



The German Act to Modernize the Law of Obligations as a Model for the Europeanization of Contract Law? The New Rules Regarding Impossibility of Performance from the Perspective of a Portuguese Lawyer

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I.

The German Act to Modernize the Law of Obligations of 26 November 2001 amended the provisions of German Civil Code (*Bürgerliches Gesetzbuch*: BGB) regarding impossibility of performance, by adding the new rules on abnormal difficulty in § 275 (1) and (2) and by removing the old rules on initial impossibility and subjective impossibility.

1. Under old German law, there were no statutory rules on the cases of abnormal difficulty. If impossibility was *absolute*, for the impediment to performance could not be surmounted, the case should be resolved either by old § 306 or by old § 275 of the German Civil Code: whilst old § 306 applied to cases of initial absolute impossibility, old § 275 applied to cases of subsequent absolute impossibility. If, however, impossibility was *relative*, for the impediment to performance could still be surmounted, the case could not be resolved by those rules. Enneccerus and Lehmann proposed to connect the principle of good faith in § 242 with the rules in § 275 and in § 306: if the impediment to performance were to alter the equilibrium of the contractual relation, making performance unreasonably onerous for the debtor, the rules regarding *absolute impossibility* should apply to *relative impossibility*. The creditor should not be allowed to require an excessive expenditure from the debtor.¹ The influence of the two

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authors was not enough to impose their thesis. Larenz, for instance, criticized the equation of the two types of impossibility. In his view, the concepts of “abnormal difficulty” (*außergewöhnliche Schwierigkeit*) or “difficulty that goes beyond what the obligation requires” (*überobligationsmäßige Schwierigkeit*) could hardly be defined. The criteria developed by Enneccerus and Lehmann were much too imprecise: judges could not decide concrete cases on the basis of such imprecise, unclear, vague criteria. Therefore, the principles and rules regarding absolute impossibility could not apply to cases of relative impossibility: where impossibility was absolute, judges should apply the rules in § 306 and § 275; where impossibility was only relative, judges should decide the case on the basis of the principle of good faith in § 242.² In fact, § 242 of the German Civil Code says “[t]he debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage”.³ The principle of good faith constitutes the basis to the doctrine regarding the foundation of the legal transaction (*Geschäftsgrundlage*). If the circumstances which are to be considered as the foundation of the legal transaction collapse, the debtor may require adaptation or termination of the contract. Larenz takes this doctrine as the appropriate criterion to resolve the cases of abnormal difficulty, or relative impossibility, of performance: “Whether performance [could] be required from the debtor, [...] [was] a problem to be resolved by § 242, not by § 275”.⁴

2. The German Act to Modernize the Law of Obligations amended § 275. Section 1 deals with absolute impossibility, sections 2 and 3 deal with relative impossibility. Section 2 applies to cases of practical impossibility: the debtor has the right to refuse to perform in so far as performance requires expenditure “which is manifestly disproportionate to the creditor’s interest in performance”. Section 3 applies to cases of “ethical”, or “moral”, impossibility, that is to say, to cases where the debtor is prevented from performing, for he is under an ethical, or moral, duty, which is to be considered as superior to the legal one. In that circumstance, the debtor has the right to refuse to perform in so far as performance is to be effected in person and, “after weighing up the creditor’s interest in performance and the impediment to performance, performance cannot be reasonably required of the debtor”.⁵ Ethical, moral, and practical impossibility are types of relative impossibility.

European Contract Law (SECOLA).

¹ Ludwig Enneccerus & Heinrich Lehmann, *Derecho de Obligaciones* 241 (1966).

² Karl Larenz, *Lehrbuch des Schuldrechts. Allgemeiner Teil* 320 (14th. ed. 1989).

³ See the translation of § 242 in Basil S. Markesinis / Gerhard Dannemann / Werner Lorenz, *The German Law of Obligations. The Law of Contracts and Restitution* (2001).

⁴ Karl Larenz, *Lehrbuch des Schuldrechts. Allgemeiner Teil*, *supra* note 2, at 320.

⁵ See Stefan Grundmann, *Germany and the Schuldrechtsmodernisierung 2002*, 1 *European Review of Comparative Law* 129, 135 (2005).

