

## **THE LIMITS OF THE DUTY TO PERFORM IN THE PRINCIPLES OF EUROPEAN CONTRACT LAW**

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### **Abstract**

The Principles of European Contract Law (PECL) contain two Articles limiting the duty to perform if performance has become more burdensome. On the one hand, Article 6:111 PECL, ‘Change of Circumstances’, is based on the idea of a *clausula rebus sic stantibus* and may lead to an adaptation of the contract by the court. On the other hand, it is Article 8:108 PECL, ‘Excuse Due to an Impediment’, excusing non-performance without giving the court the power to adapt the contract. This article analyses the scope of the provisions and their relationship critically, and investigates whether such a dichotomy, i.e. two rules limiting the duty to perform with probably different results, is desirable in a future European private law. The author takes a comparative approach by looking at the sole concept of frustration in English and Scots Law on the one hand and a similar division in German law on the other.

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## A. Introduction

The Principles of European Contract Law (henceforth PECL)<sup>2</sup> contain two provisions dealing with the situation that the performance of the debtor's obligation becomes or is more onerous than expected by the parties at the time they entered into the contract. However, the result of the application of Article 6:111 and Article 8:108 PECL<sup>3</sup> may be entirely different, leading to adaptation of the contract by the court and excuse for the non-performance respectively. Although this attempt of drafting a European contract code has provoked much literature in general, there are hardly any writings on the limits of the duty to perform in the principles.<sup>4</sup> Thus, the following sections analyse the provision's preconditions, their relationship as well as the borderline between the two.

The additional aim of this article is to discover similarities and differences between the PECL's statutory provisions and English and German law.<sup>5</sup> These two national systems suit our task because they may stand for the different approaches to the issue. While English law deals with situations we are interested in by means of the doctrine of frustration,<sup>6</sup> German law has, like PECL, two distinct concepts of impossibility<sup>7</sup> and change of circumstances

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<sup>2</sup> O Lando/H Beale (eds), *Principles of European Contract Law*, Parts I and II, combined and revised (2000).

<sup>3</sup> All Articles referred to are those of the PECL unless stated otherwise.

<sup>4</sup> Some exceptions are constituted predominantly by the German debate on the reform of the law of obligations: W Ernst, 'Die Verpflichtung zur Leistung in den Principles of European Contract Law und in den Principles of International Commercial Contracts', in J Basedow (ed), *Europäische Vertragsvereinheitlichung und deutsches Recht* (2000), 129; N N Fischer, *Die Unmöglichkeit der Leistung im internationalen Kauf- und Vertragsrecht* (2001); D P Flambouras, 'The Doctrines of Impossibility of Performance and *clausula rebus sic stantibus* in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis', 13 (2001) *Pace International Law Review* 261; U Huber, 'Das geplante Recht der Leistungsstörungen', in W Ernst, R Zimmermann (eds), *Zivilrechtswissenschaft und Schuldrechtsreform* (2001), 31.

<sup>5</sup> For a comparison between English and (unreformed) German law, cf recently G Hammer, *Frustration of Contract, Unmöglichkeit und Wegfall der Geschäftsgrundlage. Ein Vergleich der Lösungsansätze englischer und deutscher Rechtsprechung* (2001).

<sup>6</sup> Cf for an extensive treatment E McKendrick, *Force Majeure and Frustration of Contract*, 2<sup>nd</sup> edn (1995); G H Treitel, *Frustration and Force Majeure* (1994).

<sup>7</sup> § 275 (1)-(3) BGB; the only - however, concise - discussion of those in English so far is R Zimmermann, 'Remedies for Non-Performance: The Revised German Law of Obligations Viewed against the Background of the Principles of European Contract Law', 6 (2002) *Edinburgh LR* 273, 280ff; cf also idem, 'Breach of Contract and Remedies under the New German Law of Obligations', Saggi, conferenze e seminari 48 (2000) <<http://w3.uniroma1.it/idc/centro/publications/48zimmermann.pdf>>, 11ff.

(*Störung der Geschäftsgrundlage*),<sup>8</sup> and is - with regard to our issue - the most recently reformed.

Our comparison is a special one because it compares national legal rules and concepts, rules which are applied and have been applied over years, i.e. 'hard law', with a newly developed 'soft law', which does not govern contracts unless the parties agree on it. Even though the rules differ totally from each other as regards legal nature, the comparison makes much sense. PECL is recognized as a kind of model code for European contract law, serving both the unification and modernisation of domestic contract law. In addition, the principles summarise a 'common core' of European contract law and thus have some similarity with the US Restatements.<sup>9</sup> This 'common core' may, however, follow a national solution or may constitute a compromise; at least it should achieve results similar to the major legal systems, and thus it has to take into account similar if not the same aspects.

## **B. Article 8:108: 'Excuse Due to an Impediment'**

The first provision in the PECL capable of granting relief in the case of burdensome performance is Article 8:108, which was drafted after Article 79 CISG. The underlying idea in the PECL is that the debtor is strictly liable for non-performance like in English law, i.e. the debtor is liable as long as he is not able to show that his non-performance is excused, whereas German law generally requires fault for any liability.

### **B.I Prerequisites**

The provision only applies to impediments subsequent to the conclusion of the contract.<sup>10</sup> The whole situation must be one commonly described as *force majeure*,<sup>11</sup> which originates from French law.<sup>12</sup> The non-performance is excused according to paragraph (1) on four conditions.

Firstly, there must be an *impediment*. Impediment is not defined in the PECL themselves nor in their commentary. The examples given include a ship's sinking and a

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<sup>8</sup> § 313 (1)-(3) BGB; it is probably better known under the old terminology of *Wegfall der Geschäftsgrundlage*; cf for the concept according to the old law W Lorenz, 'Contract Modification as a Result of Change of Circumstances', in R Zimmermann, S Whittaker (eds), *Good Faith in European Contract Law* (2000), 357; K Zweigert, H Kötz, *Introduction to Comparative Law*, 3<sup>rd</sup> edn (1998), 518ff. Yet the legislator's aim was not to change the existing status of the doctrine; BT-Drucks 14/6040 <<http://dip.bundestag.de/btd/14/060/1406040.pdf>>, 175f.

<sup>9</sup> In theory, the US Restatements rather summarise the law as it is today, whereas PECL's aim is rather unification - i.e. the future development of contract law - than restating a current status. Yet the differences should not be overestimated; cf R Zimmermann, 'Konturen eines Europäischen Vertragsrechts', (1995) *Juristenzeitung* 477, 478f.

<sup>10</sup> Lando/Beale, n 2, 379 (comment B); a previously existing impediment is dealt with in Art 4:103, 'Fundamental Mistake as to Facts or Law'.

<sup>11</sup> Lando/Beale, n 2, 379f (comment C).

