate and the right to receive cooperation. The debtor must seek honestly to perform the obligations undertaken by it, even if it causes it special sacrifices or harm. But the creditor, in turn, must be open to settlement, if the purpose of the contract might not be reached otherwise, because of extraordinary difficulties.[18] Omitting cooperation may influence the whole contract and make it turn into a breach. Section 6:62 of the CC provides a non-exhaustive list of actions forming part of cooperation, handling it together with the duty to provide information, other than which is available from other sources. Issuing a prior reminder is a recognized example of the duty to cooperate.

[16] In the example of FOB cases ending in a third country, it would be in bad faith to stipulate any other place than the third country as the appropriate place to calculate damages. In Zeller, *Damages,* 325–326.
[17] Schwenzer and Muñoz, *Global*, 588.
[18] László Kelemen, *A szerződésen alapuló kötelmek áldozati határa* (1941), 3., Michel O. Bridge, *The international sale of goods* (Oxford University Press, 2017), 677, 688.

Protective duties by which the obligee assists the obligor to perform, by which the contractual obligation is protected from failure. These are vigorous forms of conduct, by which the entitled party shall subordinate certain of its interests to the accomplishment, even with sacrifices, withdrawals and expenditures, within the limits dictated by the purpose of the contract and proportionality.
Duty to inform. It is also deemed to belong with the duty to cooperate, but it can figure also alone because of the significant role it fulfils in practice. The elements of the obligations, the concerned persons, the subject-matter, the temporary character, instalments, recognized defaults are the most frequent subjects. The purpose is to enable the other party to take well-founded decisions. It is applied with rational limits. The desire of the legal experts to submit a claim right after it has arisen and not to wait until the end of the limitation period cannot prevail in practice, though any delay increases the burden of proof, notwithstanding the case when the burden falls on the obligor.
The duty to be informed and, connected to that, diligent and well-founded interpretation and assessment of knowledge. Today official public registries are, to a certain extent, easily accessible based on private applications, which raises the necessity of a diligent control over additional information.[19] As for interpretation, legal instruments propose a sophisticated itinerary. Besides Sections 6:86-6:87 of the CC, article 8(1) of the CISG, especially the formulation 'the other party knew or could not have been unaware' is worth the attention of the parties.

7. 1. 2 Precontractual possibilities: vigorous conduct of diligence

To choose the partners with care, to stipulate and to assess the burdens and reality of contractual conditions appear in the judicial practice in the claims labelled as frustration and impossibility.[20] Model laws and model contracts elaborated by civil and commercial associations assist the contracting parties in choosing the appropriate conditions and establishing the equilibrium of their contract.[21] It is also essential to build up a system of assurances, to allocate risks or, at least, to foresee them and to find a mechanism to deal with difficulties. Conditions of and access to penalty, interest for late payments, financial

[19] Béla Reitzer, *A teljesítési és szavatossági szabályok viszonya a tervezetben* (Pfeifer Ferdinánd Könyvkereskedésének Bizománya, 1912), 21–22.
[20] About the distinction between negligence at conclusion and frustration caused by the blockage of the Suez Canal in 1956, see the examples taken in Konrad Zweigert, Hein D. Kötz and Tony Weir, *An Introduction to the Comparative Law* (Clarendon Press, 1998), 530–531.
[21] International Commercial Terms of the International Chamber of Commerce (ICC) – INCOTERMS®, accessed Sept 9, 2024, https://iccwbo.org/business-solutions/incoterms-rules/incoterms-2020/. Standard Forms of The Grain and Feed Trade Association (GAFTA), accessed Sept 9, 2024, https://www.gafta.com/All-Contracts.

assurances, an agreed sum of damages and, at the end of the list, litigation and enforcement can be elaborated when forming a contract.
Limitations on the responsibility for breach are acceptable[22], in certain situations, like negligence or a hotel safe, or by method, through an interest rate, but cannot reach the level of complete exclusion.
The national laws regulate precontractual diligence with differences, for example, the question of disrupting negotiations. Here comes again the old and general principle of good faith to navigate the contracting parties.