3. Under the new law, the principles and rules regarding ethical, moral, and practical impossibility are stated in § 275; the principles and rules regarding the foundation of the legal transaction are stated in § 313. The preliminary report aimed at explaining the proposal of a German Act to Modernize the Law of Obligations says, rather clearly, where the lawmaker intended to draw the line between § 275 and § 313. The scope of application of § 275 (2) is to be strictly interpreted. It is to be applied only to extreme cases, where the imbalance between the expenditure of the debtor and the interest of the creditor is apparent. Emmerich's formula is rather impressive: § 275 (2) is to be applied only to those cases where no reasonable creditor would expect performance.⁶ In contrast, the scope of application of § 313 is to be widely interpreted: if there is no practical impossibility, if there is only an abnormal or extraordinary difficulty, the case is to be resolved through the doctrine regarding the foundation of the legal transaction.⁷

II.

Whereas the (new) German Civil Code considers the cases of relative impossibility; the Portuguese Civil Code does not: Articles 280 and 401 apply to cases of initial absolute impossibility; Article 790 applies to cases of subsequent absolute impossibility; neither Article 280, nor Article 401, nor Article 790, apply to cases of relative impossibility.

1. The preliminary reports prepared by Vaz Serra during the 50s and 60s with a view to the drafting of the Civil Code accepted the equation of relative impossibility with absolute impossibility. If the debtor can only perform with a sacrifice which is absolutely disproportionate, or at serious risk, or by infringing higher duties, it is in accordance with the principle of good faith to consider performance as impossible.⁸ In drafting the Civil Code, the lawmaker was to consider, and to weigh up, two opposed principles: the principle of the binding force of the contract (*pacta sunt servanda*) and the principle of good faith. The first one, the principle of the binding force of the contract, should normally prevail over the second, that is to say, over the principle of good faith. The best solution would consist at designing a rule-exception relationship between the two principles: as a rule, the debtor would be under a duty to perform; as an exception, the debtor would have a right to refuse to perform, in so far as the principle of good faith requires his release from contractual obligations. Vaz Serra therefore argued that the Portuguese Civil Code should contain an article aimed at explaining

⁶ Volker Emmerich, *Das Recht der Leistungsstörungen* 37 (5th. ed. 2003).

⁷ See, for example, Claus-Wilhelm Canaris, *Die Reform des Rechts der Leistungsstörungen*, 2001 *Juristenzeitung* 499, 501-502.

⁸ Adriano Vaz Serra, *Impossibilidade superveniente por causa não imputável ao devedor e desaparecimento do interesse do credor*, 46 *Boletim do Ministério da Justiça* 5, 19 (1955).

the consequences of an abnormal difficulty of performance: “If performance became much too difficult, so that the claim of performance is contrary to good faith, [...] the debtor [might] claim either modification or termination of the contract”.⁹

2. In spite of their reasonableness, the rules drafted by Vaz Serra did not pass into the Civil Code. The Portuguese lawmaker considered them to be much too imprecise, much too vague, and therefore decided to eliminate all provisions regarding abnormal difficulty, or relative impossibility, of performance. In conforming to that line of reasoning, the Civil Code accepts the principle according to which only absolute impossibility is relevant as to relieve the debtor from the duty to perform, either by invalidating the contract (Portuguese Civil Code art. 401) or by extinguishing the obligation (Portuguese Civil Code art. 790). Where impossibility is absolute, so that the debtor simply cannot perform, the judge is to apply Articles 401 and 790: initial absolute impossibility has the effect of invalidating the contract; subsequent absolute impossibility has the effect of extinguishing the obligation. Where impossibility is relative, the judge is to apply neither Article 401, nor Article 790. The cases where performance is much too difficult, so that the claim for performance is contrary to good faith, are to be resolved by one of three sets of rules: either by the rules on the foundation of the contract (Portuguese Civil Code Articles 252 and 437), or by the rules on the conflict of rights and duties (Article 335), or by the principle aimed at preventing the abuse of rights (Article 334). If the impediment causes practical impossibility, to such an extent that no reasonable creditor would expect performance, the case is to be resolved by Article 334. Even though performance is possible, the debtor may refuse to perform, for the exercise of the right to claim performance is to be considered as an abuse and, therefore, it is to be prevented by the basic principles and values of private law. If the impediment causes ethical, or moral, impossibility, the case is to be resolved by Article 335: the debtor may refuse to perform on the basis of the existence of a higher duty, of a higher interest. Finally, if there is no abuse of rights, if there is no conflict of duties, the problems resulting from abnormal difficulty are to be resolved by applying the doctrine on the collapse of the foundation of the legal transaction (*Wegfall der Geschäftsgrundlage*).¹⁰