<sup>12</sup> For *force majeure*, cf B Nicholas, 'Force Majeure in French Law', in McKendrick (ed), n 6, 21.

buyer's insolvency.<sup>13</sup> However, the latter is not beyond the control of the party and does not excuse non-performance. According to these examples, 'impediment' can be described as impossibility,<sup>14</sup> which is no unambiguous term either. There are still obligations that are impossible to perform physically, but technical progress enables us to manage tasks thought to be impossible before. Given economic power, time and resources only small ground remains for objective impossibility. Yet, as the reference to bankruptcy shows, it is not an objective but a subjective assessment of impossibility. One has to examine whether the actual debtor can perform or not.

But this impossibility only covers cases of 'true impossibility'; the commentary limits the application of Article 8:108 to cases 'where an impediment prevents performance'<sup>15</sup> and expressly excludes excessively onerous performance. Even an immediate and unexpected price increase of several hundreds of per cent is therefore irrelevant for Article 8:108. It thus reasonably clarifies the PECL's position on an issue that is highly controversial for Article 8:108's antetype, Article 79 (1) of the CISG.<sup>16</sup>

Secondly, the impediment must have been *beyond the debtor's control*. Beyond the parties' control means that the obstacle must be something outside the debtor's sphere of control.<sup>17</sup> *Force majeure* must have come about through no fault of the debtor.<sup>18</sup> For the latter case, the PECL's commentary refers to a delayed performance in order to illustrate this requirement. The reference to any form of *culpa* in this context illustrates that it is often difficult to distinguish between *force majeure* and absence of fault.<sup>19</sup> In many cases, the answer to the question whether the obstacle was external and whether the debtor was at fault will coincide. But both limitations are distinct and vary in scope. While for externality it is necessary that it does not fall into a specified/standard sphere of responsibility,<sup>20</sup> fault may

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<sup>13</sup> Lando/Beale, n 2, 379 (comment B).

<sup>14</sup> Lando/Beale, n 2, 324 (comment A), although this is stated in the commentary to Art 6:111: 'Change of Circumstances'.

<sup>15</sup> Lando/Beale, n 2, 379 (comment A).

<sup>16</sup> Cf H Stoll, in P Schlechtriem (ed), *Kommentar zum Einheitlichen UN-Kaufrecht. Das Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf, CISG*, 3<sup>rd</sup> edn (2000), Art 79 CISG paras 39, 40; D Tallon, in C Bianca, M Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987), Art 79 para 3.1; A H Hudson, 'Exemptions and Impossibility under the Vienna Convention', in McKendrick (ed), n 6, 267, 276f; Fischer, n 4, 194ff with extensive references.

<sup>17</sup> Lando/Beale, n 2, 380 (comment A(i)). It appears to be the same test as the externality test in French law; cf Nicholas, n 12, 24.

<sup>18</sup> Lando/Beale, n 2, 380 (comment A(i)), limits the application to the absence of 'fault of either party'. The only sensible solution is that the party at fault must be barred from being freed from liability, for it is not obvious why the innocent party should be prejudiced by culpable behaviour by the obligee.

<sup>19</sup> Cf for the relationship between *force majeure* and *culpa* Cass Civ, 9 March 1994, Bull Civ I.91 (partly translated in H Beale et al (eds), *Cases, Materials and Texts on Contract Law* (2002), 594f).

<sup>20</sup> Cf for Art 79 CISG, Schlechtriem/Stoll, n 16, Art 79 para 20.

occur even beyond those borders.<sup>21</sup> The illustration of the risk sphere, however, must not be taken literally. It is also beyond a debtor's control if the debtor's factory is destroyed by a terrorist attack,<sup>22</sup> even if the terrorist entered the factory itself.

The third requirement is that *it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract*. Either the party should have accepted the risk or have been at fault in not having foreseen it.<sup>23</sup> The standard is one of reasonable foreseeability<sup>24</sup> judged from the perspective of a normal person placed in the same situation. The party should not be too anxious, but if an obstacle is reasonably foreseeable and the debtor nevertheless contracts unconditionally, he has taken the risk that the impediment evolves.

Fourth, it is required that *it could not reasonably have been expected to have avoided or overcome the impediment or its consequences*. The commentary summarises this issue as the impediment being 'insurmountable'.<sup>25</sup> This prerequisite may be surprising. As the impediment must be outside the party's control, how could the party have avoided it? The PECL's commentary illustrates: 'In an earthquake zone the effects of earthquakes can be overcome by special construction techniques, though it would be different in the case of a quake of much greater force than usual.'<sup>26</sup> But demanding an earthquake-resistant construction presupposes that the risk has been foreseen or was foreseeable. In many cases, the prerequisite of a non-foreseeable impediment steps in. The issue whether an impediment is insurmountable is hence only rarely relevant. E.g. where the risk was not foreseeable originally - i.e. at the time of the conclusion of the contract - but becomes foreseeable afterwards or where the obligation can be fulfilled in a different way - e.g. in a contract for the delivery of goods that under normal circumstances would be delivered by sea - the impediment is not irresistible if transfer by air is possible;<sup>27</sup> generally, if there is a

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<sup>21</sup> Intentional interference by the debtor (unlike culpable action) is not necessarily covered by the standard sphere of responsibility. The delayed performance example provided by the commentary is a special case, because the event that constitutes the impediment may nevertheless be an external one. Yet, the fault on the part of the debtor allowed the external event to have its effect on the performance.

<sup>22</sup> Cf for Art 79 CISG Schlechtriem/Stoll, n 16, Art 79 para 20.

<sup>23</sup> Lando/Beale, n 2, 380 (comment c(ii)).

<sup>24</sup> Lando/Beale, n 2, 381 (comment c(ii)); cf for Art 79 CISG: Bianca/Bonell/Tallon, n 16, Art 79 para 2.6.3; F Enderlein, F Maskow, D Strohbach (eds), *International Sales Law* (1992), art 79, para 5.3; Schlechtriem/Stoll, n 16, art 79 para 23.

<sup>25</sup> Lando/Beale, n 2, 381 (comment c(iii)).

<sup>26</sup> This illustration is more appropriate for the question of foreseeability. It shows that, although a risk of a specific kind is foreseeable, e.g. an earthquake, an earthquake of a strength that could not have been reasonably expected is not foreseeable.

<sup>27</sup> Nicholas, n 12, 24.

commercially reasonable substitute available.<sup>28</sup> The obligator is required to incur extra expenses in order to ensure performance of the contract.

Finally, although this is not stated in the Article, it seems right to demand - like under the CISG - that the impediment is caused solely by an event that was neither foreseeable nor insurmountable.<sup>29</sup>

Taking the facts from the English landmark decision of *Taylor v. Caldwell*,<sup>30</sup> the plaintiffs and the defendants entered into a contract for the use of the defendant's music hall for four concerts in the summer months of June to August. The day before the first concert was to take place the hall burned down. Provided that the supervening event was beyond the debtor's sphere of control, this case would also lead to excuse (at least for the first concert) under Article 8:108.