7. 1. 3 Rights and duties in the phase of performance of the contract

This is the phase where the fate of the contract may easily come close to either performance or breach. Offering performance while simultaneously requiring performance, as provided for by Section 6:128 of the CC, and ensuring the conditions for performance by the other party, as the interim duties of the obligee are the first to mention here.
The examination of conformity under Section 6:127 of the CC and Article 38 of the CISG is, in fact, not an obligation, but a right by which the party's rights to protection may be broadened. The entitled party may carry out this examination, when rationally appropriate.[23]
The request for reinforcement of assurances, by further resources or by making up for lost value, under Section 6:139 of the CC or the Articles 71 and 72 of the CISG is a good example of the significance of vigorous conduct by the obligee. Assurances, in most cases, are not at the forefront of the entitled party's attention. In addition, it requires enormous attention from the aggrieved party to assert its claims based on Section 5:104 of the CC, if the pledged goods perish.
The right to withhold under Article 58 (3) of the CISG, offering simultaneous performance, can serve as a first aid in restoration of the equilibrium of obligations. It results in a temporary modification of the relationship, to inspire both sides to accomplish. The right of suspension under Section 6:139 of the CC and Article 71 of the CISG is a stronger relative of withholding, when the aggrieved party feels like being in the lobby of breach.[24]
Adjustment to changes in circumstances is an expectation in cases of hardship, anticipatory breach, and breach. If the contract does not provide a mechanism, legal instruments offer possible answers for the parties, as provided for in Section 6:192 and Section 6:151 of the CC, in Articles 79, 71 and 72 of the

[22] Rule 4(b) of CISG-AC Opinion No. 17, Limitation and Exclusion Clauses in CISG Contracts, Rapporteur: Prof. Lauro Gama Jr., Pontifical Catholic University of Rio de Janeiro, Brazil. Adopted by the CISG-AC following its 21st meeting in Bogotá, Colombia, on 16 October 2015.
[23] Rule 2 of CISG-AC Opinion no 2, Examination of the Goods and Notice of Non-Conformity: Articles 38 and 39, 7 June 2004. Rapporteur: Professor Eric E. Bergsten, Emeritus, Pace University School of Law, New York.
[24] '*Magánjogi Törvényjavaslat*,' the Proposal for the Hungarian Civil Code (1928), which had never been adopted but applied as a code, gave a very detailed prescription regarding the right to withhold in Section 1130.

CISG.[25] Mitigation of damages may start in this contractual phase, also by the setting of an additional deadline.

7. 1. 4 Rights and duties around and after the time of breach

The occurrence of breach and the time when the breach comes to the knowledge of the wronged party may not obviously concur. The latter, which may happen even prior to the breach, as regulated in the institution of anticipatory breach, puts the aggrieved party into a situation to decide. When choosing the appropriate consequence, the injured party may derive inspiration from the lists of the previous phases, such as suspension, demanding reinforcement of assurances and must keep its eyes on the limitation periods.

The sphere of restoration of the lost equilibrium embraces the rights, duties and reactions of the aggrieved party. The duty to mitigate, which cannot be understood as acting instead of the obligor, and the possibilities of setting an additional deadline belong here. Between cooperative parties, it works through the injured party providing an additional deadline, or the non-conforming party providing cure within the period open to performance, or through the special case between the two possibilities, the 'Nachfrist', as regulated in Articles 37 and 48 of the CISG. The 'master of performance' is the debtor, therefore, tolerance is useful on the creditor's side. To provide an additional deadline is far less than an obligation, but it cannot be denied without a good reason of interest or other circumstances. By applying an additional period, any other rights which are inapplicable before the expiry of the deadline become frozen.

The duty to renegotiate, which also serves to regain the equilibrium, is not expressed in codified legal instruments. Nevertheless, it is frequently used in practice, as it is proved in Article 6.3.2 of the UPICC. However, it requires a spirited mindset to ask for and verify proof of the obligor's intention and allegations.