3. If one compares §§ 275 and 313 of the German Civil Code with the rules resulting from the interpretation of the Portuguese Civil Code, it is apparent that they tend to coincide: new § 275 (2) of the German Civil Code considers the cases where there is an abuse of the right to claim performance, thus providing a solution that corresponds to the one resulting from Article 334 of the Portuguese Civil Code; new § 275 (3) of the German Civil Code considers the cases where there is a conflict of duties, thus providing a solution that corresponds to the

⁹ *Id* at. 123-124.

¹⁰ 2 João de Matos Antunes Varela, *Das obrigações em geral* 171 (7th ed. 1997).

one resulting from Article 335 of the Portuguese Civil Code; in both jurisdictions, cases of “economic impossibility” are to be resolved, by the rules regarding the collapse of the foundation of the legal transaction. In Germany those rules are stated in new § 313; in Portugal they are stated in Articles 252 (2) and 437 to 439 of the Civil Code.

III.

In my opinion, the Portuguese law of obligations could, and indeed it should be modernized, by explaining the criteria which are to be applied to cases of practical, ethical, moral, or “economic” impossibility. In fact, both the Unidroit Principles of International Commercial Contract and the Principles of European Contract Law, use the standard of “reasonableness” so as to determine the limits of the duty to perform: Article 7.2.2, paragraph (b), of the Unidroit Principles states that “where a party who owes an obligation other than the one to pay money does not perform, the other party may require performance, unless [...] performance or, where relevant, enforcement, is unreasonably burdensome or expensive”; Article 9:102 of the Principles of European Contract Law states that “specific performance cannot [...] be obtained where [...] performance would cause the debtor unreasonable effort or expense”.¹¹ Even though there is no provision regarding hardship, abnormal difficulty, or relative impossibility, in the UN Convention on the International Sale of Goods, it follows from the general principles that “in the event of a subsequent, unforeseeable impediment to performance, as a result of a material change in economic conditions there must be a ‘limit of sacrifice’, beyond which, in view of the severe economic disadvantage involved, the promisor can no longer be expected to perform the contract”.¹² Furthermore, Article 3 (3) of the Directive 1999/44/EC, on certain aspects of the sale of consumer goods and associated guarantees, limits the right of the consumer to claim performance, in the form of a right to require repair or replacement of the defective goods, by combining the standards of proportionality and reasonableness: the first paragraph in section 3 declares that “the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless it is impossible or disproportionate”; the second paragraph explains that “a remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable”. I think Portuguese law should conform to the evolution of European law, by adding a new article to the Civil Code, so as to recognize the right to refuse performance in cases of practical, ethical, or moral, impossibility.

¹¹ Ole Lando & Hugh Beale (eds.), *Principles of European Contract Law* (2000).

¹² Hans Stoll, commentary on Article 79, in: Peter Schlechtriem (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)* 618 (2d. ed. 1998).

IV.

The difference between old and new rules of the German Civil Code as to initial impossibility is evident: old § 306 considered initial impossibility as a cause of invalidity, new § 311a does not.