## B.II Results

Whereas Article 79 of the CISG only provides a defence against an action for damages,<sup>31</sup> Article 8:108's result is a wider excuse. Article 8:101(2) provides that the 'aggrieved party may resort to any of the remedies set out in Chapter 9 except claiming performance and damages'.<sup>32</sup> Another difference occurs in the case of delay amounting to fundamental non-performance: while under the PECL an impediment terminates the contract automatically (Article 9:303(4)), under the CISG the creditor may choose.<sup>33</sup> The practical differences, however, will be minimal for fundamental non-performance in the case of delay will hardly be claimed by the debtor but by the creditor. The latter will not have any interest in performance. If, e.g., A employs B's big band at a fixed date and time for his anniversary garden party and the big band does not show up, then it is likely that A wants to terminate the contract, whereas B is likely to be able and willing to perform on another day.<sup>34</sup>

## B.III English law: Frustration

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<sup>28</sup> For Art 79 CISG, Secretariat Commentary, Art 65, para 7ff <<http://www.cisg-online.ch/cisg/materials-commentary.html>>; OLG Hamburg, 28 February 1997, CISG Online 261 <<http://www.cisg-online.ch/cisg/urteile/261.htm>>; Schlechtriem/Stoll, n 16, art 79 para 24.

<sup>29</sup> For Art 79 CISG, Bianca/Bonell/Tallon, n 16, Art 79, para 2.6.6; Schlechtriem/Stoll, n 16, Art 79 para 31; of a contrary opinion are Enderlein/Maskow/Strohbach, n 24, Art 79, para 3.4.

<sup>30</sup> *Taylor v Caldwell* (1863) 3 B & S 826; cf the detailed discussion by Treitel, n 6, paras 2-024ff.

<sup>31</sup> Cf Art 79 (5) CISG.

<sup>32</sup> For the relationship between the right to demand specific performance and Art 79 CISG, cf Schlechtriem/Stoll, n 16, Art. 79 paras 55ff.

<sup>33</sup> Cf also Flambouras, n 4, 284.

<sup>34</sup> This is of course no Sale of Goods example; it only serves to illustrate the parties' interests in such situations.

After the courts in the 17<sup>th</sup> century upheld contracts as being absolute,<sup>35</sup> the English doctrine of frustration has been developed and may discharge the debtor from liability. Unlike in the PECL and in German law, there are no two distinct concepts for that. The classic definition of the modern idea of frustration was given by Lord Radcliff in *Davis Contractors v Fareham Urban DC*,<sup>36</sup> as follows: '[F]rustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.' However, *Davis* was no case in which the claimant succeeded with the argument of frustration; it has generally been observed that cases of frustration are rare.<sup>37</sup>

Comparing it to Article 8:108, frustration seems to be the one with the wider application. Both are only applicable for subsequent obstacles.<sup>38</sup> But the obstacle does not need to amount to an impediment;<sup>39</sup> also delay<sup>40</sup> or frustration of purpose<sup>41</sup> may amount to legal frustration.

Frustration and Article 8:108 may accord on the second and third requirements, externality and unforeseeability of the impediment. There are some *dicta* that the supervening event must be 'something altogether outside the control of the parties'<sup>42</sup> like under the PECL.

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<sup>35</sup> *Paradine v Jane* (1647) Aleyn 26: '. . . when a party by his own contract creates a duty and charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.' The history is well narrated in Treitel, n 6, ch 2.

<sup>36</sup> [1956] AC 696; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675; *Pioneer Shipping Ltd v BTP Tioxide Ltd ('The Nema' (No 2))* [1982] AC 724; for a similar reasoning prior to *Davis Contractors* cf *F A Tamplin Steamship Company v Anglo-Mexican Petroleum Products Company* [1916] 2 AC 397. *Davis Contractors* is also cited as an authority in Scotland; H L MacQueen, J Thomson, *Contract Law in Scotland* (2000), para 4.100; W W McBryde, *The Law of Contract in Scotland*, 2<sup>nd</sup> edn (2001), para 21-08.

<sup>37</sup> E McKendrick, 'Force Majeure and Frustration: Their Relationship and a Comparative Assessment', in *idem*, n 6, 33, 42f.

<sup>38</sup> *Amalgamated Investment & Property Co v John Walker & Sons* [1977] 1 WLR 164 (CA); E McKendrick, *Contract Law*, 4<sup>th</sup> edn (2000), 301; MacQueen/Thomson, n 36, para 4.91; McBryde, n 36, 21-04.

<sup>39</sup> But an impediment may frustrate the contract, *Joseph Constantine Steamship Line v Imperial Smelting Corp Ltd* [1942] AC 154, 163f; *Taylor v Caldwell*, n 30; cf Treitel, n 6, paras 3-001ff.

<sup>40</sup> *Kodros Shipping Corporation v Empresa Cubana de Fletes*, ('*The Evia*' (No 2)) [1982] 1 Lloyd's Rep 334 (CA), affirmed [1983] 1 AC 736.

<sup>41</sup> *Krell v Henry* [1903] 2 KB 740 (CA); but contrast the same court's decision in *Herne Steamboat v Hutton* [1903] 2 KB 740 (CA), which is not easily distinguishable from *Krell v Henry*; cf discussion in McKendrick, n 38, 306ff. Scots law on this point remains unclear; cf McBryde, n 36, 21-33ff with further references.

<sup>42</sup> *J Lauritzen AS v Wijsmuller BV ('The Super Servant Two')* [1989] 1 Lloyd's Rep 148, 156, affirmed [1990] 1 Lloyd's Rep 1 (CA), in which Bingham LJ stated: 'The essence of frustration is that it is caused by some unforeseen supervening event over which the parties to the contract have no control and for which they are therefore not responsible.' McBryde, n 36, para 21-43 states that 'beyond the control' the test is describing the law more accurately than referring to 'externality' and 'foreseeability'.

Thus, fault on the part of the debtor averring frustration generally excludes frustration<sup>43</sup> as well as any discharge according to the PECL. This is accepted for intentional actions, whereas the law is uncertain if the subsequent event is caused by negligence.<sup>44</sup> It is also doubtful whether the frustrating event must have been unforeseeable.<sup>45</sup>

A significant difference is that frustration does not require an insurmountable obstacle as the alternative way will often constitute something 'radically different'.<sup>46</sup> The immediate result concurs again: the debtor is freed from performance and any damages for non-performance.

#### B.IV German law: Impossibility

A comparison with the German concept of impossibility only is less fruitful as the effect of an impossible performance under German law is entirely different. It only excludes the general claim for specific performance<sup>47</sup> notwithstanding fault and foreseeability on the part of the debtor. The question whether the debtor has to pay damages is a matter of fault. The following example may illustrate this. A sold his Volkswagen Golf to B, but the car was destroyed before it was handed over. The destruction of the car only excludes B's claim of performance in *forma specifica*. With regard to damages, B's claim will only succeed if he can prove that A's culpable behaviour led to the impossibility.<sup>48</sup>

Nevertheless, we should take a look at the issue when German law considers an obligation to be impossible. § 275 (1) of the BGB applies to all types of impossibility:

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<sup>43</sup> McKendrick, n 6, 50f; Treitel, n 6, para 14-001 calls it 'the preferable view'.