Requiring performance is based on the principle of *pacta sunt servanda*. It consists of three rights, with a different meaning in national laws and international legal instruments, namely: the requirement of performance in a narrow sense, the demand to repair and the demand to substitute. The first is significant rather in the case of unique and non-fungible goods and services. The latter two, in Sections 6:159-6:167 of the CC and in Articles 46 and 82 of the CISG, provide an example how the aggrieved party should adjust to the changed circumstances, in obligatory cooperation with the wrongdoer, whose interests cannot be ignored by the former. All the three are limited by logic and rationality, which leads the injured party to look for other possibilities, and to modify its own expectations, in the purpose of reducing its losses.

[25] See also: CISG-AC Opinion No. 20, Hardship under the CISG, Rapporteur: Prof. Dr. Edgardo Muñoz, Universidad Panamericana, Guadalajara, Mexico. Adopted by the CISG Advisory Council following its 27th meeting, in Puerto Vallarta, Mexico on 2 – 5 February 2020.

Damages constitute a complex system within the remedies, completing the possibilities of the injured party. The main elements in keywords are: causality, foreseeability, questions of strict liability, and measure. Legally prescribed or consensual limits are: exemption, contribution by the injured party, proportionality, difficulties of enforcement, and mitigation. These limits may easily remove damages from among the available tools, so the aggrieved party had better look around for help.

Price reduction or reduction of the consideration for the non-conforming performance is a real jolly joker in the package. It serves as a counterbalance in the obligation imposed on the aggrieved party to balance between its own interests and those of the obligor. It can be also applied as a consolation in case of delay or omission of notice or restitution by the aggrieved party, or when the obligor is exempted from liability. Details are provided in Articles 44, 50, 79 and 83 of CISG. It is flexible and apt to be combined with other tools, like a flexible partial avoidance.

Substitute transactions are the third element of the triumphal triangle of the most useful tools in the injured party's hands to save the breached contract, the other two are: damages and price reduction.[26] A precondition for the substitute transaction, presented in Section 6:141 of the CC and Article 75 of the CISG, is the termination of the breached contract, when performance by the obligor is no longer in the aggrieved party's interests. The surplus over the harm achievable by the substitute transaction is subject to the rules on unlawful profit on damages. A close relative of the substitute transaction is the claim for the difference in price, but it forms part of and, as such, is subject to the limitations of the system of damages.

The enforcement of pecuniary claims and contractual assurances is dependent on the contractual stipulations. The stipulations are subject to judicial or authority supervision, to avoid exaggerated or underestimated claims of the injured party. These assurances can be: interest, penalty, earnest money ('foglaló'), pledge, bank guarantees, etc.

The entitled party may perform its obligation, in particular, by set-off and by deposit. The first is frequently used in practice and regulated in Sections 6:49-6:52 of the CC. Even though the CISG is silent on set-off, but the CISG Advisory Council in its Opinion No. 18[27] describes this possibility as available under the general principles of the norm. Performance by deposit is deemed to belong under the right to withhold, as it does not release the obligee automatically from the consequences of late performance, for example, it is not exempted from default interest.

[26] John O. Honnold clarifies the teamwork of the triangle in the example of the Edam cheese fair, in John O. Honnold, *Uniform Law for International Sales* (Kluwer Law International, 1999), 322–325. See also: Bridge, *The International*, 699.

[27] CISG-AC Opinion No. 18, Set-off under the CISG, Rapporteur: Professor Doctor Christiana Fountoulakis, University of Fribourg, Switzerland. Adopted by the CISG Advisory Council following its 24th meeting in Antigua, Guatemala, on 2 February 2018.