1. Old § 306 of the German Civil Code stated a rule on the validity of the contract: if performance was impossible at the time the contract was concluded, the contract was invalid (void). Old § 307 stated a rule on the liability resulting from the conclusion of an invalid contract: “If a party, in concluding a contract, the performance of which is impossible, knew or should have known that it was impossible, he [was] obliged to make compensation for any damage which the other party has sustained, by relying upon the validity of the contract”. In conforming with old § 307, liability resulting from initial impossibility of performance was limited to the negative interest, or reliance interest. The rules on initial impossibility of performance in old § 306 and in old § 307 were repealed by the German Act to Modernize the Law of Obligations: while § 311a (1) replaced the rule in old § 306, by saying that initial impossibility of performance does not affect the validity of the contract; § 311a (2) replaced the rule in old § 307, by saying that “the creditor may, at his option, demand compensation in lieu of performance or reimbursement of expenditure to the extent provided for in § 284”. If one distinguishes the consequences of initial impossibility as to the duty to perform and the consequences of initial impossibility as to the duty to compensate damages resulting from non-performance, the contrast between old §§ 306 and 307 and new § 311a is even clearer. With regard to the duty to perform, the rules in old § 306 and in new § 311a (1) lead to approximate results: old § 306 excluded the claim for performance, for the reason that the contract was invalid (void); new § 311a excludes that claim, for the reason that performance is impossible. In fact, the new § 275 (1) of the German Civil Code reads as follows: “a claim for performance cannot be made in so far as it is impossible for the debtor, or anyone else, to perform”. The time at which the impediment occurred turns out to be immaterial, irrelevant. With regard to the duty to compensate damages, however, the rules in old § 307 and in new § 311a (2) lead to rather different results: old § 307 obliged the debtor to make compensation for the negative interest, by restoring the situation which would have occurred if no contract at all had ever been concluded, new § 311a obliges the debtor to make compensation for the positive interest, by restoring the situation that would have occurred if the contract had been accurately performed.

2. Articles 280 and 401 of the Portuguese Civil Code contain a rule on the validity of the contract which is equivalent to old § 306 of the German Civil Code — if the object of a legal transaction is impossible, either physically or legally, the legal transaction is invalid (void);

Article 227 of the Portuguese Civil Code contains a rule on the liability resulting from the conclusion of an invalid contract which is equivalent to old § 307 of the German Civil Code: the party who knew, or should have known, that performance was impossible, is to compensate the negative interest of the other party. In spite of the fact that Article 227 does not directly address the problem of damages arising from initial impossibility, for it contains a general clause regarding pre-contractual liability, the limitation of the duty to compensate damages to the negative interest, or reliance interest, results from the connection between Articles 227 and 898 of the Portuguese Civil Code. The rule in Article 898 considers the damages arising from the sale of an item which does not belong to the seller (*venda de bens alheios*). In Portugal, the sale of an item which does not belong to the seller is invalid (Article 892). For the contract is invalid, there are no duties to perform and, thus, there can be no duty to compensate damages resulting from non-performance. In conforming to this reasoning, Article 898 distinguishes two situations: if the contract has been validated, for the seller did eventually buy the item he had sold, then he is obliged to make compensation for the positive interest; if, however, the contract has not been validated, for the seller did not buy the item he had sold, he is to make compensation for the negative interest. The general rules on initial impossibility in Articles 280, 401 and 227 of the Portuguese Civil Code are to be interpreted in accordance with the specific rules on the sale of goods which do not belong to the seller in Articles 892 to 904. In fact, the sale of goods which do not belong to the seller is just a case of initial impossibility of the object of the sales contract. The conclusion of a sales contract has the purpose, and the effect, of transferring property from the seller to the buyer (Articles 408, 874, 879). If, however, the seller has no property rights on the goods he sells, the object of the contract is impossible and the contract is invalid (Article 892). It follows from the principles on the transfer of property in Articles 408, 874 and 879 that the scope of Article 892 is to specify the general rule in Article 280. Therefore, if the general rules on initial impossibility of performance in Articles 280, 401 and 227 of the Portuguese Civil Code are to be interpreted in accordance with the specific rules on the sale of goods which do not belong to the seller, as they are, the decision to limit liability to the negative interest stated in Article 898 of the Civil Code is to be applied to all cases of initial impossibility.¹³

3. In my view, the rules on initial impossibility of performance in Articles 280, 401 and 892 to 904 should either be amended or removed from the Civil Code. First, the distinction between initial impossibility and subsequent impossibility should not be relevant as to decide on the effects of an impediment to performance: the time at which the impediment occurred may be just an accident; furthermore, it may be difficult to determine whether it occurred after or before the conclusion of the contract.¹⁴ Second, in the cases of initial impossibility, the debtor

¹³ Carlos Alberto da Mota Pinto, *Cessão da posição contratual* 458-462 (reprint 1982).