<sup>44</sup> In *Joseph Constantine Steamship Line v Imperial Smelting Corporation*, n 39, it was considered *obiter* whether negligence on the part of the party seeking relief denies the claim of frustration, contrast 166 per Viscount Simon LC and 195 per Lord Wright. However, there is Scottish authority: *London & Edinburgh Shipping Company, Ltd v Lords Commissioners of the Admiralty* [1920] SC 309 (IH).

<sup>45</sup> The classic approach was that unforeseeability was necessary: *Walton Harvey Ltd v Walker & Homfrays Ltd* [1931] 1 Ch 274 (CA); see also post *Davis Contractors, National Carriers Ltd v Panalpina (Northern) Ltd*, n 37, 700; *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal ('The Hannah Blumenthal')* [1983] 1 AC 854, 909. This was questioned in *Ocean Tramp Tankers Corps v V/O Sovfracht ('The Eugenia')* [1964] 2 QB 226, 239 (CA) per Lord Denning, *W J Tatem Ltd v Gamboa* [1939] 1 KB 132, 137f; McBryde, n 36, para 21-28; Treitel, n 6, para 13-001f.

<sup>46</sup> Treitel, n 6, para 12-017.

<sup>47</sup> Zimmermann, n 7, 286; W Ernst, in K Rebmann (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 4<sup>th</sup> edn (2001-), § 275 para 3.

<sup>48</sup> There is some discussion on the question whether the non-performance itself can constitute a breach of contract in the case of impossibility or whether the breach can only be seen in the culpable behaviour. The prevailing view is the former approach; cf *Münchener Kommentar/Ernst*, n 47, § 280 para 11f.

objective, subjective<sup>49</sup> and initial impossibility<sup>50</sup>. Besides the relevance for initial impediments it corresponds with the notion in Article 8:108 of an impediment; particularly excessively onerous performance is not covered.<sup>51</sup> However, §§ 275 (2) and (3) of the BGB cover changes in the equilibrium<sup>52</sup> as well as cases where performance is owed in persona and it is unreasonable to demand it<sup>53</sup>.

### **C. Article 6:111: ‘Change of Circumstances’**

Now we shall turn to Article 6:111. Included in PECL’s chapter 6, it is primarily concerned with the contracts’ content, but may have an effect similar to Article 8:108. Its paragraph (1) states the general rule that an obligation is not discharged if its performance becomes more onerous. Hence the underlying principle is still the one of *pacta sunt servanda*. Paragraph (2) provides an exception to this.

#### **C.I Prerequisites**

Paragraph (2) is applicable provided four conditions are satisfied. Firstly, the performance of the contract becomes *excessively onerous*.<sup>54</sup> Excessively onerous is distinct from an impediment. The performance must be at least ‘ruinous’ for the debtor,<sup>55</sup> whereas impossibility presupposes an ‘insurmountable obstacle’<sup>56</sup>. Thus, extremely onerous means an obstacle of one degree less than impossibility.<sup>57</sup> The commentary tries to illustrate the situation in which a change of circumstances brought about a major imbalance in the

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<sup>49</sup> Yet, subjective impossibility seems to differ from the former § 275 (2) as it demands to overcome some impediments; Münchener Kommentar/Ernst, n 47, § 275 para 3. This, however, corresponds with Art 8:108.

<sup>50</sup> Cf Zimmermann, n 7, 280f.

<sup>51</sup> Cf Zimmermann, n 7, 282.

<sup>52</sup> § 275 (2) BGB; cf Zimmermann, n 7, 281ff, and in German the extensive treatment by Münchener-Kommentar/Ernst, n 47, § 275 paras 69ff. Some remarks on § 275 (2) BGB are made below, last para of C.IV.

<sup>53</sup> § 275 (3) BGB; cf Zimmermann, n 7, 285f and in German the extensive treatment Münchener-Kommentar/Ernst, n 47, § 275 paras 107ff.

<sup>54</sup> This terminology was adopted from Art 1467 of the Italian *Codice civile*; Lando/Beale, n 2, 324 (comment A).

<sup>55</sup> Lando/Beale, n 2, 324 (comment A).

<sup>56</sup> Ibid.

<sup>57</sup> Cf for Art 6.2.2 of the PICC also U Maskow, ‘Hardship and Force Majeure’, 40 (1992) *American JCL* 657, 663.

contract<sup>58</sup> within in the particular economic context<sup>59</sup>. The contract must be ‘overturned by events’, so that performance will involve ‘exorbitant costs’ for one of the parties.<sup>60</sup> Reference is made to the French concept of *imprévision*.<sup>61</sup>

But when is a contract’s performance ‘excessively onerous’ to the debtor? ‘Ruinous’ suggests that the performance must lead to the economic breakdown of the debtor. This may be the case in the classic textbook example of the golden chalice to be delivered by the vendor to the buyer that sunk to the ground of the deep sea. But is it necessary that actual performance leads to collapse, or is it sufficient that performance is disturbed greatly but the debtor would be able to perform thanks to financial reserves? In the latter case, it would be ruinous in the sense that any other performance of this kind would lead to the debtor’s economic collapse. The distinction is very important. A financially strong debtor may sustain a major imbalance while the same case may be ruinous for a financially weaker party.

It is submitted that the financial power to sustain a major imbalance must be irrelevant because it does not fit the test embodied in Article 6:111. This can be explained by looking at the Article itself. Paragraph (1) provides two helpful examples for events that make performance more burdensome: firstly, increase in the cost of performance and secondly devaluation of the counter-performance. Although the initial reference to ‘performance’ might suggest that the assessment should focus on the isolated performance of the party seeking relief, which would accord with the testing method for impossibility, Article 6:111 looks at the proportionality of the two performances; for only this view can explain why the diminution of the counter-performance’s value may suffice.

The overall financial situation, however, has nothing to do with a comparison of the two performances, thus taking it as the decisive criterion would not fit the comparison as embodied in Article 6:111. It would replace the test with a test of general economic capacity, an assessment of the debtor’s pocket’s depth. From the view taken here, the ruinous-test reflects rather the exceptional character of paragraph (2) and may indicate major imbalance. In fact it constitutes a threshold excluding insubstantial aggravations. Looking at the imbalance of the performances in the particular case must thus assess whether a performance has become excessively onerous.<sup>62</sup>

The PECL’s commentary gives as an example the unexpected closure of the Suez Canal.<sup>63</sup> This happened, too, in the English case of *Tsakiroglou & Co Ltd v Noble Thorl*

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<sup>58</sup> Lando/Beale, n 2, 324 (comment B(i)).

<sup>59</sup> Lando/Beale, n 2, 324f (comment B(i)).

<sup>60</sup> Lando/Beale, n 2, 324 (comment B(i)).