Breach of contract by the obligee as a revenge or putting pressure on the obligor is far less recognized as lawful.
Avoidance is the ultimate instrument in the hands of the aggrieved party, for the situation where the contract cannot be maintained, cannot be saved, because of a fundamental, and only fundamental, breach. By the avoidance, the contract ceases to exist, and a phase of dissolution starts with its own difficulties. These drastic changes are subject to strict legal restrictions. The concept of breach and the system of remedies offer a correct dissolution of the parties' relationship. Dwelling for a moment on avoidance, which requires all the circumstances of its basis to be taken into account, it is worth having a glance at the aggrieved party's contribution to the breach. A creditor's unilateral, even if implied, conduct disregarding the non-performance of certain obligations by its co-contractant may be interpreted as a waiver only with care, as the creditor remains entitled to return to the strict terms of the contract. But this return must respect the obligor's interests, e.g. tolerance of delay for a long time, releases.[28]
In the case of dissolving a contractual relationship, the modes of settlement and restitution, the potential claims for restitution, and the preservation of the goods are to be clarified, under the circumstances of the case. The choice of remedies is influenced by the impossibility of restitution, liability for non-performance and impossibility of performance. The question of preservation is coupled with that of expenditure, it should remain within the limits of rationality.
The last on the list is the possibility of litigation, to be estimated together with the question of enforcement. Litigation poses a series of questions, which are partially foreseeable and negotiated prior to the dispute, such as choice of law, forum, arbitration, costs. Further risks become visible only on the spot, like delay which generates further harm, additional costs generating further costs, and third-party claims endangering the satisfaction of the request of the injured party.

7. 2 Rights and duties in special cases

It is not the end of the world when the grievant realizes later its initial deafness to apperceive dangers. Invalidity ab initio is a consequence of a claim based on the lack of will, such us mistake, fraud, duress. Even though, it is available almost only through litigation.
A claim of relative invalidity may arise when a preferential right is infringed or in cases where one of multiple creditors obtains a disproportionate part of the estate and funds of a debtor who is in a financially difficult situation.
A proposition from the obligor may cause the obligee difficulties if it is about non-conform performance or performance through a third party, without its prior knowledge. Such a proposition is to be understood as a request for the modification of the contract, the acceptance of which is not obligatory. Neither refusal is obvious, depending on the causes and circumstances. Possible

[28] Commented on in detail by Grosschmid under the creative notion of 'érdekleengedés' as a frequent concomitant phenomenon of obligations. Grosschmid, *Fejezetek,* 866.

answers besides the acceptance are withholding and suspension of the obligee's own performance, or, in cases endangering with breach, the application of the rules of anticipatory breach.
Anticipatory breach obtained an expressed form not long ago in legal instruments, such as Articles 71 and 72 of CISG and Section 6:150 of the CC. It serves as a guidance for a diligent contractor, regarding the aspects, conditions and limits of suspicion, likelihood and certainty, together with proportionate reactions, due regard to and a duty to cooperate with the obligor. It may occur in any kind of breach of contract that it is not reasonable to force the entitled party to stay in the contract and wait till the deadline, as in the course of time the damage increases.
In cases of partial performance, excessive or premature delivery, the wronged party faces questions of proportionality, divisibility, the importance and extent of the non-conformity. The direct reactions might be: refusal, withholding, price reduction, avoidance, but also, the acknowledgement and tolerance of the erring party's interests, especially when there is no serious reason to ignore them.[29]
The breach of an ancillary obligation is to be judged through its connection to the purpose of the contract. Even an ancillary obligation may influence the life of a contract to an extent which shall qualify as fundamental breach.[30]
Further special cases can be found concerning relations where the aggrieved party is facing protected third parties' rights, e.g. in Article 43 of CISG.

7. 3 Tools in operation

The answers of the aggrieved party given in enforcing its interests depend primarily on the type and characteristics of the breach. A conscious approach may strengthen its position and purposes, which are to be adjusted to the changed circumstances. It is the entitled party who – bound by the purpose – disposes of the right to choose, to act, to react proportionally and in good faith, in a tolerant manner. And it is the obligor who has the possibility to perform. The law qualifies and categorizes the rights and duties, and the remedies of the parties. The law uses different approaches from country to country and such differences may influence the creditor's decision. An example is constituted by the causes of exemption from liability for damages. While the common law uses price reduction and the claim for the difference in price as a supplementary part of the system of damages subject to exemption, continental law ranks them among the basic tools. But the law of any country serves the principle of pacta sunt servanda.
A part of the tools accessible for the creditor can be used alone or together with others, while there are tools the use of which can be excluded logically or by