¹⁴ Bundesministerium der Justiz, *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts* 145

should be obliged to make compensation for the positive interest. The duty to compensate damages resulting from initial impossibility of performance arises in two situations: where the debtor knew that performance was impossible at the time of the conclusion of the contract, and where the debtor should have known that it was so. If the debtor *knew* that performance was impossible at the time of the conclusion of the contract, he should be obliged to compensate the creditor, by restoring the situation which would have occurred if the contract had been accurately performed: the limitation of liability to the negative interest in Article 227 creates a situation which is tantamount to an abuse of rights, in the form of *venire contra factum proprium*, for the debtor promises to perform, *knowing that performance is impossible*, and refuses to compensate damages resulting from non-performance *by invoking impossibility*.¹⁵ If the debtor did not know, but should have known, that performance was impossible, he should also be obliged to compensate the creditor. The risk of ignoring a circumstance, relating either to facts or to the law, on the ground of one's own fault is to be on the one who ignores. The debtor is not to take advantage of his own fault, the debtor is not to sustain disadvantage from the breach of the debtor's duty.¹⁶ Third, the rules on initial impossibility in Articles 280 and 401 of the Portuguese Civil Code are out of line with the tendencies of European contract law: both Article 3.3 of Unidroit Principles and Article 4:102 of the Principles of European Contract Law state that "the mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract". The rights and duties of the parties are therefore to be determined by applying the rules regarding non-performance¹⁷.

V.

1. The third aspect of the law of impossibility amended by the German Act to Modernize the Law of Obligations of 26 November 2001 relates to the distinction between objective impossibility and subjective impossibility of performance: objective impossibility relates to performance — no one can perform; neither the debtor, nor any other person —; subjective impossibility relates to the debtor — even if the debtor cannot perform, other persons can. The old law distinguished the cases of initial and subsequent impossibility. Old § 306 of the German Civil Code considered the cases of an initial impediment to performance, rejecting the equation of subjective impossibility with objective impossibility: initial objective impossibility was relevant, for the legal transaction whose object was impossible for everyone

(1992).

¹⁵ See Britta Kley, *Unmöglichkeit und Pflichtverletzung* 147 (2001).

¹⁶ António Menezes Cordeiro, *Da boa fé no direito civil* 512 (reprint 1997).

¹⁷ See, for instance, António Menezes Cordeiro, *Tratado de direito civil português. Parte geral. Introdução. Doutrina geral. Negócio jurídico* 679, 682 (3d. ed. 2005).

was invalid; initial subjective impossibility was irrelevant, for the legal transaction whose object was impossible for the debtor, and just for him, was valid. Old § 275 considered the cases of a subsequent impediment to performance, supporting the equation of the two types of impossibility: section 1 explained the effect of subsequent objective impossibility; section 2 extended this effect to subsequent subjective impossibility, by saying that “the inability of the creditor to perform after the creation of the obligation [was] equivalent to the subsequent impossibility of performance”. In either case, the debtor was relieved from the duty to perform. The new law eliminates the distinctions in old § 306 and in old § 275, equating initial impossibility with subsequent impossibility, as well as subjective impossibility with objective impossibility: the impediment to performance extinguishes the right of the creditor, regardless of being prior or posterior to the conclusion of the contract¹⁸.

2. While the German Civil Code now accepts the equation of subjective impossibility with objective impossibility, the Portuguese Civil Code does not. First, in Portuguese law there is no equation of subjective with objective impossibility in the case of an impediment existing at the time of the conclusion of the contract: initial objective impossibility causes invalidity of the legal transaction; initial subjective impossibility does not. Second, there is no equation of subjective with objective impossibility in the case of an impediment occurring after the conclusion of the contract: Article 790 of the Portuguese Civil Code declares that subsequent objective impossibility has the effect of relieving the debtor, by extinguishing the obligation; Article 791 declares that subsequent subjective impossibility has the effect of relieving the debtor, by extinguishing the obligation, *if, and only if, the debtor is to perform in person*. Even though the law does not use the word “only”, it certainly causes the impression that the debtor, who is unable to perform *in person*, is under a duty to entrust performance to a third party¹⁹.