<sup>61</sup> The reference to *imprévision* is unfortunate as it is rather a comprehensive heading than a singular concept; cf Zweigert/Kötz, n 8, 524ff; for *imprévision* cf also Lorenz, n 8, 1ff; D Tallon, ‘Hardship’, in A. Hartkamp et al (eds), *Towards a European Civil Code*, 2<sup>nd</sup> edn (1998), 327 with further references.

<sup>62</sup> This concurs with the position adopted by the PICC in Art 6.2.2; cf the wording ‘equilibrium of the contract’.

<sup>63</sup> Lando/Beale, n 2, 325 (comment B(i)).

*GmbH*.<sup>64</sup> The plaintiff had sold Sudanese nuts c.i.f. Hamburg to the defendant. The usual route from Port Sudan to Hamburg is through the Suez Canal. However, due to the Suez Crisis the canal was blocked and the plaintiff refused to ship the nuts around the Cape of Good Hope, which would have taken twice as long as the route originally intended and would be far more costly. Whereas the PECL would demand the parties to renegotiate, the House of Lords denied frustration and thus upheld the contract.<sup>65</sup>

However, some questions remain unanswered. Neither wording nor commentary clarifies how the counter-performance's devaluation should be calculated. An objective calculation would tackle, for example, the case of inflation. If, however, a subjective assessment is allowed, Article 6:111's scope of application would be considerably wider. On the latter approach, it would also cover cases commonly regarded as of frustration of purpose. An illustration in the *Unidroit Principles of International Commercial Contracts* (henceforth 'PICC') commentary suggests that it is the case there.<sup>66</sup> It is a flaw of the regulation that it is not clear on this.<sup>67</sup> Yet it is suggested that the regulation is to cover frustration-of-purpose cases as well for two reasons. Firstly, the law would have an enormous lacuna otherwise. Let us consider the facts of one of the famous<sup>68</sup> English coronation cases, *Krell v Henry*.<sup>69</sup> Henry hired Krell's flat at Pall Mall for the day at which the announced coronation processions would take place and pass along Pall Mall. The processions were cancelled and Krell demanded payment of the extraordinary lease. In this case, the procession was no part of the debtor's obligation and thus did not make the sole provision of the flat impossible.<sup>70</sup> Secondly, dealing with frustration of purpose within Article 8:108 is not possible for the latter Article examines solely the impediment of the performance with no regard to the consideration. The frustration of purpose in such cases, however, will be claimed more likely by the recipient of the goods in relation to the payment of the price,<sup>71</sup> but his performance, i.e. the payment of the rent, is still possible. This approach therefore clarifies the scope of impossibility at the same time: impossibility is relevant if the debtor cannot perform, whereas Article 6:111 deals with a situation where he can perform but does not want to because of a

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<sup>64</sup> *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93.

<sup>65</sup> *Ibid*, 103.

<sup>66</sup> Art 6.2.3 PICC (1994), illustration 5 at 155.

<sup>67</sup> Ernst, n 4, 149.

<sup>68</sup> Hammer, n 5, 49, believes that the English coronation cases are amongst the best known English court cases in Germany.

<sup>69</sup> *Krell v Henry* [1903] 2 KB 740 (CA).

<sup>70</sup> Nevertheless, a minority of German writers try to solve this situation by the way of impossibility: W Flume, *Allgemeiner Teil des Bürgerlichen Gesetzbuches, Band 2: Das Rechtsgeschäft*, 4<sup>th</sup> edn (1992), § 26 3 and 5b; D Medicus, *Bürgerliches Recht*, 19<sup>th</sup> edn (2002), 160.

<sup>71</sup> As rightly pointed out by G H Treitel, *Law of Contract*, 10<sup>th</sup> edn (1999), 824.

change in the equilibrium.<sup>72</sup> Our proposed extension to frustration-of-purpose situations would not open the floodgates to contract adaptation as this is prevented by the other prerequisites of Article 6:111 (2).

Another question is whether the grade of the change is to be decisive or if there is an absolute border. Comparing the grade of the change and the absolute values may make a significant difference as the following instance will show. A sells his car (value EUR 3000) to B for EUR 5000, but the car is stolen before it is handed over. Two months later the car is found in Lithuania by the police. The costs of having the car transported back amount to EUR 6000. The costs of performance on part of A have increased by EUR 3000, twice as much as anticipated, whereas comparing the absolute values, EUR 6000 costs on A's part and EUR 5000 counter-performance, things look less significant. The construction of Article 6:111 suggests the latter. This means that the provision is applicable as long as there is a change causing the equilibrium to pass the threshold. In classical terms, it combines the idea of *clausula rebus sic stantibus* with the notion of *laesio enormis*. But the result of this is that the provision is more likely to apply if the debtor has made a bad bargain. This conflicts with the policy reason that provisions limiting the duty to perform should not easily be discharged from bad bargains.<sup>73</sup> This problem is not solved by the limitations of foreseeability or risk bearing because both relate only to the circumstances and not to the equilibrium of the contract.<sup>74</sup>

In all legal systems there are borderline cases, and therefore some ambiguity remains when a provision relieving the obligator applies. It is therefore tempting to wonder whether an absolute value can be set up to deliver a clear-cut rule when Article 6:111 (2) steps in. Yet, this seems to be impossible because Article 6:111 of the PECL does not consider the change directly and it would be wrong to allow the debtor who entered into a bad bargain an easier discharge.<sup>75</sup> But courts should keep an eye on this, and the drafters of the PECL should reconsider this too. It is thus suggested that taking the change into account when examining the excessively onerous character of the performance may abate the problem. The threshold, however, should not be low to preserve the general principle of paragraph (1).

Secondly, *the change of circumstances must have occurred after the time of conclusion of the contract*. This constitutes a time limit for the application of paragraph (2). The contract remains binding, and no duty to renegotiate is imposed on the parties if the performance has been excessively onerous *ab initio*.<sup>76</sup>

Thirdly, *the possibility of a change of circumstances was not one that could*

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<sup>72</sup> Cf Huber, n 4, 123.

<sup>73</sup> Cf Lord Roskill's statement with regard to frustration, viz. that such a doctrine was 'not lightly to be invoked to relieve contracting parties of the . . . consequences of imprudent bargains'; in *Pioneer Shipping Ltd v BTP Tioxide Ltd*, n 36, 752.

<sup>74</sup> Cf the express wording of Art 6:111 (2)(a) and (b) of the PECL.

<sup>75</sup> Cf for Art 6.2.2 of the PICC, Maskow, n 57, 662, suggesting a change of at least 50% for PICC 6.2.2 and the comment to PICC comment 2 at 147, but PICC refers explicitly to an alteration of the equilibrium.

<sup>76</sup> A change of circumstances prior to the conclusion of the contract is dealt with in Art 4:103: Fundamental Mistake as to Facts or Law. Cf for policy reasons for this sensible solution below, text to note 102.