[29] Bridge, *The International*, 680.
[30] With reference to an example provided by Ulrich Magnus about the non-performance of an obligation of packaging in a simple case, as opposed to the case when the buyer cannot resail the goods without being packaged, in Tamás Sándor and Lajos Vékás, *Nemzetközi adásvétel* (HVG Orac Lap- és Könyvkiadó Kft, 2005), 153.

virtue of the circumstances of the case, like the request for performance and avoidance. A combination of rights is expressed in Section 6:139 (1) and (2) of the CC, where the creditor has a right to withhold performance and to request assurance. When providing a further deadline in any form, fixing the deadline means the will to end tolerance and the start of enforcement. Anticipatory breach gives rise to an obligation to mitigate one's losses. The partial application of a tool opens the door before the proportionate application of another one. The partial avoidance of the contract makes possible a substitute transaction in the same proportion, if the breach provides a reason for that.
The injured party may lose access to certain remedies. The reasons may relate to its own conduct or to that of the infringing party, but the rationality of such restrictions might be questioned on assessment of all the circumstances. An example for that is avoidance without restitution of the received goods, contained in Article 82 (2) of the CISG.
The engine of the operation is the totality of achievable interests. The essence in the engine of the operation is the duty to cooperate and, especially, the duty to inform, which can be replaced with consequential losses, by partial or complete judicial support or serious harm.

8. From the sphere of obligations to the limits of sacrifices

One shall be liable for its own facts, conduct and behaviour under the fundamental laws of society.[31] Even towards itself. In contractual relationships, we are expected to conduct ourselves vigorously, to fulfil obligations of the type of providing services, and of responsible, diligent and protective management of interests. The creditor pays due attention to its own interests, to those of its co-contractant and further members of their society. Its thoughts encompass the impediments to those interests, as well. A good reason for that is the safety provided by the equilibrium between interests and obligations. The creditor concludes a contract in trust of performance by the other side and is aware that accidental allowances and sacrifices are to be made towards others.
What do these allowances and sacrifices stand for? To save the wronged party's own interests by tolerance for the offending party's interests and conduct which are worthy of respect. Are they gratuitous exceeding the creditor's own performance? Yes, but not unlimitedly and discretionarily.
Limits to the allowances and sacrifices figure in legal terms or in general principles of law. In addition, the spirited injured party may be inspired by analogy from the rules relating to easements in favour of an infringing party in difficulty, or relating to cases of anticipatory breach or mitigation, in cases where the foundations of the legal transaction, the expectations or presumptions of the creditor fail to be fulfilled. A working and diligent party may cherry-pick from the possibilities, within the limits of its duties and circumstances.
Reasonable and logical impediments are promoted by moral and ethical limitations. The demand for allowances may become inequitable under the

[31] Fürst, *Utaló*, 10.

principle of good faith, other prevailing rights or obligations, the changes in the circumstances, or the incorrect behaviour of the debtor.
The sacrifices, efforts and risks to be taken for the purpose of performance are also limited in the case when the obligation becomes an excessive burden for the party. This may be caused by impossibility, by the other party's endangering conduct or a common false presumption of the parties.[32]
In the shaping of contractual relationships, from the precontractual phase till the termination of the contract, it is diligence, foresight, and thinking forward that are to guide the parties. An offended party is to seek performance, while keeping the rules of proportionality, the equilibrium of obligations and safety, and considering the circumstances, including the offending party's interests. For this reason, the offended party, in case of difficulties and breach, is forced to make allowances and sacrifices limited by rationality and good faith. The offended party may mitigate the harm resulting from a breach by foresight and mechanisms established for managing difficulties, and risk allocation. Consciousness increases the safety of transactions and interests.

[32] With reference to Szladits and Kelemen, *Áldozati határ*, 11.