VI.

The equation of subjective impossibility with objective impossibility in new § 275 (1) of the German Civil Code raises at least two problems. First, Article 79 of the UN Convention on the International Sale of Goods, Article 7.1.7 of the Unidroit Principles, and Article 8:108 of the Principles of European Contract Law implicitly recognize the existence of a duty to avoid or overcome the impediment to performance, regardless of the fact that the impediment

¹⁸ Peter Schlechtriem, *Schuldrecht. Allgemeiner Teil* 152 (5th. ed. 2003): “Nach § 275 kann ein Anspruch auf Naturalerfüllung nicht durchgesetzt werden, wenn die Leistung in natur entweder ‘für jedermann’, also objektiv, oder ‘für den Schuldner’, also subjektiv, unmöglich ist”.

¹⁹ See, for example, Inocêncio Galvão Telles, *Direito das obrigações* 364 (7th. ed. 1997).

relates to performance itself or to the person of the debtor.²⁰ The German rule on subjective impossibility of performance in § 275 of the Civil Code has the effect of exempting the debtor from such a duty where the impediment relates to the person of the debtor. Second, in the cases of subjective impossibility the debtor can always avoid or overcome the impediment by entrusting performance of the contract to another person, who is able to perform, who is willing to perform. The rules on abnormal difficulty, or relative impossibility, apply, or should apply, to subjective impossibility: if the debtor can entrust performance to another person, at a reasonable cost, he owes a duty to do so; if he cannot entrust performance at a reasonable cost, he has a right to refuse performance, by invoking the rules on abnormal difficulty. There is no good reason to apply different rules to impediments which result from circumstances regarding the person of the debtor and to impediments which result from any other circumstances.²¹

§ 275 of the German Civil Code does not consider the close proximity between relative impossibility and subjective impossibility: section 1 equates subjective impossibility to objective impossibility; section 2 refuses to equate relative impossibility to absolute impossibility. While section 1 excludes the claim for performance “in so far as it is impossible for the debtor or for anyone else to perform”, section 2 does not exclude that claim, for it simply authorizes the debtor to refuse to perform. The rules in section 1 and in section 2 of § 275 are, therefore, incoherent. Reinhard Zimmermann confirms this conclusion in a recent article: “Unless the general borderline between § 275 I and II BGB is to be subverted, and unless the debtor is to be denied the benefit of being able to choose whether or not to render performance, cases of subjective impossibility cannot normally be brought under § 275 I BGB”.²² For those reasons, I think the rule regarding subjective impossibility in § 275 of the German Civil Code is not to be taken as a model to the Europeanization of contract law: Whereas the equation of initial impossibility with subsequent impossibility constitutes a rather successful amendment of the German law of obligations, the equation of subjective impossibility with objective impossibility does not.

²⁰ Hans Stoll, commentary on Article 79, in: Peter Schlechtriem (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, *supra* note 12, at 612: “as a rule, it can be expected of the promisor that he overcome the impediment, in order to perform the contract in the agreed manner, even where this results in him incurring greatly increased costs and a business loss”.

²¹ See, for instance, Volker Emmerich, commentary to (old) § 275, 2 *Münchener Kommentar zum Bürgerlichen Gesetzbuch* 781-808 (3d. ed. 1994): “in einer marktwirtschaftlichen Ordnung im Grunde (fast) jede Leistung ihre Preis hat, so daß — abgesehen von der höchstpersönlichen Leistungen [...] — kaum Fälle vorstellbar sind, in denen nicht der Dritte, dem die Leistung immer noch möglich ist, hierzu gegen einne freilich notfalls erhebliche Gegenleistung des Schuldners bereit wäre”.

²² Reinhard Zimmermann, *Breach of Contract and Remedies under the New German Law of Obligations* 15 (2002).

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