*reasonably have been taken into account at the time of conclusion of the contract.* No remedy is available if a reasonable man in the position of the burdened party could have foreseen and taken in account the change.<sup>77</sup> This does *a minore ad maius* apply to the party that had positive knowledge. This preserves the sanctity and freedom of contract: a party should be generally responsible for his sake. If a party knows or should know a risk of change he is expected to take precautions. He cannot rely on relief provided by the law and the courts if he refuses to do so.

Lastly, *the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.* This is probably the most difficult requirement in practice. In rare cases, the contract contains an express provision regarding to the risk. The vast majority of cases require an assessment of risk without it. In these cases, it is often said that one should discern the distribution of the risk underlying the actual contract. A conservative approach would be that normally each party has to bear the risk of the further use of the other party's performance; the risk of increasing prices in the supply are attributed to the party whose performance has become more onerous. These two positions stand whenever there is no express regulation in the contract. In this case, the decision whether the party seeking relief does not have to bear the risk thus comes down to a decision whether it would be fair, just and reasonable in the specific case.

According to the PECL's commentary, the change has to be borne if the party seeking relief has assumed the risk expressly or if the contract is a speculative one like the sale on a future market.<sup>78</sup> It seems to this author that the approach should thus be wider than the conservative one stated. The assumption seems to be the converse, viz. that, generally, an external risk is not to be borne by either party. According to the view that it is generally impossible to discern the risk from a contract tacit on this point, this approach appears to be right. The case of speculative contracts is a clear case of risk assumption and should not be too difficult to discover.

## C.II Results

Article 6:111 puts the obligation on the parties to re-enter into negotiations to achieve an agreement on either an adaptation or cancellation of the contract. If the parties fail to achieve an agreement within a reasonable time, the court may take action on the basis of Article 6:111 (3): It may (a) end the contract stipulating date and terms. Alternatively, (b) it may adapt the contract. In addition, the court may award damages if one of the parties refuses to negotiate or breaks off negotiations contrary to good faith. Finally, at least according to the commentary of the PECL the court may order the parties to restart their failed negotiations.<sup>79</sup> The last alternative should be eradicated in the next version of PECL.<sup>80</sup> It does not make sense to force the parties to renegotiate after they have failed to do so once and after - in addition - the court

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<sup>77</sup> Lando/Beale, n 2, 325 (comment B(iii)).

<sup>78</sup> Lando/Beale, n 2, 326 (comment B(iv)).

<sup>79</sup> Lando/Beale, n 2, 326 (comment D), 324 (comment A).

<sup>80</sup> Fischer, n 4, 326.

had to deal with the matter. The parties are not more likely to achieve a result of their dispute after such proceedings.

### C.III English law: Frustration again

English law has to cope with hardship situations by means of frustration again. Both frustration and Article 6:111 apply only to subsequent changes.<sup>81</sup> A radical, fundamental change is necessary for frustration.<sup>82</sup> It does not suffice for frustration that the performance has become more difficult, which accords with Article 6:111. However, the English rule does not refer to the equilibrium but to a change in the performance itself. In addition, courts have been very reluctant to grant relief in the case of economic difficulty.<sup>83</sup> The requirements of unforeseeability and risk allocation are also taken into account for frustration: as frustration deals with the allocation of risk in the case of a supervening event,<sup>84</sup> frustration cannot be applied in favour of the party that took the risk.<sup>85</sup> Yet the result of frustration constitutes a major difference from Article 6:111. If performance is frustrated, it is discharged automatically irrespective of the parties' wishes as long as the parties' contract does not provide otherwise.<sup>86</sup> This means that the court does not have the power to adapt the contract, though the contractual performance is not impossible. However there is authority that reached results similar to the one that would result from application of the PECL. In *Staffordshire AHA v South Staffordshire Waterworks Co*,<sup>87</sup> the Court of Appeal had to deal with the situation that a hospital had entered into a contract of water supply with a waterworks company in 1929. The contract provided that the hospital was entitled to 5,000 gallons of water a day for free and additional water at a fixed price 'at all times hereafter'. In 1975 the water supplier wanted to terminate the contract after a six-months' notice for the cost of supplying the water had risen to approximately eighteen times the contract price. The Court of Appeal granted the right to terminate the contract. Two different ways of reasoning can be distinguished. Lord Denning MR focused on the construction of the contract. Although he did not refer to 'frustration' explicitly, his formula does not differ greatly from the implied

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<sup>81</sup> More burdensome performances of an impediment at the time of the formation of the contract are subject to the rules of common mistake; cf McKendrick, n 38, 289ff; for PECL, cf n 77.

<sup>82</sup> McKendrick, n 38, 302.

<sup>83</sup> Cf *British Movietonews Ltd v London and District Cinemas Ltd* [1952] AC 166, 185; *Hangkam Kwintong Woo v Lin Lan Fong (Alias Liu Ah Lan)* [1951] AC 707 (PC); more explicit is the US case of *Anderson v Equitable Life Assurance Society of the United States* (1926) 134 LT 557.

<sup>84</sup> McKendrick, n 38, 317; Treitel, n 6, para 13-001.

<sup>85</sup> *Amalgamated Investment & Property Co v John Walker & Sons*, n 38, which shows how closely related foreseeability and bearing the risk are.

<sup>86</sup> *Hirji Mulji v Cheong Yue SS Co* [1926] AC 497 (PC); *Joseph Constantine Steamship Line v Imperial Smelting Corporation*, n 39, 187; *National Carriers Ltd v Panalpina (Northern) Ltd*, n 36, 689.

<sup>87</sup> *Staffordshire AHA v South Staffordshire Waterworks Co* [1978] 1 WLR 1387 (CA).

condition of *Taylor v Caldwell*,<sup>88</sup> and he put some emphasis on the change due to inflation.<sup>89</sup> The upshot of termination should not be that the water supply company would be able to refuse further water supply but it would be obliged to renegotiate,<sup>90</sup> which corresponds with Article 6:111 (2). But Goff and Cumming-Bruce LJ disagreed with this reasoning.<sup>91</sup> Especially Goff LJ rejected that the change of the equilibrium was relevant and stated that ‘the power was a power which made the agreement always determinable on notice’.<sup>92</sup> The status of the two approaches is in question, though.

However, a major difference with the rules in PECL remains, although results are often similar. The doctrine of frustration is much more concerned with the effect on the performance than in the supervening event and its nature and circumstances.<sup>93</sup> In theory, it is rather important for frustration that performance of the contract has become different from what the debtor originally agreed to do. English law therefore gives - again in theory - more weight to the parties’ agreement and their freedom of contract.<sup>94</sup> This effect on the performance amounting to frustration, however, often coincides with a worsening of the equilibrium or impossibility as required by Article 6:111 and Article 8:108.

#### C.IV German law: *Störung der Geschäftsgrundlage* and impossibility

The German provision differs from the rule adapted by the PECL in various issues. Firstly, there is a significant difference regarding the preconditions of the two rules. According to § 313 of the BGB, any significant change of circumstance suffices as long as it has become the foundation of the contract. In contrast, Article 6:111 takes only those circumstances into account that alter the equilibrium of the contract. German law seems to be wider on this point. However, the limitation of this wide approach is innate in the requirement of the foundation of the contract. Yet in practice German courts are more likely to grant relief if the contract is excessively burdensome, but in the *inhomogene Rechtsprechung* (inhomogeneous

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<sup>88</sup> Above n 30; arg: implying a term is part of constructing a contract.

<sup>89</sup> *Staffordshire AHA v South Staffordshire Waterworks Co*, n 87, 1336.

<sup>90</sup> *Staffordshire AHA v South Staffordshire Waterworks Co*, n 87, 1338; his rule was applied in *Pole Properties v Feinberg* (1982) 43 P & CR 121 (CA).

<sup>91</sup> *Staffordshire AHA v South Staffordshire Waterworks Co*, n 87, 1399 per Goff LJ, 1406 per Cumming-Bruce LJ.

<sup>92</sup> *Staffordshire AHA v South Staffordshire Waterworks Co*, n 87, 1403 per Goff LJ.

<sup>93</sup> *Pioneer Shipping v BTP Tioxide*, n 36, 754 per Lord Roskill; as observed by McBryde, n 36, para 21-21.

<sup>94</sup> Lately, E Picker, ‘Schuldrechtsreform und Privatautonomie’, (2003) *Juristenzeitung* 1035, criticised §§ 275 (2), 313 BGB for neglecting this.

case law)<sup>95</sup> this is usually granted in the case of pension agreements.<sup>96</sup> This difference is caused by the diverse underlying concepts. Whereas German law still clings to doctrinaire justification<sup>97</sup> and tries to treat a vast bulk of different (and barely consistent) case-law under one extremely abstract and thus vague provision,<sup>98</sup> the PECL's concept is preferable. Codifying the change of the equilibrium covers the least controversial but most important cases.<sup>99</sup> It rightly recognises that the situation is merely about fairness and relief than about anything between motive and contract term. However, foreseeability<sup>100</sup> and risk allocation<sup>101</sup> are taken into account by § 313 of the BGB in a way similar to Article 6:111.

With the view taken here both rules cover frustration of purpose. But in contrast to the PECL, German law also allows the adaptation of the contract if the change took place before the conclusion of the contract. This, however, is rather a matter of mistake and is more appropriately treated therefore in Article 4:103. It also seems right that the initial discharge is easier as performance does not need to become 'excessively onerous' for it is no interference with the rule of *pacta sunt servanda*.<sup>102</sup> The German solution can be explained by peculiarities of the law of rescission.<sup>103</sup>

Moving on to a comparison of the results, § 313 (1) BGB gives one party the right to demand adaptation and therefore renegotiation.<sup>104</sup> But in practice it is unlikely to change that the court will adapt the contract without prior renegotiation. Both provisions accord in giving the court the power to adapt the contract or to terminate it, but it seems to be within the court's discretion to take actions if the contract is governed by the PECL. This discretion of the courts is unfortunate. It does not resolve the dispute if, despite the narrow conditions being fulfilled and despite unsuccessful renegotiations beforehand, the debtor is still to be held to fulfil his original obligation. German law allows the parties to withdraw from the

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<sup>95</sup> B Dauner-Lieb, 'Kodifikation von Richterrecht', in Ernst/Zimmermann (eds), n 4, 305, 322.

<sup>96</sup> Cf *Bundesarbeitsgericht*, [1973] NJW, 959; *Bundesgerichtshof*, 61 BGHZ 31; *Bundesgerichtshof*, 79 BGHZ 187, 194ff; *Bundesgerichtshof*, 97 BGHZ 52, 61; *Medicus*, n 71, paras 166f.

<sup>97</sup> Cf Lorenz, n 8, 369f; Zweigert/Kötz, n 8, 518ff.

<sup>98</sup> Dauner-Lieb, n 95, 322f.

<sup>99</sup> Cf Dauner-Lieb, n 95, 321.

<sup>100</sup> Cf Jauernig/Vollkommer, § 313 para 24, generally no foundation of the contract.

<sup>101</sup> Cf Jauernig/Vollkommer, § 313 para 20ff.

<sup>102</sup> Huber, n 4, 124.

<sup>103</sup> Firstly, errors in motive are, in contrast to Art 4:103, greatly immaterial. Secondly, due to § 122 BGB common mistake led to liability of the rescinding party. Employing *Störung der Geschäftsgrundlage* instead may abate the problem.

<sup>104</sup> Jauernig/Vollkommer § 313 para 27: the claim for adaptation should encourage the parties to achieve a solution by way of negotiations.

contract if adaptation of the contract is impossible or unreasonable.<sup>105</sup> The German regulation is preferable here. Giving the courts wide discretion may soften the prerequisites of Article 6:111 and thus lead to a wide application though not necessarily an effect on the contract, which is very unfortunate in view of legal certainty. Furthermore, this discretion does not serve the principles' aim to further the unification of European contract law as it allows courts to stick to their traditional national solution although under a new heading.

As stated above, § 275 (2) of the BGB also covers changes in the equilibrium under the heading of impossibility. Without having to go into the details of this highly controversial provision,<sup>106</sup> it should be noted that its test differs significantly from Article 6:111. It does not compare the mutual performances but the creditor's interest in the performance and the costs of performing on the part of the debtor. Thus, if the costs of performance rise and the interest in performance increases accordingly, the debtor is not discharged on the basis of § 275 (2) BGB. The relationship between § 275 (2) BGB and § 313 BGB is unclear and controversial.<sup>107</sup>

#### **D. The relationship between Article 6:111 and Article 8:108 PECL**

Basically, there are two possibilities for characterising the relationship between Article 6:111 and Article 8:108: either they are applied alternatively and thus have a distinct scope or they may be relevant cumulatively. Can there be situations that fulfil both the requirements of both Article 6:111 and Article 8:108? While the PICC's commentary assumes that there are such situations where both regulations are relevant and hence give the debtor a choice,<sup>108</sup> the PECL's notes are tacit on this issue. The result seems to depend on whether the termination of the contract due to an impediment takes place *ipso facto* or only at the request of the debtor. If the former is the case, Article 6:111 is not applicable as it presupposes that the original obligation still exists.<sup>109</sup> Article 9:303 (4) of the PECL points to the former. Article 8:108 contains no reference that the debtor must raise the impediment in order to take effect. In fact, paragraph (3) shows that it does not preclude the excuse if the debtor does not

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<sup>105</sup> § 313 (3) BGB; cf Jauernig/Vollkommer, § 313 para 29.

<sup>106</sup> For details, cf the references in n 52.

<sup>107</sup> In favour of a cumulative application: Münchener Kommentar/Ernst, n 47, § 275 para 23, although the official comment suggests otherwise, cf BT-Drucks 14/6040, n 8, 176.

<sup>108</sup> PICC Art 6.2.2 comment 6 at 150; Huber, n 4, 125 believes that this view is taken for e.g French law has tried to tackle hardship situation with the concept of *force majeure* after the courts have refused to apply the doctrine of *imprévision* to private law litigation.

<sup>109</sup> Arg e Art 6:111 (1)(2) PECL: otherwise the adaptation would be impossible and the power to terminate would be superfluous. Cf also the reference to withholding performance in PECL, n 2, 324 (comment A) which presumes that the obligation is neither discharged nor the debtor is given a right to withhold his performance during the process according to (2) and (3).

give notice as the very failure to do so gives rise to an entitlement to damages.<sup>110</sup> Additionally, the introduction of two distinct concepts for two different problems only makes sense if there is a clear dividing line between the two.<sup>111</sup> Allowing the debtor to choose between the two provisions foils the whole distinction between impediment and excessively onerous performance. Finally, Article 6:111 does not contain a paragraph corresponding with Article 8:108 (3), which lays a duty on the debtor to inform the creditor of the impediment. Any non-compliance therewith will result in liability. But the debtor may easily circumvent this regulation if joint application of Articles 8:108 and 6:111 were sound. This, however, would be unfair to the creditor, who can hardly put pressure on the debtor. He cannot demand or enforce specific performance<sup>112</sup> and thus has to wait until the debtor decides. This conflicts with the creditor's justified interest in legal certainty.<sup>113</sup> The better view, therefore, is that joint application of Article 8:108 and Article 6:111 is not sound.

## **E. Conclusion**

The rules in PECL setting limits to the duty to perform have some similarities with German law as well as with English law.

Overall, Article 8:108 has the advantage that its antetype, Article 79 of the CISG, is regularly applied by courts and substantial information concerning its application is widely available. The principles' rule and Article 79 of the CISG correspond widely. However, the principles diverge in discharging the obligation ipso facto once its requirements are met. Yet, this difference should have little practical significance. Another difference worth noting is that, in contrast to Article 79 of the CISG, it is not open to debate that an impediment means true impossibility. An aggravation to a degree below impossibility is solely covered by Article 6:111 as joint application of Article 8:108 and Article 6:111 is not sound for conceptual and equitable reasons. Thus, the interpretation and use of Article 8:108 should not be problematic.

Not surprisingly, the interpretation and use of Article 6:111 as a newly developed provision is more difficult. Article 6:111 may be invoked even if performance is not impossible but excessively burdensome. Whether a performance can be rated excessively burdensome has to be assessed simply by comparing performance and counter-performance. In the view taken here, Article 6:111 covers cases of frustration of purpose as well. Unfortunately, Article 6:111 (2) does not take the change of the equilibrium into account. This is regrettable, for it grants easier relief to the debtor who has made a bad bargain. Reconsideration is recommended, e.g. Article 6.2.2 of the PICC refers explicitly to the change. Nevertheless, in comparison with the German concept of *Störung der*

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<sup>110</sup> The damages claim does not compensate for the non-performance but for the failure to inform the creditor.

<sup>111</sup> Rightly stressed by Fischer, n 4, 221f.

<sup>112</sup> Art 9:102 (2)(a) PECL excludes specific performance if the performance is impossible.

<sup>113</sup> A similar view is taken by Fischer, n 4, 222.

*Geschäftsgrundlage* the principles provide the more advanced rule; Article 6:111 sets requirements that are clearer and much more practicable than those of the new § 313 BGB.

The biggest drawback of Article 6:111 is the discretion given to the courts whether to act at all. This neither helps to achieve legal certainty nor does it serve the principles' aim of harmonization. Improvement may follow the German solution that a court has to take actions, i.e. to adapt the contract or to allow one of the parties to withdraw from the contract. The question what the courts should do leads us to our final issue. With regard to frustration McKendrick wrote that '[t]he real issue is: who should do the adjusting? Is it the courts or is it the parties?'.<sup>114</sup> While English law leaves it to the parties,<sup>115</sup> (the reformed) German law grants the power to revise to the courts as well. The PECL's solution is a balance between the two as it demands renegotiation before the court takes action. From an economic point of view, some considerations seem to be in favour of the English solution. In many cases something equivalent to the debtor's performance is available on the market usually at competitive prices. Entering into a new agreement takes time and resources, but this is also the case when renegotiation and possibly adaptation has to be done by the court. Additionally, one may say that avoiding a contract means less interference with the parties' freedom of contract than changing its terms. But this approach can hardly cope with 'mass calamities'<sup>116</sup> such as the post-World-War-I inflation that led to the development of the German doctrine, or the oil crisis of 1973. Renegotiation is not likely to help, for one of the parties will of course be in a stronger position. In the case of running inflation, the discharge will rather result in refusal on the part of the property owner to dispose of it at all, whereas in the case of an oil crisis the supplier will rarely enter into a deal much below the increased market price.

One should remember, too, that the PECL - unlike the PICC - is not restricted to commercial contracts only. For example, also cases of pension agreements which dealt with the concept of *Störung der Geschäftsgrundlage* may have an unjust upshot if they are simply discharged as - facing renegotiation - an insurer and an elderly, probably ill man are hardly equal parties (anymore). This case should be governed by Article 6:111 of the PECL, too, for a pension - analogous to a loan - is the counter-performance for the premiums paid beforehand. From the view taken above - viz. that assessing the risk allocation underlying the contract is hardly possible and the general assumption is that a party has not taken the risk - it follows that application of Article 6:111 in favour of one party does not inevitably mean that the other party should bear the entire risk. It is, therefore, submitted that the only possibility of ensuring the necessary compromise between the two parties - and thus a fair and just solution - is to give the court the power to adapt a contract. This is the only consistent solution for the PECL, which are extensively pervaded by objective good faith.<sup>117</sup> Yet again this discussion shows that a future version of the principles may give the court discretion, but

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<sup>114</sup> McKendrick, n 38, 304.

<sup>115</sup> As a result of *Walford v Miles* [1992] 2 AC 128, clauses demanding renegotiations are of questionable validity, thus it may purely depend on the parties' interests after frustration.

<sup>116</sup> Used by Zweigert/Kötz, n 8, 532 attributing it to F Wieacker without further reference.

<sup>117</sup> Cf the following Articles in PECL: 1:102, 1:106, 1:201, 1:302, 1:305, 2:301, 4:103, 4:107, 4:109, 4:110, 4:118, 5:102, 6:102, 6:111, 8:109.

only discretion as to how to act and not to act at all as both English law and German law are in agreement on the fact that the contract as it initially was concluded should be cancelled once performance has become excessively burdensome.

On the whole, the first assessment of the rules limiting the duty to perform in the PECL has a positive outcome. Nevertheless, only further case analysis will show whether the PECL will in fact be able to function as the foundation for a new codified *ius commune*. This will take time, but it is time worth to be taken as the uncertain status of German law after its hasty revision illustrates.

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